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**Monday 9 February 2009**

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des débats  
(Hansard)**

**Lundi 9 février 2009**

**Standing Committee on  
Government Agencies**

Agency review:

Human Rights Tribunal  
of Ontario

**Comité permanent des  
organismes gouvernementaux**

Examen des organismes  
gouvernementaux :

Tribunal des droits  
de la personne  
de l'Ontario

Chair: Julia Munro  
Clerk: Douglas Arnott

Présidente : Julia Munro  
Greffier : Douglas Arnott

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LEGISLATIVE ASSEMBLY OF ONTARIO

ASSEMBLÉE LÉGISLATIVE DE L'ONTARIO

## STANDING COMMITTEE ON GOVERNMENT AGENCIES

## COMITÉ PERMANENT DES ORGANISMES GOUVERNEMENTAUX

Monday 9 February 2009

Lundi 9 février 2009

*The committee met at 0930 in room 151, following a closed session.*

### AGENCY REVIEW

#### HUMAN RIGHTS TRIBUNAL OF ONTARIO

**The Chair (Mrs. Julia Munro):** Good morning, everyone, and welcome to the Standing Committee on Government Agencies. This morning we are reviewing the Human Rights Tribunal of Ontario. Our first order of business will be to hear the presentation.

Mr. Gottheil, I am pleased to be able to welcome you here to the standing committee. I'd ask you, for the purposes of Hansard, to introduce yourself and those who accompany you, and then you may begin. As you know, you have five minutes in which to make a presentation. Then we will divide the remaining time amongst the caucuses for questioning in specific rounds.

**Mr. Michael Gottheil:** Thank you very much and thank you for inviting us here to report this morning on the business of the Human Rights Tribunal of Ontario. I have asked Mr. David Draper, on my left, who's the executive director of the tribunal, to join me this morning; as well, Ms. Fanella Hodge, who's directly to my right, the manager of business services for the tribunal; and also Ms. Reema Khawja, who's one of our counsels, to be here today and, if need be, provide some information that they're more familiar with.

As I said, I'm pleased to be here today to report on the business of the tribunal. We've submitted our questionnaire as requested by the committee, along with attachments. We've also included a report that provides some initial statistical information on our caseload and operations for the current fiscal year and, in particular, since June 30.

As you know, the tribunal recently went through a significant transformation. On June 30, 2008, the Human Rights Code Amendment Act came into force. The tribunal is now responsible for receiving and resolving all claims of discrimination brought under the Human Rights Code. In the six months ending December 2008, we received approximately 1,050 new applications and 940 transitional or opt-out applications, in which individuals chose to transfer their commission complaints to the tribunal. Traditionally, the tribunal received only about 150 complaints each year, all of which were matters referred by the Human Rights Commission. We were, until re-

cently, a fairly small tribunal: between about three full-time adjudicators, six to eight part-time adjudicators and about eight staff. The amendment to the legislation has effected a fundamental realignment of responsibilities in relation to the enforcement and resolution of claims filed under the code. This means that the tribunal had to expand significantly in staff and operations. We now have about 50 staff, 22 full-time adjudicators and about 22 part-time adjudicators.

It has also meant that the way individual claims of discrimination are dealt with and resolved is quite different. The tribunal, as a quasi-judicial adjudicative body, is mandated by statute to deal with applications filed by individuals fairly, expeditiously and on the merits of the application. The code requires that, for all applications that are within the tribunal's jurisdiction, we must provide the parties with the right to be heard orally before finally disposing of the matter and we must provide written reasons when finally determining an application.

Our process provides the parties to the dispute an opportunity to engage in mediation. Mediation is entirely voluntary. Our role in mediation is to facilitate the parties' interests and efforts to reach a settlement where they freely choose to do so. Where the parties do not choose mediation or when mediation does not result in a settlement, the matter will be scheduled for a hearing.

The tribunal has a robust triage and case management component which allows the tribunal to hear from the parties and assess what procedures will best ensure a fair and expeditious resolution of the application. This may include, for example, determining whether there are significant issues which need to be decided at a preliminary stage, the number of witnesses, or the length of the hearing that is required to fairly decide the dispute. The approach ensures that both the tribunal's and the parties' resources are focused on the most effective manner in which to reach a fair outcome based on the facts and the law.

So where are we? We currently have three streams of cases, and I'll talk a bit more about them if you choose to ask me some questions. We have the new applications, which are applications filed under sections 34 and 35, which are commission-initiated applications. As I said earlier, as of December 31, we had 1,051, and by the end of January we had close to 1,270 new applications. In addition, we are responsible for transitional applications. These are applications by individuals who had or have

complaints outstanding at the commission. Individuals were able to transfer their complaints to the tribunal beginning June 30, and have until June 30, 2009, if they wish the matters to be dealt with.

**The Chair (Mrs. Julia Munro):** I'm sorry; you have exhausted the five minutes. We'll begin, then, with our questions. To the government, Mr. Zimmer.

**Mr. David Zimmer:** The tribunal has been up and running formally since June 30, 2008. That's about seven months. I appreciate that that's a partial year of a very important year, a start-up year, when you're getting all the pieces in place and are developing the practices, the model, and staffing and so on. I realize that not having the full year under your belt, there are no first-year formal statistics and all of that information that would normally follow and will in the future follow at the end of every year, but can you give us a sense, as the chair, of how things are working out these first seven months? What has the experience of the tribunal been during this seven-month set-up period?

**Mr. Michael Gottheil:** Well, as I was going to get to, and I appreciate that I ran out of time, the tribunal deals with three separate streams of cases, which makes our task challenging, but one that we meet.

The first is new applications that are filed under the legislation directly by individuals. As I said, we had at the end of January about 1,268 of those. We had issued, I think, about 250 decisions out of that stream, most of them interim decisions. About 60 of them either finally dealt with the matters or deferred the application. We have a process where we defer applications in which the matter is being dealt with in another forum—for example, a grievance arbitration—in order to avoid duplicative litigation. We held about 200 mediations and resolved over 105 applications.

**0940**

We also deal with a transitional stream. As I was mentioning, these are cases in which individuals had complaints outstanding at the commission that had not been dealt with by the commission. Individuals have the right, between June 30, 2008, and June 30, 2009, to transfer those applications to the tribunal if they want them dealt with. As of December 31, we had over 940 of those. Again, we held a number of mediations and hearings to resolve those.

Also, we have what was traditionally our work at the tribunal, which is commission-referred complaints. As of December 31, there were about 750 of those matters. When I say "commission-referred complaints," these are not the transition cases that are transferred by individuals, but cases that the commission had investigated and decided to refer for a hearing to the tribunal. We had about 750 open complaints. In reality, because there were a number of complaints that were grouped, there are about 275 cases before us. We continue to hold mediations and hearings in those.

So when you ask how we're doing, I think we're doing pretty well. As you mentioned, it's early days, but the initial feedback we're getting from the community,

the people who actually use the tribunal, who appear and file applications, come to mediations, hearings and so forth, seems to be positive. I appreciate that the feedback at this point is anecdotal, but nonetheless we've had extremely positive feedback. People feel that the tribunal is professional, responsive and fair, and that our decisions are understandable, readable and seem to make sense. So we're cautiously optimistic and pleased.

**Mr. David Zimmer:** My next question is—and again, I appreciate that you've only got seven months under your belt; you have the set-up pains and all of that sort of stuff. Are you in a position, after seven months, to get some sense of what your early challenges will be in achieving the mandate of the tribunal and to have some thought about plans to meet those challenges, as you've been able to develop them for seven months?

**Mr. Michael Gottheil:** I would say that the thing we're always keeping an eye on at this early stage is the volume. Of course, under the old system, the commission had the responsibility of receiving inquiries and claims and so forth. It was a very different system.

As I mentioned in my opening, the new system doesn't move the responsibility of the commission to the tribunal as much as it realigns the responsibilities. There is the legal support centre that takes inquiries and provides initial advice to assist people. People can file on their own. We see that there seems to be a fairly high volume of people who have filed applications on their own, not having representation, which in some ways we see as a good thing; it indicates that our process is accessible. Of course, as we move through the system, we will see how the volumes play out.

The other challenge, of course, will be the transitional cases. There is a high volume of transitional cases, and again, we don't really know at this point the numbers that will eventually transfer over from the commission.

**Mr. David Zimmer:** I want to read to you from a letter that I have from Mary Cornish. As you know, she's one of Canada's and one of Ontario's leading human rights lawyers. It's a letter addressed to the clerk of this committee, Mr. Arnott. I just want to quote from the letter and then ask you a couple of questions about the quote.

