



Justice Centre for Constitutional Freedoms

August 19, 2019

Via Facsimile: (780) 422-3563

Alberta Human Rights Commission
800 - 10405 Jasper Ave NW
Edmonton, AB TSJ 4R7

Attn: Office of the Director of the Commission

Dear Sir or Madam:

**Re: *Cyrynowski v. [REDACTED]*; Complaint #: N2019/05/0064
Request for Director to Dismiss the Complaint**

We write on behalf of Todd [REDACTED], respondent in the above-described complaint. On July 21, 2019, Mr. [REDACTED] received a registered letter dated June 13, 2019 from the Alberta Human Rights Commission providing a copy of the complaint by James Cyrynowski (the “Complainant”) dated September 1, 2017 (the “Complaint”).

Pursuant to section 22(1)(a) of the *Alberta Human Rights Act*, Mr. [REDACTED] requests that the Director dismiss the Complaint on the basis that it is without merit, for the reasons set out in *Cyrynowski v Alberta (Human Rights Commission)*, 2017 ABQB 745, and on the basis that proceeding with the Complaint would violate the *Charter* rights of Mr. [REDACTED] and his children.

Context of the Complaint

Mr. [REDACTED] is a single father with two sons, who were ages 5 and 8 in August 2017. On August 31, 2017, Mr. [REDACTED] posted an ad on Kijiji for a babysitter, because he was planning on meeting a friend for dinner on September 1, 2017. The ad stated: “Babysitter wanted for evening Friday Sept 1 and other evenings.”

Shortly after the ad was posted, the Complainant responded to the ad stating:

Hi, I have CPR, first aid, clean criminal record check, own car, and an early child development certificate. I have 7 years of experience taking care of kids. I charge \$13 per hour except on Saturday and Tuesday evenings. On those two days I charge \$18 per hour.

Mr. [REDACTED], who lives 14 kilometers southeast of [REDACTED], wrote back asking the Complainant some basic preliminary questions:

Hi
Can you tell me what town you live in and your age and if your male or female?
Sorry for all the questions.
Thank you
Todd [REDACTED]

The Complainant replied stating: “Hi, I live in Edmonton. I’m male and 28 years old.”

After receiving the Complainant’s response, however, Mr. [REDACTED] dinner plans with his friend for the next day fell through, and Mr. [REDACTED] no longer needed a babysitter. Consequently, Mr. [REDACTED] did not further respond to the Complaint, who was only one of numerous individual who responded to his ad.

The Complainant did not make any attempt to follow up with Mr. [REDACTED]. Rather, the very next day, September 1, 2017, the Complainant filed the Complaint against Mr. [REDACTED], alleging a discrimination on the basis of age and gender in violation of section 8 of the *Alberta Human Rights Act* (“*AHRA*”).

Previous dismissal of similar complaint

Evidently, Mr. [REDACTED] is one of many parents who did not hire the Complainant as a babysitter and were subsequently subject to a human rights complaint from Complainant.¹

One such complaint has already been completely adjudicated all the way to the Supreme Court of Canada as a test case.² That complaint, against Ms. Christina [REDACTED] a mother of a five year old boy, was originally dismissed by the Director on the basis that an advertisement for a babysitter was a “private relationship between the parties and not an employment relationship falling within the scope of the *AHRA*”, and alternatively that the “refusal to hire (or interview) the Applicant was based on a *bona fide* occupational requirement (BFOR), and that parents must have final say in who babysits their children.”³

The Chief Commissioner affirmed the Director’s dismissal of that complaint on the second basis, agreeing that the parent’s “preference for who looks after her child in her own home is a BFOR.”⁴

On judicial review, Justice Pentelchuk then at the Alberta Court of Queen’s Bench affirmed the Chief Commissioner’s decision dismissing the complaint as reasonable, and also noted that such a complaint entrenched on parental autonomy:

[70] The issues raised in this application highlight the tension between human rights legislation and the autonomy to make decisions about personal care provided in one’s own home. The Director was alert to the possibility of human rights

¹ See *Cyrynowski v Alberta (Human Rights Commission)*, 2017 ABQB 745 [*Cyrynowski*] at paras 1, 5.

