September 1, 2016

# Human Rights Cannot Be Renounced or Waived

**By: Hasna Shireen**

**Case Commented On:** *Webber Academy Foundation v Alberta (Human Rights Commission)*, 2016 ABQB 442 (CanLII)

The Court of Queen's Bench of Alberta recently upheld a human rights decision that found Webber Academy, a private school in Calgary, had unlawfully discriminated against two Muslim high school students by prohibiting them from performing certain prescribed Sunni prayers at school. Dr. Webber, President and Chairman of Webber Academy, said that bowing and kneeling was too overt and such prayers would be not allowed on campus. The Alberta Human Rights Tribunal in 2015 found that Webber Academy discriminated against the two students and awarded the students $12,000 and $14,000 respectively as damages for distress, injury and loss of dignity (see 2015 AHRC 8 (CanLII)). The Academy did not explicitly claim that the complainants had waived their rights prior to enrollment. However, on appeal Justice GH Poelman addressed the issue of waiver, as the pre-enrollment discussions between the students and staff were discussed at length by the Tribunal. Justice Poelman held that waiver is not a possible defence in any case, as human rights are a matter of public policy and protect the inherent dignity of every individual; thus they "cannot be waived or contracted out of" (at para 106).

## Complaints at the Alberta Human Rights Commission

On February 13, 2012, Ms. Farhat Amir and Dr. Shabnam, on behalf of their sons Sarmad Amir and Naman Siddique, made a complaint to the Alberta Human Rights Commission against Webber Academy for discrimination on the ground of religious beliefs in the area of services or facilities customarily available to the public (section 4 of the *Alberta Human Rights Act*, RSA 2000, c. A-25.5 (*AHRA*)). The students are Sunni Muslims and need to pray five times a day. According to their personal Sunni religious beliefs these prayers are mandatory and at least one and not more than two prayers must be performed during school hours (depending upon the time of year). The parents and their children requested a space that would accommodate the students' need to stand, bow and kneel safely, but not a dedicated prayer space. The Academy facilitated their prayers until December 17, 2011. On that date and in subsequent meetings, Dr. Webber advised the parents that bowing and kneeling was "too overt" and this form of prayer was forbidden on the school's campus, as the Academy is a non-denominational school (paras 5 - 6).

## Tribunal's Findings and Decision

One issue before the Tribunal was whether the complainants were asking for a designated prayer space as per the Webber Academy's submission, or their request was to be able to pray, with flexibility as to where that occurred, as per the Director's and the complainants' submission (at para 13).

The Tribunal perceived that the prayer space required was only a bit larger than the space required to be occupied by a person and rejected the Academy's framing of the issue as a request for "prayer space". It found that the students were requesting the Academy to permit them to honour their religious beliefs on praying (at para 16).

The Tribunal was presented with conflicting evidence regarding the discussion at the pre-enrollment meeting about whether prayers are allowed on school campus. The Tribunal found the testimony of the students and their mothers to be "more accurate and consistent with the balance of the evidence as a whole" (at para 19) and that a positive indication of acceptance to praying on campus was given by Academy staff at the pre-enrollment meeting.

Dr. Webber stated that Webber Academy is a non-denominational school and there had been no approval to have prayer space at school; since the policies were disregarded, the students would not be accepted for enrollment the following year (at para 23).

The Tribunal characterized "the service and facility customarily offered by Webber Academy" to encompass "educational programs and other supportive services and facilities including the use of Webber Academy campus and Facilities", and defined the "public" as the "student body" (at para 26). The Tribunal considered the scope of services and facilities, and found the students were dependent upon the school to meet their needs during school hours, as they were minors and attended school for full days. Thus, the Tribunal disallowed the Academy's argument that it did not fall under the *AHRA* because prayer space is not a service it customarily makes available to its public—prayer space was not the service being offered; rather, the service was education and other supportive services and facilities allowing meaningful access to education (at paras 26 - 27).

The Tribunal used the *Moore* test for discrimination, which is as follows:

> (1) The complainant must have a characteristic that is protected from discrimination;
>
> (2) The complainant must have experienced an adverse impact; and
>
> (3) The protected characteristic must have been a factor in the adverse impact
>
> (at para 49, citing *Moore v. British Columbia (Ministry of Education)*, 2012 SCC 61 (CanLII)).

