Amir and Nazar v. Webber Academy Foundation, 2015 AHRC 8 (CanLII)

Date: 2015-04-10

Docket: S2012/02/0290; S2012/02/0291

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Legislation cited

- Alberta Human Rights Act, RSA 2000, c A-25.5 — 4; 11; 29; 32
- Judgment Interest Act, RSA 2000, c J-1
- School Act, RSA 2000, c S-3 — 3

Decisions cited

- British Columbia (Public Service Employee Relations Commission) v. BCGSEU, [1999] 3 SCR 3, 1999 CanLII 652 (SCC)
- British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights), [1999] 3 SCR 868, 1999 CanLII 646 (SCC)
- Central Okanagan School District No. 23 v. Renaud, [1992] 2 SCR 970, 1992 CanLII 81 (SCC)
- Chamberlain v. Surrey School District No. 36, [2002] 4 SCR 710, 2002 SCC 86 (CanLII)
- Funk v. Manitoba Labour Board, 66 DLR (3d) 35, [1976] 3 WWR 209 (not available on CanLII)
- Gay Alliance Toward Equality v. Vancouver Sun, [1979] 2 SCR 435, 1979 CanLII 225 (SCC)
- Kelly v. B.C. (Ministry of Public Safety and Solicitor General) (No. 3), 2011 BCHRT 183 (CanLII)
- Loyola High School v. Quebec (Attorney General), 2015 SCC 12 (CanLII)
- Moore v. British Columbia (Education), [2012] 3 SCR 360, 2012 SCC 61 (CanLII)
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- Ont. Human Rights Comm. v. Simpsons-Sears, [1985] 2 SCR 536, 1985 CanLII 18 (SCC)
- Ross v. New Brunswick School District No. 15, [1996] 1 SCR 825, 1996 CanLII 237 (SCC)
- Syndicat Northcrest v. Amselem, [2004] 2 SCR 551, 2004 SCC 47 (CanLII)
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- Walsh v Mobil Oil Canada, 2013 ABCA 238 (CanLII)

HUMAN RIGHTS TRIBUNALS OF ALBERTA

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Citation: Amir and Nazar v. Webber Academy Foundation, 2015 AHRC 8

BETWEEN:

Farhat Amir (on behalf of Sarmad Amir)

Complainant

- and -

Alberta Human Rights Commission (Director)

Director

- and -

Webber Academy Foundation

Respondent

Shabnam Nazar (on behalf of Naman Siddique)

Complainant

- and -

Alberta Human Rights Commission (Director)

Director

- and -

Webber Academy Foundation

Respondent

DECISION

Tribunal Chair: Sharon Lindgren-Hewlett, B. Comm., LL. B.
Tribunal Member: William J. Johnson, Q.C.
Tribunal Member: Melissa L. Luhtanen, J.D.
Decision Date: April 10, 2015
File Numbers S2012/02/0290 and S2012/02/0291

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I. Introduction and Overview

Introduction

[1] The director of the Alberta Human Rights Commission has carriage of this complaint pursuant to section 29 of the *Alberta Human Rights Act* (the Act).[1]

[2] On February 13, 2012, two human rights complaints were filed, alleging that a private high school discriminated against two high school students, contrary to sections 4(a) and 4(b) of the Act, on the ground of religious beliefs in the area of goods, services, accommodation or facilities that are customarily available to the public.

[3] The complaints allege discrimination in that the respondent, Webber Academy Foundation (Webber Academy), would not allow the students to perform a short prayer on campus in accordance with their religious beliefs, eventually advising the students that they would not be re-enrolled in Webber Academy. In response, Webber Academy argues that providing prayer space at school is not a service it customarily offers and therefore its actions do not fall within the authority of the Act. Webber Academy further argues that prayer while at school during the day is not a requirement of the religion in issue. Webber Academy submits it did offer reasonable accommodation by giving the students permission to miss classes and leave the campus to pray.

Background: Parties and Proceedings

[4] In November 2011, Dr. Shabnam Nazar, on behalf of her 14-year old son, Naman Siddique, and Ms. Farhat Amir, on behalf of her 14-year old son, Sarmad Amir, sought admission to the accredited private school, Webber Academy. Dr. Nazar and Ms. Amir will be collectively referred to as the "Parents." Mr. Siddique and Mr. Amir will be collectively referred to as the "Students." Dr. Nazar and her son moved from Edmonton to Calgary in November 2011 and were family friends of Ms. Amir and her son. The Students and Parents belong to the Islamic faith.

[5] The complainants adopted the director's arguments. The director called nine witnesses at the hearing:

- the Students, Mr. Amir and Mr. Siddique
- the Parents, Ms. Amir and Dr. Nazar
- Mr. Wayne Schneider, principal of the private school Rundle College where the Students have attended high school for the last two years;
- Mr. Birju Dattani, a PhD student and legal Islamic academic;
- Dr. Dianne Roulson, director of learning services, Calgary Board of Education;
- Imam Fayaz Tilly, a Calgary Imam; and
- Mr. Mahdi Qasqas, director of Muslim Youth Services in Calgary.

[6] Webber Academy was founded in 1997 and has declared its mandate to be a high quality, non-denominational, co-educational, university preparatory, accredited private school. Part of its

mission is to prepare students to thrive in university and beyond by creating an environment of high expectations of achievement, behaviour, and service. In 2011, it offered services from kindergarten through Grade 12. Webber Academy is a highly respected school, consistently ranking as a top school in Alberta.

[7] The respondent called six witnesses to give evidence:

- Dr. Rumee Ahmed, a duly qualified expert in Islamic studies;
- Dr. Patrick Webber, founder, president and chairman, Webber Academy;
- Ms. Maninee Goel, a parent of two children at Webber Academy;
- Ms. Dianne Lever, director of admissions, Webber Academy;
- Ms. Vicki Grenier, admissions assistant, Webber Academy; and
- Ms. Barbara Webber, vice president of administration, Webber Academy.

Main Issues

(a) Has *prima facie* discrimination on the basis of religious beliefs been established?

(b) If *prima facie* discrimination is established, has the respondent shown that the discriminatory standard has a *bona fide* and reasonable justification?

(c) If the Act has been contravened, what is the appropriate remedy?

Positions of the Parties

[8] In addition to the positions outlined below, additional specific positions and arguments are addressed within the analysis.

Director and Complainants

[9] The director and the complainants submit that Webber Academy discriminated against the Students under section 4(b) of the Act by denying the Students' requests to conduct their mandatory prayers on campus during the school day. The director asserts the complainants' prayer requests are based on sincerely held religious beliefs that performance of the prayers during appointed times is necessary. The director argues it would not have been an undue hardship for Webber Academy to accommodate the Students' prayers on campus. Further, refusing to re-enroll the Students for the following school year was a denial of a service, contrary to section 4(a) of the Act.

Respondent

[10] The respondent accepts that Webber Academy is subject to the application of human rights legislation, but submits "the provision of prayer space" is beyond the scope of section 4 of the Act. It submits "prayer space" is not a service Webber Academy customarily makes available to the public it serves.

[11] It further argued there was not differential treatment of these Students compared to other students and there was no *prima facie* discrimination. The respondent submits being non-

denominational is an integral part of Webber Academy's identity. Its argument during the hearing evolved to be that allowing prayer in an overt form on campus is contrary to its principled approach of being non-denominational.

[12] The respondent indicates that it offered the accommodation of allowing the Students to leave the campus to pray, and submits this was reasonable and sufficient. The respondent submitted the complainants failed to participate in the search for reasonable accommodation. Webber Academy sought dismissal of the complaints.

II. Framing the Analysis and Initial Findings

[13] This case involves analysis and findings regarding a number of matters that occurred between November 2011 and February 2012, all revolving around requests to allow the Students to pray. Later in this decision, further particulars of the Muslim prayer and religious beliefs will be addressed. However at this point, a description of the prayer and initial findings will be made to enable an accurate framing of the issues for purposes of analysis.

What Was Requested - Permission to Pray or Provision of Prayer Space; Religious Beliefs: Symbol or Practice

[14] Throughout these proceedings and in written submissions, the respondent takes the position that "prayer space" was sought. The respondent also attempted to draw a distinction between a religious practice involving movement, and a religious symbol, such as a turban or hijab, worn by a student.

[15] The complainants made it very clear in their letters to Webber Academy that they were not seeking a designated prayer space or a space dedicated only to prayer. The Students sought to "be permitted to carry out their prayer on Webber Academy's campus [in a space] sufficiently large to allow the children to bow, kneel and stand safely." We accept the evidence of the Parents at the hearing and in written requests, that the request was for the Students to be able to pray; there was flexibility in terms of where that occurred on Webber Academy campus. Mr. Siddique described to the Tribunal how he prayed:

So, specifically, when I am starting a prayer, I raise my hands over my head and I say (OTHER LANGUAGE SPOKEN), which means God is greater. I go on to read a short passage from the Qur'an, which is called (OTHER LANGUAGE SPOKEN). After that, I read another short chapter from the Qur'an, after which I say a lot of my prayer again, and then I go into a bowing position. I say (OTHER LANGUAGE SPOKEN) three times, which means Glory Be to Allah, the Supreme. I stand up again, while saying (OTHER LANGUAGE SPOKEN), which means Allah hears he who thanks him. I say (OTHER LANGUAGE SPOKEN) over again, and then I go into prostration, which is putting my hands on the floor, my knees on the floor, and my head also on the floor. I proceed to say (OTHER LANGUAGE SPOKEN) three times, which means Glory be to Allah the most high. I say (OTHER LANGUAGE SPOKEN), go into a sitting position. I say (OTHER LANGUAGE SPOKEN), which means My Lord, forgive me and my parents. I say (OTHER LANGUAGE SPOKEN) again, and I go back into prostration, and I say (OTHER LANGUAGE SPOKEN) three times again, and then I come back up and then I stand up. And that's one unit of prayer, and there's four units of prayer. And then at the very end, instead of standing up again, I simply sit back down, and I recite a short little supplication, and then I end my prayer.

[16] The complainants testified that this sequence took five to ten minutes.

[17] In the respondent's submission, because the prayer was "overt" involving movement, it was an activity that required prayer space. Dr. Nazar provided evidence that we accept, that Dr. Webber stated he didn't want a visible prayer but if someone made a cross in the corner that would be okay.

[18] The respondent attempted to distinguish a religious "practice" from a religious "symbol." Ms. Webber considered the hijab to be a symbol of love and thus acceptable on Webber Academy campus:

Q Well, for example, head coverings are allowed under the parent/student handbook.