² See *Ibid* at para 1-2.

³ *Ibid* at para 9.

⁴ *Ibid* at para 11.

legislation inappropriately entrenching into “one of the most revered relationships recognized in society and law.”

The Complainant attempted unsuccessfully to appeal the dismissal of his complaint to the Alberta Court of Appeal, and was also denied an application for leave to appeal to the Supreme Court of Canada on May 23, 2019.

Despite the final dismissal of the Complainant’s complaint in the test case, the Commission has accepted the Complainant’s very similar Complaint against Mr. [REDACTED]

Request for a Director’s Referral to dismiss the Complaint

As described above, the Chief Commissioner has previously held that a parent’s “*preference as to who looks after her young child in her home, should be accorded utmost deference and is a bona fide occupational requirement.*”⁵ On judicial review, that holding was upheld as reasonable by the Court of Queen’s Bench, with Justice Pentelechuk specifically noting that bona fide occupational requirements are often expressly defined to permit discrimination for the purpose of “fostering or maintaining a desired environment within the residence”.⁶ She further held:

In effect, while the Alberta legislation does not provide exemption for employers in private homes, it is not unreasonable for the Chief Commissioner to have made the inference that similar qualification by a private home employer in Alberta could amount to a *bona fide* occupational requirement, given that some provincial legislatures have expressly declared that such qualification or discrimination constitutes a BFOR.⁷

Thwarting parents from even inquiring about a babysitter’s gender or age is inconsistent with giving “utmost deference” to parents’ preferences concerning a babysitter for their children. It is also inconsistent with the fact that both gender and age may each be *bona fide* occupational requirements in this context. For the reasons stated in the *Cyrynowski* case, this Complaint should be dismissed.

The AHRA must comply with the Canadian Charter of Rights and Freedoms

The Alberta Human Rights Commission should apply the *AHRA* in a manner that is consistent with the rights and freedoms protected under the *Charter*. This is an established and essential principle of administrative law.⁸ Further, where there is ambiguity in the interpretation of the *AHRA*, the Commission should prefer an interpretation that promotes *Charter* principles over an interpretation that does not.⁹

⁵ *Cyrynowski* at para 52 [emphasis added by Court].

⁶ *Cyrynowski* at para 55.

⁷ *Cyrynowski* at para 56.

⁸ See *Doré v. Barreau du Québec*, 2012 SCC 12.

⁹ See *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, at para 62.

It appears that these principles were not brought to bear in the *Cyrynowski* case. Specifically, there is no indication that these principles were utilized in the Chief Commissioner's interpretation of the *AHRA* referenced in the *Cyrynowski* case. However, Justice Pentelechuk did note that "[t]he Director was alert to the possibility of human rights legislation inappropriately entrenching into 'one of the most revered relationships recognized in society and law.'"¹⁰

The relationship between parents and their children is indeed "one of the most revered relationships recognized in society and law." It is constitutionally protected under section 7 of the *Charter*, as explained by the Supreme Court of Canada in *B. (R.) v. Children's Aid Society of Metropolitan Toronto*:

In recent years, courts have expressed some reluctance to interfere with parental rights, and state intervention has been tolerated only when necessity was demonstrated. This only serves to confirm that the parental interest in bringing up, nurturing and caring for a child, including medical care and moral upbringing, is an individual interest of fundamental importance to our society.

...