Applying this test, the tribunal found *prima facie* discrimination contrary to section 4 of the *AHRA* for the following reasons:

1. The students' desire to pray during school hours was based on a [sincere] religious belief;
2. The students were not allowed to pray on campus and were refused re-enrollment to Webber Academy, thus experiencing an adverse impact with respect to the educational services and related facilities of Webber Academy; and
3. Their religious belief, a protected characteristic under the Act, was the basis for Webber Academy's denial of services and discrimination with respect to its services (at para 29).

After finding *prima facie* discrimination, the Tribunal considered the defence of whether the Academy's actions were reasonable and justifiable under section 11 of the *AHRA*. Here, the

Tribunal applied *British Columbia (Superintendent of Motor Vehicles) v British Columbia (Council of Human Rights)*, 1999 CanLII 646 (SCC) (commonly known as "*Grismer*"), which involves three steps that must be proven by a defendant in order to rely on section 11. As applied to Webber Academy, these criteria were as follows:

1. Whether 'Webber Academy adopted the standard for a purpose or goal that is rationally connected to the function being performed',
2. Whether it 'adopted the standard in good faith, in the belief that it is necessary for the fulfillment of the purpose or goal,' and
3. Whether the standard was 'reasonably necessary' to accomplish its purpose or goal, in the sense that the defendant cannot accommodate persons with the characteristics of the claimant without incurring undue hardship (at para 30).

The Tribunal held that the first two criteria were met by Webber Academy. The Academy's standard was articulated as "no overt prayer or religious activities on school property" (at para 71) and the purpose for the standard "was to foster a non-denominational identity that ensures Webber Academy's students are placed in a learning environment that is 'free of religious influence'" (at para 71). Next, the Tribunal identified the Academy's 'function being performed' as educational services and facilities (at para 73). The Tribunal decided that the Academy had established a rational connection between the Academy's purpose and the function it performed (at para 74). It also found that the Academy had adopted its position in good faith (at para 75).

However, the Academy did not meet the third criterion from *Grismer*. There was no evidence that the students' prayer practices would have a religious influence on other students, other overt religious observances were permitted, initial allowance of prayers had been easily accommodated, and Webber Academy had not undertaken any assessment of whether allowing the students' prayers would amount to a hardship for the Academy (at para 31). Thus, the Tribunal found against Webber Academy and awarded Mr. Amir $12,000 and Mr. Siddique $14,000 as damages for distress, injury and loss of dignity.

**Standard of Review: Court of Queen's Bench of Alberta**

Justice GH Poelman of the Court of Queen's Bench of Alberta relied on *Association of Professional Engineers and Geoscientists of Alberta v Mihaly*, 2016 ABQB 61 (CanLII) for the standards of review to apply to various questions on appeal (at para 34). These will be identified for each of the issues discussed below.

**Characterizations: Students' Request and Services Customarily Available**

Both parties agreed that the "public" for the purposes of section 4 of the *AHRA* is the student body of the Academy as per the Tribunal decision and *University of British Columbia v Berg*, 1993 CanLII 89 (SCC). However, the parties differed on whether there was discrimination with respect to any services or facilities "customarily available to the public" (at para 36). Justice Poelman determined that this inquiry required a characterization of what the students were seeking and how that related to the services offered to Webber Academy's "public"—the student body (at para 36).

Justice Poelman held that determining what was requested by the students is primarily a factual matter and thus was reviewable on a reasonableness standard. The Tribunal factually disallowed the Academy's characterization of the students' request as being for "prayer space". There was

ample evidence the students were not asking for dedicated space but only for somewhere they could perform prayers for five to ten minutes in a discreet manner (at paras 37 - 38).

Justice Poelman then focused on determining whether what the students requested was a service or facility customarily available to the Academy's public. On appeal, the Academy did not clearly express how its services and facilities should be described. Rather, the Academy argued that if the specific thing requested—namely the provision of prayer space—is not customarily available to the student body, and it is not therefore protected under section 4 of the *AHRA* (at para 40).