A I think that as part of a symbol of their religious belief. No, that has not been an issue because it's -- it's a symbol. And it's just the head coverings, … if they were students in our school that we have, we have young ladies with hijabs on the -- on the property. To me, that's a symbol of love.

[19] The respondent also submitted that wearing a turban was acceptable at Webber Academy because it was a state of "being" while prayer was a visible activity that required prayer space.

[20] It is this Tribunal's view that the respondent's framing of the issue as a request for "prayer space" is not factually accurate and is not the correct approach to addressing requests to honor religious beliefs. The amount of space required for the Muslim prayer as described here is only slightly larger than the space occupied by a person. Indeed, if a person were sitting in a chair, the amount of space utilized would be about the same. In the circumstances here, we do not accept that there is a distinction of any significance between a visible religious "practice" or a visible religious "symbol." We find as fact that the Students were requesting Webber Academy allow them to honor their religious beliefs regarding their prayer. The analysis and this decision proceeds on this basis.

Timeline Overview

[21] Below is a timeline of various meetings and events that will be referenced and reviewed:

November 10, 2011	Initial meeting of the Parents and Students with the director of admissions of Webber Academy
November 29, 2011	Offer of admission and subsequent meeting (Exhibit 6)
December 1, 2011	Students begin attending classes at Webber Academy
December 13, 2011	Parents tour Webber Academy including the library with the director of admissions
December 17, 2011	Dr. Webber telephones Parents to inform them the Students are not allowed to pray on school campus
January 17, 2012	Letter from the Parents to Dr. Webber (Exhibit 8)
January 30, 2012	Letter from the Parents to Dr. Webber (Exhibit 11)
February 6, 2012	Letter from Dr. Webber to Parents advising the Students will not be re-enrolled the following year (Exhibit 12)
February 13, 2012	Complaints filed (Exhibit 21 and 22)
February 24, 2012	Parents and Students conduct congregational prayer on Webber Academy school grounds (photographs Exhibit 14 and Exhibit 2)

November 10, 29, and December 13, 2011 Pre-enrollment and Library Tour

[22] The Parents assert that they specifically discussed the Students' requirement to pray while at school as part of their faith prior to enrollment (at one of two pre-enrollment meetings on November 10 or 29, 2011), and were told by the director of admissions it would not be a problem. Mr. Siddique also recalled a similar response, which withstood cross examination.

[23] Dr. Webber testified that if the Parents or Students had insisted on praying anywhere at the school, this would have been a basis for denying enrollment. Ms. Lever testified she had stated to the Parents and Students that the school was non-denominational therefore no prayer space would be allowed. Ms. Grenier testified that she overheard a statement from Ms. Lever about Webber Academy being non-denominational and unable to provide prayer space. However she acknowledged she did not hear the entire conversation because she was in and out of the office. We find Ms. Grenier's evidence to be of little assistance in that she was not present for the entire discussion of the Students' religious beliefs and prayer requests.

[24] Ms. Lever testified that she thought the Parents were satisfied that they couldn't pray otherwise they wouldn't have enrolled in Webber Academy.

[25] The Students began attending classes at Webber Academy on December 1, 2011. For the first two and a half weeks of classes, the Students gave evidence that they prayed on the Webber Academy campus; they were comfortable openly asking staff and teachers about various places to pray. Mr. Siddique testified he would go to the office, and upon asking, he would be shown to an empty room where he would pray and then return to class. He also said that sometimes a teacher would allow him to go into an empty classroom to pray. The respondent did not call any evidence refuting Mr. Siddique's evidence on this point.

[26] On December 13, 2011, Ms. Lever conducted a tour of the school with the Parents. During the tour, Dr. Nazar testified she asked Ms. Lever to thank the teachers for providing the boys with a place to pray and Ms. Lever replied by saying "don't thank me, thank the teachers." Ms. Lever's version of her response is "don't thank me because I didn't give permission." Ms. Lever also testified that a request for a space to pray was not really brought up on the tour and it was only on reflection that she realized Dr. Nazar was looking for places to pray.

[27] Dr. Nazar testified that Ms. Lever pointed to a corner of the library as a potential prayer spot. At the hearing, Ms. Lever was asked what she would do if she saw someone who was Catholic cross themselves at a meal or take out their rosary beads while on campus at Webber Academy. She responded:

I might approach them and ask them what they are doing. I don't know. I would have to probably seek administrative direction, but being the Director of admissions, I don't normally, you know, go in and discipline the children because I'm not one of their teachers. So I don't really know what I would actually do in that situation because I -- I haven't been in that situation at school.

[28] Moments earlier Ms. Lever had defined "non-denominational" as:

"Non-denominational", to me, meant that we would welcome children of all different faiths and cultures, that we wouldn't have open practices of faith, that that would be something that families would take care of on -- outside of school time, and that our focus would be academic.

[29] If Ms. Lever was clear about Webber Academy's school policies on religion, it is to be reasonably expected that she would know what to do when seeing a student visibly display a religious observance. Her response and uncertainty, with a relatively straightforward question, highlights her uncertainty and lessens the reliability of her evidence in relation to her communications with the Parents about Webber Academy's policies on religious practices. Ms. Lever initially testified that her response to being asked to thank the teachers was to ask questions of the Parents about who was allowing prayer and then offer explanations that not even staff members can pray on campus. Subsequently, she testified that upon being asked to thank the teachers she became very quiet and the tour ended. Ms. Lever's lack of clarity about how to handle a visible religious practice, even now, coupled with the inconsistencies in her testimony support our conclusion that Ms. Lever did not clearly articulate or convey that prayer was not allowed at the time the requests were raised.

[30] The Students and the Parents were all consistent in their evidence regarding the initial discussions held. Further, the Students openly approaching staff and teachers in their first few weeks of school to enable performing their prayers, is consistent with an understanding that prayer was acceptable. We find that the Students' and Parents' version of the initial conversations prior to enrollment are more accurate and reliable and consistent with the balance of the evidence as a whole. By way of summary, we find the Students' need to pray was discussed with Ms. Lever prior to enrollment and a generally positive indication of acceptance was given. We further find that on the tour, Ms. Lever indicated a spot in the library where the Students could pray.

December 17, 2011 Telephone Call and January 17, 2012 Letter

[31] On December 17, 2011 Dr. Webber telephoned the parents to say that the school was "non-denominational" and the Students could not pray on school premises. We find that Dr. Webber's telephone call was the first clear communication from Webber Academy that the Students' prayers would not be allowed on Webber Academy campus.

[32] Subsequent to Dr. Webber's telephone call, Dr. Nazar made an appointment to meet with Dr. Webber and also sent a letter (Exhibit 8 - letter dated December 17, 2011 sent as an attachment to an email of January 17, 2012):

We are writing this to find a solution to the issue of prayers in the school for our sons: Naman Siddique of Grade 9 and Sarmad Amir of Grade 10. Both students were admitted into Webber Academy on December 1, 2011 and during the proceedings of admissions many points were discussed including the children praying in the school as it was explained to the admission staff that these are obligatory prayers. At that time none of the admission staff or any other staff member raised any concern or mentioned that prayers are not allowed in the school.

Both children prayed in the school for two and a half weeks and it was facilitated by the school staff. However after two and a half weeks, we received a phone call from the school on Saturday morning that our children are not allowed to pray at the premises due to the school's non-denominational policy. This was unexpected for us as this was highlighted at the admission stage, and was accepted by the school and that is why the children prayed in the school. To discuss this sudden change from allowing to prohibiting prayers in the school, we made an appointment to see you and have discussed this issue in great detail. …

… This issue has been very stressful for us and the children.

It is our strongest desire that our children, along with all other children, should thrive in one of the best schools in Alberta while fulfilling their religious obligations.

…

[33] Dr. Nazar testified she asked Dr. Webber if the Students could pray in the garage outside, in a corridor, in the basement, behind some trees or even in a closet. Dr. Webber answered no, and said that they must go off the school premises. Dr. Nazar and Ms. Amir both testified that Dr. Webber suggested the Students could pray quietly in their head or quickly make a cross where no one is aware of the prayer and this would be acceptable. Dr. Nazar testified that Dr. Webber stated he did not want other children to see the bowing or kneeling.

[34] After Mr. Siddique was told that he could not pray on school property he said that he began to pray outside of the school on the school grounds. It was winter and so they would often come back to the school really wet and cold. If there was a blizzard outside or if it was too cold to pray Mr. Siddique testified that he and Mr. Amir would find a nook or cranny and pray. He felt that this was humiliating. Dr. Nazar said that her son felt he had to choose religion over school. She testified her son "…was scared to pray in front of anyone."

[35] After the first meeting with the Parents and Dr. Webber, Dr. Nazar promised to consult with her religious leaders to see if there was any other way that the Students could pray. She reported back to Dr. Webber that, only if the Students' lives were in danger, could they amend the prayer. One further meeting was held that included Dr. Nazar, Mrs. Amir, Mr. Dattani, Mr. Qasqas, Dr. Webber and Ms. Webber.

January 30, 2012 Letter Requesting Accommodation

[36] By letter dated January 30, 2012, Dr. Nazar wrote to Dr. Webber summarizing what had happened and making a formal request for accommodation and attaching the prayer timetable:

Exhibit 11

Dear Dr. Webber,

I write this on behalf of myself and Mrs, Farhat Amir formal request for accommodation to allow our children to pray as this is a requirements of their religion [sic]. The request involves the school accommodating in two ways - a nominal space being provided to perform prayers and that the students be excused from class for five minutes per prayer when these prayers coincide with their scheduled classes. I am making this request in writing in accordance with the recommendations of the Alberta Human Rights Commission.

First, I would like to set out a brief summary of the facts in this matter. Second, I will emphasize the compulsory nature of prayer in Islam as well as the formal components of the prayers (i.e. kneeling, bowing, etc). I will enclose supporting documents which support these claims, including a calendar of the daily prayer times and a juridical opinion on the compulsory nature of the prayer

which can be accessed at http://www.albalagh.net/kids/understanding_deen/Salat.shtml. Third, I will set out the amount of physical space requested to complete the required prayers.

Summary of Facts

I believe that the following facts are not in dispute by any of the parties concerned.

