

T.D. 3/99

Decision rendered on July 9, 1999

CANADIAN HUMAN RIGHTS ACT

R.S.C., 1985, c.H-6 (as amended)

CANADIAN HUMAN RIGHTS TRIBUNAL

BETWEEN:

BALBIR SINGH NIJJAR

Complainant

and

CANADIAN HUMAN RIGHTS COMMISSION

Commission

and

CANADA 3000 AIRLINES LIMITED

Respondent

DECISION

TRIBUNAL: Anne L. Mactavish Chair
Shirish Chotalia Member

Mukhtyar Tomar Member

APPEARANCES: Rene Duval and Julie Beauchemin
Counsel for the Canadian Human Rights Commission

Balbir Singh Nijjar, on his own behalf

Gerard Chouest and Carlos Martins
Counsel for Canada 3000 Airlines Limited

DATES AND PLACE OF HEARING: Toronto, Ontario
April 19-23 and 27-29, May 10-11 and 13, 1999

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On April 11, 1996, Balbir Singh Nijjar was denied permission to board an aircraft operated by Canada 3000 Airlines Limited. Permission to board was denied because Mr. Nijjar was wearing a ceremonial dagger carried by initiated members of the Sikh faith. As a result, Mr. Nijjar filed a complaint with the Canadian Human Rights Commission wherein he complains of discrimination on the basis of religion in the provision of a service customarily available to the public.

I APRIL 11, 1996 INCIDENT

Mr. Nijjar lives in Brampton, Ontario. He was scheduled to deliver a lecture on Sikhism in Surrey, British Columbia in April of 1996. Mr. Nijjar purchased a ticket to fly to Vancouver on April 11, 1996 on Canada 3000 Airlines.

As an initiated member of the Khalsa order of the Sikh faith, Mr. Nijjar wears a ceremonial dagger known as a kirpan. Khalsa Sikhism requires that members of the Khalsa order wear the kirpan at all times. Mr. Nijjar ordinarily wears an 11 ½ inch kirpan. On April 11, 1996, however, Mr. Nijjar stowed his large kirpan in his luggage, and wore a smaller kirpan, which he had purchased specifically for air travel. (For ease of reference, this kirpan shall hereinafter be referred to as the 'travel kirpan'.) The travel kirpan is 5 ¾ inches in length, with a 3 ⅛ inch curved blade. Mr. Nijjar testified that he understood that the law permitted him to travel by air with a kirpan, as long as the blade length of the kirpan did not exceed four inches.

Mr. Nijjar had flown on Canada 3000 on two previous occasions, each time wearing his travel kirpan. On the earlier occasions Mr. Nijjar was able to pass through security without incident. In cross-examination, Mr. Nijjar confirmed that security personnel had seen the travel kirpan on these earlier occasions and had let him through with it, but that the kirpan had not been observed by Canada 3000 personnel.

As he attempted to board the aircraft on April 11, 1996, Mr. Nijjar went through the metal detector at security. When the travel kirpan triggered the alarm, Mr. Nijjar showed the travel kirpan to a security officer, who allowed Mr. Nijjar to go through.

As Mr. Nijjar proceeded towards the departure gate, he was approached by a security supervisor who asked to see the kirpan. After inspecting the kirpan, the security supervisor told Mr. Nijjar that they would have to speak to the airline supervisor. Mr. Nijjar was taken to the Canada 3000 counter, where he met with a supervisor subsequently identified as Katarina Michulkova.

Although there are minor differences in the testimony of Mr. Nijjar and Ms. Michulkova, the differences between them as to what transpired are not material. The security supervisor explained the situation to Ms. Michulkova, who then looked at Mr. Nijjar's kirpan. Ms. Michulkova advised Mr. Nijjar that Canada 3000 policy did not permit Mr. Nijjar to board the aircraft with an item such as the travel kirpan.

According to Ms. Michulkova, Canada 3000's policy was to prohibit passengers from carrying into the cabin any object with a greater potential for injury than the eating utensils used on board the aircraft. In Ms. Michulkova's view, the travel kirpan had a greater potential for injury, as it was pointed, and the blade was sharper than the Canada 3000 dinner knife.

Mr. Nijjar states that he advised Ms. Michulkova that he would not part with the kirpan, although it does not appear that he explained the religious significance of the kirpan to her. It is apparent from Ms. Michulkova's evidence that although she had seen similar items on other occasions, she was not familiar with kirpans and had no appreciation of their religious significance.

After being told that he would not be permitted to board with the kirpan, Mr. Nijjar pointed out to Ms. Michulkova that if the aim was to hurt someone, fists could be used. Ms. Michulkova reaffirmed her position and advised the security officer accordingly.

Ms. Michulkova later checked on the status of the situation with the security officer. The security officer advised Ms. Michulkova that he had contacted his supervisor, and had been told that the kirpan had been approved for boarding in accordance with the "four inch rule".⁽¹⁾ Ms. Michulkova was unfamiliar with this rule and contacted her own manager, who supported her position.

Ms. Michulkova then contacted the departure gate, and asked airline personnel there to keep Mr. Nijjar at the gate until Ms. Michulkova could get there. When she got to the departure gate, she approached Mr. Nijjar, reaffirmed Canada 3000's policy, and offered Mr. Nijjar the option of checking his kirpan as a security item or stowing it with his luggage. After consulting with his travel companion, Mr. Nijjar stated that if he could not take his kirpan with him, he would not

travel. Mr. Nijjar demanded a refund for his ticket, whereupon Ms. Michulkova explained that Canada 3000's tickets are non-refundable.

The RCMP subsequently attended at the scene, but declined to pursue the matter. Mr. Nijjar subsequently made alternate arrangements to fly to Vancouver.

II LEGAL ISSUES

Mr. Nijjar's complaint is made pursuant to Section 5 of the Canadian Human Rights Act (the "CHRA"), which provides:

It is a discriminatory practice in the provision of goods, services, facilities or accommodation customarily available to the general public

a) to deny, or to deny access to, any such good, service, facility or accommodation to any individual, or

b) to differentiate adversely in relation to any individual,

on a prohibited ground of discrimination.

Religion is a prohibited ground of discrimination⁽²⁾. Religious freedom includes the right to manifest one's beliefs and practices.⁽³⁾

The parties are in agreement that if there is discrimination here, it is indirect or adverse effect discrimination. The burden is on the complainant and the Canadian Human Rights Commission to establish a *prima facie* case of discrimination. In cases of indirect discrimination, a *prima facie* case is established by demonstrating the existence of a neutral rule, honestly made for sound business reasons, which rule is rationally connected to the business of the respondent and which rule applies to all. It must also be established that the rule has a discriminatory effect, based upon a prohibited ground, upon an individual or group of individuals because of a special characteristic of the individual or group.⁽⁴⁾

Once a *prima facie* case has been established, the burden shifts to the respondent to demonstrate that it has accommodated those detrimentally affected by the rule to the point of undue hardship.⁽⁵⁾

The standard of proof in discrimination cases is the ordinary civil standard of the balance of probabilities.