She says, at the second paragraph of the letter, "The tribunal was given a very difficult and complex task by the Legislature with the passage of Bill 107. It had to transform its procedures in order to take on a vastly increased mandate and workload, from about 100 to 150 complaints annually to an estimated 3,000 applications. It had to create a customer-service-oriented administrative justice tribunal. Despite significant resource constraints, the tribunal has thus far executed this task successfully with vision, innovation, skill and diplomacy. It should be recognized for its achievement in reorienting its mandate and services towards implementing the promise of human rights justice called for in Bill 107."

She refers to the challenges of creating a consumer-service-oriented tribunal, the consumers being, of course, the people of Ontario. Can you comment, aside from the

legal issues involved in the work of human rights, on what sorts of things you are emphasizing to achieve this consumer-service-oriented administrative tribunal? That may be an appropriate question for the administrative side, for your CEO, but I'll leave that to you—

**Mr. Michael Gottheil:** I would say at the outset that our core values and mandate certainly are focused on recognizing that our role, under the statute, is to resolve applications that are brought before us. The values that I and the senior staff try to instill throughout the organization are to be consumer-focused, to recognize that our role is to provide and facilitate the resolution of disputes—that's essentially what human rights complaints are, disputes—that are put before us in a fair, just and expeditious way.

On the service side, if I can call it that, certainly our staff—I know Ms. Cornish wrote the letter; it's really about our staff. To a person, I can report to this committee that they exhibit the highest standards of integrity and public service, and they should be commended, in the first seven months, as it really has been a trying time. But everyone is focused on that mandate, which is to resolve the disputes that are put before us.

Again, the focus is to understand that these are disputes between parties and they're put before us, and we need to resolve them in a fair, equitable and timely way. The other thing is, we've tried very hard, in the development of both our procedures, but also the materials that explain—our forms, our guides—to make those accessible and understandable, in plain language. Again, it's very much focused on the consumers, the public. As opposed to what we need, it's what the community of users needs to effectively participate in the system.

**Mr. David Zimmer:** Just following up on that, Ms. Cornish, in her letter on page 2, the penultimate paragraph, says, "In carrying out its mandate, the tribunal carefully balanced four important goals." I'm just going to read to you how she's described each of the four goals, and perhaps you can comment on your approach to each of those goals.

The first goal was "ensuring a participative and responsive implementation process"; the second goal, "preserving the tribunal's independence and neutrality as a quasi-judicial administrative body"; the third goal, "expeditiously implementing administratively the reforms to meet the legislative time frame"; and last, "ensuring the new process would be user-friendly, accessible and deliver human rights justice."

Can you just take a minute and comment on each of those goals?

**Mr. Michael Gottheil:** With respect to the first one, which is the consultative process, almost immediately following the introduction of the legislation in the spring of 2006, we got out into the community. We set up meetings and discussions and listened to a broad range of interests and groups and individuals in the community: members of the bar who practise human rights law, both on the complainant and the respondent side; the Ontario Bar Association; we spoke with experts in the adminis-

trative justice community; we spoke to and listened to individuals and organizations that advocate or represent people who most often deal with the code; and other tribunals across Canada. In addition to that, we set up a number of meetings across the province to deal with both general and specific aspects of the new process, whether it was accessibility or mediation processes and so forth. The ministry had set up a number of public forums across the province in which we participated, along with the Human Rights Commission and the legal support centre.

**0950**

So it was almost an 18-month process that we went through. Our focus was user-friendly, our focus was for the public, so it was very useful to be able to listen to that. Once that was done, we incorporated that and developed draft rules which we then submitted and posted on our website and sent to over 500 people who had participated in all of those activities over 18 months, got feedback on those, and eventually came up with our rules.

I have to say it was enjoyable for me, in a sense, to be able to get out there. It was a real opportunity. That consultation not only helped us and informed our rules and procedures, but it continues to inform how we do our work. When we have meetings and talk about challenges that we face, we think back to—and I tend to remind the staff—what we heard from the community, because we want to have that as our focus.

With respect to independence, that's pretty basic. The tribunal is a quasi-judicial agency. Our role, like a court, is to decide disputes based on the facts and the law. Obviously we need to, again for the public's sake, make sure that our role is integrated and in some sense seamless with the other agencies in the human rights system, those being the commission and the legal support centre, so we work with the ministry on some of that. But ultimately, how we set up our processes and the decisions on any particular case—we're quite conscious and protective, if you will, of our independence.

Expeditioness: I'm not sure whether Ms. Cornish is saying that we were expeditious in how we developed our process. We had certain timelines we had to reach, and the government, of course, set the proclamation date and we worked toward that. Again, we felt that timeliness of resolution of any legal disputes is fundamental to access to justice, to fairness.

Finally, when we talk about being user-friendly, and I think I spoke about that already, we continue to want to be responsive. We're in the process of setting up a stakeholder advisory committee of users, so we're moving forward on that. I continue to go out into the community and speak to law firms and organizations, community groups. I've been up to the north and so forth. It's all part of an ongoing process of development.

**Mr. David Zimmer:** So with that under way in the first seven months of the tribunal, can you gaze into the crystal ball and get some sense of how you expect the remaining five months to unfold before you've then finished your first year?

**Mr. Michael Gottheil:** Not really. I'm not sure that would be particularly useful. We obviously are keeping our eye on things like statistics, feedback and comments, but we have another five months, and then we have another year, and then there are another 10 years. This is, as I say, an ongoing process. Of course, we always keep an eye on not only the numbers but the kinds of complaints that we get, whether they're mostly employment-, disability- or race-related, and whether we get a lot of more complex cases, or are they mostly, as we've found in the past, fairly straightforward cases, which of course will inform how we spend our resources and how we focus our processes.

**The Chair (Mrs. Julia Munro):** Time is of the essence—

**Mr. David Zimmer:** Thank you, Chair.

**The Chair (Mrs. Julia Munro):** And so we must move on. Ms. MacLeod.

**Ms. Lisa MacLeod:** I'll be splitting my time with our Attorney General critic in the official opposition, Christine Elliott, the MPP for Whitby–Oshawa.

Good morning and welcome, Mr. Gottheil. I understand you're also from the city of Ottawa, so I'm very happy to have you here today. The parliamentary assistant for the Attorney General, who is also responsible for the tribunal, made a great case for having you come back in five months' time to talk to us about an entire year's worth of work. I think I'd like to call you up on that. I think he made an excellent case of justification to have you appear before this committee again.

I just have a couple of quick questions before I defer to my colleague, who certainly has more experience in this. It does indicate, though, in our legislative report that you do not provide any information on your website concerning the disposition of the complaints referred to it by the commissioner, and the tribunal also no longer posts decisions on its website. Could you provide us with an explanation?

**Mr. Michael Gottheil:** I'm not sure I understand the first part of your question. On the second part of the question, all our decisions are publicly available. What we did—and many tribunals have done this—is, rather than create our own database of decisions, we submit decisions to CanLII, which is a cross-Canada reporter service where there's a much greater ability for users to search. So all our decisions are publicly available, are posted. On our website there is a link that says “Decisions,” and if you click on that link, rather than going to an internal database, it simply refers you to the CanLII database, in which you can enter the case name or search by subject. So, in fact, our decisions are publicly available.

**Ms. Lisa MacLeod:** Okay. I appreciate that—

**Mr. Michael Gottheil:** On the first one, I'm not sure I understand the question.

**Ms. Lisa MacLeod:** Let me expand on it. I think that we all know that with the new system in place here with the human rights sector here in Ontario, you've accepted cases, whether they are transition cases from the Ontario

Human Rights Commission, in some cases where the Ontario Human Rights Commission was able to continue on with its work, and I'm wondering if any of that information has been made available to you. I understand that as of December 31, 2008, the commission no longer has that ability, but I'm wondering if you can shed any light on the cases that remained with the commission, and if you can shed any more light on the transition cases that you've received.

**Mr. Michael Gottheil:** You're quite right. There are two streams with respect to cases that originated, if you will, at the commission. So there are transition cases. The transition cases are cases in which individuals who had filed complaints at the commission but the commission had not dealt with—so either investigated and decided not to refer, dismissed or that weren't settled at the commission level, or that weren't referred to the tribunal or that weren't withdrawn, so they were outstanding at the commission. Starting on June 30, 2008, and running until June 30, 2009, the legislation says to those people, “You have that one-year window in which to transfer your case to the tribunal if you want it dealt with.” As I said, as of December 31, we had received 940 of those cases, and I don't have the exact commission statistics as to how many on December 31 remained in their inventory. I understand it's in the neighbourhood of 2,000, but I don't have that specific statistic for you.