The children, Naman Siddique (Grade 9) and Sarmad Amir (Grade 10) were admitted to Webber Academy on December 1, 2011. For a period of approximately 18 days, the children were performing their prayers on school facilities; these prayers were facilitated by members of the school's staff. On ***Saturday, December 17, 2011****, I received a call from the school stating that the children were not permitted to pray anywhere on the school's premises; the school cited its non-denominational status as the reason. On January 19, 2012 I sent an email to you requesting a meeting to discuss this matter further. On January 23, 2012, you agreed to a meeting on January 25, 2012. This meeting was also attended by 2 representatives of the Muslim Council of Calgary (MCC).The fundamental points raised at this meeting by ourselves were as follows:*

(i) The children are Sunni Muslims and such are required to pray 5 times a day. A minimum of one and a maximum of 2 of the required prayer times coincide with the school schedule. These prayers are compulsory and there is no scope for derogation. We emphasized that, as these prayers do not take longer than 5 minutes to perform, we were only asking for a maximum of 10 minutes per day to be set aside to fulfill this requirement

(ii) A dedicated prayer space is not necessary to meet these requirements. We are satisfied with any space that will allow the children to stand, kneel and bow. We cited corners of classrooms or offices as examples of the sort of space that would suffice.

(iii) We expressed our willingness to find any solution that would allow the children to fulfil their prayer requirements on campus. To this end, we stated our willingness to schedule a future meeting to present a solution that would be mutually agreeable to all parties concerned; we accepted the fact that the prospect of finding such a solution may require us to schedule future meetings with you.

The school articulated the following positions:

(i) The school is non-denominational and as such, prayer or other "religious ceremony"

cannot be permitted on school campus. The children may be permitted to leave campus to fulfil these requirements, subject to a letter of permission from the parents.

(ii) While quiet meditation or other non-descript prayer may be permitted, prayer which requires conspicuous 'bowing' and/or 'kneeling' is too obvious and may make other students uncomfortable.

(iii) There is no possibility whatsoever of the children praying on school campus. This precluded the possibility of any solution which would keep the children on campus for the purposes of carrying out their prayers. Additionally, you assert that if this accommodation is granted in our case, it would have to be granted in the future to those seeking similar accommodation.

[Three paragraphs referencing Alberta Human Rights Commission website not included]

The compulsory nature of Prayer in Islam

As the children are adherents of "Sunni Islam", they are required to pray 5 times a day. I am enclosing a prayer calendar to this correspondence as well as a juridical opinion of the compulsory nature of the prayers which can be accessed here: http://www.albalagh.net/kids/understanding_deen/Salat.shtml. Please feel free to avail yourself of both of these documents in support of my request.

The Accommodation being Sought

I am requesting the follow accommodation from Webber Academy:

(i) That the children be permitted to carry out their prayers on Webber Academy's campus. The space need not be a dedicated prayer space; I would only ask that it is sufficiently large to allow the children to bow, kneel and stand safely; and

(ii) That the children are excused to pray if and/or when the prayers coincide with their scheduled classes.

I am willing to explore any solution which will allow the children to remain on campus.

Parenthetically, I cannot accept your earlier proposal which would require the children to leave campus to pray. I do not believe that this solution is either reasonable or justifiable. It would, among other things, require the children to spend a disproportionate amount of time to seek out a suitable location and it is potentially dangerous, especially during inclement weather.

February 6, 2012 Letter of Webber Academy Response

[37] By letter dated February 6, 2012, (Exhibit 12) Dr. Webber summarized what had occurred that year from Webber Academy's perspective. The full contents of that letter are set out:

Dear Shabnam Nazar & Farhat Amir,

In response to your e-mail letter of December 17, 2011 and e-mail letter of February 3, 2012 I would like to make the following points:

1. At the time of the admission of your boys (Naman Siddique and Sarmad Amir) to Webber Academy there was no agreement on the provision of prayer space. In fact, you were told by Dianne Lever, Director of Admissions, that we are a non-denominational school and as such we would not be able to accommodate space for prayers.

2. An acceptance offer for admission on November 29, 2011 for both boys to start school December 1, 2011. A tour was arranged for December 13, 2011 and Dianne Lever was informed by you that the boys had found a place to pray which was a surprise to her because admission was predicated upon the point that no prayer space was available. It was following this that I phoned to reinforce the non-availability of prayer space at Webber Academy or on the premises of Webber Academy.

3. At two subsequent meetings, I indicated again that we had no prayer space and that the boys would have to leave the campus for prayer or attend another school.

4. A legal opinion obtained by Webber Academy indicated that Webber Academy is under no obligation to accommodate your request because:

- *It does not make physical accommodations for any other student of the Academy to practice their religion and*

- *Webber Academy is a non-denominational school and this is an integral part of its character and it is legally entitled to remain so.*

Therefore, to respond once again, you do not have permission to have prayer space at Webber Academy. Furthermore, since the policies and procedures of Webber Academy are being ignored by you I wish to formally inform you that your sons – Sarmad Amir and Naman Siddique – will not be accepted for enrollment at Webber Academy Foundation for the 2012-2013 school year.

Attached please find two cheques refunding the first installment for the 2012-2013 tuition fees.

Sincerely,

Neil Webber

[38] Dr. Nazar testified that she interpreted this as the Students being expelled or "kicked out" from the school because they "…did not agree with Dr. Webber's policy of not allowing the children to pray on the premises of the school…"

[39] We highlight Dr. Webber's statement that "since the policies and procedures of Webber Academy are being ignored by you .... your sons .... will not be accepted for enrollment … [next year]." It is noted that the basis of Webber Academy's refused re-enrollment is non-compliance with policies and procedures yet the respondent has not ever introduced any clearly worded policy or procedure addressing prayer or religious obligations generally. While the meaning of "non-denominational" will be returned to later in these reasons, this Tribunal considers that this one word, found in the mandate statement of Webber Academy, does not reasonably equate to a "policy" or a "procedure."

February 10, 2012 Library Incident

[40] On February 10, 2012 Mr. Siddique was conducting a prayer in the library at Webber Academy. Mr. Siddique gave evidence that he was about to commence prostration when Ms. Webber approached him, interrupted him by coming very close to him, and asked repeatedly, "What are you doing?" Mr. Siddique felt compelled to break his prayer:

… I had this intense sense of shame and humiliation, despite the fact that I was just exercising my right as a Canadian Citizen, as a human being, to practice my faith. Due to this intense sense of shame and fear, I just got so stressed out, I just had to break. As well, she was so close to me, I couldn't continue my prayers, so I broke my prayer …

[41] Mr. Siddique said that he felt a "…great deal of fear inside…," that he was afraid of Ms. Webber because she was uncomfortably close. Dr. Nazar confirmed that Mr. Siddique came home and related to her that he was scared when Ms. Webber approached him that day. She instructed her son to tell the teachers that they should talk to his parents.

[42] Ms. Webber's version of the library incident is that she heard Mr. Siddique praying and bent over interrupting him, asking him what he was doing and asking him if he was alright. The information strongly supports, given what had occurred to date, that Ms. Webber understood Mr.

Siddique to be praying and she knew that he was alright. She gave no evidence that Mr. Siddique was negatively impacting or influencing his surroundings. It is this Tribunal's finding that Ms. Webber abruptly interrupted Mr. Siddique's quiet prayer. We also acknowledge that Mr. Siddique was praying in violation of Dr. Webber's directive not to pray on campus. However, even assuming that Mr. Siddque knew about this directive sent by letter four days earlier, we accept that Mr. Siddique was attempting to fulfill his religious obligations as he understood them. The manner of Ms. Webber's physical intrusion and interruption while Mr. Siddique was praying contributed to a sense of shame and humiliation developing in this 14 year old student.

February 24, 2012 Incident: Parents and Students Conduct Prayer on School Grounds or Outside

[43] On one occasion on February 24, 2012, the Parents and Students were praying outside on Webber Academy campus and they were stopped by Dr. Webber and Ms. Webber. We note that this occurred subsequent to the filing of the human rights complaint on February 13, 2012. The involvement of parents on campus as well as the conducting of a congregational prayer on Webber Academy campus did not figure prominently in the evidence and argument and is not the subject of any further analysis by this Tribunal.

III. Section 4: Service or Facility Customarily Available to the Public

i. School Act

[44] Prior to addressing section 4 of the Act, we will address arguments regarding the relevance of the *School Act*.[2] While the parties submitted numerous provisions of the *School Act*, we have not been referred to anything that specifically addresses the subject of prayer or religious observance or religious exercises in private schools in Alberta. The respondent has not identified anything within the *School Act* that conflicts with or has paramountcy over obligations and rights set out in the Act. Consequently, the fact that Webber Academy is a private school accredited pursuant to the *School Act* is of no assistance or hindrance in determining this case on the evidence and argument before us. The only governing legislation required to be assessed on the evidence presented is section 4 of the Act. Our only observation is that the *School Act*, in section 3, supports diversity, and by implication, human rights.

ii. The *Alberta Human Rights Act*

Section 4 of the Act sets out:

No person shall

(a) deny to any person or class of persons any goods, services, accommodation or facilities that are customarily available to the public, or

(b) discriminate against any person or class of persons with respect to any goods services, accommodation or facilities that are customarily available to the public,

because of the race, religious beliefs, colour, gender, physical disability, mental disability, ancestry, place of origin, marital status, source of income, family status or sexual orientation of that person or class of persons or of any other person or class of persons.

[45] In this case, the director and the respondent would define the "public" as the "student

body." We agree and find the Students are part of the "public" that Webber Academy serves. As stated in *University of British Columbia v. Berg*[3] *(Berg)*:

Every 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.

[46] Webber Academy argues it does not fall under the Act because prayer space is not a service it customarily makes available to its public. In determining which activities of a school may be covered by the Act, this Tribunal considered the direction of the Supreme Court in *Berg,*[4]:

Instead, in determining which activities of the School are covered by the Act, a principled approach which looks to the relationship created between the service or facility provider and the service or facility user by the particular service or facility. Some services or facilities will create public relationships between the School's representatives and its students, while other services or facilities may establish only private relationships between the same individuals.

[47] In defining the service customarily available to youth in education, the nature of the primary service user as a dependent youth is relevant. Dr. Webber testified that students at Webber Academy are not at liberty to come and go as they wish. Webber Academy assumes responsibility for the students while they are at school, and full day attendance is required unless there is permission to leave. Detailed materials regarding the written mandates, objectives, and codes of conduct for Webber Academy students were introduced into evidence. Webber Academy undertakes within its mission, and as a code of conduct expectation of its students, to respect principles and moral consciences. The respondent purports to give tribute to all of the world`s great religions, and seeks to provide an educational experience that translates to students becoming responsible members of our communities and society.