While acknowledging that parents bear responsibilities towards their children, it seems to me that they must enjoy correlative rights to exercise them. The contrary view would not recognize the fundamental importance of choice and personal autonomy in our society. As already stated, **the common law has always, in the absence of demonstrated neglect or unsuitability, presumed that parents should make all significant choices affecting their children, and has afforded them a general liberty to do as they choose. ... [O]ur society is far from having repudiated the privileged role parents exercise in the upbringing of their children. This role translates into a protected sphere of parental decision-making which is rooted in the presumption that parents should make important decisions affecting their children** both because parents are more likely to appreciate the best interests of their children and because the state is ill-equipped to make such decisions itself. Moreover, individuals have a deep personal interest as parents in fostering the growth of their own children. This is not to say that the state cannot intervene when it considers it necessary to safeguard the child's autonomy or health. But such intervention must be justified. In other words, **parental decision-making must receive the protection of the *Charter*** in order for state interference to be properly monitored by the courts, and be permitted only when it conforms to the values underlying the *Charter*.¹¹

It is contrary to the *Charter*'s protection for parental responsibility and liberty to impose the obligations of the *AHRA*, particularly section 8, on parents as they make personal or intimate decisions about their own children and the care of their own children. To prohibit parents from asking such basic questions as potential babysitters' age and sex prevents parents from fulfilling their obligation to responsibly make decisions concerning the care of their own vulnerable children.

¹⁰ *Cyrynowski* at para 70.

¹¹ *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 SCR 315, 371-72.

An expansive interpretation of the *AHRA* would also impair the right of children to receive their parents' protection. This protection depends on parents having relevant and accurate information, and the right to ask for such information. Importantly, the constitutional rights of children, including their security of the person protected under section 7 of the *Charter*, are protected by permitting their parents to make inquiries and receive relevant information. In *C.P.L., Re*, 1988 CanLII 5490 (NL SC), the court addressed the situation of a young child receiving medical treatment and made the following important findings:

The right that an infant child has, which is important to this case, is a right to be cared for by its parents. This is a right which I find is a right enshrined in the *Charter* under section 7. The right to security of the person. This is a right which a person is not to be deprived of except in accordance with principles of fundamental justice. The right of the state or the Crown to interfere with the right of security of the person can only be exercised if it is in accordance with the principles of fundamental justice.

...

When Baby C.P.L. was born, he immediately had the right to the protection of his parents. That includes the right to have them make all the decisions for him with respect to his health and well-being. It was his right and his parents' obligation. **Baby C.P.L. had that right to parental care, including the making of decisions on his behalf with respect to his well-being.**

...

The child was apprehended. Apprehension is similar to arrest. It is the taking control of the physical person. When a person is apprehended he is denied his right to liberty and security. When he is subjected to medical or surgical treatment without his consent his security is violated. Surgery without consent is a battery. **I am satisfied that Baby C.P.L. was deprived of his right to liberty and security of the person.**

...

I believe that Baby C.P.L. had the right to be informed through his parents of this apprehension and detention and the reasons therefor. They were his natural and legal guardians and they are the appropriate persons to speak for him. I find that the failure of the Director to advise the parents of the detention and the reasons therefor is a violation of the child's right.

...

The procedure for the apprehension and consent to treatment by the Director under the *Child Welfare Act* deny the rights granted to children by section 7 of the *Charter*. ... Almost secretly the Director was contacted, consent obtained and the operation performed. This effectively kept the parents out of the picture. In this case it was not what was actually done but how it was done, which was the denial of the child's rights. As I have already stated the medical treatment for the child was appropriate and performed in an expert manner. **The child was still**

denied his right to be informed through his parents. I find the apprehension and detention of C.P.L. was not in accordance with fundamental principles of justice.¹²

One of Canada's fundamental freedoms is the freedom of expression, guaranteed under section 2(b) of the *Charter*. To prohibit a parent from inquiring about a potential babysitter's gender or age is a direct impairment of that freedom.

There is no justification for prohibiting parents from asking basic and relevant questions of persons interested in babysitting their children. There is no legal right to babysit another's children. Further, parents' decisions as to who will babysit their children is an intensely personal and private matter. Interference in that matter from the Human Rights Commission cannot be justified in a free and democratic society.