**1000**

**Ms. Lisa MacLeod:** So given your new mandate, and the relatively expansive size of your office today compared to what it was last year, I think it would be fair to this committee to sort of look into the Ontario Human Rights Commission's application of those current cases. And I'm wondering if you think it would be a benefit for us. I know that Chief Commissioner Barbara Hall has actually submitted a letter to us, but do you think it would be relevant for this committee to actually speak to her about those outstanding cases that were left with the ORC—I want to say “ORC” because we have the Ontario Racing Commission here tomorrow—the Ontario Human Rights Commission so that we may get a bigger picture? There has been some concern, and I know my colleague will speak to this a little later on, about the backlog just being shuffled from one office to another. That was a big concern that, as you'll recall, the official opposition raised during the committee hearings of Bill 107. I wonder if you think it would be relevant.

I know that in your questionnaire you have highlighted that, and I will quote, if I can find the relevant place here, that “the following are agencies who have formal responsibility in matters dealt with by the tribunal, the Ontario Rights Commission and the Ontario Human Rights Legal Support Centre.” I'm wondering if you think it would be relevant for us to have both Raj Anand and Barbara Hall in here to highlight that, perhaps with you coming back after you've heard the dispositions today.

**Mr. Michael Gottheil:** I wouldn't be so presumptuous as to tell this committee what is important or what

they should be looking into. Your role, and I respect it entirely, is to review from time to time boards, agencies and tribunals and their work, and no doubt there are a variety of considerations which play into which of those agencies you look at and at what time period. I would say, just in response to your question, that at this point—again, I said my understanding is that there are roughly 2,000 cases, complaints, still at the commission; the commission no longer has any jurisdiction under the legislation to deal with those. So they're sitting there.

**Ms. Lisa MacLeod:** Yes. I just think maybe the question I should have asked is, do you think we, as legislators, can effectively review the Human Rights Tribunal of Ontario without reviewing the other two agencies?

**Mr. Michael Gottheil:** Yes, I think you can. Our role is—we have a business role, in a sense, right? Yes, we have a role within the system, but our role, and this ties back to the question earlier about the independence, is very specific, in a sense, and that is that we resolve applications that are put before us. We have a process and we have a business plan and we have rules and we deal with the parties. We don't involve ourselves in policy questions that, for example, the commission might engage in, or considerations of how to deliver legal services at the legal support centre. Those are legitimate discussions that individuals may have and they may be legitimate for you to look into. But in terms of reviewing our mandate and our business, if you're asking me questions about how we're dealing with our responsibilities under the legislation, I can answer those questions.

**Ms. Lisa MacLeod:** Okay. Thank you, Mr. Gottheil. I'll now defer to my colleague.

**Mr. Michael Gottheil:** Thank you.

**The Chair (Mrs. Julia Munro):** Ms. Elliott.

**Mrs. Christine Elliott:** Thank you, Mr. Gottheil. I do appreciate your being here today to speak to us about the tribunal. I do have five broad categories of questions I would like to ask you. Perhaps if I'm not able, within the time that we have allowed in the first round of questioning, I can get to them in the second round.

The first area relates again to the backlog, as my colleague Ms. MacLeod was indicating. If I'm correct in the numbers, currently you have on your caseload a little over 2,000 cases, of all things combined—2,200, something in that area? Is that correct?

**Mr. Michael Gottheil:** Sorry. We have 940, and I think there were another 80, so just over 1,000 already at the tribunal. Again, I heard about this statistic; I have not received an official report from the commission, but my understanding of it is somewhere around 2,000 that are still at the commission for hearing.

**Mrs. Christine Elliott:** Two thousand. So potentially there could be close to 4,000 cases—

**Mr. Michael Gottheil:** Three thousand.

**Mrs. Christine Elliott:** Three thousand. Okay. Do you have a specific plan in order to deal with that so that you don't end up with your new cases being further backed up while you're dealing with the old cases, or how are you administratively dealing with that?

**Mr. Michael Gottheil:** We absolutely have a plan, because we recognize, as you quite rightly point out, that there could be a risk in the new system, and also evaluating whether the new system actually is working and whether our processes that we've designed for the new system are working. So what we had done in our development process, if you will, is to set up a separate string to deal with the backlog cases. There are separate rules of procedure for those, because of course those cases are different. They were filed with the commission; they may have gone through an investigation or not; the parties may have engaged in mediation or not; so they're really at a different stage and are a different kind of complaint. So we had different rules of procedure.

Secondly, the legislation, for the cases that came over between June 30 and December 31, specifically mandated us to create rules that were expeditious. All our processes are expeditious, but the legislation said "expeditious" for those cases. So we had a highly expeditious process for those cases.

The other thing that we've done is we've dedicated resources—administrative and adjudicative resources—specifically to that project. That includes an administrative team; as well, we've dedicated four full-time adjudicators to that stream and a number of the part-time adjudicators are dedicated to that stream. We're tracking that stream of cases separately to be able to report and assess—to track that, because we appreciate, as you point out, that it's a very difficult challenge.

**Mrs. Christine Elliott:** Thank you. One of the assumptions to the success of the new system was that approximately 80% of the complaints filed would come through the legal support centre. Are you finding that that's the case?

**Mr. Michael Gottheil:** No. I know Mr. Draper has that statistic. Was it 20%?

**Mr. David Draper:** It's more in the order of 20%. We talk to the legal support centre, so there is some sense that the way they're doing their business is that they are assisting people to complete applications but they are not filing them. We suspect—and we don't have the answer; this is an example of something that someone else might be able to tell you that we can't—that a number of the applications—hundreds of them, probably—are cases that the legal support centre has had an involvement in, but they don't appear in our system as counsel. But the number we're seeing as counsel is more like 20%.

**Mrs. Christine Elliott:** So that could potentially be a problem, then, could it not, as you move forward?

**Mr. Michael Gottheil:** I guess I would ask, a problem in what sense?

**Mrs. Christine Elliott:** One of the things that we discussed extensively during the Bill 107 hearings was the fact that—and it was stated by many government members that everyone who needed it would have full legal representation through the legal support centre. Yet it would seem that if only 20% are coming through the legal support centre as counsel, and full legal represen-

tation was indicated during those hearings, that is not fulfilling its mandate in that respect.

**Mr. Michael Gottheil:** Again, it's not really my role or our role at the tribunal to comment or to even engage in the discussion about Bill 107 or those kinds of things. I can say, from the point of view of an agency that works in the tribunal, that works in the justice sector, that provides a legal process for resolving legal disputes, the issue of self-represented litigants is one that the courts and other agencies deal with all the time.

**1010**

I think there's an understanding that some people choose to be self-represented. I was speaking to our registrar the other day when we saw these statistics about the self-represented individuals. He said that he speaks to people and they say, "Well, don't tell me to go see the legal support centre. I don't want to; I don't want representation." So there are some people who choose, for whatever reason, to be self-represented.

I think more importantly from our perspective, what we want to make sure of—and why somebody might be self-represented is not really our business. What we need to make sure of is access to the system, that the hearing is fair and outcomes are just and are timely, regardless of whether somebody is represented or not.

The way I always looked at it is that if the legal system is entirely dependent upon whether somebody is represented and who the lawyer is, we've got a problem, because the outcome should be based on the facts and the law. That's not to suggest, of course, for people like yourself who have worked in the legal system, that there aren't complaints and applications and disputes, both in human rights and more generally, that are complex. Proper representation by people who have subject area expertise—because it's not just if you're a lawyer; subject is critical. But what we've found at the tribunal and what I've found over the past close to four years that I've been the chair and in my practice 20 years before that, is that there is a range of types of disputes. There is a range of parties; there is a range of circumstances. I don't think it's accurate necessarily to say that in every single case, somebody needs to be represented or the outcome will not be fair and just and timely.

**Mrs. Christine Elliott:** But wouldn't it be important to know whether people would have liked to have a lawyer and couldn't get a lawyer, rather than, "We think maybe some people just choose not to be represented"?

**Mr. David Zimmer:** On a point of order, Chair, and I spoke to this earlier in our session: There are three entities in the human rights, and they're all quite separate. There's the Ontario Human Rights Commission, there's the Ontario Human Rights Tribunal, and then there's the legal support centre. This committee has chosen to look into the work of the tribunal. As Mr. Gottheil has in my view rightly indicated, the work and practices and policies and all of that stuff having to do with the commission are quite a separate matter, as the work, policies and practices of the legal support centre are quite distinct entities. We're dealing with the tribunal

here, and I think we should limit our questions, examination and comments to the tribunal rather than the other two bodies that are not before this committee.

**The Chair (Mrs. Julia Munro):** Thank you very much. We have only a moment left. I'm just going to let Mrs. Elliott finish the question that she has, and then we'll move on.

**Mrs. Christine Elliott:** Madam Chair, if I could, before I go on, though, respectfully submit that the status of persons appearing before the tribunal, whether they are represented or not and whether they wish to have representation, is one of the key elements with respect to the operation of the tribunal. I would submit that these questions are relevant.