III THE PRIMA FACIE CASE

i) The Rule in Issue

It is common ground that the rule in issue in this case is the Canada 3000 policy dealing with weapons or dangerous articles. The operative portions of the policy state:

The following guidelines are furnished in making an effective determination of what property in possession of a passenger should be considered as a weapon or dangerous article ...

... Sabres, swords, hunting knives, knife belts and such other cutting instruments which have a greater potential for injury than utensils provided with in-flight meals...

Any person refusing to undergo the required screening process or found to be in possession of a weapon or other dangerous object or making threats or otherwise believed to be a threat to the safety of the aircraft shall be denied passage beyond the screening point unless subsequently cleared.

The final decision to board or refuse boarding rests with the air carrier.⁽⁶⁾

This policy is clearly a neutral rule, in that it is not targeted at a particular group protected by the Canadian Human Rights Act.

ii) Rational Connection

There is no suggestion that the respondent acted other than honestly and in good faith in adopting the policy in issue. The question has been raised, however, as to whether there is a rational connection between the policy and the business of the respondent.

A neutral rule may be found to be rationally connected to the business of a respondent on the basis of a common sense appreciation of what is reasonable in a particular business. Extensive evidence on the issue will not necessarily be required.⁽⁷⁾

Counsel for the Commission acknowledges that airlines have a legitimate business interest in screening passengers for dangerous items. Mr. Duval's position is that insofar as the rule relates

to kirpans, it goes too far. As we understand Mr. Nijjar's position on this issue, he is in agreement with Commission counsel.

The 'rational connection' test in cases of alleged indirect discrimination differs from the 'reasonably necessary' test applied in cases of direct discrimination. In cases of direct discrimination, a respondent must establish that there is no other reasonable and less burdensome alternative to the impugned rule, whereas there is no such requirement in cases of indirect discrimination.⁽⁸⁾

In our view, the question of whether the respondent's rule overreaches its objectives with respect to airline security is a matter that may properly be considered as part of the reasonable accommodation analysis. In other words, if the respondent's rule goes farther than is necessary, it may be that the rule can be modified in order to accommodate affected individuals or groups.

In all of the circumstances, we are satisfied that the respondent's rule restricting the type of bladed items that may be carried on board Canada 3000 aircraft is a rule that is rationally connected to the business of the respondent.

iii) Differential Impact

In order to establish a *prima facie* case of indirect discrimination, it is necessary for the complainant and the Commission to establish that the rule in issue has a discriminatory effect upon the complainant, on the basis of a proscribed ground. It is therefore necessary to examine the tenets of the Sikh faith, both in general terms and as they are understood by Mr. Nijjar.

a) Role of the Kirpan in Sikhism

It should be noted at the outset that the respondent has conceded that Sikhism is a *bona fide* religion, and that certain members of the Sikh faith have accepted the obligation to wear the kirpan.

Considerable evidence was led in the course of the hearing with respect to the role of the kirpan within the Sikh faith. Three individuals were qualified to testify as experts on matters relating to Sikhism - Professor Hew McLeod and T. Sher Singh on behalf of the Commission and Dr. John Spellman on behalf of the respondent. The testimony of these individuals was consistent on many points. For the reasons set out below, where the testimony of Professor McLeod differs from that of either Mr. Singh or Dr. Spellman, we prefer the testimony of Professor McLeod. It is apparent that Professor McLeod has devoted his adult life to the scholarly study of Sikhism, including Sikh history, religion and culture. He has written major texts in the area, and was recognized by many involved in this hearing as one of the world's leading experts in the field. Indeed, counsel for the respondent described Professor McLeod as 'a sterling witness'. We found Professor McLeod's testimony to be scholarly, measured and candid.

T. Sher Singh is a lawyer in private practice, and has been active within the Sikh community. Mr. Singh has been consulted on a number of occasions by various bodies on matters relating to the Sikh faith. Counsel for the respondent objected to Mr. Singh being qualified as an expert on the bases that he was an advocate for the Sikh community, and that he lacked the necessary academic qualifications. We concluded that formal academic qualifications were not an absolute pre-requisite to being qualified as an expert witness, and determined that we were unable to assess whether or not Mr. Singh was truly appearing as an advocate for the Sikh community without hearing his testimony. Accordingly, we allowed Mr. Singh to testify as an expert in Sikhism and Sikh culture, reserving our decision on the issue of the weight to be attributed to his evidence. In the course of his testimony it became apparent that Mr. Singh was indeed acting very much as an advocate for the Sikh community. His testimony was totally lacking in the objectivity one would expect of the true expert. By way of example, in cross-examination, he was at times aggressive and at other times quite rude to respondent counsel.

More troubling was Mr. Singh's explanation of an entry on his curriculum vitae, where he stated that he had "Qualified and testified as an Expert Witness on Sikh religion, Ontario Court (General Division)". Mr. Singh was asked for particulars during the course of his cross-examination on his qualifications. While maintaining that he had testified as an expert on approximately 12 occasions in civil, criminal and administrative fora, he was unable to provide details from memory, and undertook to provide further particulars later. His further written explanation was provided some time after Mr. Singh had stood down.⁽⁹⁾ Suffice it to say that Mr. Singh was unable to provide much in the way of additional information, apart from recalling the name of one accused in a criminal case in Provincial Court. Mr. Singh's explanation for his inability to provide particulars is entirely unconvincing.

Finally, it is uncontroverted that Mr. Singh telephoned one of the respondent's witnesses, Dr. Pashaura Singh, on the morning that Dr. Singh was to testify. According to Dr. Singh, Mr. Singh was unhappy that Dr. Singh was going to testify "against the community". Dr. Singh stated that Mr. Singh did not try to influence his testimony, but that it was not a pleasant conversation and made him uneasy. This is not conduct that one would expect of a dispassionate expert. It is all the more surprising when one considers that Mr. Singh is a member of the Bar with many years of litigation experience, and would therefore presumably have a good understanding of his role as an expert witness.

As a result of concerns such as these, we place no weight whatsoever on any of Mr. Singh's testimony, except where it is corroborated by that of other witnesses.

Dr. Spellman is a Professor of Asian Studies at the University of Windsor. While his academic credentials are impressive, they are considerably more generic than those of Professor McLeod. Dr. Spellman does not have the significant publication record that Professor McLeod has. He does not speak Punjabi, and thus is unable to read source material in its original form, or to

communicate with many in the Sikh community. It appears that the evidence Dr. Spellman gave in the course of this hearing is not entirely consistent with testimony he has provided in earlier cases involving similar issues. This inconsistency is not entirely explained by what he described as the evolution in his thinking. As a result, where Dr. Spellman's testimony differs from that of Professor McLeod's, we prefer the testimony of Professor McLeod.

According to Professor McLeod, Sikhism is a monotheistic religion, whose followers believe in one God known as *Akal Purakh*. Within Sikhism, there are a number of sub-groups or sects, including the Khalsa order, which was established in 1699 by the Guru Gobind Singh. In order to enter the Khalsa order, it is necessary to undergo an initiation ceremony known as the *amrit sanskar*. Those who have 'taken amrit' are also known as 'Amrit-dhari' Sikhs.⁽¹⁰⁾ There are between sixteen and eighteen million Sikhs worldwide, 15-20% of which are Amrit-dhari Sikhs.