[48] As held in *Berg, supra,*[5] incidents of a service are part of the service to the defined public, in that a school’s resources are available to all who are admitted:

Illustrating the relational approach by applying it to the services in this case, I conclude that the key and rating sheet were incidents of the public relationship between the representatives of the School and its students.

The School exists to provide accommodations, services or facilities to its students which will further their education and social activities relating to the School. It is a publicly funded institution (although this is not a determinative factor), which makes its educational and recreational resources available to all who are admitted.

....

The crux of the determination in these appeals is the nature of the services themselves and the relationship they establish between the School and its students. The key I would liken to the

educational and recreational services of the School generally, since all that is represented by the key is access to the School's physical facilities after normal class or office hours. These facilities surely must be part of the public relationship between the university and its students, since they are a necessary adjunct to the educational process which has brought the university and its students together. …

[49] Relying on the above authority, this Tribunal defines the service and facility customarily offered by Webber Academy to include: educational programs and other supportive services and facilities including the use of Webber Academy campus and facilities. We have defined Webber Academy's offerings as both a service and a facility given the nature of the relationship formed between the students and Webber Academy, and the bricks and mortar nature of the Webber Academy campus. These students attend for full days beginning early in the morning and concluding late in the afternoon. The student body is necessarily reliant on the school to meet many of their needs, including use of the facility to eat, possibly take required medications on campus to ameliorate an illness or disability, and a myriad of other activities.

[50] The respondent essentially argues that it has discretion not to offer the service of allowing students to pray on its campus. As will be the situation in so many educational contexts, there will be a great deal of discretion that a school must exercise in the meaningful delivery of the services it offers. However, as stated in *Berg, supra*,[6] such discretionary decisions cannot be exercised on prohibited grounds:

I do not think that a purposive approach to interpreting this provision can allow a discretion to be exercised on prohibited grounds of discrimination, once the service or facility which is the subject of the discretion is otherwise found to fall within the purview of the Act, i.e., to be customarily available to the public. In making this latter finding, the trier of fact must be careful to exclude from his assessment of whether the discretion is customarily exercised to provide the service those instances where the service has been withheld on discriminatory grounds. Furthermore, it would seem obvious that the fewer the guidelines for the exercise of the discretion, and the greater the scope for the person exercising that discretion to set his or her own criteria, the greater potential there is for invidious discrimination. It is a basic principle of administrative law that a discretion vested in an administrative official or body is only to be exercised on proper grounds. Similarly, in this context, while the existence of a discretion may mean that the person with the discretion is under no obligation or duty to extend the service or facility to everyone who asks for it, he or she is surely under an obligation to not make his or her decision in a discriminatory fashion.

and at page 26:

Therefore, I would conclude that Berg, by virtue of having passed through a selective admissions process, did not cease to be a member of the "public" to which the School provided its educational services and facilities. The key and rating sheet were incidents of this public relationship between the School and its students. Neither the existence of a discretion, nor the element of personal evaluation attached to these services or facilities, excludes the Act, …

[51] The above supports this Tribunal's conclusion 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.

While Webber Academy certainly has discretion to set admissions criteria and to set policies regarding student conduct on its campus, this does not give a private school license to exercise their discretion in denying the services or use of facilities in a discriminatory fashion.

[52] The respondent cites the majority in *Gay Alliance Toward Equality v. Vancouver Sun*[7] as still "good law" for the proposition that human rights legislation cannot dictate the nature and scope of the service that must be offered to the public by any business. It further argues the words "customarily available" are limiting words, which means the requested service must be habitually or consistently made available to other members of the public to which the complainants belong. The respondent argues that because "prayer space" is not provided to any other students at Webber Academy, the complainants' requests fall outside the scope of the Act. The respondent adds it does not provide a designated area for the practice of religion by any student therefore the service is not customarily available.

[53] Relying on more recent Supreme Court of Canada authority, we reject these arguments. Again, we have held that “prayer space” is not the service being offered. Rather, the service is education and other supportive services and facilities, which allow meaningful access to education.

[54] The Supreme Court of Canada has specifically undermined the authority of *Gay Alliance* in *Berg, supra.* Further, the Supreme Court in *Berg* and *Moore v. British Columbia (Ministry of Education),*[8] decisions both in the educational context, have interpreted “services” broadly. For example, in *Moore,* the Court determined that the service was properly defined as general education, rather than special education for an individual with a learning disability.

[55] In light of our conclusion that Webber Academy offers services and facilities customarily available to the public pursuant to section 4 of the Act, the question to be answered is whether Webber Academy denied access or discriminated in the delivery of its services and/or the use of the Webber Academy facilities to the Students contrary to section 4 of the Act. Prior to addressing that question, further specifics of the evidence regarding the religious practice in question will be assessed.

IV. Religious Beliefs

[56] The Supreme Court of Canada case of *Syndicate Northcrest v. Amselem*[9] *(Amselem),* is the leading decision on assessing whether the protected ground of religious beliefs is triggered. It directs an inquiry into the individual's sincerity of belief in the context of religion. The following excerpt displays the Court's emphasis on a subjective, 'personal beliefs' approach; it also provides direction regarding the use and reliance on religious experts:[10]

42. *… [C]onsistent with a personal or subjective conception of freedom of religion, [is] one that is integrally linked with an individual’s self-definition and fulfilment and is a function of personal autonomy and choice, elements which undergird the right; see, generally, J. Woehrling, “L’obligation d’accommodement raisonnable et l’adaptation de la société à la diversité religieuse” (1998), 43 McGill L.J. 325. According to Professor Woehrling, at p. 385:*

[TRANSLATION] Virtually every judicial decision based on s. 2 (a) of the Canadian Charter or s. 3 of the Quebec Charter concerns freedom of religion. However, it would appear that these decisions stress the subjective aspect of the believer’s personal sincerity rather than the objective aspect of the conformity of the beliefs in question with established doctrine. [Emphasis added.]

43. The emphasis then is on personal choice of religious beliefs. In my opinion, these decisions and commentary should not be construed to imply that freedom of religion protects only those aspects of religious belief or conduct that are objectively recognized by religious experts as being obligatory tenets or precepts of a particular religion. Consequently, claimants seeking to invoke freedom of religion should not need to prove the objective validity of their beliefs in that their beliefs are objectively recognized as valid by other members of the same religion, nor is such an inquiry appropriate for courts to make; see, e.g., Re Funk and Manitoba Labour Board (1976), 66 D.L.R. (3d) 35 (Man. C.A.), at pp. 37-38. In fact, this Court has indicated on several occasions that, if anything, a person must show "[s]incerity of belief" (Edwards Books, supra, at p. 735) and not that a particular belief is "valid".

...

54. A claimant may choose to adduce expert evidence to demonstrate that his or her belief is consistent with the practices and beliefs of other adherents of the faith. While such evidence may be relevant to a demonstration of sincerity, it is not necessary. Since the focus of the inquiry is not on what others view the claimant's religious obligations as being, but rather what the claimant views these personal religious "obligations" to be, it is inappropriate to require expert opinions to show sincerity of belief. An "expert" or an authority on religious law is not the surrogate for an individual's affirmation of what his or her religious beliefs are. Religious 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.

65. As outlined above, the first step in successfully advancing a claim that an individual's freedom of religion has been infringed is for a claimant to demonstrate that he or she sincerely believes in a practice or belief that has a nexus with religion. …

69. … [R]egardless of the position taken by religious officials and in religious texts, provided that an individual demonstrates that he or she sincerely believes that a certain practice or belief is experientially religious in nature in that it is either objectively required by the religion, or that he or she subjectively believes that it is required by the religion, or that he or she sincerely believes that the practice engenders a personal, subjective connection to the divine or to the subject or object of his or her spiritual faith, and as long as that practice has a nexus with religion, it should trigger the protection of s. 3 of the Quebec Charter or that of s. 2 (a) of the Canadian Charter, or both, depending on the context.

[57] It is noted that the above legal analysis references a "religious belief" while the Students and Parents often spoke of "religious obligations." For the purposes of this decision, a religious obligation stems from a religious belief, therefore we use the terms interchangeably.

[58] The respondent says its "expert" trumps the three witnesses called by the director. The Tribunal notes that *Amselem, supra,* underscores the emphasis is on personal choice and sincerity of belief, not whether a religious practice or belief is valid according to a particular expert. However, for completeness, we will review the evidence of several witnesses called who are familiar with the Muslim faith as well as the evidence of the Parents and Students.

[59] The witnesses called to give evidence about the practice of prayer in the Muslim religion (Mr. Dattani, Imam Tilly, Youth Director Qasqas, and expert Dr. Ahmed) all agreed that there were five mandatory prayers, each of which is to be performed within a specific time range, which fluctuates throughout the year as it adjusts with the rising and setting of the sun. The prayers are: Dawn (*fajr* sometimes called *subh*); Noontime (*zuhr),* Afternoon (*'asr)*, Sunset (*maghrib)*, and Evening (*'isha').* The complainants submitted into evidence (Exhibit 11 attachment) the time schedule they follow - the "Calgary Perpetual Prayer Timetable." The timing as shown on the timetable gives a window of time for each prayer. Without making any specific findings regarding the significance, the timetable depicts Noontime and Afternoon prayer times that may create conflicts close to the school hours of 8:30 a.m. to 3:30 p.m. only during the months of November, December, January and part of February.

[60] There was evidence that prayers can sometimes be delayed or combined for certain reasons. Some scholars consider attendance at school a "hardship" that justifies delaying or combining prayers.

[61] On the evidence presented there is no consensus in Islamic law or the Muslim religion about what situations excuse an individual from praying at a certain time. To quote the respondent's expert Dr. Ahmed: “In the modern day, there has emerged a minority opinion that only travel, inclement weather, and in some cases illness, warrants combining prayers. This is not a recognized historical opinion, however, and does not represent any major, recognized school of Islamic law*.”* Rather than supporting the respondent's argument that the Students could miss their prayers, or combine prayers, Dr. Ahmed's opinion on this point bolsters a conclusion that there is no universal consensus.

[62] The manner of prayer requiring standing, kneeling and bowing to the ground, as described by Mr. Siddique in his testimony, was not challenged by the respondent. Mr. Amir confirmed his belief that this was compulsory in order to be Muslim. Dr. Nazar and Ms. Amir concurred. Dr. Nazar testified: "if even by law, if we were prohibited to pray, our next move would have been to take the kids out to preserve our religion to preserve our faith." Mr. Siddique and Mr. Amir were both consistent in their belief they must not relax their prayer obligations except in extreme circumstances. Mr. Siddique testified he did not believe missing school was a "material loss", which would justify not praying during the designated time range. Both Students testified they considered it a sin to regularly miss prayers, even if the prayers are made up later.