It is appropriate to utilize the *Charter* to interpret the *AHRA* in this case, because there is ambiguity within the *AHRA* as to whether a parent's choice of babysitter for their own children is an "employment" decision subject to the *AHRA* or a "personal decision" not subject to the *AHRA*. In *Cyrnowski*, Justice Pentelechuk specifically noted "the possibility of multiple, reasonable interpretations".¹³

The Commission should utilize the *Charter* as an interpretative guide and find parents' decisions concerning who will babysit their own children are not "employment" decisions subject to the *AHRA*. Such an interpretation is necessary to respect the constitutional rights of parents and children, who are protected by allowing their parents' to make informed decisions for their care. Applying section 8 of the *AHRA* to requests for personal services in a private home, such as babysitting, violates the *Charter* rights of parents and their children.

Conclusion

We request that the Director dismiss the Complaint for the reasons set out in *Cyrnowski*, and on account of the constitutional rights of Mr. [REDACTED] and his children that would be violated by proceeding with the Complaint.

Yours truly,



Marty Moore
Justice Centre for Constitutional Freedoms
Counsel for the Respondent

Enclosures

¹² *C.P.L., Re*, 1988 CanLII 5490 (NL SC) at paras 77, 78, 80, 97.

¹³ *Cyrnowski* at para 72.

Reply to your "Babysitter wanted for evening Friday Sept 1 and other evenings." Ad on Kijiji

James <[REDACTED]>

Thu 31/08/2017 3:05 PM

To: [REDACTED]

Hello! The following is a reply to your "Babysitter wanted for evening Friday Sept 1 and other evenings." Ad on Kijiji:

From: James

Hi, I have CPR, first aid, clean criminal record check, own car, and an early child development certificate. I have 7 years of experience taking care of kids. I charge \$13 per hour except on Saturday and Tuesday evenings. On those two days I charge \$18 per hour.

You can respond to "James" by replying to this email.

Other options:

- Want more replies? [Promote your ad](#) through My Kijiji
- Ad no longer relevant? [Delete your ad](#) from the original Manage My Ads email or from Kijiji.

Important Kijiji Safety Notice:

- Take steps to make your Kijiji transactions as secure as possible by following our suggested safety tips. [Read our Safety Tips.](#)
- Never click links in an email that ask you to sign in to Kijiji. All "Your Kijiji account has expired" emails are fakes.
- PayPal transactions made through the Kijiji app qualify for PayPal's Seller Protection. Kijiji, Ebay and Paypal do not offer buyer protection for Kijiji items. [See terms.](#)

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Please note that we now automatically mask email addresses of buyers and sellers on non-commercial ads. For your safety, we recommend you only use the masked email address when replying to emails. To learn more, [click here.](#)

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Re: Reply to your "Babysitter wanted for evening Friday Sept 1 and other evenings." Ad on Kijiji

T t

Thu 31/08/2017 3:15 PM

To: James [Redacted]

Hi

Can you tell me what town you live in and your age and if your male or female? Sorry for all the questions.

Thank you

Todd [Redacted]

Get [Outlook for Android](#)

From: James [Redacted]

Sent: Thursday, August 31, 2017 3:05:06 PM

To: [Redacted]

Subject: Reply to your "Babysitter wanted for evening Friday Sept 1 and other evenings." Ad on Kijiji

Hello! The following is a reply to your "[Babysitter wanted for evening Friday Sept 1 and other evenings.](#)" Ad on Kijiji:

From: James

Hi, I have CPR, first aid, clean criminal record check, own car, and an early child development certificate. I have 7 years of experience taking care of kids. I charge \$13 per hour except on Saturday and Tuesday evenings. On those two days I charge \$18 per hour.

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▼ Inbox 1568

██████████ 1520

🗑️ Junk Email 18

✍️ Drafts 50

▼ Sent Items

🕒 Scheduled

🗑️ Deleted Items

📁 Archive

Conversation Hist...

Notes

test

New folder

Re: Reply to your "Babysitter wanted for evening Friday Sept 1 and other evenings." Ad on Kijiji

James ██████████
Thu 31/08/2017 3:22 PM

↩ ⏪ ⏩ ...

Hello! The following is a reply to your conversation regarding "Babysitter wanted for evening Friday, Sept 1 and other evenings." on Kijiji:

From: James
Hi, I live in Edmonton. I'm male and 28 years old.

You can respond to "James" by replying to this email.

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