As part of the amrit ceremony, initiates undertake to adhere to a Code of Conduct known as the *Rahit*. The *Rahit* commands followers to observe the *panj kakke*, otherwise known as the 'Five Ks'. The Five Ks are the five items that each initiated Sikh must wear on his or her person at all times. To neglect to wear one or more of the Five Ks represents a serious lapse. These items include uncut hair or *kes*, over which a turban is worn, a comb or *kanga* worn in the hair, a steel bracelet called a *kara*, undershorts known as *kachh*, and the kirpan.

Professor McLeod testified that the kirpan is a sacred object for Amrit-dhari and Kes-Dhari⁽¹¹⁾ Sikhs. The kirpan originated as a weapon but now has symbolic value for Sikhs well beyond that of a weapon. While there is no single understanding as to the way in which the kirpan is perceived amongst Sikhs, it is generally understood to represent the defence against injustice and oppression.

A kirpan must be made of steel. There is, however, no minimum or maximum size prescribed for the kirpan. According to Professor McLeod, some Sikhs wear miniature kirpans a centimetre in length fastened to the kanga or comb, whereas other Sikhs would find this unacceptable. In India, many Sikhs accept kirpans that are 20 centimetres (or 8 inches) from the tip of the blade to the end of the handle, although some would want them larger, and others would agree to have them smaller. Professor McLeod stated that for many Sikhs, for the kirpan to be considered a kirpan, it has to be something that one can hold. For these individuals, a miniature kirpan would be unacceptable.

Professor McLeod's testimony was consistent with that of Dr. Pashaura Singh. Dr. Singh is himself an Amrit-dhari Sikh, one who has held positions of considerable responsibility within the Sikh community, and who is clearly a devout adherent to the Sikh faith. Dr. Singh was called by the respondent to testify with respect to his own practices relating to the wearing of the kirpan. Dr. Singh testified that when he flies, he will wear a miniature kirpan of approximately 1 ½ inches in length attached to his kanga or comb, as some airlines do not permit kirpans the size of Mr. Nijjar's travel kirpan to be carried on board. In Dr. Singh's view, wearing a miniature kirpan

is sufficient to discharge his religious obligations, and is a practice followed by many devout Amrit-dhari Sikhs.

Dr. Singh acknowledged in cross-examination that there are different groups within the Khalsa tradition that have different attitudes toward the kirpan. Views differ as to whether it is ever appropriate to part with the kirpan, whether there is a minimum size for the kirpan and as to whether the wearing of the miniature is sufficient to discharge one's religious obligation.

b) Issue to be determined

It is clear, based upon the evidence of Professor McLeod and Dr. Singh, that the respondent's policy with respect to bladed items could have a differential impact on some Sikhs, who would be unable to comply with the rule without compromising their religious beliefs. The rule would not have such an impact on other Sikhs such as Dr. Singh, whose interpretation of his faith is such that he is able to comply with the respondent's policy in a manner that does not impinge on his observance of his religion.

Given that this is a complaint under section 5 of the CHRA, the issue for us is not whether the respondent's rule has a potentially discriminatory effect for Sikhs in general, but rather whether the rule had such an effect as it relates to Mr. Nijjar.⁽¹²⁾

In assessing whether the respondent's policy had a differential impact on Mr. Nijjar, the issue is not whether Mr. Nijjar's beliefs accord with the teachings of Sikhism, but whether he genuinely holds beliefs, as a matter of religious conviction, which beliefs render him unable to comply with the respondent's policy.⁽¹³⁾ It is therefore necessary to examine the nature of Mr. Nijjar's beliefs.

c) Mr. Nijjar's Beliefs

It was evident to the Tribunal, and indeed it was conceded by the respondent, that Mr. Nijjar is a devout Khalsa Sikh. What remains to be determined is his beliefs with respect to the wearing of the kirpan.

The most significant evidence, in our view, with respect to the determination of whether Mr. Nijjar holds beliefs, as a matter of religious conviction, which beliefs render him unable to comply with the respondent's policy, is the testimony of Mr. Nijjar himself.

It is clear that Mr. Nijjar believes that it is not acceptable to part with his kirpan so as to enable him to fly on an airplane. He testified to an earlier experience where he did just that, and described the spiritual consequences that he suffered as a result.

We must also consider Mr. Nijjar's beliefs with respect to the size and other characteristics of the kirpan, and to determine whether his beliefs in this regard render him incapable of complying with the respondent's policy without spiritual consequences.

Mr. Nijjar did not address this issue in his testimony in chief. He was, however, cross-examined and re-examined on the issue of the size of the kirpan.⁽¹⁴⁾ Mr. Nijjar concurs with Professor McLeod, Dr. Spellman, Mr. Singh and Dr. Singh in his understanding that Sikhism does not prescribe a minimum or maximum size for the kirpan. In the context of a discussion of the Royal Canadian Mounted Police uniform requirements pertaining to the kirpan, Mr. Nijjar did not suggest that the wearing of a kirpan with an overall length of 3 1/2 inches would contravene his understanding of the faith. Instead, he seemed to suggest that the wearing of such a kirpan could be necessitated by the tight-fitting RCMP uniform.

Mr. Nijjar testified that he wears the 11 1/2 inch kirpan in his everyday life because he likes it. He wears a smaller kirpan when he bathes. It is not clear whether the smaller kirpan he is referring to is the travel kirpan or a different one. Clearly Mr. Nijjar felt able to wear a smaller kirpan in order to be able to fly, as that was the reason for his acquisition of the travel kirpan. It is apparent from his testimony that Mr. Nijjar understood that kirpans the size of his travel kirpan complied with air travel security requirements, and that he was able to comply with the so-called four inch rule without compromising his faith.

There appear to be differing views within the faith as to the necessary degree of sharpness for the kirpan and whether a dulled blade is appropriate. Similarly, there appear to be conflicting beliefs with respect to blunting the point of the kirpan. There is no evidence from Mr. Nijjar that dulling the blade or blunting the point of his kirpan would offend his religious beliefs. Indeed, there is no suggestion anywhere in Mr. Nijjar's testimony that to wear a kirpan with less of a potential for injury than Canada 3000 eating utensils would contravene his religious beliefs. His inclination to wear one kirpan over another is always expressed as a personal preference as opposed to a matter of religious conviction.

iv) Conclusion re Prima Facie Case

While the fact that Mr. Nijjar filed and pursued his complaint for several years certainly suggests that he has strong feelings about what transpired, ultimately we must decide the case on the basis of the evidence before us. In this regard we cannot conclude on the basis of that evidence, and in particular, on the basis of Mr. Nijjar's testimony, that the respondent's policy had a differential impact on Mr. Nijjar based upon his religion. As a consequence, we find that the complainant and the Commission have failed to establish a *prima facie* case of discrimination, and the complaint is dismissed.

