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Is Non-denominational Education a Secularism Principle or a Violation of Human Rights Law?

By: Hasna Shireen and Linda McKay-Panos

Case Commented On: *Webber Academy Foundation v Alberta (Human Rights Commission),* 2018 ABCA 207 (CanLII)

In 2015, the Alberta Human Rights Tribunal (AHRT) found that a private school in Calgary (Webber Academy) had unlawfully discriminated against two Muslim high school students by prohibiting them from performing certain prescribed Sunni prayers on the school campus. The AHRT awarded the students $12,000 and $14,000 respectively as damages for distress, injury and loss of dignity (see 2015 AHRC 8 (CanLII)). The Court of Queen's Bench of Alberta (per Justice G.H. Poelman) upheld that decision (see 2016 ABQB 442 (CanLII), and see the ABlawg post on this decision). Webber Academy appealed the decision to the Alberta Court of Appeal (ABCA), adding new constitutional issues. The Court of Appeal (per Justices Jack Watson, Patricia Rowbotham, and JD Bruce MacDonald) sent the matter back to the AHRT for re-determination after it has heard appropriate evidence and argument on all the issues. The ABCA held that the AHRT was better placed to make the necessary findings of fact, mixed fact and law, or questions of law alone that were within its jurisdiction. The ABCA noted that there may be remaining discrete issues under the *Canadian Charter of Rights and Freedoms*, such as the constitutionality of s 4 of the *Alberta Human Rights Act*, RSA 2000, c A-25.5 (AHRA), which prohibits discrimination in services customarily available to the public, including education. The ABCA ordered a new hearing with a new panel of the Tribunal, and the AHRT was ordered to refer any *Charter* questions by way of a stated case to the Court of Queen's Bench for resolution. (*Webber* at para 52).

Grounds of Appeal

Webber Academy submitted to the ABCA that the Tribunal and Chambers Judge erred in that they:

> (a) failed to consider the freedom of conscience and belief of the entire school community at Webber Academy, and the freedom to choose to educate their children in a private, secular, non-denominational school in accordance with their own conscience and beliefs;
>
> (b) compelled Webber Academy to permit religious worship and private prayer space as part of its educational services to the public; and

(c) found that the students were discriminated against and that the students [sic] request for prayer space could have been accommodated, as it failed to (1) correctly identify the scope of services; and (2) balance the competing *Charter* rights at stake (at para 31).

Standard of Review

The ABCA noted that the role of an appellate court in an appeal of a tribunal decision has been defined as "step[ping] into the shoes' [sic] of the lower court" such that the appellate court's focus is, in effect, on the administrative decision: *Merck Frosst Canada Ltd. v Canada (Health*), 2012 SCC 3 (CanLII), [2012] 1 SCR 23 at para 247. The standard of review chosen by the chambers judge and his application of that standard must be reviewed by the ABCA for correctness: *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 (CanLII), [2013] 2 SCR 559 at para 45 (*Webber* at para 32).

Analysis and Decision

Charter Issue

Webber Academy served the Alberta Minister of Justice and the Minister of Justice and Attorney General of Canada with a Notice of Constitutional Question pursuant to Part 3 of the *Judicature Act*, RSA 2000, c J-2, as follows:

> 1. The decisions of the Alberta Human Rights Tribunal, 2015 AHRC 8 (CanLII), 2015 AHRC8 and the Alberta Court of Queen's Bench, 2016 ABQB 442 (CanLII), are contrary to section 2(a) of the *Canadian Charter of Rights and Freedoms* (*Constitution Act*, 1982), 'Everyone has the following fundamental freedoms: (a) Freedom of conscience and religion'.
>
> 2. To the extent that the *Alberta Human Rights Act*, RSA 2000, c A-25.5, section 4 (or any other provision of the Act), permits religious prayer and other acts of religion within secular schools in Alberta, it violates the constitutional principle of religious neutrality in secular schools, including accredited independent schools within the Alberta school system.
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> 3. All persons of diverse religious denominations, faith, conscience and practices, including agnostic and atheist persons, have the fundamental right to attend secular schools, without the obligation or accommodation of mandated prayer or other religious exercises. This constitutional principle of religious and secular neutrality applies to public, charter and accredited independent secular schools, including the Appellant (Respondent before the Tribunal), Webber Academy Foundation.
>
> 4. Therefore, the Human Rights Tribunal of Alberta, and the Court of Queen's Bench erred on not applying section 2(a) of the *Canadian Charter of Rights and Freedom*s including the obligation to interpret and apply the *Alberta Human*

> *Rights Act* consistently with section 2(a) of the Canadian Charter of Rights and Freedoms.
>
> 5. In doing so, the Human Rights Tribunal of Alberta and the Court of Queen's Bench did not take into account the fundamental rights and freedoms of persons of other faiths, conscience, religious practices and beliefs (including atheists and agnostics) who are part of the school community at Webber Academy in Calgary (*Webber* at para 33).