[63] We acknowledge the evidence of the respondent’s expert witness, Dr. Ahmed. He concluded:

It is my opinion that Muslim students who attend the school have a valid reason within the Sunni Islam legal tradition to delay their Noontime prayer and to pray it during the time for the Afternoon prayer for a portion of the school year (during the majority of the school year, this is not an issue). They will not be in violation of Islamic law by delaying their prayer.

[64] Again, however, we must emphasize that Dr. Ahmed's opinions and conclusions are not the definitive or "correct" way to perform the Sunni Muslim prayer, nor are they binding on these Students with respect to how they practice their religion. It is our finding that Dr. Ahmed's opinions, while presented genuinely and credibly, merely serve to legitimize elements of the religious practice in question. Dr. Ahmed's opinion does not establish that these Students can combine their prayers or miss their prayers without consequence in their personal and sincerely held religious beliefs and obligations.

[65] The respondent suggested the individuals called by the director were not necessarily their religious leaders but were sought to be witnesses in these proceedings, which was the basis of their relationship. Mr. Qasqas, a counsellor in the Calgary Muslim community became a mentor for the Students. Mr. Qasqas testified about his ongoing relationship with the Students, highlighting their genuine ongoing interest and participation in religious discussions and explaining that the practice of prayer helped the boys to relax and feel better about themselves. Imam Tilly, a religious leader with the Muslim Council in Calgary, corroborated the evidence of the Students that, complying with their religious prayer obligations was necessary to "be a Muslim." We find on the evidence, that the relationship of Imam Tilly and Mr. Qasqas with the Students and their family was genuine and in furtherance of their religious practices quite separate from these proceedings. As regards Mr. Dattani, we considered him to be a credible, truthful and knowledgeable witness. While he lives elsewhere, he has been long connected to the Calgary community. These three witnesses called by the director supported the sincerity of religious belief regarding the manner and timing of prayer conveyed by these Students and Parents.

[66] The respondent submitted its expert evidence is relevant in considering whether the beliefs are sincerely held. In our view, there is nothing in the expert opinion that challenges the Students or Parents sincerity of belief. We find the testimony of Mr. Siddique and Mr. Amir to be credible. We accept that Mr. Siddique and Mr. Amir each believe that their obligations come from the Qur'an and the sayings of the Prophet as conveyed to them by their parents, without strict adherence to any specific school of thought. Further, at the time of the complaint, Mr. Siddique and Mr. Amir were in Grade nine and 10 respectively. Their assertions that they follow the guidance and timetable given to them by their parents is accepted as reliable and truthful.

[67] In addition, we accept Principal Schneider's testimony that these Students easily practiced their prayer without significant disruption for the two years they attended Rundle College. This is strong and unshaken evidence of a genuine belief and commitment by these Students to their religious practice of prayer.

[68] On all of the evidence, we have no hesitation in finding these Students each sincerely held the belief that the practice of prayer in the manner and at the times requested was their sincerely held religious belief. The complainants have credibly established that they sincerely believe they are required to pray their mandatory prayers during the school day in accordance with the timetable, in order to fulfill "being Muslim."

V. *Prima Facie* Discrimination

i. Differential Treatment /Comparator Group Analysis Not the Test

[69] Prior to addressing the key analysis for *prima facie* discrimination, we will address the respondent's submission that we utilize a three-part differential treatment or comparator group test as enunciated in *Kelly v. B.C. (Ministry of Public Safety and Solicitor General) (No. 3).*[11] The respondent submits that in order to prove *prima facie* discrimination under section 4 of the Act, it is incumbent on the director to establish that the complainants experienced some form of "differential treatment" as a result of a characteristic protected under the Act. To do this, the respondent argues a form of "comparative analysis" must be undertaken. In this case, the respondent argues the complainants did not receive differential treatment as compared to other members of the student body (the "public" for purposes of section 4).

[70] The director, addressing this kind of approach, submits that the sincerely held belief of Sikh students to wear a turban and grow facial hair has been accommodated by Webber Academy. By comparison, the requirement of Muslim students to pray at certain designated times has not been accommodated. In this sense, the director submits one could reasonably conclude that the

obligations imposed by Sikhism are given a preference over the obligations imposed by Islam. The director submits this could easily be characterized as "differential treatment."

[71] Both *Kelly, supra,* and *Armstrong v. British Columbia (Ministry of Health),*[12] relied upon by the respondent, were decided before the Supreme Court rendered its decision in *Moore,*[13] where the differential treatment or comparator analysis approach was specifically dispensed with as "unnecessary and inappropriate" in assessing *prima facie* discrimination. Accordingly, it is this Tribunal's view that the starting point for assessing *prima facie* discrimination is the three part test set out in *Moore.*

[72] In any event, we consider the differential treatment by Webber Academy of students with different religious faiths, as pointed out by the director, to be a factor that supports our finding of *prima facie* discrimination. In the final analysis, it is our view that differential treatment is properly a consideration but not a requirement in the analysis of whether *prima facie* discrimination has occurred.

ii. *Moore* Three-Part Test

[73] The three-part test set out by the Supreme Court of Canada in *Moore, supra,*[14] requires a complainant to show:

1) they have a characteristic protected from discrimination under the *Code;*

2) they experienced an adverse impact with respect to the service or facility; and

3) the protected characteristic was a factor in the adverse impact.

[74] As previously found, the characterization of the issue as "denial of prayer space" is rejected. The question is whether there has been a discriminatory denial of services or facilities to these Students on the basis of religious beliefs.

[75] Applying the *Moore* test to this situation:

1) Pursuant to our previous findings, these Students praying during school hours is based on a sincerely held religious belief triggering protection regarding religious beliefs;

[76] The complainants have satisfied part i) of *Moore:* due to the Student's sincerely held religious beliefs and practices, the Students have a characteristic that is within a protected ground under the Act.

2) The Students were not allowed to pray on campus. They were refused re-enrollment to Webber Academy. The negative impact is obvious.

[77] In the context of section 4 of the Act, the Students were denied the services provided by Webber Academy and denied the use of facilities because of their requests to fulfill their sincerely held religious beliefs on campus. The Students were placed in a conflict between their religious obligations and following the rules of the respondent. Mr. Siddique felt humiliated and fearful. Mr. Amir was also upset by this situation. We find clear adverse impact on these Students with respect to the services and facilities denied by the respondent.

3) Was religious belief a factor in the adverse impact?

[78] The evidence establishes that the Students were forbidden to pray on school grounds. The below evidence of Dr. Webber confirms that the only basis for refusing re-enrollment was connected to the Students' religion.

Q: … what was the reason or reasons that you would not enroll the boys in the 2012/2013 school year?

A: Well, the parents had not accepted the fact that we wouldn't provide prayer space, and, so, we had decided that we would not have them back at the school the following year for that purpose.

[79] The Students were denied services in the form of both a refused re-enrollment and a denial to exercise their religious prayer on campus. That these denials were based on the Students' desires to exercise their religious beliefs clearly connects the protected ground of religion to the adverse impact of refusal and denial of enrollment.

[80] To cite *Moore*:[15]

But if the evidence demonstrates that the government failed to deliver the mandate and objectives of public education such that a given student was denied meaningful *access to the service based on a protected ground, this will justify a finding of* prima facie *discrimination.*

[81] The respondent argued its policy under the general motive of remaining "non-denominational" such that it appeared to be neutral on its face, similar to "everyone has to work on Saturday"[16] however, its effect on these Muslim Students was adverse and discriminatory. After having met all of the eligibility and admission requirements of the respondent, the Students were thereafter denied *meaningful access* to Webber Academy (in all its facility and service offerings) based on their religious belief, a protected ground. Accordingly, a finding of *prima facie* discrimination is made out.

VI. Reasonable Justification

[82] As the director and complainants have established *prima facie* discrimination, the onus shifts to the respondent to prove, on a balance of probabilities, that the discrimination is justified or, as part of that analysis, a reasonable accommodation has been offered.

[83] The respondent submits any discrimination was reasonable and justifiable and pursuant to section 11 of the Act it should be deemed not to have contravened section 4.

Section 11 sets out:

A contravention of this Act shall be deemed not to have occurred if the person who is alleged to have contravened the Act shows that the alleged contravention was reasonable and justifiable in the circumstances.

[84] The Tribunal finds the "reasonable and justifiable" defense in section 11 should be approached using the analysis established in the seminal cases of *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*[17] (*Meiorin)* and *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*[18] *(Grismer).* The Supreme Court of Canada in *Grismer* confirmed that the three-part test for assessment articulated by the Supreme Court of Canada in *Meiorin* applies equally in non-employment areas such as services and facilities. As this is a services case, we look to the articulation of the *Grismer* test:[19]

Once the plaintiff establishes that the standard is prima facie discriminatory, the onus shifts to the defendant to prove on a balance of probabilities that the discriminatory standard is a BFOR or has a bona fide and reasonable justification. In order to establish this justification, the defendant must prove that:

(1) it adopted the standard for a purpose or goal that is rationally connected to the function being performed;

(2) it adopted the standard in good faith, in the belief that it is necessary for the fulfillment of the purpose or goal; and

(3) the standard is 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.

This test permits the employer or service provider to choose its purpose or goal, as long as that choice is made in good faith, or "legitimately". Having chosen and defined the purpose or goal – be it safety, efficiency, or any other valid object – the focus shifts to the means by which the employer or service provider seeks to achieve the purpose or goal. The means must be tailored to the ends. For example, if an employer's goal is workplace safety, then the employer is entitled to insist on hiring standards reasonably required to provide that workplace safety. However, the employer is not entitled to set standards that are either higher than necessary for workplace safety or irrelevant to the work required, and which arbitrarily exclude some classes of workers. On the other hand, if the policy or practice is reasonably necessary to an appropriate purpose or goal, and accommodation short of undue hardship has been incorporated into the standard, the fact that the standard excludes some classes of people does not amount to discrimination. Such a policy or practice has, in the words of s. 8 of the Human Rights Code, a "bona fide and reasonable justification". Exclusion is only justifiable *where the employer or service provider has made every possible accommodation short of undue hardship.*

22 "Accommodation" refers to what is required in the circumstances to avoid discrimination. Standards must be as inclusive as possible. There is more than one way to establish that the necessary level of accommodation has not been provided. In Meiorin, the government failed to demonstrate that its standard was sufficiently accommodating*, because it failed to adduce evidence linking the standard (a certain aerobic capacity) to the purpose (safety and efficiency in fire fighting). In Mr. Grismer's case, a general connection has been established between the standard (a certain field of peripheral vision) and the purpose or goal of reasonable highway safety. However, the appellant argues that some drivers with less than the stipulated field of peripheral vision can drive safely and that the standard is discriminatory because it does not provide for individualized assessment. Failure to accommodate may be established by evidence of arbitrariness in setting the standard, by an unreasonable refusal to provide individual assessment, or perhaps in some other way. The ultimate issue is whether the employer or service provider has shown that it provides accommodation to the point of undue hardship.* [Emphasis in original]

[85] *Grismer* involved a finding that a rigid vision standard imposed by Motor Vehicles on potential drivers, who had a disease known as homonymous hemianopia "HH" (which restricted peripheral vision), was not justified. The Supreme Court of Canada held that a reasonable and justifiable qualification will not be recognized as a defence to a complaint regarding "services provided" if the service provider can individually assess a situation and modify conditions or practices without undue hardship. The superintendent of Motor Vehicles failed to show that individual vision testing of applicants with HH imposed undue hardship.