Just following on the same line, with respect to the applications that people file before the tribunal, have you had any problems with people who are self-represented with respect to procedural problems with application filing?

**Mr. Michael Gottheil:** I appreciate the questions, the concerns and the considerations about self-represented litigants. As I say, legal courts and tribunals generally are confronted with these issues. As I said before, I think there's a consensus in the legal community, the courts and the justice system that it's a more complex, multi-dimensional question, and the answers are more complex than simply saying, "Well, let's make sure everyone has a lawyer." That doesn't necessarily achieve access.

You asked about the application process. I can say that we're quite proud—and it's early days, but at that level we're actually quite pleased to see that all of the work we did on a plain language, plain design application form—we did a lot of work on that, trying to draw out information—seems to have worked. As we've said, I think that about 60% of the applicants who have filed applications are self-represented. We have a process by which, when somebody files an application, we review it for completeness. If it's not complete, we will send it back with instructions about the missing information. Through that process, there have only been about 35 cases that remain so incomplete and unclear that we cannot serve them on the respondents and deal with them in an informed way. So at least at that level, I'm happy to report the process seems to be working well equally for represented and self-represented people.

**The Chair (Mrs. Julia Munro):** Thank you. We must move on. Ms. DiNovo.

**Ms. Cheri DiNovo:** Thank you for appearing before us. I want to pick up on some of the points Mrs. Elliott made first and foremost by quoting the former Attorney General, Michael Bryant, at the first reading of Bill 107. He said, "We would ensure that, regardless of levels of income, abilities, disabilities or personal circumstances, all Ontarians would be entitled to share in receiving equal and effective protection of human rights, and all will receive that full legal representation."

So, clearly Michael Bryant at the time felt it was critical that all could at least have access to equal legal representation. On that point, the question of self-rep-

resentation versus legal representation, I would buy into perhaps some of what you've said if it's equal on both sides; in other words, if respondent and complainant both were self-represented. So I'd like to know, for example—I'm going to break it down because I'd like the actual numbers here—of the complainants who filed complaints with the Human Rights Commission under the old code and then opted between June 30, 2008, and December 31, 2008, to transfer their cases directly to the tribunal, in how many cases was the complainant not represented by a lawyer, as contrasted with the respondent?

**Mr. Michael Gottheil:** I don't have that information. I would say that representation may occur in a number of ways, so it's not just by a lawyer. There are paralegals who appear before us who are licensed by the law society and who actually have expertise in human rights, there are other individuals who may represent applicants, but I don't have those statistics for you.

**Ms. Cheri DiNovo:** But would you say that—obviously, if a respondent has a lawyer or a paralegal and a complainant does not, then one might be a little concerned about the quality of the representation before you.

**Mr. Michael Gottheil:** Again, I apologize. First of all, I don't have statistics for the 53(3) transition cases, the percentage of representation amongst applicants. Nor do we have statistics with respect to the level of representation amongst respondents. In fact, we find—I don't want to say many or a lot or a little, because I don't have the statistics, but there are cases, and it's not the rare case, where respondents are self-represented.

**1020**

But to your question, that I can answer, which is the tribunal process, do I think there is an unfairness simply because in a case, one or the other side is represented or self-represented? I don't think so. That's not to say that in every case there wouldn't be an unfairness, or in any particular case there wouldn't be an unfairness. As I said before when I was speaking to Mrs. Elliott's question, there are complex cases that come before the Human Rights Tribunal, complex factually or legally. But what we find is that most of the cases that come before us are not particularly complex, factually or legally; they're straightforward.

The other thing I should say—and this is where I'm speaking more about the tribunal and the work that we've done to ensure that our process is accessible, that hearings are fair and outcomes are based on the facts and the law, regardless of whether people are represented or not. We've done a lot of work on that. That includes our application forms, as I was saying before, but it also deals with adjudicator competencies. We have done a lot of work, both in the recruiting process and the training process, at mediations and at hearings, to sensitize and to train adjudicators and mediators to be able to deal with self-represented people—

**Ms. Cheri DiNovo:** So you would disagree with Michael Bryant's comment, then.

**Mr. Michael Gottheil:** I don't know what—

**Ms. Cheri DiNovo:** I read it at the beginning. He said that all Ontarians should be entitled to share in receiving

equal and effective protection of human rights, and that means they will receive full legal representation if they so desire.

**Mr. Michael Gottheil:** If I understand Mr. Bryant, he was speaking to a different part of the system, which was the—

**Ms. Cheri DiNovo:** He was speaking to Bill 107.

**Mr. Michael Gottheil:** I understand, but he was speaking to a different part of the system. If I understand your question and what he was saying, he was speaking to that part of the system that relates to access to representation. I'm speaking to the tribunal, which is—you asked me a question about fairness of outcomes, so I'm speaking about a different thing.

**Ms. Cheri DiNovo:** Yes. I think he implied—

**Mr. David Zimmer:** On a point of order, Chair: We're back to the earlier point that I made, that there are three entities in the human rights world. There is the Human Rights Commission, stand-alone; the Human Rights Tribunal, stand-alone; and the legal support centre, stand-alone. This committee is dealing with the tribunal, and those are the issues to which Mr. Gottheil is speaking. We should direct our questions to the work of the tribunal, not the work of the centre or the commission.

**The Chair (Mrs. Julia Munro):** Thank you. I'm going to allow the question to continue.

**Ms. Cheri DiNovo:** And if I could have some time—

**The Chair (Mrs. Julia Munro):** If I think that you've strayed, I will certainly follow up.

**Ms. Cheri DiNovo:** Absolutely, because we're speaking about the fairness of the tribunal, and this speaks to the fairness of the tribunal.

On another note just for a moment, I introduced a bill, supported by Égale and the Trans Health collective, to add the words "gender identity" to the Ontario Human Rights Code. That bill was supported by Barbara Hall in the pages of the Toronto Star and since followed up with a letter. I would ask, would you support that as well, that "gender identity" be added to the Ontario Human Rights Code?

**Mr. Michael Gottheil:** It's really not appropriate for the chair of a tribunal or a judge or the Chief Justice or anyone who has an adjudicative or quasi-judicial position to comment on policy choices that the government or the Legislature may make. So it's not appropriate for me to answer that.

**Ms. Cheri DiNovo:** Okay. Barbara did, and I honour her for it.

To get on to the applications that are filed electronically, we've heard that there are some problems with the case management software that have been causing problems for you at the tribunal. Can you describe what kinds of problems the software has caused?

**Mr. Michael Gottheil:** I'll let Mr. Draper answer. As with any start-up, and for anyone who has been familiar not only with a start-up, but, more particularly, a fairly complex case management system which needs to be customized for the particular processes of the tribunal,

there's always work to be done to customize, but we're working on that. I'll let Mr. Draper speak to some of the particular challenges.

**Mr. David Draper:** Sure. I'm happy to. We did identify that as a problem in our materials and it has been a problem for us. The task of setting up the tribunal was—although there was lead time on the consultation, the implementation of some of this stuff seemed very tight. The case management system was being designed on a tribunal whose processes were being developed, and that's a tall task.

I think part of the issue was that the case management system was intended to do quite a bit. With the advantage of hindsight, perhaps we should have been a little more modest in what the case management system was intended to do. That said, we are continuing to work with the vendor of the case management system to improve its functionality, the areas that are not as functional as we had hoped and expected—we've developed workarounds. The cost of the workaround is that it takes more staff time. It's more paper-intensive; we're more paper-intensive than we expected to be. Some of the steps of the process are more time-consuming.

The electronic filing that you've raised specifically is relatively straightforward. The system was meant to get the information electronically directly into our database. Instead, that's now a two-step process. We receive the information electronically and then we upload it into our system. It is somewhat more time-consuming but that piece of it is not a dramatic problem.

**Ms. Cheri DiNovo:** So in dealing with the effectiveness, because one of the reasons for the shift with Bill 107 was backlog, can you realistically say that you're not going to be facing a backlog with those kinds of software programs right out of the gate?

**Mr. David Draper:** Well, it doesn't help, and I'll go back to Michael's answer, which is that we're watching the numbers carefully. I mean, backlog obviously is a big concern for us, and I'm sure for you as well. We're tracking those numbers and trying to project ahead about how we're doing.

It's early days. We are working through the first round, if you will. We're working through the mediations and we're just getting to the hearings. Administratively, we're keeping up. Adjudicatively, we're watching how those numbers are looking. Clearly it's a concern that we not get ourselves into backlog.