In the event that we are in error in our conclusions with respect to the establishment of a *prima facie* case, we will consider the remaining issues presented in this case.

IV REASONABLE ACCOMMODATION

Where a *prima facie* case of discrimination has been established, the burden shifts to the respondent to demonstrate that it has accommodated Mr. Nijjar to the point of undue hardship.

i) General Principles

In determining whether the respondent has met its burden with respect to the issue of accommodation, we are guided by the principle that in cases of accommodation, more than a minor inconvenience must be shown before a complainant's entitlement to be accommodated will be defeated. Minor inconvenience is the price to be paid to enable individuals to enjoy religious freedoms in a multi-cultural society.⁽¹⁵⁾

In assessing what constitutes undue hardship in a case where safety is in issue, both the magnitude of the risk and the identity of those who will bear the risk are relevant considerations.⁽¹⁶⁾ The phrase 'magnitude of the risk' encompasses two notions: the likelihood that loss or injury may occur and the seriousness of the loss or injury that may result.⁽¹⁷⁾

ii) Position of the Respondent

The respondent maintains that its policy regarding bladed items does accommodate the needs and aspirations of some, if not all Khalsa Sikhs. The respondent further maintains that it has a legitimate concern with respect to passenger safety and that any modification to its policy would present an unacceptable risk to that safety, which risk would constitute an undue hardship.

iii) Position of the Canadian Human Rights Commission and Mr. Nijjar

The Canadian Human Rights Commission and Mr. Nijjar take the position that, as a neutral rule, the Canada 3000 policy should be permitted to stand as it applies to the population at large. However, where the policy interferes with the right of Sikh passengers to manifest their religious faith by wearing the kirpan, the policy must be modified so as to accommodate the individuals so affected. Specifically, Mr. Duval contends that Sikh passengers should be allowed to carry kirpans on board Canada 3000 aircraft, as long as the blades of the kirpans do not exceed four inches in length. In the Commission's submission, such a modification of the policy as it applies to Sikhs would not create an unacceptable risk, given the special regard that Sikhs have for their kirpans.

iv) Regulatory Environment

Mr. Jim Marriott testified on behalf of the Canadian Human Rights Commission. Mr. Marriott is the Director of Security Policy and Legislation at Transport Canada and has been involved in issues relating to kirpans on aircraft for approximately ten years. According to Mr.

Marriott, for at least the last ten or twelve years, the practice in Canada has been to allow bladed items on board aircraft, as long as the blade does not exceed four inches in length. Mr. Marriott stated that it was his understanding that this practice is also followed by the Federal Aviation Administration in the United States.

The Air Transport Association of Canada ('ATAC') is an industry group. ATAC members include Air Canada, Canadian Airlines and Canada 3000. There is a Security Committee of ATAC, which meets periodically to develop industry positions on various security issues. In the mid-nineteen nineties a concern arose with respect to different standards being applied across the country regarding the bringing of bladed items onto aircraft. An uneven approach was creating difficulties for passengers. In an effort to achieve a level of consistency within the industry, the Security Committee developed a list of items which it recommended be allowed on board aircraft. The list includes pocket knives with blades of less than four inches in length. Knives, including 'religious knives' should not be allowed on board if their blades exceed the four inch limit. Mr. Marriott stated that, in his view, a pocket knife was either a folding knife or a non-folding knife in a container that would permit the knife to be carried inside a pocket.

As far as Mr. Marriott knows, the Security Committee did not obtain advice from qualified medical practitioners with respect to the nature and degree of danger posed by the various items included on the list.

Transport Canada has endorsed the use of this list, as it reflected a long-standing practice that appeared to have worked well. In April, 1997 Transport Canada published a 'Security Notice' to the industry. The Security Notice reflects Transport Canada's view that the use of the list would ensure an appropriate level of security on flights. Although reference was made throughout this hearing to a four inch *rule*, in fact the 'rule' is only a recommended standard for the industry, and is not binding on airlines. Each airline is ultimately responsible for developing its own standards for safety on board its own planes.⁽¹⁸⁾ This responsibility must, however, be carried out in accordance with the Air Carrier Security Regulations, which prohibit certain items, such as explosives and incendiary devices, from being brought onto aircraft.

The Security Notice also contains a schedule listing items that will not be permitted on board aircraft. The schedule lists "Knives (more than 4" or menacing)". There was almost no discussion of this provision during Mr. Marriott's testimony. However, when the document is read in conjunction with the Transport Canada publication used in training security personnel⁽¹⁹⁾, it appears that the term "menacing" is used to refer to particular types of knives such as

switchblades and shooting blade knives, and does not require an assessment of the offensive capacity of individual bladed items. This interpretation is consistent with Mr. Marriott's testimony, which suggests that, in the absence of unusual circumstances, blade length will be the determining criteria.

Transport Canada has also issued a Security Notice dealing specifically with kirpans, which Notice was developed in consultation with the Sikh community. This Notice, which incorporates the suggested four inch limit, was intended to sensitize security personnel to the religious significance of kirpans. The Notice confirms that the ultimate authority to decide what will be allowed on board rests with the air carrier, subject to the absolute prohibitions referred to in the preceding paragraph.

Mr. Marriott does not know where the four inch limit comes from, or how that particular blade length was originally arrived at as an acceptable standard. He suggested that a line had to be drawn somewhere, and agreed that there was a certain arbitrariness as to where the line was drawn. Mr. Marriott conceded that there may well be items with blades of under four inches that could cause serious injury or death, and that would present an unacceptable security risk. Such items could nevertheless be permitted on board aircraft under the terms of the Transport Canada policy.

Mr. Marriott chairs a committee known as the Working Group on Prohibition Against Interference with Crew Members. The purpose of the group is to develop a strategy for dealing with unruly passengers. Mr. Marriott notes that there have been suggestions in the media that incidents involving unruly passengers or 'air rage' are on the increase, and that there is an increased sensitivity to the subject in the industry. Mr. Marriott cannot say, however, whether such an increase in such incidents can in fact be demonstrated statistically.

v) Air Canada Experience

Denis McCulla has been the Manager of Corporate Security for Air Canada for twenty years. According to Mr. McCulla, for at least the last twenty years Air Canada has followed the four inch rule for knives, including kirpans. Air Canada security contractors do have discretion to refuse to allow people to board with items that are otherwise permissible if circumstances warrant it - for example if the individual's behaviour suggests that there may be a problem.

Air Canada flies approximately 600 flight legs each day. Mr. McCulla is not aware of any instance where a kirpan was involved in an incident that was perceived as compromising the safety of a flight. He did not indicate whether there had been any such incidents involving bladed items other than kirpans.