Justice Poelman agreed that the Tribunal was correct in using the *Berg* and *Moore* cases. In applying these two cases to the matter before the Court, Justice Poelman found that the services and facilities the Academy customarily made available to its public were non-denominational educational programs and other supportive services and facilities incidental to those programs (at para 44). To apply the language of *Moore*, incidental supportive services and facilities include "the means by which those programs could be accessed by students" (at para 44). To apply the language of *Berg*, Webber Academy has "discretion in the types and scope of incidental services and facilities it offers" (at para 44). However, the "discretion must not be exercised on prohibited grounds of discrimination" (at para 44, citing *Berg* at para 75). Accordingly, the Tribunal was accurate in concluding "that Webber Academy, as a private school offers services and facilities customarily available to the public and does not have an 'unfettered discretion' to summarily refuse a student's request to perform a religious obligation on its campus" and the Academy's discretion to set policies regarding student conduct "does not give a private school license to exercise their discretion in denying the services or use of facilities in a discriminatory fashion" (at para 45).

### ***Prima Facie* Discrimination**

On appeal, the Academy submitted that the *Moore* test used by the Tribunal was inadequate because it failed to incorporate a "comparator analysis" as *per Kelly v B.C. (Ministry of Public Safety and Solicitor General) (No. 3)*, 2011 BCHRT 183 (CanLII). The Court held that as it was the most recent relevant Supreme Court of Canada authority, the Tribunal was correct in identifying the *Moore* test as applicable (at para 49).

### **Application of the Test**

#### ***Characteristic Protected from Discrimination***

As noted above, the Tribunal found that the students had a characteristic protected from discrimination under the *AHRA*, because of their sincerely held religious beliefs. The Academy argued that the Tribunal gave inadequate consideration to their expert testimony because leading and majority opinion among the four major Sunni schools of Islamic law consider attendance at school is a valid reason to delay or skip prayer (at para 52). The Tribunal's decision on religious beliefs was based upon its finding that the students personally believed it was necessary to conduct their prayers during scheduled times and it would be sinful to miss them, based on the Qur'an and the sayings of the Prophet as conveyed to them by their parents. Moreover, the Tribunal accepted the testimony of the principal of Rundle College (where the students attended after Webber Academy) that the students practiced their prayer without significant disruption for the two years they attended that school. This was strong evidence of a genuine belief and commitment by the students to their prayer practices (at paras 52 and 54).

Justice Poelman found that the Tribunal appropriately followed the approach established in *Syndicat Northcrest v Amselem*, 2004 SCC 47 (CanLII). *Amselem* holds that for complainants relying upon freedom of religion, it is not necessary to prove their beliefs are objectively recognized as valid by coreligionists, nor is it appropriate for courts to inquire into that question. Rather, a person must show sincerity of belief, not validity of a particular belief. *Amselem* does not support the reliance placed by the Academy on expert evidence, because, as stated by the Court, "[r]eligious belief is intensely personal and can easily vary from one individual to another. Requiring proof of the established practices of a religion to gauge the sincerity of belief diminishes the very freedom we seek to protect" (at para 60, citing *Amselem* at para 54). Thus, the Court ruled that the Tribunal properly focused on a determination of whether the students sincerely held their religious beliefs regarding the form and times of prayer and found ample evidence from the students, their mothers and their coreligionists to support the Tribunal's finding that the religious beliefs were sincerely held (at paras 59 and 60).

***Adverse Impact***

On appeal, the Academy maintained its argument that the students had requested a designated prayer space. The Court noted that this argument was "premised on a mistaken characterization" and that the students desired to be allowed to conduct private prayers "in whatever unobtrusive place was available" (at para 64). The Academy denied their right to pray and treated them "differently from other students whose religious beliefs in the form of head coverings and facial hair were permitted during their attendance at school, even advertised by Webber Academy, despite the fact that those observances were contrary to the usual policies applicable to Webber Academy students" (at para 64). Thus, there was plenty of evidence showing that the students experienced an adverse impact as a result of the Academy's actions (at para 65).

***Religious Belief a Factor in Adverse Impact***

The Tribunal found the students were denied meaningful access to the Academy based on their religious belief, which clearly connects the protected ground of religion to the adverse impacts (of refusing to allow prayer and denial of re-enrollment) (at para 66). The Court of Queen Bench found that based on the evidence, the Tribunal's findings were reasonable.

