Justice Centre
for Constitutional Freedoms

December 28, 2020

Michael Gottheil
Chief of the Commission and Tribunals
Alberta Human Rights Commission
7th Floor, Commerce Place, 10155-102 Street
Edmonton, Alberta T5J 4L4

Attn: Office of the Chief of the Commission

Dear Chief Gottheil:

Re: James Cyrynowski v. Danielle [redacted] Complaint N2019/06/0096 (the "Complaint")
Dismissal of Request for Review

Pursuant to section 9(2) *Alberta Human Rights Commission Bylaws*, the Respondent requests that the you dismiss the Complainant's request for review of the November 20, 2020 decision of the Director dismissing the Complaint (the "Decision"), as being without merit on the following bases:

- the reasons stated in the Investigation Memo and endorsed by the Northern Director;
- the reasons stated in the Director's Decision;
- the reasons set out in *Cyrynowski v Alberta (Human Rights Commission),* 2017 ABQB 745; and,
- that proceeding with the Complaint would violate the constitutional rights of Ms. [redacted] and her children protected by the *Canadian Charter of Rights and Freedoms*.

Brief facts of the Complaint

The Respondent, Danielle [redacted], is a mother to three children, ages 2, 8 and 11.

On or around February 2, 2019, the Respondent 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.

On February 6, 2019, the Complainant responded to the ad by text. The Respondent replied 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. My girlfriend had 3 miscarriages."

The Respondent then further inquired about him current employment status and if he was able to give references. The Complainant then responded stating that he was self-employed and providing several references.

The Complainant was only one of numerous people who contacted the Respondent in response to the ad. The Respondent 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 the Respondent.

On April 30, 2019, the Complainant made the Complaint against the Respondent, alleging discrimination on the basis of family status in violation of section 8 of the *Alberta Human Rights Act* ("*AHRA*").

On June 6, 2019, the Commission accepted the Complaint.

On June 17, 2019, the Commission sent the Respondent a letter requiring her to provide a detailed response to the Complaint.

On June 21, 2019, the Respondent 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.

The Complaint was investigated, and an Investigation Memo was prepared. Northern Director Diane Addy reviewed the Investigation Memo, and on September 26, 2019, issued a letter agreeing with its recommendation that there is no reasonable basis to proceed with the Complaint.

Decision of the Director

In coming to the Decision that the Complaint is meritless, the Director categorically took note of the fact that there is no evidence to support that the Complainant's claim that he was denied the opportunity to babysit the Respondent's children on the basis of any protected ground. Pertinently, the Director in Paragraph 5 of the Decision stated:

> There is no evidence to support that you were unsuccessful in the application process for any protected ground. Your speculation as to why you were not successful is not a foundation for a meritorious complaint under the Act. Given that the position required a part-time experienced caregiver for three young children in a private home, the personal preference for a caregiver, including experience with children, can be justified as a bona fide occupational requirement under the Act. In these circumstances, I see no reasonable basis for this matter to proceed to the next step in the complaint process. For the above reasons, my conclusion is that the complaint is without merit and this complaint is therefore dismissed.

Complainant's request for review

The Complainant has requested that you review the Complaint, claiming that the Director erred by not seeing the evidence in the application and that the Director did not take note of the three-part

test analysis as formulated in the *British Columbia (Public Service Employee Relations Commission) v. B.C.G.S.E.U.(Meiorin)* [1999] 3 S.C.R Judgement.

The Commission provided the Complainant's request to counsel for the Respondent via a letter dated December 3, 2020.

Bases upon which to dismiss the Complainant's request for review

The Respondent is one of many parents who have chosen not to have the Complainant babysit their children 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 Stadler, 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 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 impinged on parental autonomy:

> 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."[5]

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.

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.*"[6] In the *Cyrynowski* judicial review, that holding was upheld as reasonable by the Court, with Justice Pentelechuk specifically noting that bona fide occupational

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[1] See *Cyrynowski v Alberta (Human Rights Commission)*, 2017 ABQB 745 [*Cyrynowski*] at paras 1, 5.
[2] See *Cyrynowski* at para 1-2.
[3] *Cyrynowski* at para 9.
[4] *Cyrynowski* at para 11.
[5] *Cyrynowski* at para 70.
[6] *Cyrynowski* at para 52 [emphasis added by Court].

requirements are often expressly defined to permit discrimination for the purpose of "fostering or maintaining a desired environment within the residence".[7] 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.[8]

The submission of the Complainant with respect to the Director not conducting the three part test analysis as held in the *British Columbia (Public Service Employee Relations Commission) v BCGSEU*, [1999] 3 SCR 3 [*Meiorin*] is also inconsistent with the fact that parents' preferences as to who should babysit their children are *bona fide* occupational requirements in this context. For the reasons stated in the *Cyrynowski* case, this Complaint's request for review of the Decision is devoid of merit and legally flawed and should be prima facie dismissed.

Moreover, it is well established that the Director under section 22, and you under section 26(3), play a screening or gatekeeping function. The question they must ask is whether there is a "reasonable basis in the evidence for proceeding to the next stage."[9] In so doing, they are to apply their own experience and common sense in evaluating the information in the investigator's report. The threshold assessment of merit is low and the gatekeeper is given wide latitude.[10] The Decision of the Director must be given deference and will be upheld if there is no reasonable basis in evidence for proceeding to the next stage.

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

The Alberta Human Rights Commission must 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.[11] 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.[12]

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.'"[13]

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[7] *Cyrynowski* at para 55.
[8] *Cyrynowski* at para 56.
[9] *Mis v Alberta Human Rights Commission*, 2001 ABCA 212 at para 8
[10] Mis v Alberta Human Rights Commission, 2001 ABCA 212 at para 9
[11] See *Doré v. Barreau du Québec*, 2012 SCC 12.
[12] See *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, at para 62.
[13] *Cyrynowski* at para 70.

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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> …
>
> 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*.[14] [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 their 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

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

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.**
> …
> **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 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.[15]

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 may be appropriate to utilize the *Charter* to interpret the *AHRA* in this case, because there appeas to be some 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

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

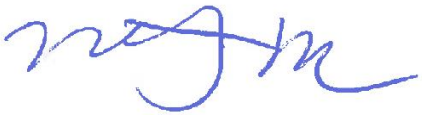
the *AHRA*. In *Cyrynowski*, Justice Pentelechuk specifically noted "the possibility of multiple, reasonable interpretations".[16]

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

For the reasons mentioned herein above, we request that you dismiss the Complainant's request for review.

Yours truly,



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[16] *Cyrynowski* at para 72.