Mr. McCulla understands that the four inch blade policy is imposed on the airline by Transport Canada. He stated that if it were up to him, he would not allow any knives of any type on board aircraft. A similar sentiment was expressed by a representative of Canadian Airlines interviewed by the Canadian Human Rights Commission investigator.⁽²⁰⁾

vi) Canada 3000 Policy

Angus Kinnear is the President and a founder of Canada 3000. Canada 3000 has over 2000 employees, operates 15 aircraft and flies to 88 destinations around the world. Mr. Kinnear confirmed that it is the airline's responsibility to ensure passenger safety. In order to meet this responsibility, Canada 3000 has a rigorous training program for staff, and as well has a number of safety policies, including its policy with respect to weapons and dangerous items. This policy was introduced in August, 1992, although it reflects a practice that goes back to the establishment of the company in 1988.

According to Mr. Kinnear, at the time the policy was prepared, the drafters of the policy did not consider factors such as the potential conflict of the policy with religious beliefs. Indeed he doubts that the drafters were even aware of religious concerns that could arise. As far as he knows, safety was the only consideration.

Mr. Kinnear is familiar with the four inch rule. He understands that the rule is followed by some airlines, but that others, such as British Airways, do not use it. In his view, while the rule has the advantage of being easy to apply, it is not a reasonable rule in that it is arbitrary and does not exclude items that could be used as weapons. According to Mr. Kinnear, a four inch blade could inflict considerable damage when wielded in a confined space. Mr. Kinnear points out that, at 35,000 feet, one cannot simply call 911 if difficulties are encountered.

The fact that Air Canada may have used the rule successfully for twenty years does not suggest to Mr. Kinnear that his company's policy should be relaxed. According to Mr. Kinnear, although there may not have been a fatal stabbing on board an Air Canada plane, it does not mean that one may not occur in the future. Mr. Kinnear draws an analogy to the 'baggage match rule' now in standard use in the industry. This rule, which requires that all luggage on a plane be matched to passengers actually on board, was instituted after the bombing of an Air India 747 en route from Canada, and the bombing of a Canadian aircraft at Narita airport, both apparently by means of bombs planted in suitcases. Twenty years ago, there was no concern about matching baggage to passengers - to that point there had been a long history without such incidents. The bombings occurred nonetheless, with the loss of approximately 300 lives in the case of the Air India tragedy.

In order to be workable, a rule must be simple. It must be one that can be applied around the world by many different people from many different cultures. The need for simplicity is driven

by concern for safety, and not by economics. In this regard, the Canada 3000 rule, which uses the Canada 3000 dinner knife as a template, is simple and easy to apply.

According to Mr. Kinnear, it is not workable to attempt to make an exception for Sikh passengers, and to allow them to board with kirpans with blades of up to four inches. It is not clear how a person in Fiji, Stuttgart or New Zealand would be able to verify that the person was indeed a bona fide Sikh and not an imposter. Further, he points out that the spiritual restrictions that bind Amrit-dhari Sikhs with respect to the use of the kirpan would not assist if the kirpan was seized by a non-Sikh passenger in the course of a dispute.

Mr. Kinnear testified that airlines have very little opportunity to scrutinize passengers before boarding - on average, the airline interacts with each passenger for between 45 and 90 seconds at the check-in desk.

Mr. Kinnear states that Canada 3000 transports hundreds of Sikhs each month, and has no desire to alienate the Sikh community. This is the only complaint that the airline has ever received in relation to its policy. He further testified that he understands that there are kirpans, such as those prescribed for use by Sikh members of the RCMP, that would conform to the Canada 3000 policy, and that would be allowed on board Canada 3000 aircraft.

Notwithstanding the use of the policy, there was an incident in 1994 involving a knife on a Canada 3000 aircraft. Kelly Welch was the Purser on a flight from Vancouver to Toronto. In the course of the flight a non-Sikh passenger produced a knife and threatened Ms. Welch after being denied anything further to drink. The knife was a folding knife with a two inch blade. Ms. Welch described her terror, and as well, told how upset the other passengers were by the incident. She also described her sense of helplessness at being confronted with a weapon, facing the risk of serious injury in a situation where she could not call the police or expel the passenger.

Several Canada 3000 witnesses, including Jean Jones, the Director of Cabin Services for Canada 3000 and Mr. Kinnear, testified with respect to the 'air rage' phenomenon. Ms. Jones is responsible for safety and service standards for flight attendants. One of Ms. Jones' responsibilities is to receive reports from Canada 3000 personnel with respect to incidents involving disruptive passengers. Based upon Ms. Jones' review of these reports and her discussions with airline personnel, it is her view that incidents of this nature are increasing, although no formal study has been conducted in this regard. She testified that an informal survey conducted of flight attendants disclosed that thirty four percent of Canada 3000 flight attendants have been subjected to verbal abuse by passengers. Twenty three percent of Canada 3000 flight attendants have been involved in attempting to defuse a fight. Twenty three percent of Canada 3000 flight attendants report having been physically assaulted on the job. It is not clear from Ms. Jones' evidence whether these results relate to incidents occurring during a particular time frame.

Similarly, there is no suggestion from her that the results reflect an increase in such incidents relative to earlier survey results.

vii) Other Kirpan Policies

There is no standard within the airline industry with respect to kirpans on aircraft. We have earlier described Transport Canada's position with respect to the four inch rule and the application of that approach by Air Canada and Canadian Airlines. It appears that Air India and Pakistani International Airlines specifically prohibit kirpans on board their airplanes. British Airways, US Air and American Airlines have policies prohibiting any bladed items on board, which policies are interpreted to include kirpans.

Detective Sergeant Gordon Graffman testified on behalf of the respondent with respect to the policy respecting courthouse security for the Toronto region. Detective Sergeant Graffman is the Head of Research and Planning for the Toronto Police Service, Court Service Unit.

Detective Sergeant Graffman described the special nature of the courthouse environment, and the differing levels of security that may be required, depending on the nature of the court, and the particulars of the cases being tried at any given time. Metal detectors are routinely used. According to Detective Sergeant Graffman, screening personnel are given varying degrees of discretion with respect to the application of the policy, depending on the level of threat felt to exist. In normal situations no bladed items with blades greater than two inches in length will be permitted in the courthouse.

Detective Sergeant Graffman stated that the provision of security is a human endeavour. The courthouse policy includes a discretionary element so as to permit personnel to use their judgment, and to seize items such as X-Acto knives, which may have very short blades, but nonetheless present a significant danger.

In situations determined to present a higher than normal degree of threat, no metal or other implements of any size that are capable of causing injury will be permitted. Security personnel have little discretion in such circumstances.

The court policy makes no exception for kirpans as they have the potential to inflict damage, notwithstanding their religious nature.

Corporal Pierre McConnell of the Surrey detachment of the Royal Canadian Mounted Police testified with respect to the courthouse security policy in use in British Columbia. According to Cpl. McConnell, British Columbia court policy prohibits any knives being brought into

courthouses. The policy specifically notes that no exception is to be made with respect to religious knives.

Decisions filed by the parties in support of their positions discuss policies developed with respect to the wearing of kirpans in schools and hospitals, which policies have become the subject of litigation. In Pandori v. Peel Board of Education⁽²¹⁾, an Ontario Board of Inquiry considered the nature of the school environment and determined that Sikh students should be permitted to wear kirpans to school, provided that the kirpans were of 'a reasonable size'. The Board did not make a specific finding as to what is a reasonable size. This decision was affirmed by the Divisional Court.