**The Chair (Mrs. Julia Munro):** All right. Thank you. Yes—

**Mr. Lorenzo Berardinetti:** Thank you. Good morning to all the members present today from the Ontario Human Rights Tribunal. My question is a very simple one. I was reading through some of the information here and listening, as well, to your presentation and your answers to questions. I want to ask about the workload, and the workload of the tribunal looking into the future. I know right now you're still dealing with transitional applications and commission-referred complaints, but six months or a year from now, how do you see your work-

load as being: the same as it is now, increasing or decreasing, or would it be, "I don't really know"?

**Mr. Michael Gottheil:** Certainly, for example, taking the commission-referred case stream—I mentioned that there were 750 complaints; really there are 275 cases—I've actually assigned one of my more senior adjudicators to look at that and manage and track that. These are cases that the commission referred, that the commission has carriage on. There are a number of those cases that are pending settlement, for example, so I think that number is lower. We will not get any more cases in that stream.

I am waiting for a report later this week from Ms. Reaume, who is one of our vice-chairs that I assigned to take a look at that, on estimates of how long it may take to finish those cases. I'm hoping that we can get them done within a year.

### 1030

Part of that obviously depends on the resources we have, though I'm firmly committed to putting the resources in to get those cases done. But part of it will depend on the nature of the cases. Some of those commission cases are highly complex cases, and the parties themselves may wish—and the nature of the cases may require—longer hearings than, for example, many cases in the new stream. We're going to set a time frame and try to work towards that time frame.

Likewise, in the backlog cases—what we call the backlog cases; in a sense, we don't have a backlog at the tribunal at this point. When I say "backlog," really the more appropriate term is transitional cases, cases that were outstanding at the commission. Again, much depends on how many of those cases come over. Yes, there are potentially 3,000, but there may be less. We know that many of those cases were very old. In some cases, the individuals may no longer wish to pursue the application for a variety of reasons. As of June 30, we'll be better able to assess where we're at with the number of those cases and better able to report to the ministry about the resources required and the expected time to finish and deal with those cases. Certainly, once that caseload is done, then what we will have is just cases in the new stream. Again, it's early days to know what our annual caseload will be there.

**Mr. Lorenzo Berardinetti:** Just, again, roughly estimate—maybe you don't know the answers, but would it be perhaps around the same as it is now, the workload? Or do you think that once the backlog or transitional applications are dealt with, maybe a year or two years from now, let's say, and the commission-referred complaints are dealt with and you're strictly dealing with new applications, Bill 107-type applications, would you see your workload being the same as it is today or this week, or perhaps a little bit less?

**Mr. Michael Gottheil:** Really, it's very difficult. What we're planning for, in some sense, is that as the caseload in the new applications under section 34 increases, as it will—we're at 1,200 now and no doubt by the end of the year it will be higher—we will have

worked down the commission-referred cases. The transition cases are a completely different stream that we're tracking differently, and that's a separate project.

**Mr. David Draper:** If I can just add one thing, we certainly look forward to the day when we're a one-stream tribunal. That'll be wonderful. It's easier to manage.

We're projecting, on the basis of the new applications, that we'll find a level and it will be a fairly steady track of cases. One of the issues that I think people wondered about was whether there was a pent-up body of complaints out there that would hit our door the moment we opened, and we did not see that. For whatever explanation there is, we did not see that early spike. So our prediction is that it will become a more mature system and, unless there's something that happens in society or attention to some issue, we're likely to see, wherever the level ends up, a fairly steady line of new applications that we hope will be brought into a system that has no backlog. The number we've been working with is on the order of 3,000 annually. That's been the projection and we continue to work with that.

**Mr. Lorenzo Berardinetti:** So the system would then have no more backlog and you'd just be focused on simply new cases coming in.

Chair, I was going to share my time—I forgot to mention—with Mrs. Sandals.

**The Chair (Mrs. Julia Munro):** Certainly. Mrs. Sandals.

**Mrs. Liz Sandals:** Thank you very much, and welcome. We've been talking about the fact that this is very much a transitional process. When we look at the dates that are sort of in the record, starting with working with the new act on June 1, 2008, it sounds in some ways as if you were ready to take flight at that point, but my sense would be that, given that we were still doing hearings in the summer about your appointees for adjudicators, in fact it was much later in the process when you were actually fully staffed up to handle all these things.

Could you give us some idea of when you really did have more or less a full complement of staff and you had the systems in place to handle the new input? Maybe you could give us some idea of the growth in capacity at the tribunal, from moving from the old volume, which would have been that third stream of cases you're talking about, to the new transition and new complaints that you will be dealing with in the future, and give us a sense of the change in capacity at the tribunal and when that was available.

**Mr. Michael Gottheil:** Sure. I'll speak to, if I may, the adjudicators, and then I'll let Mr. Draper speak about the staff level. In terms of the adjudicators, we, as Mr. Draper just said, are working with what we call a steady state, or a new application figure, of 3,000. We did some studies, we did some work, we did some estimating, and we had to come up with some number, and it was based on some research. Of course, we didn't know for sure, but that's the number we were working with. As a result, we planned the budget, adjudicators and staff around

that. We wanted to be responsible, so the next step down was to look at what will be the flow of cases in, so though we may need X number of adjudicators, if and when we get to 3,000, we're not going to have that on June 30. This is one of the reasons we sort of ramped up with adjudicators. As of June 30, I think there were about eight full-time adjudicators, plus myself, and then, as you know, through the summer there were additional persons put forward and recommended for appointment. Now we're at 22.

The other thing we've done: My own thinking was that part-time adjudicators are useful in terms of trying to be responsible and responsive to a greater or lesser caseload because part-time adjudicators go through the same rigorous selection process, but they're per diem appointments. If you need them, they're there and you pay them. If you don't need them, you don't pay them. So there's some flexibility to respond more quickly, which is one of the reasons we had appointed a number of part-time adjudicators.

I'll let Mr. Draper speak to the ramp-up on the staff side.

**Mr. David Draper:** Sure. I'll deal with the details. In a lot of ways, the ramp-up was appropriate and responsible. Because of the way the cases come in, we didn't need full staffing on June 30. Personally, I arrived in early May. Ms. Hodge arrived on the day we opened, as I remember, on June 30. My early time at the tribunal was pretty much non-stop recruitment of staff. It was a time-consuming but extraordinarily important process for us, and as Michael has said, the results are good. We have a good staff of almost up to the staff levels we want to be at.

**Mrs. Liz Sandals:** I'm assuming that before you get to this case where you may need an adjudicator, there's a lot of preliminary work that comes first. What sorts of things would that staff be responsible for before it potentially gets to that point?

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**Mr. David Draper:** Exactly. I don't want to give the sense that nothing happened before we arrived. There was a transition team that set all of this in place, including some of the timetables for hiring. So exactly as you've said, what we've concentrated on is first bringing in the intake staff.

That was a process. The OPS recruitment process takes some time; we did it properly. We brought in those intake staff and trained them. They were ready to go on June 30. Cases came in and were processed, with the challenges of our case management system. That's the order in which it was done. On the staff side, we're up to about 48. We have been looking, depending on some hiring issues currently at play, but our plan was to go to about 12 more by the end of the fiscal year, so there still are some holes that we would like to fill. That's where we are.

**Mrs. Liz Sandals:** In the large number of cases that have been transferred from the commission, I'm assuming that they almost have to start as if they're intake cases

because, unlike the ones which had been referred for legal resolution by the tribunal earlier, these transition cases could be at pretty much any stage.

*Interjection.*

**Mr. David Draper:** Let's do it the reverse way: I can speak to the staffing and then Michael can do the bigger picture.

Again, our staffing is divided so that those transitional cases that are coming over from the commission have a separate staff. That staff has been in place since June 30 to take those cases.

**Mr. Michael Gottheil:** Yes, and in terms of process, in fact there is a bit of a different process, and as a result the intake resources required to process the transitional cases are actually less than for the new cases. Although the cases that come over from the commission may be at different stages—they may have had mediation, they may not; they may have gone through investigation, or not—they were handled by the intake staff at the commission. So they're at least in a form that the—

**Mrs. Liz Sandals:** You know what to do next.

**Mr. Michael Gottheil:** We didn't want to set up a process where we would duplicate what the commission had already done. So the process for transferring a case from the commission is quite simple. Essentially, you put your name, address and the respondent's name and address stapled to your commission complaint, and your application is filed. On the respondent's side, a respondent doesn't have to duplicate the response. Essentially, they would staple the response that they had filed at the commission.

We can actually move those cases much quicker and with less staff resources because, as I said, we didn't want to duplicate both the OPS staff's work that had been done as well as the party's work that had been done at the commission level.

**Mrs. Liz Sandals:** Good. So you're just taking up where they left off.

**Mr. Michael Gottheil:** Right.

**Mrs. Liz Sandals:** You said that there are a number that are still left at the commission. You don't know how many more will come over. Does the commission continue to deal with some of the ones that haven't come over? Is there sort of, at this point you're dealing with the ones that have chosen to come over and the commission is still dealing with some of the existing ones, or is this more a process of waiting for people to decide themselves how they want to organize it?