**Reasonable Justification**

The Tribunal's findings with respect to rational connection and good faith were not challenged on appeal (at paras 74-75). As for the third criterion, the Tribunal made note of the following: the Academy's public information in the Parent-Student Handbook stated that "at Webber Academy, we believe in," among other things, "creating an atmosphere where young people of many faiths and cultures feel equally at home"; the Academy's website page for "Admissions" prominently showed a student with a turban, mustache and beard, along with two other students, conveying the acceptance of students of many backgrounds and faiths; the "Webber Academy information package" contained the statement that the Academy is "non-denominational" (at para 77, citing the Tribunal decision in general). However, the Tribunal rejected Dr. Webber's view, expressed in his testimony, "that a non-denominational school can reasonably be interpreted as meaning that no prayer or religious practice would be allowed" (at para 79). Justice Poelman found that the tribunal's finding that the standard imposed by the Academy

"was not reasonably necessary to accomplish its purpose of fostering a non-denominational identity" was a reasonable one "founded on the evidence" (at para 83).

As noted above, the third aspect of the *Grismer* test also requires the respondent to establish that it could not accommodate persons with the characteristics of the claimant without incurring an undue hardship. The Tribunal found that "[t]he evidence overwhelmingly supports that accommodation of the prayer was possible and it would not have been an undue hardship to accommodate the Students' requests to pray on campus" (at para 81). The Court held that the Tribunal applied the correct legal test under section 11 of the *AHRA* and its conclusions were reasonable based on the evidence (at para 87).

**Waiver**

Webber Academy made submissions on the conflicting evidence on the content of the pre-enrollment meeting and school tour, and also argued that the Tribunal had incorrectly refused to accept evidence of one staff person's version of the meeting. Justice Poelman held that the Tribunal's explanations about its conclusions on credibility were unreasonable (at para 100) and not adequately transparent and intelligible (at para 104). However, Justice Poelman concluded that even if Webber Academy's evidence was accepted, and the Tribunal had found that there had been a clear warning that no prayers would be allowed, this conclusion would also have led to an analysis of whether there was discrimination and whether it was reasonable and justifiable (at para 105). This brings into play the point that one cannot waive one's rights under human rights law.

Justice Poelman noted that the Academy did not argue waiver, but nevertheless found that a defence of waiver by the complainants of their human rights would not be available (at para 106). As a general rule, any person can enter into a binding contract to waive the benefits conferred on them by legislation, or in other words, can contract out of legislation, unless it can be shown that it would be contrary to public policy to allow such an agreement. In the context of human rights law, "It has been well established that human rights are a matter of public policy, created for the benefit of the community, inherent to the dignity of every individual, and cannot be waived or contracted out of" (para 106, citing *Ontario (Human Rights Commission) v Etobicoke (Borough)*, 1982 CanLII 15 (SCC) at paras 8 to 9; *Central Okanagan School District No. 23 v Renaud*, 1992 CanLII 81 (SCC) at paras 23 to 25; and *Dickason v University of Alberta*, 1992 CanLII 30 (SCC) at para 116). As noted in *Dickason*, human rights legislation is quasi-constitutional, and rights generally cannot be renounced or waived.
After upholding the Tribunal's finding of discrimination, Justice Poelman also upheld the Tribunal's damages awards (at para 119).

**Commentary**

Justice Poelman's concluding remarks emphasize that this case was not "precedent-setting with far reaching implications" as argued by Webber Academy (at para 120). Public and private schools have long been required to adhere to human rights law when offering educational services to the public (at para 121). Webber Academy had discriminated against the Sunni students, and could not defend its practices as reasonable and justifiable. Perhaps the most interesting aspect of this decision is the discussion of waiver. Although waiver was not clearly argued, the Tribunal spent a fair bit of time analyzing the pre-enrollment discussions between the school and the students. Presumably, the Tribunal concluded that Webber Academy was arguing that the students waived their human rights based on the pre-enrollment discussions. However, as

noted by Justice Poelman, one cannot contract out of human rights legislation. What is interesting is that Justice Poelman does not completely rule out waiver, as the stated conclusion is "it is highly unlikely that waiver would be made out *on these facts, even if it was open as a possible defence"* (at para 106, emphasis added). To date though, contracting out arguments have only been successful in limited circumstances (see e.g. *Dickason*, dealing with a mandatory retirement clause in a collective agreement where the parties had equal bargaining power).