Similarly, in Pritam Singh v. Workmen's Compensation Board Hospital and Rehabilitation Centre⁽²²⁾, another Ontario Board of Inquiry reviewed a hospital policy prohibiting the possession of offensive weapons on hospital premises and concluded that Sikh patients should be allowed to wear kirpans of a reasonable length while receiving treatment. Once again the Board did not specifically define 'a reasonable length'.

viii) Forensic Evidence

Dr. David McAuliffe was called by the respondent and was qualified, on consent, as an expert in forensic medicine and the forensic pathology of sharp objects as weapons. Dr. McAuliffe is a pathologist with the Forensic Pathology Unit of the Office of the Chief Coroner for Ontario.

According to Dr. McAuliffe, sharp force injuries can be divided into stab wounds and incised wounds or cuts, both of which have the potential to cause death. There are a range of variables that determine how lethal a wound may be, which include the physical characteristics of the weapon, the location and nature of the wound, the force used and the intent of the assailant.

Both stab wounds and incised wounds have the potential for being life threatening, depending on factors such as the location and depth of the wound. Both types of wounds can require emergency treatment and medical facilities not ordinarily available on board aircraft.

The important determinants of a weapon's potential to injure are the length of the blade, the sharpness of the weapon, the pointedness of the weapon and the rigidity of the blade. The offensive capacity of a bladed item can only be assessed by considering all of these factors together. A policy that only considered one factor, such as blade length, as a means of assessing the potential for injury would be 'a ludicrous policy'.

According to Dr. McAuliffe, Mr. Nijjar's travel kirpan has sufficient blade length, rigidity, sharpness and pointedness to cause a fatal outcome: indeed, in the course of his practice, Dr.

McAuliffe has seen many fatalities caused by items similar to the travel kirpan, although he has never seen wounds actually caused by a kirpan.

In contrast, Dr. McAuliffe has never seen a fatal outcome with an implement such as the Canada 3000 dinner knife currently in use or the Canada 3000 dinner knife in use in April, 1996. While either dinner knife could theoretically cause a fatal injury, for example, by being driven through an eye socket and into the brain, Dr. McAuliffe described such a scenario as 'fanciful'. The Canada 3000 dinner fork could be used to penetrate the skin, and could conceivably cause a fatal injury if driven into the chest with sufficient force. However, Dr. McAuliffe stated that he does not see any plausible way that could happen. He has never seen a serious injury or death caused by an item such as the Canada 3000 dinner fork.

Dr. McAuliffe states that the Canada 3000 dinner knife would be an appropriate template for use in assessing the offensive capability of bladed items. In Dr. McAuliffe's view, the assessment of the offensive capabilities of a bladed item is one that can be made by a lay person.

Dr. McAuliffe was asked to address whether items such as wine bottles, which are commonly found on aircraft, have the potential to cause fatal injuries either by bludgeoning or by breaking the bottle, and using the broken bottle as a cutting weapon. Dr. McAuliffe stated that he has never seen a fatality caused by a wine bottle. He points out that it is very difficult to smash a wine bottle without injury to the person breaking the bottle.

ix) Violent incidents involving Kirpan

Dr. McLeod and other witnesses described the sacred nature of the kirpan for followers of the Sikh faith. According to Dr. McLeod, Sikhism dictates that the kirpan should never under any circumstances be used as an offensive weapon. The kirpan may be used for defensive action, but only when all other methods of self-defence have failed.

According to Dr. McLeod, because of the spiritual significance of the kirpan, the attitude of all Sikhs towards the kirpan will be distinctively different from the attitude of non-Sikhs towards other types of knives.

Failure to follow the restrictions on the use of the kirpan would amount to a contravention of the Rahit. The transgressor would be a *tanakhahia*, and would be required to confess his shortcomings and accept a penance.

Notwithstanding these spiritual restrictions, Dr. McLeod is aware of situations where the kirpan has been used as an offensive weapon, including situations in Canada. While such incidents may

have occurred, they would not be in accordance with the teachings of the faith.

Dr. McLeod points out that, as with any other segment of society, Sikhism encompasses a range of mankind from paragons of untarnished moral principle to the opposite extreme. Mr. Nijjar made the same point in his testimony.

Evidence was led by the respondent with respect to a number of incidents where it appears that kirpans were indeed used as offensive weapons, including evidence with respect to the hijacking of two aircraft in the mid-1980's. In addition, testimony was given by Cpl. McConnell, who was the file co-ordinator with respect to a major disturbance at the Guru Nanak Gurdwara in Surrey, British Columbia, on January 11, 1997. The disturbance evidently arose as a result of a disagreement between two factions in the congregation with respect to an issue of religious doctrine. Cpl. McConnell was present at the scene and described what occurred there. In addition, he provided two videotapes of the disturbance.

It was apparent from both Cpl. McConnell's testimony and from the videotapes that kirpans were indeed brandished in an offensive manner on a number of occasions in the course of the disturbance. Cpl. McConnell testified that in the course of the incident one individual was slashed on the side of the head and was also stabbed at least twice in the chest area, sustaining serious and potentially life-threatening injuries. In a subsequent criminal trial, the trial judge found as a fact that the victim's injuries were sustained as a result of the use of a kirpan. The evidence at the trial was that the kirpan in issue was somewhere between 4 and 10 inches in length.

In the course of the hearing the concern was expressed on several occasions with respect to this and other evidence of violence within the Sikh community. Commission counsel suggested that the respondent was attempting to characterize Sikhs as having a general propensity for violence. The respondent submitted that it was not attempting to suggest that Sikhs were any more dangerous than anyone else. Rather, the position of the respondent is that, like any other group of humanity, there are good Sikhs and bad Sikhs, those who strictly observe the teachings of the faith, and those who do not. As a consequence, the respondent states that one cannot generalize about the manner in which any one individual will act vis à vis his or her kirpan in a given situation.

x) Reasonable Accommodation and the Level of Risk

There is considerable authority with respect to the issue of the assessment of risk in cases involving public safety. The majority of these decisions arise in the context of direct discrimination. Mr. Duval and Mr. Chouest both agree that in cases of direct discrimination, the case law has established that a 'sufficient risk' must be demonstrated before a *bona fide* occupational requirement can be established. Both counsel urge the Tribunal to apply the same

risk standard in assessing whether or not Mr. Nijjar can reasonably be accommodated, notwithstanding that what is alleged is indirect discrimination. No cases were provided to us to support this position.

A review of the jurisprudence discloses that counsel's position has not been uniformly accepted. Cases such as Woolverton et al. v. B.C. Transit ⁽²³⁾ and Dhillon v. Ministry of Transportation ⁽²⁴⁾ conclude that it would be inappropriate to import the test of sufficiency of risk developed in the context of the *bona fide* occupational requirement analysis into the indirect discrimination context, given the underlying differences between direct and indirect discrimination. Utilizing the language of Madam Justice Wilson in Central Alberta Dairy Pool, these decisions assess whether or not accommodation is possible having regard to the 'magnitude of the risk' posed by the accommodation of the complainants. What is not clear from these decisions, however, is how the 'magnitude of the risk' test is perceived to differ from the 'sufficiency of the risk' test, and whether a greater or lesser tolerance of risk is required.