For the first time on appeal, Webber Academy submitted that its *Charter* rights and the *Charter* rights of the school community to freedom of conscience and religion and freedom of association had been unreasonably violated. Webber claimed that the Tribunal failed to recognize their *Charter* rights to a secular, non-denominational education. It argued "that the definition of 'non-denominational' must be determined with respect to the institution and school community as described by Webber Academy's witnesses, including the sincere belief that no prayer on campus was a requirement of their non-denominational belief" (at para 36).

Webber Academy raised two issues in its Notice of Constitutional Question (see #2 and 4 under *Charter Issue* above).

The Court of Appeal dealt with the second issue (#4) first, which was whether the AHRT and the Court of Queen's Bench erred in not applying section 2(a) of the *Charter*, including "the obligation to interpret and apply the *Alberta Human Rights Act* consistently with section 2(a) of the *Charter"* (at para 39). The ABCA held that the AHRT could determine this issue. In *Doré v Barreau du Québec*, 2012 SCC 12 (CanLII) at para 24, the SCC stated that "administrative decision-makers must act consistently with the values underlying the grant of discretion, including *Charter* values" (cited in *Webber* at para 40). Because the AHRT has jurisdiction over questions of law, it is obligated to interpret s 4 of the *Act* in a way that is consistent with the *Charter*.

However, on the first issue (#2), the ABCA found that the Tribunal did not have jurisdiction to declare s 4 of the *Act* to be unconstitutional. According to ss 11 and 16 of the *Administrative Procedures and Jurisdiction Act*, RSA 2000 c A-3, read together with s 2 of the *Designation of Constitutional Decision Makers Regulation*, AR 69/2006, the AHRT only has limited constitutional jurisdiction, which does not include adjudicating *Charter* claims.

Further to this point, s 31 of the *Alberta Human Rights Act* permits the AHRT to refer questions of law outside of its reach to the Court of Queen's Bench. The AHRT does have discretion to review questions of law within its jurisdiction under s 13 of the *Administrative Procedures and Jurisdiction Act*. The ABCA held that:

> [r]ead harmoniously, all the foregoing provisions signal the Legislature's view of the appropriate route for *Charter* questions to be addressed directly and in a manner which would allow for their proper exploration in a court which is competent to grant appropriate remedies (at para 43).

The Court also noted that the Tribunal could make findings of fact which would form the record for the courts' consideration of constitutional issues (at para 41).

Despite the procedure to be followed when the AHRT deals with a *Charter* issue, the ABCA reiterated the general rule that the parties may not raise new issues on appeal without leave (at para 47).

The ABCA noted that the "no new issues on appeal" rule is particularly appropriate when a party applies to raise a constitutional argument for the first time on appeal and when there is no contextual evidentiary foundation (at para 48; citing *Aftergood v Alberta (Minister of Municipal Affairs)*, 2006 ABCA 154 (CanLII) at paras 4, 7-8 and *Ernst v Alberta Energy Regulator*, 2017 SCC 1 (CanLII) at paras 22, 65, 99-113).

If Webber Academy had given notice that it was raising the constitutional challenge, then the intervenor, Alberta Justice, would have applied to adduce evidence including: the impact of the issues on other schools and institutions, whether they could deny accommodation to students on the basis of religion even it if posed no undue hardship, whether students have independent freedom of religion given their ages, and whether there was minimal impairment for the purposes of *Charter* s 1 (at para 49).

In addition, while Webber disagreed with the Tribunal's definition of "non-denominational" and argued that it had a right to offer "secular" education, there was no evidence regarding the freedom of conscience and religion of the school community or its views on secularism. There was also no evidence of the beliefs of Webber Academy students and teachers, and limited evidence from some parents, to support any analysis of infringement of their religious freedoms and freedom of association or provide factual context for the *Charter* challenge (at para 50).

The ABCA held that this appeal clearly lacked the factual foundation for it to determine the new issues based on the *Charter* (at para 51).

The need to resolve conflicts between rights (e.g. freedom of religion vs discrimination on the basis of religious belief), coupled with the errors listed in the next section, necessitated that the matter be remitted to a new panel of the AHRT (at para 67). While the ABCA noted that *Charter* issues should normally be raised at the first Tribunal hearing, they held that these issues were too important to be dismissed by the ABCA (at para 68).

