Justice Centre
for Constitutional Freedoms

August 28, 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 #: N2019/06/0096***
Request for Director to Dismiss the Complaint

We have been retained by Danielle [redacted] respondent in the above-described complaint. Ms. [redacted] received a registered letter dated June 17, 2019 from the Alberta Human Rights Commission providing a copy of the complaint by James Cyrynowski (the "Complainant") dated April 30, 2019 (the "Complaint").

Pursuant to section 22(1)(a) of the *Alberta Human Rights Act*, Ms. [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 constitutional rights of Ms. [redacted] and her children as protected by the *Canadian Charter of Rights and Freedoms*.

Context of the Complaint

Ms. [redacted] is a mother to three children, ages 2, 8 and 11 at the relevant time. On or around February 2, 2019, Ms. [redacted] posted an ad on Kijiji looking for a reliable caregiver for her children from 5:45 a.m. until 7 a.m. when the children needed to be dropped off at daycare. Ms. [redacted] needed the caregiver as she has to leave for work early in the mornings.

On February 6, 2019, the Complainant responded to the ad by text stating:

> Hi, this is James. I saw your posting on Kijiji. I have an early child development certificate, own car, and a criminal record check. I have 9 years of experience taking care of kids as young as a year old.

Ms. [redacted] responded with a basic question she deemed relevant to, but not conclusive of, the Complainant's interest in babysitting her children: "Do you have any children?"

The Complainant replied stating: "Not yet. [redacted]"

Ms. [redacted]'s text conversation with the Complainant continued, as she responded: "I'm sorry to hear that. Are you currently employed? Are you able to give me references?"

The Complainant then responded stating that he was self-employed and providing several references.

Ms. [redacted] replied "Thank you."

The Complainant was only one of numerous people who contacted Ms. [redacted] in response to the ad. Ms. [redacted] was able to identify a person located in her neighbourhood that she believed to be ideal to babysit her children. It was therefore unnecessary for her to follow up with the individuals, including the Complainant, who had contacted her expressing interest in babysitting her children.

The Complainant did not make any attempt to follow up with Ms. [redacted]. Rather, on April 30, 2019, the Complainant made the Complaint against Ms. [redacted] alleging discrimination on the basis of family status in violation of section 8 of the *Alberta Human Rights Act* ("*AHRA*"). In his Complaint, the Complainant stated:

> I applied for a caregiver job on Kijiji. I was asked if I have children. I do not. I did not get the job.

On June 6, 2019, the Commission accepted the Complaint. On June 17, 2019, the Commission sent Ms. [redacted] a letter requiring her to provide a detailed response to the Complaint. On June 21, 2019, Ms. [redacted] provided her written response to the Complaint, explaining that she had hired a person who lived in her neighbourhood and worked right next to her children's daycare.

Previous dismissal of similar complaint

Ms. [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. [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]

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[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.

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 Pentelechuk, then of the Court of Queen's Bench of Alberta, 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 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 Ms. [redacted].

Request for 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 making even basic inquiries about a babysitter, including about whether they have children themselves, is inconsistent with giving "utmost deference" to parents' preferences concerning a babysitter for their children. It is also inconsistent with the fact that parents' preferences as to who should babysit their children are *bona fide* occupational

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[4] Ibid at para 11.
[5] *Cyrynowski* at para 52 [emphasis added by Court].
[6] *Cyrynowski* at para 55.
[7] *Cyrynowski* at para 56.

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 is required to adopt an interpretation that accords with *Charter* values over an interpretation that does not.[9]

It appears that these values 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 in the *Cyrynowski* case that the *AHRA* applied to a parent's choice in hiring a babysitter. 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**.
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> ...
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> 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

[8] See *Doré v. Barreau du Québec*, 2012 SCC 12.
[9] See *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, at para 62.
[10] *Cyrynowski* at para 70.

> 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] [emphasis added]

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

An overly broad 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.
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> ...
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> 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.**
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> ...
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> **I am satisfied that Baby C.P.L. was deprived of his right to liberty and security of the person.**
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> ...
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> 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

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

> failure of the Director to advise the parents of the detention and the reasons therefor is a violation of the child's right.
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> ...
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> **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 personal experience of being a parent 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 necessary 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 *Cyrynowski*, 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 when their parents are permitted 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 or parents and their children.

Conclusion

We request that the Director dismiss the Complaint for the reasons set out in *Cyrynowski*, and on account of the constitutional rights of Ms. [redacted] and her children that would be unjustifiably infringed by proceeding with the Complaint.

Yours truly,

Per:

Marty Moore
Justice Centre for Constitutional Freedoms
Counsel for the Respondent

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[12] *C.P.L., Re,* 1988 CanLII 5490 (NL SC) at paras 77, 78, 80, 97.
[13] *Cyrynowski* at para 72.