Although Madam Justice Wilson uses different language in Central Alberta Dairy Pool than that which had previously been used by the Supreme Court of Canada in cases such as Ontario Human Rights Commission v. Etobicoke ⁽²⁵⁾, we do not read that decision to permit a different degree of risk to public safety in cases of indirect discrimination.

We accept that there are fundamental differences between direct and indirect discrimination, and that the focus of the risk analysis will differ, depending on the nature of the discrimination alleged. ⁽²⁶⁾ However, where public safety is in issue, we do not see a principled basis for demanding more or less protection for the public depending upon whether a complainant is discriminated against directly or indirectly. This is particularly so where, as in this case, the risk of injury will be borne by third parties, and not just the complainant him or herself.

Further militating against the use of differing standards is the fact that in at least some cases, the distinctions between the two types of discrimination are 'perilously close to semantic'. ⁽²⁷⁾

For these reasons, we are in agreement with the submissions of counsel, and will approach our analysis using a standard of 'sufficient risk'.

xi) Risk Analysis

We must now consider whether the respondent has satisfied the burden on it to establish that it has reasonably accommodated the needs of the complainant to the point of undue hardship, or that no such accommodation is possible.

It considering this issue, it should be noted that the respondent's policy does not prohibit all kirpans on board Canada 3000 aircraft. It only prohibits those kirpans with a greater potential for injury than that of Canada 3000 eating utensils. The respondent maintains that this, in itself, is a form of accommodation. The respondent further submits that to modify the Canada 3000 policy in the manner suggested by the Canadian Human Rights Commission would present unacceptable risks to the public and that this would constitute an undue hardship.

In determining whether or not a modification of the respondent's policy to allow Sikhs to bring kirpans with blades of up to four inches in length on board its aircraft would constitute an undue hardship, we must consider the risks that such a modification would present. As noted earlier, the assessment of risk has two components: the likelihood that injury might occur and the seriousness of the injury. In addition, we must consider who it is that will bear the risk of injury. Finally a determination must be made as to whether or not the effect of these factors is such as to create a sufficient increase in the risk of injury as to establish undue hardship.

a) Likelihood of Injury

We will consider first the question of the likelihood that injury may occur if kirpans with blades up to four inches long are allowed on board. In this regard the evidence suggests that the likelihood of anyone being injured by a kirpan on an aircraft is low. This is demonstrated by the experience of Air Canada. In twenty years, Air Canada has never had an incident involving the violent use of a kirpan. This evidence must be viewed in light of Mr. McCalla's testimony that Air Canada flies 600 flight legs each day.

We do not place any weight on the evidence before us relating to the perceived increase in incidents of so-called 'air rage'. The evidence before us on this subject was largely anecdotal, and in our view, was not sufficiently reliable for us to conclude that incidents of this nature are in fact occurring with greater frequency, and are not simply receiving more attention from the media and the industry.

Consideration must also be given to the evidence of Professor McLeod and others as to the special regard that Sikhs have for their kirpans. It is clear that the teachings of Sikhism do not permit the use of the kirpan as an offensive weapon. There is, however, considerable evidence before this Tribunal that establishes that, notwithstanding the teachings of the faith, the kirpan has been used by some Sikhs as an offensive weapon in a variety of circumstances, including in airplane hijackings, and that the consequences of the actions of these individuals have in some cases been disastrous.

In finding that the kirpan has been used as an offensive weapon by some Sikhs, we note that the actions of these individuals are contrary to the teachings of the faith. We are not suggesting that Sikhs have any greater propensity for violence than the rest of the population. Rather, this

finding is one consistent with the evidence of Professor McLeod and Mr. Nijjar, both of whom noted that Sikhs are human, and as with all humans, there are good Sikhs and those that are not so good - those that follow the teaching of the faith to the letter, and those that do not.

We also note that the special regard that Sikhs have for their kirpans would not come in to play if the kirpan were seized by another passenger during an altercation. It was also pointed out in argument that spiritual considerations would not bind a non-Sikh posing as a Sikh, although in our view, the likelihood of this latter scenario occurring is remote.

Spiritual strictures may have limited effect on Sikhs who may be mentally ill. This appears to be the case in one of the examples cited to the Tribunal, where a mentally ill Sikh used a kirpan to kill a child. Similarly, spiritual considerations may not assist where an individual is intoxicated.⁽²⁸⁾

In making these observations, we are not suggesting that Mr. Nijjar would ever use his kirpan in an offensive fashion. It is clear to us that Mr. Nijjar is a devout individual, who takes the teaching of his faith both literally and seriously, and one who endeavours at all times to conduct his life in a manner consistent with the tenets of his religion.

b) Seriousness of Potential Injuries

The most helpful evidence on this issue was that of Dr. McAuliffe, who we found to be a most impressive witness. It is apparent from Dr. McAuliffe's testimony that used by itself, the blade length of an item is not an appropriate criteria for determining the offensive capacity of a bladed item. A bladed item such as a kirpan, an X-acto knife or a surgeon's scalpel may have a short blade, and yet be pointy, sharp and rigid enough to inflict considerable harm. Similarly, a kirpan or other bladed item may have a blade longer than four inches, yet have a limited potential for harm because of its blunted point, the dullness of its blade or the lack of rigidity of the item. We accept Dr. McAuliffe's evidence that it is ludicrous, to use his term, to only consider blade length when attempting to assess how dangerous a particular bladed item may be.

It is also clear from Dr. McAuliffe's testimony that a kirpan with a blade of less than four inches could inflict life-threatening injuries, depending on its pointedness, sharpness and rigidity.

c) Who Will Bear the Risk?

While there is at least a possibility that the bearer would be injured by his or her own kirpan in the course of an altercation, in our view it is at least equally possible if not more likely that other passengers could be injured if a kirpan was drawn in the course of a fight.

xii) Conclusion With Respect to Accommodation

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.

The Commission points out that airplanes contain all manner of items such as wine bottles, crutches and walking sticks, all of which have the potential to be used as weapons but are allowed on board. While it is true that these types of items could theoretically be used as weapons, in light of Dr. McAuliffe's evidence with respect to the offensive capacity of wine bottles, and having regard to the confined space inside an aircraft in which crutches or walking sticks could be wielded, we do not think that the risk posed by items of this nature can be equated to that posed by kirpans.

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. It will be recalled that Mr. Kinnear testified that Canada 3000 check-in personnel have between 45 and 90 seconds of contact with each passenger.

We accept Mr. Kinnear's evidence that, in order to be workable, an airline policy with respect to dangerous items must be simple and easy to apply. The policy must be suitable for use by many different individuals around the world. We also accept Dr. McAuliffe's evidence that the Canada 3000 dinner knife would be an appropriate template for assessing the offensive capabilities of a bladed item.