Application of the *Grismer/Meiorin* Analysis to this Case

i) Rational connection – Has Webber Academy adopted the standard for a purpose or goal that is rationally connected to the function being performed?

[86] The respondent argued it was founded in 1997 on the premise of a non-sectarian education with a secular mandate. Up to and including the hearing of this matter, there has been no written policy introduced into evidence outlining the expectations of students or staff regarding prayer, or religious practices, generally, on campus. The standard evolved, but can be expressed as "no overt prayer or religious activities on school property."

[87] In terms of Webber Academy's purpose for the standard, this too evolved throughout the hearing and was stated in a number of different ways. The respondent's written submission argued: "[Webber Academy's] approach - that religious observance is to occur at home and not at school - is reasonable and logically connected to its stated goal of fostering a learning environment where students feel comfortable and free from religious influences." At the hearing, the purpose for the standard was defended generally under the umbrella of seeking to foster a non-denominational identity. Dr. Webber testified that the goal was to have a school that was "religious neutral" where there was no overt prayer and no religious activities on school property.

[88] In any event, for this step one analysis, we accept that Webber Academy's purpose was to foster a non-denominational identity that ensures Webber Academy's students are placed in a learning environment that is "free of religious influences."

[89] To satisfy step one, the purpose of the imposed standard must be rationally connected to the public function being performed. As stated in *Grismer*, *supra*:[20]

Having determined the nature of the Superintendent's objective, the next question is whether the Superintendent established on a balance of probabilities that the goal of reasonable road safety was rationally connected to the Superintendent's public function. In Meiorin, the question was

whether the purpose (safety and efficiency) was rationally connected to the performance of the job (fire fighting). In this case, the question is whether the Superintendent's goal (ensuring a reasonable level of highway safety) was rationally connected to his general function (issuing driver's licences).

[90] Webber Academy's purpose for the standard, as outlined above, relates generally to maintaining a non-denominational identity that is free from religious influences. Webber Academy's public function is to provide educational services and facilities. It is open to a school to create an "identity" that includes setting standards regarding the conduct of students (and staff) in the particular learning environment and on its campus. Under the broad assessment required here, we find there is a rational connection between the purpose Webber Academy was seeking and the function it performs. As noted in *Meiorin*, the *validity* of the standard is not addressed at this stage.

ii) Good faith - Has Webber Academy adopted the standard in good faith, in the belief that it is necessary for the fulfillment of the purpose or goal?

[91] We accept that the respondent adopted its position in good faith, believing it was necessary to the accomplishment of its purpose of maintaining a non-denominational identity, as it defined that term. We also note that Dr. Webber was considered by the complainants and all witnesses to have conducted all discussions in a respectful and courteous manner.

iii) Reasonably necessary - Is the standard 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.

Preliminary Determinations re: Non-Denominational and Religious "Influence"

[92] To squarely address step 3 of the *Meiorin* test (with the focus on accommodation to the point of undue hardship), two preliminary matters require determination: how non-denominational identity should reasonably be defined, and Webber Academy's concerns that allowing these Students to pray would have impacted or resulted in religious influence on other students.

Non-Denominational Identity

[93] Ms. Webber, in cross examination, testified that the respondent's published statement of being a "non-denominational school" was enough to convey that no prayer is allowed at Webber Academy:

Q Well, with respect to the -- the Islamic school, the policies regarding prayer were set out in that school parents' handbook.

A Yes, sir.

Q Is there a policy, a similar policy set out at Webber Academy on prayer?

A No. We don't allow prayer, so we don't need a policy on prayer.

Q How is one to know that prayer is not allowed at Webber Academy?

A Because it is reflected in our parent/student handbook that we're a non-denominational school.

…

[94] The respondent advanced its perspective on what they understood "non-denominational" to mean. Dr. Webber testified:

… we didn't specify there shall be no prayer space, but it was part of the understanding of the term "non-denominational" that we -- "non-denominational" meant we were welcoming students from many different cultures and religions, but religion would be the responsibility of the family, the practice of religion.

[95] When asked about what he told the staff and teachers about the policy he responded:

A I don't remember exactly how it was put.

Q Did you tell Dianne Lever about this policy, that there's no religious activity at the school?

A I don't recall specifically telling her, say, if somebody comes in and asks for prayer space, we don't allow prayer space. I never said that. She understood the meaning of "non-denominational".

Q Is it not possible that "non-denominational" would mean that your school is not affiliated with one particular faith?

A I guess the definition of the word "non-denominational", I don't know how somebody else might interpret the meaning of that word, but we've indicated what that word means to us.

[96] Ms. Webber's understanding of non-denominational is:

A "Non-denominational", in my term, in terms of a non-denominational school is providing students with -- with an academic atmosphere that does not include a religious practice. And non-denominational is -- is a place where students from any religious background is welcome to be a part of our -- of our academic studies, and it's -- it's a place where you don't have students conform to any one belief or prefer one belief over another.

[97] The dictionary definition of non-denominational introduced by the director is: "not restricted to or associated with a religious denomination." Principal Schneider of Rundle College captured non-denominational as follows: "(O)ur view of that is that we are not promoting or specifically affiliated with any denomination, and in that sense, we are non-denominational."

[98] The Tribunal does not accept that being a non-denominational school can reasonably be interpreted as meaning “no prayer or religious practice will be allowed.” We accept Principal Schneider's statement as a reasonably accurate definition of non-denominational.

<u>Religious Influence</u>

[99] Dr. Webber testified he was concerned that there was a "plan" to force Webber Academy to provide prayer space. The respondent submitted that accommodating the religious obligations as requested would have the effect of forcing the Students' educational view (interpreted by Webber Academy as: religious observance belongs in a school setting) on Webber Academy and its

students. This assertion is not accepted; the Students requests were not aimed at establishing that their religion, or any religion, "belonged" in a school setting. Rather, in order to fulfill their religion, they were required to pray at designated times. The Students' physical location was incidental to their religious beliefs. The Students' requests of Webber Academy were purely a function of being at school during their mandatory prayer times.

[100] While the respondent asserted it sought a non-denominational environment "free of religious influence" it did not proffer any evidence to establish that allowing these Students to pray on campus would even be a religious influence. The respondent argued that the potential impact on the other students was a relevant consideration in assessing the duty to accommodate. We heard evidence from a mother of students at the school that if religions started practicing at Webber Academy, she and her children would be "uncomfortable;" however what this meant was not elaborated upon. We do not consider this evidence to advance the respondent's position for three reasons: First, as the Students were willing to pray privately, this concern is of virtually no consequence. Second, this position does not explain or address whether the other religious observances currently occurring at Webber Academy also cause discomfort or merit exception. Third, an oblique reference to feeling "uncomfortable," with no direct evidence or explanation of negative impact renders this testimony of little assistance. We heard no direct evidence of a tangible impact or interference on third parties that would amount to a well-grounded concern which would prevent an assessment and implementation of accommodation measures in this case.[21]

[101] In terms of the impact of these Students praying on the campus of a non-denominational private school, Principal Schneider's evidence of the non-disruptive nature experienced at Rundle College for nearly two years is compelling:

If I felt that this was being -- that the request for prayer was something that was, first of all, disruptive to the school environment, disruptive to the classroom, disruptive to teaching and learning within our building, or there was an attempt on anyone's behalf to proselytize or influence, then I would -- then I would look at it from that perspective and make decisions accordingly. As I mentioned as well, that has not been the case in this situation.

[102] We find there was nothing requested by the Students or Parents that supports a finding that any sort of plan was in place to impose prayer on Webber Academy, except insofar as the boys were asking to be able to quietly and discretely fulfill their religious beliefs on campus. There was no suggestion that the Students or Parents requested the development of any educational programs for use in the curriculum. Any suggestion that Webber Academy's position was reasonably necessary and the Students could not be accommodated by allowing prayer on campus because the Students or their Parents were attempting to influence Webber Academy's religious affiliation or identity, is rejected.

[103] Perhaps if a very large percentage of a student body sought to fulfill religious beliefs in a very visible way, that may impact a school's non-denominational identity. However, when considering the "identity" or "learning environment" of Webber Academy, it is the Tribunal's view that allowing two of 900 students to pray behind closed doors for a period of five to ten minutes is insignificant in the context of religious identity, affiliation, or influence.

[104] The third step of the *Meiorin* analysis involves assessing whether the standard imposed (no overt prayer or religious activities on school property) is reasonably necessary to accomplish Webber's purpose of maintaining a non-denominational identity that is free from religious influences in the sense that Webber Academy cannot accommodate the Students without incurring undue hardship.

Accommodation of Religious Beliefs in Schools

[105] The respondent's standard of "no overt prayer or religious practice on campus" essentially asks these Students to leave their religion "at the door" while other students who do not have religious obligations during school hours are not so required. In *Chamberlain v. Surrey School District No. 36,*[22] the Court recognized that religion is an integral aspect of a person's life and cannot be "left at the boardroom door." Schools are expected to promote respect and tolerance for all of the diverse groups they represent. This is especially so in the face of a secular mandate. *Chamberlain*[23] elaborated that secularism implies equal recognition and respect for all members of a community:

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.