**Mr. Michael Gottheil:** Between June 30, 2008, and December 31, 2008, both were happening. Individuals could choose to move their case from the commission to the tribunal, but the commission, though they didn't receive new complaints, continued to process and work mediation and so forth. But as of December 31, the commission no longer has the statutory mandate to deal with them. Those cases in a sense were waiting for people to decide whether they want to move those cases over.

**Mrs. Liz Sandals:** Or, in the case of very old cases that have been sitting there for a long time and haven't really moved a lot, some of those people may just choose not to move them, to withdraw the application, I presume.

**Mr. Michael Gottheil:** Perhaps, yes.

**Mrs. Liz Sandals:** Do I have any more time?

**The Chair (Mrs. Julia Munro):** You have a minute.

**Mrs. Liz Sandals:** I have a minute. Just one other question I wanted to ask, because there's been a lot of conversation about fairness in application: You've noted that you have a sense that the legal support centre may be providing support; you just don't have it on the books. As you approach cases that are going to require formal hearings and the person is unrepresented, does the tribunal have the capacity to say to people, "This is going to go to a formal hearing. Perhaps you should at this point go back and talk to the legal support centre"?

**Mr. Michael Gottheil:** We don't have any power to order the legal support centre to be involved. We will advise individuals that they may want to seek, where cases are particularly complex or there are particular legal issues or there's a jurisdictional challenge—our materials, all our forms and our guides to the process clearly set out for the applicants the sources of legal support and representation, including the legal support centre.

Again, I've been quite pleased with the adjudicative decisions that come out. As I mentioned, there were about 250 decisions in the new stream, some of which deal with cases in which respondents have identified or raised preliminary issues dealing with jurisdiction or the strength of the case, that sort of thing. We can't provide legal support or advice, but in some of those cases we might, in the interim decision, say to the applicant: "This is a significant issue. There are sources of legal representation. Check our guide. There's a legal support centre." So we do identify that.

**The Chair (Mrs. Julia Munro):** Thank you very much. We'll go on and continue in the next round. Yes, Mr. Hillier.

**Mr. Randy Hillier:** Thank you very much for being here. I had a few questions as I was going through the documentation. The first one that struck me was that the Human Rights Tribunal has never had an audit or an external, outside, impartial evaluation. Is that correct?

**Mr. Michael Gottheil:** I was appointed in April 2005, sir, and there hadn't been one since I was there. I'm not aware of others, but I don't know. In the close to four years since I've been there, there has not been; that's correct.

**Mr. Randy Hillier:** But we know the Human Rights Tribunal has been around for a little bit of time, and it causes me concern that it has never had an audit or impartial external evaluation, especially even more so now when we see this great change happening with the tribunal, this transition happening: significantly increased budgets at the tribunal, bigger workload. We've seen it go in the last three years from three people out of 15 making over \$100,000 to, now, 28 out of 71 full-time

people making over \$100,000. I think it's probably most important that we do evaluate the business, and I'm wondering: Are you or the Human Rights Tribunal looking at bringing in some impartial evaluations or audits to determine how you're doing this coming year?

**Mr. Michael Gottheil:** We're here.

**Mr. Randy Hillier:** I mean financial audits.

**Mr. Michael Gottheil:** I know that Mr. Draper and Ms. Hodge prepare reports for the treasury board and the Management Board and we are required to provide financial reporting. I'm really not aware of other steps within the public service that can or may be taken.

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**Mr. Randy Hillier:** Maybe Mr. Draper might be better prepared to respond.

**Mr. Michael Gottheil:** I'll certainly let Mr. Draper answer, but I believe that if the government seeks to conduct an independent audit of our finances, I guess that they can do that. Mr. Draper?

**Mr. David Draper:** Sure; I'm happy to respond. As Michael said, we fully participate in the normal budgeting process. We are subject to audit. We have not been audited. To your very specific question: Do we plan to seek our own audit? We don't have current plans to do that.

**Mr. Randy Hillier:** I want to follow up on a couple of things. We've seen the whole subject of human rights tribunals and commissions across this land, not just in Ontario, come under significant scrutiny in the previous year or two. One of the problems that we've seen is where the same complaint can be filed in multiple jurisdictions. Of course, we're always looking for value for money, for expeditious and timely results and, of course, justice. I'm wondering if the Human Rights Tribunal is looking at if there ought to be a mechanism to prevent the same complaint from being lodged in a multitude—well, if it's already launched in other jurisdictions, for the Ontario Human Rights Tribunal to disregard it, for example.

**Mr. Michael Gottheil:** Let me answer your question in this way: We are a creature of statute, the Human Rights Code, and our powers, our mandate and our responsibility are defined in that statute. So we can't go outside our mandate and we can't avoid our jurisdiction and responsibility. Having said that, your point is extremely well taken, in the sense that we recognize that there ought not to be multiple pieces of litigation dealing with the same matter going on at the same time. So while we can't refuse to accept an application per se, we have a couple of procedural mechanisms that we can and do employ to deal with the issue that you raise.

First of all, we have a process in our rules with respect to deferrals. When a matter comes in, first of all, in the application—

**Mr. Randy Hillier:** I think that—

**The Chair (Mrs. Julia Munro):** Just let him finish.

**Mr. Michael Gottheil:** In the application form itself, we require an applicant to identify whether the same issue is being dealt with in another proceeding, specific-

ally because we want to avoid those kinds of things. So we require an answer to that question. That might be a court; it might be the Human Rights Commission; it might be a grievance arbitration—there's a range—and we require an answer to that. Then, if that is the case, we will either, on our own initiative, or a respondent might raise the issue, "Look, it's being dealt with somewhere else"—we will engage a process where we will propose to defer dealing with that application until the other matter has been completed. So that's the first stage.

**Mr. Randy Hillier:** Okay. I think that answers my question. Again, when I talk about impartial evaluations, we all have a role to better ourselves, better our agencies, better our organizations, and that's one of the things that evaluations allow us to do: identify areas of concern and then bring them forth to the appropriate bodies to look at correcting them.

During all this discussion and through my reading, we've seen a lot of discussion and talk about the process of mediation or adjudication. I'm not seeing much evidence of how the tribunal, once an application is received, determines if it ought to proceed at all or if it ought to be discarded, if it's trivial or frivolous. Right now you have about 2,000 cases; how many cases—or do you track them?—are discarded completely and don't make the grade, might I say?

**Mr. Michael Gottheil:** If I may answer your question in two parts, because one part deals with the process for identifying and considering issues with respect to our jurisdiction or merit and that sort of thing; and the other one, you asked about numbers.

On the first one, as I said earlier, we're a creature of statute. The way the statute is written, it provides individuals an opportunity to file applications with us. We don't have the power to say, "Well, we're not going to take your application." We have to take the application. Now, how we deal with it at that point is an entirely different matter.

What we have done, in fact—and the other thing I should say is that the way the legislation is written, it says that the tribunal may not finally dispose of an application that is within its jurisdiction without first providing the parties an opportunity to make oral submissions.

What we do on a procedural level is, when we receive an application—I mentioned before about a completeness check—we make sure that the form is filled out and complete. If it is not complete, then we will send it back and say, "You have to fill out the appropriate forms," and explain. That sometimes identifies cases that some might say are non-jurisdictional, because if the person can't say which ground of discrimination, if they can't identify that, that probably means, or may mean, that we don't have jurisdiction. That's one point at which there could be an analysis of whether we proceed any further.

Secondly, we will do an initial check for what we call apparent jurisdiction. We ask specific questions on the form: "Where did the events of your claim take place?" If the person says, "In Florida," before we serve it on the respondent, we will ask the applicant to explain why they

think we have jurisdiction, because generally we only have jurisdiction over things that happen in Ontario.

That's the first stage. That's before we even serve it on the respondent.

**Mr. Randy Hillier:** So this person from Florida, let's say, or the event in Florida, what would you do with that? Would you dispose of that application at that point?

**Mr. Michael Gottheil:** What we do is we send a letter to the applicant saying, "It appears to us that your application may not be one within our jurisdiction and one that we can deal with. You have"—I'm not sure if it's 20 or 30 days—"to provide us submissions on why you think we have jurisdiction." If there is no answer to that, then we would dispose of the application; correct.

**Mr. Randy Hillier:** Okay.

**Mr. Michael Gottheil:** Now, if it appears to us that we have jurisdiction, and the form is complete, then we will serve it on the respondent and the respondent files a response. There are opportunities in the response form for the respondent to identify if they think—apart from saying, you know, "It didn't happen the way the individual claims"—there are jurisdictional or fundamental problems with the application; the respondent can raise those. There are places in the response form that prompt for those kinds of issues.