We cannot accept the Commission's suggestion that permitting kirpans with blades of up to four inches in length would be a reasonable way to accommodate Sikhs. In measuring the risks associated with such an accommodative change against the benefits to be derived by those affected by the rule, we note that there is no guarantee that such a policy would in fact accommodate all Sikhs. The evidence before us with respect to the differing views within the Sikh faith regarding the acceptable length for the kirpan leads us to conclude that there will likely be Sikhs for whom a four inch blade on a kirpan is not sufficient to discharge their spiritual obligations.

In addition, there is no principled basis for permitting kirpans with blades of three and a half inches on board aircraft, and not those of four and a half inches or five inches or six inches. The

Commission's suggestion that a four inch blade rule be used for kirpans is based on the use of a similar rule by some segments of the airline industry, and its recommendation for use by Transport Canada. Mr. Marriott's evidence, however, suggests that the choice of four inches as an appropriate cut-off point was an arbitrary one, and one not based on any evidence with respect to the offensive capacity of blades of one size over another.

In our view, reasonable accommodation must indeed be reasonable. On the evidence before us, and for the reasons identified above, we cannot conclude that modifying the respondent's policy with respect to weapons and dangerous items so as to permit kirpans with blades of under four inches on board Canada 3000 aircraft is a reasonable way to accommodate the spiritual needs and aspirations of members of the Sikh community.

We find that incidents involving the offensive use of the kirpan by members of the Sikh faith are not common, are contrary to the teachings of the faith, are viewed with disapproval by the Sikh community, but do nevertheless occur. The relatively low likelihood that such incidents could occur on board an aircraft must, however, be considered in light of the potentially life-threatening consequences of such events, and the fact that it may well be parties other than members of the group requiring accommodation that will suffer the consequences.

There is a certain degree of risk associated with all of life's endeavours, including airplane travel, and some increase in the level of risk to public safety may be required in order to enable all of us to enjoy life in a multicultural society. In our view, however, the respondent has established that the presence of kirpans with a greater offensive capacity than Canada 3000 dinner knives on its aircraft would present a sufficient risk to the safety of the public so as to constitute an undue hardship.

V_NEED FOR A UNIFORM RULE

It is clear from both Mr. Nijjar's complaint form and from his evidence that much of his frustration stems from the fact that he made a good faith effort to comply with law as he understood it by purchasing a kirpan with a blade under four inches long, only to be prevented from flying. His frustration is entirely understandable, and simply serves to underscore the need for a uniform standard regarding kirpans within the airline industry. This need is of course precisely what Transport Canada's recommendation with respect to the four inch rule was intended to address. In our view, it would be very helpful if Transport Canada were to consult further with the airline industry, the Sikh community and experts, including forensic pathologists, in an effort to develop a uniform standard that best addresses the needs of the Sikh community, without presenting an unacceptable risk to public safety.

VI ORDER

For the foregoing reasons, this complaint is dismissed.

Dated this day of June, 1999.

Anne L. Mactavish

Shirish Chotalia

Mukhtyar Tomar

1. The 'four inch rule' for bladed items is contained in a non-binding guideline developed by the Security Committee of the Air Transport Association of Canada and recommended for use by Transport Canada. The four inch rule, which is used by a number of air carriers in Canada, will be discussed in greater detail further on in this decision.

2. Sub-section 3(1) of the CHRA

3. R.v Big M Drug Mart Ltd., [1985] 1 S.C.R. 295 at 337

4. Ontario Human Rights Commission and O'Malley v. Simpson-Sears Ltd., [1985] 2 S.C.R. 536 at p. 551.

5. Alberta Human Rights Commission v. Central Alberta Dairy Pool et al., [1990] 2 S.C.R. 489, at p. 515

6. Exhibit R-10

7. Toronto Dominion Bank v. Canadian Human Rights Commission and Canadian Civil Liberties Association, [1998] 4 F.C. 205 at p. 274, per. Robertson, J.A.

8. Toronto Dominion Bank, supra, note 5, at p. 276, per Robertson, J.A. and at p. 290, per McDonald J.A.

9. Exhibit R-18

10. There is some debate as to whether the terms 'Amrit-dhari Sikh' and 'Khalsa Sikh' are truly synonymous. It is not necessary to resolve this dispute for the purposes of this decision, and the terms will be used interchangeably.

11. Kes-Dhari Sikhs do not cut their hair, and may observe other of the Five Ks including the wearing of the kirpan. They have not, however, undergone the amrit ceremony.

12. In this regard, the wording of section 5 of the Act may be contrasted with that of section 10, which prohibits the establishment of policies, in the employment context, that deprive or tend to deprive individuals *or classes of individuals* of employment opportunities on the basis of a prohibited ground of discrimination.

13. Re Funk and Manitoba Labour Board (1976) 66 D.L.R. (3d) 35 at 37 (Man C.A.).

14. Transcript, pp. 215-222.

15. Central Okanagan School District No. 23 v. Renaud (1992), 16 C.H.R.R. D/425 at 432.

16. Central Alberta Dairy Pool, supra, Note 3 at p. 521.

17. Woolverton v. B.C. Transit (1992), 19 C.H.R.R. D/200 at D/214.

18. The Carriage by Air Act imposes liability on air carriers liable for damage sustained by passengers while on board aircraft.

19. Exhibit R-1.

20. Exhibit R-28, Tab 2 and Exhibit R-38, para. 52.

21. (1990), 12 C.H.R.R. D/364, aff'd (1991), 14 C.H.R.R. D/403.

22. (1981), 2 C.H.R.R. D/459.

23. (1992), 19 C.H.R.R. D/200

24. Unreported, B.C. Human Rights Tribunal, May 11, 1999.

25. [1982] 1 S.C.R. 202

26. In cases of direct discrimination, the focus will be on the population governed by the rule at large, whereas in cases of indirect discrimination, the focus will be solely on those detrimentally affected by the rule on the basis of a proscribed ground, the rule being allowed to stand in its general application.

27. Tarnopolsky and Pentney, Discrimination and the Law, at p. 7-50.19. See also Thwaites v. Canada (Canadian Armed Forces) (1993), 19 C.H.R.R. D/259, aff'd (1994), 21 C.H.R.R. D/224.

28. According to Dr. McLeod, the issue of the consumption of alcohol by Sikhs is a matter of vigorous debate. He notes that strictly observant Sikhs interpret the faith so as to prohibit the consumption of alcohol. As with many other aspects of religious doctrine, however, there are varying interpretations. Dr. McLeod writes: "Sikhs (particularly those from villages) are renowned as drinkers of hard liquor and will make no effort to conceal the fact that it is for them an important means of relaxation. Here also scripture can be cited on either side, the actual meaning of each passage depending upon the nature of its hermeneutic interpretation. But there is relatively little textual analysis as far as alcohol is concerned, except on the part of a few of its opponents. A large majority of all Sikhs prefer simply to enjoy their alcohol and not be bothered by any attempt to defend it." Exhibit HR-9, Sikhism, at p. 215.