[106] The Supreme Court of Canada has long provided ample direction that freedom of religion is to be woven into the fabric of Canadian society. In the *Multani v.Commission Scolaire Marguerie-Bourgeoys* decision,[24] the Court emphasizes long standing rationale from their decision in *R v. Big M Drug Mart Ltd.* nearly three decades ago:

This Court has on numerous occasions stressed the importance of freedom of religion. For the purposes of this case, it is sufficient to reproduce the following statement from Big M Drug Mart, at pp. 336-37 and 351:

> *The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination. But the concept means more than that.*
>
> *… Freedom means that, subject to such limitations as are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others, no one is to be forced to act in a way contrary to his beliefs or his conscience.*

[107] The importance of the values of multiculturalism, diversity, and the development of an educational culture that is respectful of the rights of others was first stated in *Ross v. New Brunswick School District No 15,*[25] and was confirmed in *Multani, supra.*[26] The Supreme Court of Canada highlighted that a school and teachers form a communication centre for values and aspirations, and have a duty to foster the respect of students for the constitutional rights of a society, free of bias, prejudice and intolerance.

[108] A number of decisions have assessed whether a religious observance must be allowed and accommodated, despite policies to the contrary. *Multani, supra,* established that kirpans (a form of knife that is a religious observance), when safely worn, are to be permitted in schools. *Singh v. Royal Canadian Legion, Jasper Place (Alta.) Branch No. 255,*[27] held that, despite a dresscode, a religious requirement of wearing a turban must be allowed. There can be no doubt that schools are required to accommodate these religious observances.

Accommodation to the Point of Undue Hardship

[109] The duty to accommodate is often stated as extending "to the point of undue hardship." In *Renaud, supra*,[28] the Supreme Court of Canada expressed it as a requirement for reasonableness "short of undue hardship:"

> *... The use of the term "undue" infers that some hardship is acceptable; it is only "undue" hardship that satisfies this test. The extent to which the discriminator must go to accommodate is limited by the words "reasonable" and "short of undue hardship". These are not independent criteria but are alternate ways of expressing the same concept. What constitutes reasonable measures is a question of fact and will vary with the circumstances of the case.*

[110] The Supreme Court of Canada has stated it is necessary to place realistic limits on the duty to accommodate and has also acknowledged a complainant is required to do his or her part to facilitate the search for accommodation.[29] As stated in *O'Malley*:[30]

Accepting the proposition that there is a duty to accommodate imposed on the employer, it becomes necessary to put some realistic limit upon it. The duty in a case of adverse effect discrimination on the basis of religion or creed is to take reasonable steps to accommodate the complainant, short of undue hardship: in other words, to take such steps as may be reasonable to accommodate without undue interference in the operation of the employer's business and without undue expense to the employer. … The employer must take reasonable steps towards that end which may or may not result in full accommodation. Where such reasonable steps, however, do not fully reach the desired end, the complainant, in the absence of some accommodating steps on his own part such as an acceptance in this case of part-time work, must either sacrifice his religious principles or his employment.

[111] To evaluate the reasonableness of accommodation steps taken in this case, we found it helpful, but not determinative, to consider evidence regarding prayer in other educational contexts. Dr. Dianne Roulson, in her capacity as director of learning services for the Calgary Board of Education (CBE), routinely addresses diversity within Alberta schools. In addition to a CBE written policy allowing non-disruptive prayer, Dr. Roulson referenced that the CBE is committed to being a welcoming and inclusive place for students. In her view, the duty to accommodate is properly approached as a discussion that canvasses and considers the specific request and the resources available. Both Dr. Roulson and Principal Schneider did not perceive any economic impact associated with the prayer request in this circumstance. Principal Schneider relayed how his school identified a few areas within their campus where prayer could occur: an empty classroom, a wrestling area, and a maintenance area. With respect to these Students praying at Rundle College for two years, Principal Schneider testified:

… when the boys need to do such and do their prayer, then it's all very seamless and straightforward. It's without disruption. It's without conversation. It's really through good communication basically.

[112] Although another private school seamlessly accommodated prayer for these Students on their campus, Webber Academy asserts it could only offer reasonable accommodation to these Students on the following terms: they could pray off-campus, they could be given permission to miss school in order to drive to the Mosque to pray, or the Students could find a nearby neighbour who would allow them to pray at their house. The respondent submits the complainants failed in their responsibility to facilitate the search for reasonable accommodation, arguing that the Students sought perfect accommodation by being permitted prayer space on campus.

[113] The respondent's argument that the Students' demands interfered with Webber Academy's educational philosophy and use of resources and would create distractions to staff and other students was not established on the evidence. The respondent's own evidence is that they did not undertake a balancing assessment of whether allowing the Students to pray on campus would amount to a hardship for Webber Academy; rather, as Dr. Webber's testimony reflects, they relied on their "policy" and their "philosophy" to deny the Students permission to pray on campus. In cross examination, Dr. Webber was directly asked:

Q Dr. Webber, do you think Webber Academy would suffer any hardship if you were to allow a minority of your students to take a few minutes out of class every day to pray, out of sight, once or twice a day?

A I'm not sure what you mean by "hardship".

Q Well, would it be expensive or just too much of an inconvenience to allow that?

A Well, one certainly could consider the meanings of those things, but we have, as our policy -- you know, we could have or we could not have, and we chose not to do it, and -- so, we had that as a policy, and we didn't contemplate hardship aspects related to it. It was a matter of philosophy for not providing prayer space.

[114] In this circumstance, where the amount of space is little more than required by a person, and the location is neither fixed nor requiring special equipment, a response of "it is our philosophy not to provide prayer space" is not a justifiable reason for refusing to consider a request. There was undisputed evidence that four staff members of Webber Academy participated in facilitating the Students praying on Webber Academy campus for their first two and a half weeks of attendance. On this basis, we draw a reasonable inference that the request of the Students was in fact easily accommodated at Webber Academy.

[115] The evidence also showed the respondent accommodated religious headcoverings and facial hair. The respondent asserted that because prayer constituted an "activity," this justified a different approach. We see no distinction between a turban as a religious obligation or prayer as a religious obligation and we find no reasonable justification for treating these Students' religious prayer requests differently than a religious headcovering request. Webber Academy's express allowance of certain visual religious observances undermines its position that overt praying could not be accommodated.

[116] We accept Dr. Nazar's evidence that praying outside is “demeaning” and potentially “dangerous because you’re focusing on your prayer. You can get hurt, you know, and it’s cold outside.” We accept that it would generally be cold outside in Calgary winters, whether on or off Webber Academy campus.

[117] The crucial aspect of accepting a proposed accommodation or cooperating in the

accommodation process requires that the proposed arrangement be reasonable in all the circumstances. We do not agree that Webber Academy's proposals meet the threshold of reasonableness in all the circumstances in that Webber Academy:

- failed to acknowledge the minimal space taken to conduct the Students' prayers;
- failed to account for the minimal time the Students would take to pray on campus as opposed to the significant school time they would miss in order to pray at the Mosque;
- was inconsistent in stating that they would allow covert prayer, but that overt prayer was prohibited;
- was inconsistent in accommodating headcoverings and facial hair on campus for religious reasons, but outright refusing prayer on campus;
- did not take into account how demeaning and unsafe it was for two teenage boys to pray outside in the cold; and
- failed to acknowledge that the Students had indeed been accommodated in the first two and a half weeks on campus, without incident or interference in the educational services being offered.

[118] The Tribunal also notes the Parents' commitment to exploring solutions for an appropriate accommodation. In all of the circumstances, we find it was reasonable for the Parents to have rejected Webber Academy's proposals. As set out earlier in these reasons, *Grismer, supra,*[31] establishes that an imposed standard must be as inclusive as possible. The respondent's refusal to undertake a balancing analysis to at least ascertain whether there would be any undue hardship involved, together with its refusal to allow the Students to continue praying on campus beyond their first two and a half weeks of enrollment, further support our finding that the respondent's actions were not reasonable and justifiable. The 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.

Conclusion

[119] In light of all of the foregoing, we conclude that Webber Academy has not demonstrated that their rigid and unwritten "policy" of disallowing these Students to observe their sincerely held religious prayer practice on campus is reasonable and justifiable. The Supreme Court of Canada stated in *Meiorin*[32] and confirmed again in *Moore*[33] that alternative approaches to accommodation must be investigated. Webber Academy's response and refusal to seriously consider hardship aspects is in conflict with Webber Academy's obligation "... to show "that it could not have done anything else reasonable and practical to avoid the negative impact on the individual."[34] Despite the respondent's specifically stated goal of making people of all religious backgrounds feel welcome, its actions, objectively viewed, were not welcoming of these complainants. The respondent has not provided this Tribunal with sufficient evidence to establish it would be an undue hardship for Webber Academy to permit the Students to pray on campus during school hours.

[120] In conclusion, we find that Webber Academy's standard of no overt prayer or religious activities on school property was not reasonably necessary to accomplish Webber's purpose of maintaining a non-denominational identity that is free from religious influences, and that the Students could have been accommodated without incurring undue hardship.

[121] Accordingly, it is our finding that Webber Academy discriminated against the Students in contravention of section 4 of the Act and that the discrimination was not reasonable and justifiable either pursuant to section 11 of the Act or the *Meiorin* and *Grismer* analysis.

[122] We add a final note regarding school hours and prayer requirements. The respondent argued that for the majority of the year, there was no conflict whatsoever between Webber

Academy's school hours (defined by Webber Academy as 8:15 a.m. to 3:30 p.m.) and the Students' prayer obligations, given the shifting time requirements for prayer. There was not enough evidence to make a determination precisely when and what prayers would conflict with school hours or activities for any particular time frame. We would, however, not confine a duty to accommodate to the strict school hours of instruction stated by the respondent. As part of any accommodation process, parties are expected to address the time frames for prayer as they exist in the context of the request and the specific school activities. This might mean that accommodating a religious practice of prayer on campus is only required for certain months of the year, or in some situations several times per day if school activities require students to remain on campus.

VII. Human Rights Legislation and Supreme Court of Canada Jurisprudence

[123] Supreme Court of Canada jurisprudence formed the bedrock of legal application to the facts of this human rights complaint and the Tribunal's resulting analysis and conclusions. While drafting this decision, the Supreme Court of Canada issued *Loyola High School v. Quebec*.[35] The Tribunal reviewed the decision but did not rely on it in its analysis as it was interpreted as having confirmatory comments consistent with the analysis of this decision. In addition to the jurisprudence, we are cognizant of the Preamble to the Act, which sets out the governing fundamental principles of equality and dignity that are enshrined in the Alberta legislation. This includes a recognition that all Albertans are equal in regard to religious beliefs and we should all share in an awareness and appreciation of our diverse cultural composition in Alberta.

