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Webber Academy II: Balancing Religious Discrimination and Freedom from Religion in the Provision of Educational Services

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Case Commented On: *Webber Academy Foundation v Alberta (Human Rights Commission)*, 2023 ABCA 194 (CanLII) (*Webber Academy II*)

In the 2011-12 school year, Sarmad Amir and Naman Siddique ("the Students") were denied prayer space at Webber Academy, where they had recently enrolled as grade 9/10 students. As observant Sunni Muslims, they prayed five times a day, which included school hours at some times of the year. Staff initially allowed the Students to pray in empty offices or classrooms; however, when the head of Webber Academy, Dr. Neil Webber, became aware of the situation, he informed the Students' parents that prayers could only be performed off campus, or on campus without bowing or kneeling. The explanation was that Webber Academy did not provide physical accommodations for students of other religions to practice their faith, and that the Academy is a non-denominational school. The Students' parents were also advised that because they had not followed the school's policies, the Students would not be enrolled for the following year.

The parents filed human rights complaints on behalf of the Students, citing discrimination based on religion in the area of services customarily available to the public, contrary to section 4 of the *Alberta Human Rights Act*, RSA 2000, c A-25.5 (*AHRA*). Their complaints were successful before the Alberta Human Rights Tribunal (see *Amir and Nazar v Webber Academy Foundation*, 2015 AHRC 8 (CanLII)) and on appeal to the Alberta Court of Queen's Bench (see *Webber Academy Foundation v Alberta (Human Rights Commission)*, 2016 ABQB 442 (CanLII)). In its further appeal to the Alberta Court of Appeal, Webber Academy raised issues under the *Canadian Charter of Rights and Freedoms* for the first time, arguing that the Tribunal's decision violated their freedom from religion as a secular school. The Court of Appeal agreed that the *Charter* issues were relevant, and because of a lack of factual foundation to address those issues, it sent the matter back to the Tribunal for a new hearing (see *Webber Academy Foundation v Alberta (Human Rights Commission)*, 2018 ABCA 207 (CanLII)). The Tribunal again ruled in favour of the Students (see *Amir and Siddique v Webber Academy Foundation*, 2020 AHRC 58 (CanLII)), and this decision was upheld on appeal (see *Webber Academy Foundation v Alberta (Human Rights Commission)*, 2021 ABQB 541 (CanLII)).

Webber Academy appealed to the Alberta Court of Appeal (ABCA) a second time, and its decision dismissing the Academy's appeal is the focus of this post. Chief Justice Ritu Khullar and Justice Bernette Ho wrote for the Court, with Justice Barbara Lea Veldhuis having participated in the hearing but not the final disposition of the appeal. The issues we will address are: (1) whether the Tribunal had jurisdiction to hear the complaint, i.e. did the complaint engage a service customarily available to the public under section 4 of the *AHRA*; and (2) whether the *Charter* freedoms of

Webber Academy and its school community were properly considered. For more background on this very lengthy litigation, see previous ABlawg posts here and here.

Services Customarily Available to the Public and the Tribunal's Jurisdiction

Human rights legislation does not protect against all forms of discrimination. Governments have made the policy choice that only some types of interactions ("areas") and some personal characteristics ("grounds") will be subject to prohibitions against discrimination. To bring a complaint successfully, claimants must establish that their matter falls within a protected area of the *AHRA*, and that they experienced discrimination in that area connected to one or more protected grounds (see *Moore v British Columbia (Education)*, 2012 SCC 61 (CanLII). If a claimant can prove a case of *prima facie* discrimination, the burden shifts to the respondent to provide a defence – typically that their policies are justifiable and that they provided reasonable accommodation to the claimant, or that they could not provide accommodation without undue hardship.

The Tribunal in *Webber Academy II* found that the school's denial of private prayer space to the Students did engage a service customarily available to the public, that Webber Academy had discriminated against the Students on the basis of religion, and that the Academy had not fulfilled its duty to accommodate the Students because it did not establish that accommodation would constitute undue hardship. These findings were upheld on appeal, and Webber Academy did not appeal the discrimination and accommodation rulings at the ABCA. Rather, their argument was that the Tribunal lacked jurisdiction to hear the complaint because there was no denial of a service customarily available to the public. More specifically, the Academy argued "that the service the Students requested was prayer space and that Webber Academy does not and has never provided prayer space to its students, nor had any other student requested it, and therefore prayer space is not 'customarily available'" (at para 31).

