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***VIA* EMAIL**

BC Human Rights Tribunal
1270 – 605 Robson Street
Vancouver, BC V6B 5J3

Attention: **Devyn Cousineau, Tribunal Member**
Robin Dean, Tribunal Member
Laila Said-Alam, Tribunal Member

Dear Panel Members:

RE: **BCTF obo CTA v Barry Neufeld, BCHRT Case No. CS-001372—BC Human Rights Commission's Proposed Opinion Evidence**

This submission responds to the BC Human Rights Commission's effort to enter opinion evidence in the absence of an expert witness, as well as its single argument for doing so. The Commission relies on Sarah Blake's *Administrative Law in Canada*, 7th ed (LexisNexis Canada, 2022) at §2.14, citing no particular pinpoint.

The starting point is that the Tribunal's expertise is in discrimination. The Commission's assertion that the Tribunal may take notice of "the formation, effect and rhetorical work" of moral panic "given its specialized knowledge in assessing claims under s. 7 of the *Code*" is a bait-and-switch, and moreover, a self-defeating argument. The Tribunal's expertise in assessing discrimination claims would lend it no particular expertise in assessing moral panic, and its presumed lack of expertise in this social science subject area would admit of need for expert guidance by way of an expert witness. On the other hand, had the Tribunal specialized expertise in the area of moral panic, it would not require a surfeit of material on the subject in order to divine the presence or absence thereof.

Moving to the administrative law textbook on which the Commission relies for its proposition, Ms. Blake's remarks alternate between truisms and circumstances that bear little resemblance to this particular matter. Beginning with the second paragraph, it is unclear what "lay people…not schooled in the rules of evidence" to which Ms. Blake refers, but certainly her characterization does not apply to this panel, the legal acumen of its members combining to bring practical experience in eight distinct areas of the law to their present appointment.

That a panel of this particular proficiency should require 23 articles exploring the topic of moral panic in order to reach a conclusion as to whether discrimination has occurred seems improbable. Accepting such a superfluous volume of unqualified opinion material would stray far outside the central purpose of the inquiry—a practice Ms. Blake would seem to discourage: "As the most important evidence is that which concerns the key facts on which the decision will turn, the key factual issues should be identified so as to avoid straying too far from the central purpose of the inquiry".

Ms. Blake continues to the effect that the purpose of admitting evidence is "to keep the hearing focused on the matters to be decided". Indeed, the Tribunal should have regard to "[t]he purpose and subject matter of the proceeding described in the notice of hearing or in a statement of the allegations". This seems uncontroversial. It is also the reason the Respondent objects to the admission of 450 pages of gratuitous scholarship focused on moral panic, let alone in the absence of an expert witness who might be cross-examined on its contents.

The administrative law text on which the Commission relies does not make the case the Commission claims. The following summarizes the text's thrust:

- While "[a] tribunal may use its own expertise to assess whether to accept or reject [an] opinion", there is no reason to believe such an opinion is to be admitted without an expert in tow;

- While "[a] tribunal may take notice of commonly accepted facts and generally recognized facts **within** its specialized knowledge", there is no reason to believe a tribunal may take notice of "facts" **outside** its specialized knowledge;

- Even where "[a] tribunal may take notice of commonly accepted facts and generally recognized facts within its specialized knowledge…a tribunal should not rely on its ability to take notice of common facts as the basis of its finding on an important disputed fact";

- While "[e]xpertise may assist a tribunal in drawing inferences from primary facts…the expertise of the tribunal should not be the basis of an essential finding of fact upon which a decision turns".

While the Morgan Criteria of the *R v Find*[1] epoch—facts so **notorious** or generally accepted as not to be the subject of debate among reasonable persons or facts capable of immediate and accurate demonstration by resort to readily accessible sources of **indisputable** accuracy—are no longer the single standard for "judicial" notice in all circumstances, they continue to apply strictly where such "facts" are positioned proximate to the issue in dispute and its disposition.[2] The Commission's statement, "These outline the formation, effect and rhetorical work of moral panics, including discussion of the claim that gender affirming care or support is child abuse" admits of such proximity; accordingly, the Morgan Criteria would apply to oust judicial notice of the social facts in question, which are obviously in dispute and upon which reasonable people are wont to disagree. Such facts, even social facts, would need to be proven.

The Tribunal can tell whether or not there is discrimination quite apart from whether or not moral panic occurred. Put another way, the point of the exercise is not to assess whether moral panic happened, rather whether discrimination happened. Since there is no reason to believe "moral panic" is either sufficient or necessary for the occurrence of discrimination, the Tribunal cannot be assisted by opinion on the topic, with or without an expert. Moreover, attempting to foist the accusation of moral panic on the Respondent crosses the line between finding fact and projecting a caricature.

[1] 2001 SCC 32.
[2] See *Basic v Esquimalt Denture Clinic Ltd*, 2020 BCHRT 138; see also *R v Spence*, 2005 SCC 71.

The Respondent therefore opposes the admission of the Commission's proposed opinion evidence.

In the event the Tribunal rules the Commission's proposed social fact evidence admissible, the Respondent will enter a not insubstantial amount of social fact evidence to counter the materials proposed by the Commission. The admission of such a prodigious quantity of written opinion evidence absent an expert would compel the Respondent to enter an equal volume of scholarship defeating the proposition. "Social 'facts'" are, after all, in the eye of the beholder.

Regards,

James SM Kitchen
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Counsel for Barry Neufeld