[124] The following Supreme Court of Canada decisions were central to our deliberations:

- the decisions of*, Multani, supra, Ross, supra* and *Chamberlain*, *supra* provided context and guidance in addressing the right to freedom of religion and the concomitant right to not be discriminated against because of religious beliefs;
- the decisions of *Berg, supra* and *Moore, supra* were relied on for our interpretation and application of the Act to the provision of services and facilities "customarily available to the public" in this education-based circumstance;
- the *Amselem*, *supra* decision informed our analysis of the religious beliefs in issue;
- the *Moore, supra* decision was relied on as establishing the requirements of *prima facie* discrimination;
- the decisions of *Meiorin, supra, Grismer, supra, Renaud, supra* and *O'Malley, supra,* all provided guidance in addressing the analysis for reasonable justification.

[125] On the significance and strength of these authorities, and for the reasons previously set out, we find the respondent has discriminated against the complainants and there is no justification present. We now turn to the appropriate remedy.

VIII. Remedy

Section 32 of the Act sets out:

32(1) A human rights tribunal
…

(b) may, if it finds that a complaint has merit in whole or in part, order the person against whom the finding was made to do any or all of the following:

(i) to cease the contravention complained of;

(ii) to refrain in the future from committing the same or any similar contravention;

(iii) to make available to the person dealt with contrary to this Act the rights, opportunities or privileges that person was denied contrary to this Act;

(iv) to compensate the person dealt with contrary to this Act for all or any part of any wages or income lost or expenses incurred by reason of the contravention of this Act;

(v) to take any other action the tribunal considers proper to place the person dealt with contrary to this Act in the position the person would have been in but for the contravention of this Act.

[126] The director sought compensation for general damages for the Students in an amount this Tribunal considers appropriate, as well as a direction that the respondent amend its policies and school materials to expressly allow for the accommodation of religious observance at Webber Academy. It also sought a letter of apology.

[127] The director submits the respondent's behaviour was uncaring. The director argues that forcing the Students (and their Parents) to leave the campus to pray, especially in Calgary winters, is a horrible insult to the Students, the Parents, and to their religious beliefs. Further, a school that demands its students go out into the winter weather to pray is a violation of dignity, a breach of the school's duty of care, and uncaring about what impact this exclusion may have on how a Student feels about his religion and the school's unwritten rule.

[128] The respondent submits its conduct was neither egregious or prolonged in nature and there were no serious personal consequences to the Students, therefore if an award of general damages is made, an amount of $2,500 to each Student would be appropriate.

[129] Several factors have been considered by the Tribunal in terms of general damages. First, as per our finding, these Parents and Students were given the impression by Webber Academy, in advance of enrollment, that something could be worked out regarding the Students' prayer requirements. Dr. Nazar testified that if she had known prayer would not be allowed, she would not have enrolled her son at Webber Academy as she would not put him through the upset of this experience. Beginning approximately three weeks after enrollment, and to the end of the school term, the Students were forbidden by Webber Academy from praying on campus, which caused significant upset. They could no longer openly ask for assistance from staff at Webber Academy as they had done their first few weeks of attendance. Mr. Siddique gave evidence that he and Mr. Amir, in seeking to fulfill their religious beliefs, would try and fulfill their obligations by finding a nook or cranny out of the way to pray, looking over their shoulder out of fear of being seen. At the time the parties' differences crystallized, it was early February and the Students were well into the school term, rendering yet another change of school impractical. In the result, the Students attended school at Webber Academy for several months, knowing they were not welcome to return the following year. The Students and the Parents testified they felt humiliated by this experience.

[130] Ms. Amir testified:

That we have been kicked out from Webber Academy and it was, like, a dream of the boys to go to a good school, and at that time when they applied, Webber was at the top of – one of the top-most schools in Calgary, and so they were happy. They were joyous. And it made us very sad when we were denied enrollment through those – that hardship, again, to find a good school for them.

[131] Mr. Amir felt like he had to choose between being a student at Webber Academy and praying. When asked if he would consider skipping a prayer to pursue his studies he responded,

Um, I do believe that I'm a Muslim, and I need to fulfill my duties, and my religion comes before my studies.

[132] Mr. Amir said "I shouldn't be made to go off campus just because I'm Muslim." He said that he felt like the administration staff would look away from him when they met in the hallway and not smile. It had a "psychological affect" however he did not seek counseling. He felt discouraged. When asked, "Did you sincerely believe that there would be any consequence to regularly missing prayers?" he answered, "Yeah, I believe that it's a sin."

[133] Dr. Nazar testified that Mr. Siddique began to complain that his stomach would ache on the way to school. He would be the last one off the bus and felt that he was dragging himself into school. Before that he had been a good student.

[134] Mr. Siddique testified:

This experience has, in general, it has just left a deep fear in my heart. Whenever I do want to pray on public grounds, I look over – I still look over my shoulder. I try to go to secluded place, and if somebody comes, sometimes I get really – I usually get really, really scared when somebody sees me praying. I didn't have this fear before I went to Webber. I was very, very committed to my principles and…

[135] The Alberta Court of Appeal in *Walsh v. Mobil Oil Canada,*[36] stated that in awarding damages, the effect of the discrimination upon the particular experience of the complainant is to be considered. The Alberta Court of Appeal also referenced *Arunachalam v. Best Buy Canada Ltd.,* [37] which proposed first characterizing the "nature of the discriminatory conduct" depending on how serious or prolonged the conduct was." In this case we are dealing with the treatment of children in an educational setting where significant time is spent. These Students were unable to freely pursue their religious beliefs on Webber Academy campus for the winter term of 2012. For several months, they experienced the humiliation or shame of being told they would not be welcome back. For Mr. Siddique, his prayer was interrupted in the library and both Students, in fulfilling their religious beliefs, were required to pray in hiding or periodically brave Calgary winters. In awarding compensation we focus on the experience of these Students and the impact it had on them. We accept that Mr. Siddique found the interruption of his prayer in the library very distressing and we also accept that it reasonably led to a "fear" that persisted. We also accept that Mr. Amir was deeply affected and upset by his experience.

[136] Taking all of these circumstances into account, we award Mr. Amir $12,000 and Mr. Siddique $14,000 for damages for distress, injury and loss of dignity. Mr. Siddique's award is slightly higher to compensate for the persistent fear which he developed. The Students will receive interest on the general damages in accordance with the rates set out in the *Judgment Interest Act*[38] from February 13, 2012.

[137] We decline to order a letter of apology. We further decline to make a direction that the respondent make express provision for religious observance. This decision makes the obligations

of the respondent clear.

IX. Decision

[138] For all of the foregoing reasons we find there is merit to the complaint, the respondent breached section 4 (a) and (b) of the Act and damages are awarded as previously set out.

April 10, 2015

Sharon Lindgren-Hewlett, B. Comm., LL.B.
Tribunal Chair

William J. Johnson, Q.C.
Tribunal Member

Melissa L. Luhtanen, J.D.
Tribunal Member

Appearances

Ms. Farhat Amir on behalf of Mr. Sarmad Amir, Complainant

Dr. Shabnam Nazar on behalf of Mr. Naman Siddique, Complainant

Mr. Jim Foster, Legal Counsel
for the Director of the Alberta Human Rights Commission

Mr. Thomas Ross, Legal Counsel
for the Respondent Webber Academy Foundation

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[1] *Alberta Human Rights Act,* R.S.A. 2000, c.A-25.5

[2] *School Act*, RSA 2000, c S-3

[3] *University of British Columbia v. Berg, 1993 CanLII 89 (SCC), [1993] 2 SCR 353; 18 C.H.R.R. D/310 (S.C.C.)* at p 20

[4] *Berg* at p 21

[5] *Berg, supra* at p 22-23

[6] *Berg, supra* at p 25-26

[7] *Gay Alliance Toward Equality v. Vancouver Sun* 1979 CanLII 225 (SCC), [1979] 2 S.C.R. 435

[8] *Moore v. British Columbia (Ministry of Education)* 2012 SCC 61 (CanLII), [2012] 3 SCR 360

[9] *Syndicate Northcrest v. Amselem* [2004] 2 SCR 551, 2004 SCC 47 (CanLII)

[10] *Amselem* at paras 42, 43, 54, 65, 69

[11] *Kelly v. B.C. (Ministry of Public Safety and Solicitor General) (No. 3),* 2011 BCHRT 183 (CanLII)

[12] *Armstrong v. British Columbia (Ministry of* Health), 2010 BCCA

[13] *Moore, supra* at para 25

[14] *Moore, supra* at para 33

[15] *Moore, supra* at para 36

[16] As *Ontario Human Rights Commission v. Simpsons-Sears Ltd.* 1985 CanLII 18 (SCC), [1985] 2 SCR 536;7 C.H.R.R. D/3102 *(O'Malley)*

[17] *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, 1999 CanLII 652 (SCC), [1999] 3 S.C.R. 3[35 C.H.R.R. D/257]

[18] *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights),* 1999 CanLII 646 (SCC),

[1999] 3 SCR 868

[19] *Grismer* at paras 20-22

[20] *Grismer, supra* at para 28

[21] *Central Okanagan School District No. 23 v. Renaud, (Renaud*) 1992 CanLII 81 (SCC), [1992] 2 SCR 970 at para 30

[22] *Chamberlain v. Surrey School District No. 36,* 2002 SCC 86 (CanLII)

[23] *Chamberlain* at para 19

[24] *Multani v.Commission Scolaire Marguerie-Bourgeoys,* 2006 SCC 6 (CanLII), [2006] 1 SCR 256 at para 32

[25] *Ross v. New Brunswick School District No 15,* 1996 CanLII 237 (SCC) at para 42

[26] *Multani, supra* at paras 78-79

[27] *Singh v. Royal Canadian Legion, Jasper Place (Alta.) Branch No. 255* (1990) 11 C.H.R.R. D/357

[28] *Renaud, supra* at para 19

[29] *Renaud, supra,* at paras 43-44

[30] *O'Malley, supra* at para 23

[31] *Grismer, supra* at para 22

[32] *Meiorin, supra,* at para 65

[33] *Moore, supra*

[34] initially stated in *Meiorin, supra,* at para 38 and confirmed in *Moore, supra* at para 49

[35] *Loyola High School v. Quebec*. Attorney General 2015 SCC 12 (CanLII)

[36] *Walsh v. Mobil Oil Canada* 2013 ABCA 238 (CanLII) at paras 59 and 60

[37] *Arunachalam v. Best Buy Canada Ltd.* 2010 HRTO

[38] *Judgment Interest Act,* J-1 RSA 2000

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