The ABCA relied on the leading Supreme Court of Canada (SCC) decision in this area, *University of British Columbia v Berg*, 1993 CanLII 89 (SCC), [1993] 2 SCR 353, for the general principles on what constitutes a "service customarily available to the public." In *Berg*, the SCC famously stated that "[e]very service has its own public, and once that 'public' has been defined through the use of eligibility criteria, the Act prohibits discrimination within that public" (at 383). This analysis applies to private as well as public entities, so at this stage it mattered not that Webber Academy is a private school, as long as it was providing services to its own public (*Webber Academy II* at para 40). Indeed, the Academy acknowledged that there was a relevant public in this case, namely the school's student body. The relevant sub-issues were therefore: (1) what was the service at issue, and (2) whether that service was customarily available to the public.

In resolving these sub-issues, the ABCA drew an analogy to the facts of *Berg*, where a university graduate student with a perceived mental disability was denied access to a building and a reference letter. The relevant "service" in *Berg* was characterized as "educational and recreational resources available to all who are admitted" (at 387). Similarly, in *Webber Academy II*, the Tribunal found that the relevant "service" was "a right to access … quiet, private spaces on campus", whether for religious reasons or otherwise – in other words, this type of private space was "customarily available to the public, the student body" (at para 42). The ABCA agreed with this characterization, noting as well that Staff at the Academy had facilitated the Students' use of private spaces for prayer for more than two weeks until Dr. Webber became aware (at para 44). The Tribunal

therefore had jurisdiction to rule on whether the denial of this service was discriminatory or was justified based on reasonable accommodation.

In the context of ruling on this issue, the ABCA also distinguished a case relied on by Webber Academy, *GNWT v Portman*, 2018 NWTCA 4 (Can LII). In *Portman*, the NWT Court of Appeal held that the NWT Human Rights Commission did not have jurisdiction to entertain a complaint challenging the lack of Legal Aid funding for tribunal matters in the NWT. According to the reasoning in *Portman*, to hold otherwise would allow human rights legislation to be used "to take financing decisions away from the boards and agencies directly charged with that responsibility", such that human rights tribunals could "decide what services should be offered to the public, including in areas where they are not presently offered" (*Webber Academy II* at para 35, citing *Portman* at para 38). The ABCA found that unlike *Portman*, there was no financial basis for Webber Academy's denial of a service (*Webber Academy II* at para 36).

While the ABCA provided one basis for distinguishing *Portman*, its rationale points to a broader question about whether human rights legislation, or rights litigation more broadly, can be used to impose positive obligations on government or other service providers (for a recent discussion of this debate in the *Charter* context, see here). Reliance on *Moore* (the 2012 Supreme Court authority cited above) in defining the service at issue would, in our view, have been a preferable approach in this regard. In *Moore*, a student with learning disabilities claimed discrimination related to lack of access to services in the public school system. The Court defined the relevant "service" as meaningful access to educational services available to all students (at para 28). Defined as such, the focus then becomes whether meaningful access was denied in a way that was connected to the ground(s) in question, and the nature of the policy change or accommodation that is required to provide meaningful access. This characterization avoids the somewhat circular argument in *Webber Academy II* and *Portman* that the service the claimant is seeking is not actually a service that is being provided. In *Webber Academy II*, this was precisely the basis of the human rights claim. Saying that the school need not provide prayer space because it does not provide prayer space undermines the inquiry into whether failing to provide the space is discriminatory. Conversely, the *Moore* approach recognizes that respondent institutions, whether public or private, will sometimes have to expend funds or change policies to ensure that members of their public receive meaningful access to their services, and they have an obligation to do so to the point of undue hardship.

In *Webber Academy II*, application of this approach would have focused on the ways in which the Students' meaningful access to education was diminished when they were denied prayer space. Webber Academy's justification was that the denial of a service was based on the manner of the Students' prayers, which involved "overt, physical movements of standing, kneeling and bowing" (at para 45). Because there was no evidence that accommodation of these prayers would have resulted in undue hardship, this objection was considered in relation to the *Charter*, to which we now turn.

The Interaction Between the *Charter* and Human Rights Legislation

As noted in our introduction, one issue that drove the ABCA to allow Webber Academy's 2018 appeal focused on the relationship between the *Charter* and the *AHRA*. One might generally assume that both human rights-protecting enactments would be congruent, and indeed the SCC

has held that courts may in some instances draw on provincial human rights legislation to interpret the *Charter* (see *Corbiere v Canada (Minister of Indian and Northern Affairs*, 1999 CanLII 687 (SCC), [1999] 2 SCR 203 at para 60). However, human rights statutes remain subject to the *Charter*. This is equally true for the government-created bodies – human rights commissions and tribunals – that implement human rights legislation. In other words, a human rights statute can be challenged for violating the *Charter* (see *Vriend v Alberta*, 1998 CanLII 816 (SCC), [1998] 1 SCR 493), and a decision of a human rights tribunal that interprets human rights legislation can also be challenged for its consistency with *Charter* values. The latter was the case in *Webber Academy II*.