Again, if those are significant issues, before the matter proceeds we will ask the parties for submissions on that particular issue, again trying to ensure that a matter is dealt with on its merits, the true basis of the facts and the law, with a process that's proportional to the issues involved. We are aware of those kinds of concerns that you raise, that others have raised, and we try to respond to those within the context of the legislative imperatives that are put on us.

**Mr. Randy Hillier:** Okay. So the final part of that question: How many of those cases would be disposed of with no action?

**Mr. Michael Gottheil:** In the new stream, the 1,000 or 1,200 applications—actually, I should speak to the end of December—the 1,050 applications, I believe that there were 22 dismissals and 18 withdrawals or 20 withdrawals—

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**Mr. David Draper:** Nineteen.

**Mr. Michael Gottheil:** Nineteen withdrawals. The withdrawals are often because we send something back or we advise the person that it appears not to be jurisdictional, and they say, "I didn't understand; I withdraw my application."

**Mr. Randy Hillier:** So that would have been out of those 250 decisions that have been made.

**Mr. Michael Gottheil:** Correct. And then there are others, though they are not yet finally disposed of, where those 250 decisions may have asked the parties for submissions and we're waiting for submissions on that preliminary issue but we haven't yet decided.

**Mr. Randy Hillier:** Okay. One further element of human rights that I want to talk about—of course, the purpose of human rights and this tribunal and, of course,

all of us here is to prevent injustice, not to create it. I'll speak to this one case of this fellow with the restaurant. I won't bother to mention names. You probably know the case: a patron who wanted to smoke marijuana cigarettes in the restaurant. Of course, the owner of this restaurant eventually pled essentially no contest. The cost to defend himself was greater than the reward of defending himself. It was going to cost him \$60,000; that was the figure that he was quoted. He'd already spent \$20,000, and he decided he was better off to give up and settle.

Do you see a fundamental failing with our system when we provide legal services to one side of the equation but not the other side of the equation? Here the public tax dollars are paying for the adjudicator, paying for the Human Rights Tribunal, paying for legal support for the plaintiff, but there's no assistance to the defendant. Do you not see a failing there, and a failing that is creating injustice? The unintended consequence of this action is injustice. Does the legislation of your tribunal prevent you from funding the defence's legal support?

*Interjection.*

**Mr. Randy Hillier:** I'm asking, does the legislation prevent you from doing that?

**Mr. Michael Gottheil:** Just on the last question, sir, the legislation doesn't provide us the power to fund anyone. The legislation creates a Human Rights Legal Support Centre which is separate from us, and we don't have any control; we can't order them to do anything. So the legislation doesn't provide us the ability to—

**Mr. Randy Hillier:** Fair enough.

**Mr. Michael Gottheil:** Now, I suppose somebody could come before us and argue that we do have the power, somehow, to order the funding, but I don't read the legislation—

**Mr. Randy Hillier:** Thank you for the clarification. I think that was important. I think this speaks to this bigger subject that my colleague on the opposite side has brought up. It is important that human rights, this whole bundle of human rights that we're talking about, the support, the commission, the tribunal—it is a jungle of human rights out there. I think for us to get really good clarity on the single tree, the agency, the tribunal tree in human rights, we will need to bring in people from the commission and the legal support side for us to get a fuller and complete understanding of how well this tree is doing in the human rights jungle.

Thank you very much.

**Mr. Michael Gottheil:** Thank you, sir.

**The Chair (Mrs. Julia Munro):** Thank you. Ms. DiNovo?

**Ms. Cheri DiNovo:** I just wanted to follow up again on the legal representation angle. We in the Ontario New Democratic Party feel very strongly that this is part of justice—that people have access to legal representation—and of course that includes your tribunal as well. We're concerned that there don't seem to be statistics available on who is represented as a complainant and who is represented as a respondent by a lawyer, paralegal or any

of that. I'm wondering how we, as a committee, can get those statistics.

**Mr. Michael Gottheil:** We have some statistics. As I said, we know that about 40% of the individuals in the new applicant stream are represented. As a result, 60% are self-represented, and roughly 20% are represented by the legal support centre.

**Ms. Cheri DiNovo:** Are those respondents or complainants?

**Mr. Michael Gottheil:** Those are complainants—applicants. That's correct.

I don't have statistics for you about respondents. I know that we are continuing, as Mr. Draper talked about our case management system and our tracking system—again, we're in early days and we're developing the various reports. We need to measure our performance. We need to measure the effectiveness of how we're fulfilling our mandate, which will mean that we need certain information. There may be other information that others may want for other purposes. We need to collect information to ensure that we're meeting our statutory mandate and that we can report to the minister when we're called here to report to you. Some of that information we don't yet have, we're early stage, and we are continuing to develop a sort of model of the kinds of reporting and statistics we need to respond and to assess our own mandate, so some of that will come, absolutely.

**Ms. Cheri DiNovo:** Okay. Again, we're just a little concerned. You seem to have, on the complainant side, some pretty ready figures, but not on the respondent side. We would just like to know, our research would like to know, where they can get those figures, because to us it speaks to the ability to access justice, which I think is all of our concern here. So, respectfully, maybe you could just find them out. It shouldn't be that difficult to do, looking at what cases you've already seen—who was represented, who was not, and how—and just get back to us. I don't expect them right now, but if you could commit to getting back to us, that would be warranted, I think.

**Mr. Michael Gottheil:** Mr. Draper will comment. In terms of getting back to you, we don't collect that at this point, to be able to respond to the particular questions you have, but certainly in terms of the issues you're raising, in terms of what people want to know and need to know and how that blends with our own mandate and what we want to measure, this is useful for us. So Mr. Draper will answer.

**Mr. David Draper:** You may have to stop me. This is my favourite subject. We track the cases differently, and it might be useful for you to know that. As far as the transitional cases, we use a very simple access database. The trade-off there is, is it worth going to the staff effort to put the information into the access database to draw it out? For better or worse, we have not put representation in that access database, so collecting that information on the transitional cases is a challenge.

On the new applications, we are developing some reports that we expect to run out of our case management

system that I would expect to include the kinds of questions you're asking.

**Ms. Cheri DiNovo:** You can see why we find it troublesome. This was one of the major discussions and major concerns with Bill 107 when it was brought in, so again, we'd appreciate anything on that basis.

The next question I have has to do with budget shortfalls. Our information suggests that between 2009 and 2010, the tribunal is projecting a total budgetary expense of \$10.5 million. This is based on a complement of 87 staff, including vice-chairs. So looking at the current allocation for that same period of \$8.7 million, the tribunal is confronting a pretty significant budgetary shortfall for this year and, by inference, for coming years. I was wondering how you plan on seeking to address that situation.

**Mr. David Draper:** I'll speak to the business side of it. There are some challenges. The figure that the \$10.5 million is based on is a staffing level that we don't expect to reach this year, and we may find that it's a staffing level that we can live with. Of course, if we had more, we could use it. The staffing level that we were looking to reach at the end of the fiscal year wouldn't take us to the \$10.5 million, but there still would be pressures.

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What we've been saying in our budgeting process all along is, we're not sure of the numbers. We're not sure of how many are going to come in; we're not sure about some of the projections we made about settlement rates and about the length of hearings that are going to be required. Our hope is that it's an ongoing discussion with the funders; that's our hope. The \$10.5 million isn't a magic number either; it's based on projections.

That's a somewhat wishy-washy answer to your question, but I think an accurate one is that we agree with you that, on the surface, it looks like we may face some substantial pressures. Whether that's going to come to bear, we're watching.

**Ms. Cheri DiNovo:** Right. This comes out of the feeling amongst some who did depute about Bill 107 that the problem was not structural so much as budgetary, that there simply wasn't enough money flowing. So of course we're concerned that even with this new structure, if there's not enough money flowing, you're going to end up with a backlog again. That's where that concern comes from.

One of the other concerns that was raised by human rights activists when you were set up under the new system was the overarching rules of the tribunal and the fact that they seemed to breach the legal safeguards as laid out in the Statutory Powers Procedure Act. These are: refusing to hear witnesses, the power to waive any of the rules of procedure, the power to set dates arbitrarily or to defer consideration of an application without reason. These were all incredibly worrisome to folks in the human rights area.

I'm just wondering, now that you're up and running, if you've given any consideration to amending your rules or procedures to deal with those criticisms and if you're

concerned that those rules give too much discretion to the tribunal.

**Mr. Michael Gottheil:** The comments and the views that you're talking about, obviously we've heard them. I talked earlier about the consultation process that we went through with the user community, the broader community, experts in administrative justice and the justice system. Certainly we've heard those views. To some extent, I think we've probably met and listened to the individuals and groups that had those views more than any others.