Prayer Space vs Discrimination on Religious Belief

The ABCA was persuaded that the Tribunal and the ABQB had made a number of errors (at para 52). The errors may be summarized as follows:

- The Tribunal had determined that the claim was not a request for 'prayer space' on the basis this was not factually accurate; the ABCA concluded that this was based on 'muddled thinking' (at para 52);

- While the Tribunal recognized that the students were requesting space that was large enough to allow children to bow, kneel and stand safely, it held that the students were only asking Webber Academy to honour their religious beliefs around prayer; the Tribunal specifically stated that its analysis and decision proceeded on that basis (at para 54);

- The ABQB held that there was sufficient evidence for the Tribunal to reach this conclusion, and further noted that the students were not seeking a dedicated space to pray; however, it too had concluded that the students were asking for a 'nominal space…to perform prayers' and to be excused from class if necessary (at para 55);

- In finding that the Tribunal did not err on this issue, the ABQB incorrectly applied the reasonableness test (at para 57);

- The ABCA agreed with the ABQB that the Tribunal had erred when it failed to resolve the inconsistency in testimony about the pre-enrollment meeting and school tour, where there was conflicting evidence around whether they had discussed the need for prayer space and whether that need 'would not be a problem'. Further, the Tribunal failed to give transparent and intelligible reasons on this issue (at paras 58, 59);

- The ABQB held that the school would have been discriminating against the students even if it had warned them that no prayers would be allowed on campus; this ruling would have been required by an interpretation of s 4 of the AHRA; the ABCA held that this, combined with the ABQB's raising of the issue of waiver and holding against Webber Academy on that issue, and other issues, raises the necessity to rule on the proper interpretation and application of s 4 of AHRA (at paras 61-62), "as this issue is no longer extricable from the outcome" (at para 62);

- The reasoning of the ABQB had "changed the ground rules" and this necessitated a new opportunity to identify the issues and newly determine the issues of fact and law; the new perspective must also include the *Charte*r issues (at para 63); and

- Additional submissions are required about the appropriateness of the remedies sought by the Director; the appeal factum was silent on some new remedies it sought (at paras 64-66).

The ABCA relied on s 37(4)(b) of the *AHRA*, which provides appeal courts with the option of "remit[ting] the matter back to the tribunal with directions." As noted above, the ABCA sent the matter back to the Tribunal to be determined with appropriate evidence and argument on all the issues in order to make the necessary findings within the jurisdiction of the Tribunal. The ABCA also held that: "If there are remaining any discrete *Charter* constitutionality questions notably as to s 4 of the *Alberta Human Rights Act*, the Tribunal shall refer any such questions under the *Charter* by way of a stated case to the Court of Queen's Bench for resolution" (at para 52).

Commentary

The effects of two conclusions arrived at by the ABCA are of concern. In general, appeal courts defer to finding of facts arrived at by tribunals or lower courts. This is the case because the triers of fact can assess factors such as credibility and weight to be given to evidence. It appears as if the ABCA is troubled by the AHRT's characterization of the key issue as whether the complainants' religious beliefs were respected, as opposed to whether they were making a request for dedicated prayer space. Further, the ABCA states that in finding the AHRT's statement of this issue to be reasonable, the ABQB applied the correct standard of review (reasonableness) incorrectly. Arguably, not allowing prayer anywhere on campus *does* discriminate against religious beliefs because in effect, it prevents the practice of those beliefs.

Further, the ABCA held that the error in mischaracterization of the issue was sufficiently serious to permit a new *Charter* issue (that should have been raised in the two previous fora) to be addressed before a newly formed panel (or the *Charter* issue is to be sent to the ABQB as a special case by the new panel). This will further prolong the outcome in a case that dates back to 2012, when the students were prohibited from praying on Webber Academy grounds.

Webber Academy argued that the Tribunal "failed to consider the sincerity of its conscientious and religious beliefs and those of the entire school community that a prohibition on overt forms of prayer on campus was a requirement of their non-denominational belief" (at para 36). It submits the "definition of 'non-denominational' must be determined with respect to the institution and school community as described by Webber Academy's witnesses, including the sincere belief that no prayer on campus was a requirement of their non-denominational belief" (at para 36). Webber Academy also noted that that the Tribunal failed to recognize the *Charter* rights of the entire school community and Webber Academy to a secular, non-denominational education. On the other hand, the Tribunal concluded that Webber Academy, as a private school, "offered services and facilities customarily available to the public, and it did not have an unfettered discretion to summarily refuse a student's request to perform a religious obligation on its campus" (at para 10).

Now it will be interesting to observe how the new Tribunal will resolve and balance the two competing interests—the *Charter's* freedom of (and freedom from) religion and the human right not to be discriminated against on the basis of religious belief. This is especially so in view of the recent Supreme Court of Canada rulings in *Law Society of British Columbia v Trinity Western University*, 2018 SCC 32 (CanLII) and *Trinity Western University v Law Society of Upper Canada*, 2018 SCC 33 (CanLII), which in part addressed the balancing of freedom of religion against other rights such as equality and non-discrimination (with a majority of the SCC finding that the law societies in question had properly balanced these rights in denying accreditation to Trinity Western University's proposed law school).

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