The determination of whether the Human Rights Tribunal met its *Charter* obligations is guided by the SCC's decision in *Doré v Barreau du Québec*, 2012 SCC 12 (CanLII). Under this analysis, courts must determine whether administrative decision makers (like the Alberta Human Rights Tribunal) proportionately balanced the relevant *Charter* values against the relevant statutory objectives. In this case, the question was whether the Tribunal gave sufficient weight to Webber Academy's *Charter*-protected religious and associative freedom interests in deciding that Webber Academy had violated the *AHRA*, in ordering Webber Academy to refrain from similar actions in the future, and in ordering payment of damages of $18,000 to each of the Students. Ultimately, for the reasons we explore below, the ABCA held that the Tribunal's decision on this issue should be upheld, meaning that it proportionately balanced *Charter* values and the objectives of the *AHRA*.

"Secular"/Non-Denominational/Freedom from Religion

Perhaps the most interesting aspect of Webber Academy's argument was its claim that the requirement to provide a prayer space violated its own religious or conscientious freedom. The Academy also claimed a violation of its freedom of association, but the ABCA noted that this argument was based on the same evidence as its freedom of religion claim (at para 73), so religious freedom will be our focus here.

In most of the leading cases, when a litigant relies on freedom of religion, they seek to carry out a religious practice such as building a succah, wearing a kirpan, or refraining from being photographed. Here, however, the claim might best be understood as a "freedom from religion" case. In this respect, Webber Academy claimed it was in an analogous position to a citizen attending a municipal council meeting at which a theistic prayer is recited (as in *Mouvement laïque québécois v Saguenay (City)*, 2015 SCC 16 (CanLII)). The ABCA, like the Tribunal and Alberta Court of King's Bench (ABKB) on appeal, rejected that argument.

The principal finding negating the argument was that Webber Academy did not prove that its freedom had been infringed by the Tribunal's order upholding the complaint. While Webber Academy proved that it and members of the school community sincerely believed that the school "is non-denominational or secular and want it to remain that way" (*Webber Academy II* at para 60), it did not show how its religious freedom was "interfered with in a manner that was more than trivial or insubstantial by accommodating the Students' need to pray on campus" (at para 61). The facts supporting this conclusion were that "Webber Academy did not ban all religious practices at school [such as religious clothing]," and that "Students would have been permitted to pray on campus if they did so silently, without overt physical movements" (at para 61). Moreover, "none of Webber Academy's witnesses claimed that allowing the Students to access a quiet place to pray interfered with their personal beliefs or those of their children, being other students attending the

school" (at para 61). Effectively, the ABCA held that, if Webber Academy's religious freedom was infringed, the infringement was trivial or insubstantial and thus proportionately balanced against the *AHRA*'s goal of prohibiting discrimination.

The result on the religious freedom issue seems correct, and consistent with how the SCC has previously understood the idea of secularism (for a primer on the contested nature of the term, see these pieces by Talal Asad and Charles Taylor). While Webber Academy argued that a secular and welcoming environment is one devoid of religious practice or symbols, the ABCA's reasoning resonates more strongly with the SCC's reasoning in *Chamberlain v Surrey School District No 36*, 2002 SCC 86 (CanLII), in which it was argued that religiously-inspired views could not be presented at school board meetings given a statutory requirement that schools in British Columbia be "conducted on strictly secular and non-sectarian principles." (*Chamberlain* at para 18, citing *School Act*, RSBC 1996, c 412 at s 76) The Court responded as follows:

> The Act's insistence on strict secularism does not mean that religious concerns have no place in the deliberations and decisions of the Board. Board members are entitled, and indeed required, to bring the views of the parents and communities they represent to the deliberation process. Because religion plays an important role in the life of many communities, these views will often be motivated by religious concerns. Religion is an integral aspect of people's lives, and cannot be left at the boardroom door. What secularism does rule out, however, is any attempt to use the religious views of one part of the community to exclude from consideration the values of other members of the community. A requirement of secularism implies that, although the Board is indeed free to address the religious concerns of parents, it must be sure to do so in a manner that gives equal recognition and respect to other members of the community. Religious views that deny equal recognition and respect to the members of a minority group cannot be used to exclude the concerns of the minority group. This is fair to both groups, as it ensures that each group is given as much recognition as it can consistently demand while giving the same recognition to others. (at para 19)

In other words, properly understood, "secular" in this legislative context does not mean devoid of religion, it means non-exclusionary. This understanding of the concept seems to underlie the ABCA's reasoning in *Webber Academy II*. This approach can obviate the need to determine whether a Christmas tree, for example, is a religious symbol (a matter of debate in *Webber Academy II*, see para 79). Of course, the answer to this question is a matter of perspective: what is a "religious" symbol for some is a "cultural" symbol for others, and both terms are notoriously slippery. Even if an institution like Webber Academy might not intend to make a religious statement by installing a Christmas tree, students and other members of the school community might legitimately perceive it that way, given the historical association between Christmas trees and particular forms of Christianity. The SCC's approach in *Chamberlain* refocuses the question on whether the installation of the tree was exclusionary, a matter that would be determined on the particular facts of each case. (We note that as a private school, Webber Academy is under no public law duty to be a secular school; this obligation, if it has one, would flow from its internal corporate constitution and by-laws.)

Despite this consistency with the SCC's approach to religious freedom and secularism, the *Webber Academy II* case points to some interesting gaps in the case law. First, given Webber Academy's

legal form as a "non-profit company," it is not clear in the case law whether it can be the bearer of religious freedom in its own right. The SCC has deliberately avoided answering this question (see *Loyola High School v Quebec (Attorney General)*, 2015 SCC 12 (CanLII) at para 34). We note that the ABCA decision in *Webber Academy II* followed the same approach that the SCC did in *Loyola*, which is to reason that an administrative decision maker (like the Tribunal in *Webber Academy II*) must respect *Charter* values in making its decisions. One of us (Koshan) attended the 2023 ABCA hearing in this case, and the issue of whether an entity like Webber Academy can claim its own religious freedom was largely absent from the discussion.

Perhaps more to the point, if Webber Academy does qualify for religious freedom, whose "sincere beliefs" are relevant to determining its infringement? On this question, the excellent work of Kathryn Chan insists on a detailed engagement with the legal form adopted by the entity claiming the freedom to determine whether all members, board members, or some other class of individuals' beliefs are the appropriate locus of inquiry. Others (including the minority of the SCC in *Loyola* and one of us) have argued that the corporate purposes adopted in a corporation's constating documents are also relevant. But in *Webber Academy II*, that analysis is simplified, focusing instead on the professed beliefs of the Academy's founder and President, and the evidence of a board member, staff members, parents of students, and several teachers. A more detailed framework for establishing institutional beliefs would provide clearer guidance on which of these witnesses spoke for the institution, and whether any of them could speak authoritatively. In this case, the non-denominational approach of the school was not disputed, so not much turns on this question, but in future litigation it indeed might.

A final lacuna in the legal doctrine relied on in the *Webber Academy II* decision resides in the requirement that litigants prove a religious freedom infringement is "more than trivial or insubstantial". It is difficult to know how to assess triviality. As one of us has written previously on this blog, "it is unclear whether the [non-triviality] requirement applies to the religious practice at issue, the civil consequences of the law, or both." In other words, does triviality depend on how central the belief is in a litigant's religious or conscientious worldview, on the gravity of the civil consequences of complying with the law, or some combination of these? This question rears its head perennially (see here), particularly in trial and provincial appellate courts, and deserves some direct consideration by the SCC.

Conclusion

The length of time taken by this litigation is in some ways at odds with how generally well-accepted the legal principles involved are (although we have acknowledged that there are some lacunae in the case law). It is also worth repeating that Webber Academy appealed one of the Tribunal's remedial orders – requiring it to "immediately cease the contravention of the Act … and refrain in the future from committing the same or any similar contravention of the Act" – on the basis that the order was "ambiguous, unlawful and impossible to comply with" (at para 85). This argument was unsuccessful at the ABCA in *Webber Academy II*, but it does not bode well for the Academy's understanding of its duty to accommodate future students with "overt" religious practices. We believe the ABCA decision and those of the ABKB and Tribunal provide Webber Academy with sufficient guidance to avoid future human rights complaints of this nature.

The decision is also important in the broader context of the proliferation of private and charter schools in Alberta. Although it did not matter to the human rights issues in this particular case that Webber Academy is a private school, that fact allowed the Academy to claim that their *Charter* freedoms of religion and association were violated by the Tribunal's decision. This argument could not be made by a public school, which has *Charter* duties rather than freedoms. Moreover, as noted above, Webber Academy has no public law obligation to be a secular school; other private schools may provide education that is focused on specific religious beliefs or on serving other communities, such as students with specific disabilities. Would those types of schools have a stronger argument that they can decline to provide services to students based on their very mandates? In our view, this analysis should always turn on the duty to accommodate *all* students unless there is persuasive evidence of undue hardship or a disproportionate impact on a *Charter*-protected interest.

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