But I think that some of the concerns, with the greatest respect, simply aren't accurate. You've mentioned the power to defer without reasons. We don't defer without reasons. In fact, we issued 250 decisions. Many of them are deferral decisions. There are reasons. We ask for submissions; we provide reasons. One of the fundamental, core values that we operate on is transparency and fairness. Transparency means transparency of the decision-making process; fairness includes providing clear, understandable reasons. We do that, and we're committed to that. So with the greatest of respect to some of the people out there who were saying that, that has not been our experience.

With respect to some of the other concerns that you mentioned, I appreciate that, again, there are certain views about how a human rights system, or adjudication of human rights, should be. The Statutory Powers Procedure Act is a piece of legislation that is old and that is based on very traditional procedural, technical, court-like processes. There are many administrative tribunals that don't operate under the SPPA. We do operate under the SPPA. What it says is that we may make rules notwithstanding. It gives us specific powers and we make rules that differ, depart from the SPPA.

The whole question of the nature of what it means in terms of procedural fairness, looking at traditional, court-like technical rules and whether those actually provide access to justice and fairness for parties, is a debate and discussion that currently goes on within the justice community among courts, tribunals, academics and people in various fields. Although I appreciate and respect some of the views of individuals who are saying this, I think there's an understanding and probably a consensus in the administrative justice world that a more modern approach, an approach that actually enhances access to justice, is an approach that isn't necessarily tied to those old criminal law, very technical, rules.

There have been a number of studies—Mr. Justice Osborne did a review of civil justice reform; there was work done in Quebec; there was work done in British Columbia—recognizing that the nature of the process, the procedures, have to be responsive to the nature of the case. They have to be proportionate to the nature of the case and the parties. It's not human rights versus divorce versus small claims. It has to be flexible enough to deal with the wide range of types of cases. So what our rules do is to say that we have a process whereby the adjudicator will, in consultation with the parties and after listening to the parties and getting submissions, have

fashioned the hearing to make it most effective and fair. Ultimately, the code tells us what we need to do, which is to ensure that the process is fair, just and expeditious.

**Ms. Cheri DiNovo:** Along that line and in the interest of transparency, have any litigants expressed concern about the rules?

**Mr. Michael Gottheil:** Not that I'm aware of.

**Ms. Cheri DiNovo:** No? Okay. Are you aware if the rules prevented any litigants from presenting all of the relevant evidence in any case? Has this happened or not happened?

**Mr. Michael Gottheil:** An adjudicator never wants to exclude relevant evidence. The question, I think, that adjudicators grapple with—and this happens in the courts—is that the traditional legal approach, the adversarial approach, tends to enable parties who are lawyered up not to bring relevant evidence; to bring irrelevant evidence so that essentially you exhaust the other side through extended proceedings. Adjudicators and judges—

**Ms. Cheri DiNovo:** Yes, which speaks to the problem, of course, that we really don't know if people have lawyers or not. Of course, if they had lawyers, it would be an advantage to do just that before the tribunal, as contrasted with someone who did not have a lawyer.

**Mr. Michael Gottheil:** With respect, I would disagree. When you have a process which essentially institutionalizes, which has rules that say, "Here is the process that we're going to use to determine the most effective and fair and expeditious way to reach a fair outcome," I think that is much better than the process in which you never know what's going to happen. We have a process which says that the parties engage with the tribunal, engage with the adjudicator. There are decisions made about what the relevant evidence is as opposed to the unnecessary evidence. I would suggest, with respect, that rather than advantaging people with lawyers, it actually enhances justice for everyone whether or not they're represented by lawyers. So I appreciate there's a view from some that what we need is more lawyers, more process, more of the law school, traditional, technical rules, but I don't think, with respect, that's the modern approach to administrative justice.

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**Ms. Cheri DiNovo:** However, it is the system for justice in just about every other venue. I quoted the Attorney General saying that the aim is to have more access to lawyers, not less access to lawyers. Again, of course, it's a personal choice, but as long as a lawyer is a choice one can make, that's the question we come back to.

**Mr. Michael Gottheil:** I would—

**Ms. Cheri DiNovo:** Just if I can continue on.

This speaks to the tribunal's excessive new powers to possibly, with respect, override legal safeguards laid out in the SPPA. In BC, as you know, the direct access model was instituted there and Mary Woo Sims—I'm just going to read another quote here—the former chief commissioner of human rights for BC, said: "There's a

saying ‘Be careful what you ask for.’ I’d urge Ontarians to be very careful. Our experience in BC is that a direct access human rights model is doublespeak for a model that ensures no justice at all.”

Again, this is the system at work in another province. Do you think there’s any truth to what she’s saying?

**Mr. Michael Gottheil:** I can’t speak to what’s going on in BC. That’s a different system, actually, than what we have in Ontario. In BC they don’t have a commission; in Ontario there is a commission.

I know that at the Human Rights Tribunal of Ontario we have developed rules and processes which ensure fairness, which ensure access, which ensure people have an opportunity to state their positions and to have the outcomes be fair and timely. What we’re finding on the ground in the first six months, is that’s happening. So I can’t really speak to what’s going on in BC.

**The Chair (Mrs. Julia Munro):** Thank you very much. That concludes this round of questions. Mr. Zimmer?

**Mr. David Zimmer:** Yes, thank you. I have five questions and I’ve got about—

**The Chair (Mrs. Julia Munro):** Twelve minutes.

**Mr. David Zimmer:** Okay. So the first question: How does the tribunal deal with a complaint that has been made to the tribunal which is also, perhaps in another form, before another adjudicative body? For instance, someone’s made a complaint to the Ontario Police Commission about police conduct and they have a complaint before your body; they have a complaint before the College of Physicians and Surgeons and a complaint before your body. How are those matters dealt with?

**Mr. Michael Gottheil:** As I mentioned before, we have a process that we call deferral. It’s in our rules. It’s explained how that may arise. Again, our approach is, as a general rule, that we try to avoid duplicitous litigation. So if somebody has the same issue being dealt with in another forum, whether it’s police complaints or—most of the cases are actually grievance arbitrations, where unions have filed grievances on behalf of a grievor against an employer and the grievor then files a human rights complaint. So it’s the same matter. We know that labour arbitrators under the Labour Relations Act have the power to interpret and apply the Human Rights Code, so there’s really the same case in two forums. We will generally defer that. Again, we give the parties an opportunity to make submissions about why it’s not appropriate to defer. There are a number of decisions that we have reached and I think the jurisprudence is developing which indicates that that principle of avoiding duplicitous—you know, multiple litigation on the same issue is to be avoided.

**Mr. David Zimmer:** And if—

**Mr. Michael Gottheil:** Now, there are situations in which the issues are different. It appears the same but they’re different—so we might not, and there have been cases where we’ve said, “We’re not going to defer.” That’s how we do it.

The other thing I should say, though, is that when we defer, the rules provide that within 60 days after the other matter is completed, the applicant can make an application to the tribunal to bring the matter back to the tribunal. At that point—again, as I mentioned to Mr. Hillier, we operate under the statute; we can’t avoid an application. But there is a section of the code, section 45.1, which provides that: “The Tribunal may dismiss an application, in whole or in part,” where the subject matter has been appropriately dealt with in another proceeding. There have been cases that have come before us in which the matter has been dealt with in another proceeding and the respondent says, as a preliminary matter, “We think you should dismiss this application because the applicant has gotten their remedy, has gotten their day in court”—their justice, for example—“in that other proceeding.” We will have to consider that and hear arguments on that.

We have a couple of cases. For example, there was a case—

**Mr. David Zimmer:** All right. In effect, if it’s reasonable, you defer to the other body but you can still come back and have a second look at it if you want to.

**Mr. Michael Gottheil:** That’s right. We’ve said we’re not going to sit in appeal, because these are adjudicative bodies—

**Mr. David Zimmer:** I just want to get through a couple of the other questions.

**Mr. Michael Gottheil:** I’m sorry.

**Mr. David Zimmer:** I’ve got about four here that I want to get through.

This question has to do with the accountability of the tribunal itself and its members. All tribunals have their own internal code of conduct and typically have a complaints process. Have you got a code of conduct? And how does your complaints process, which I understand you have, work if people complain about the tribunal in some fashion, or members of the tribunal? Can you just tell me—very short—whether you’ve got those procedures in place and how they work?

**Mr. Michael Gottheil:** The code of conduct for adjudicators is in your package, as is the complaints procedure. We developed a formal complaints procedure whereby individuals who are unhappy about the tribunal for whatever reason can file a formal complaint. There is a process by which we will address that.

Just quickly, if it has to do with an adjudicator, it’s something that I as chair will handle. If it has to do with staff, Mr. Draper, as executive director, the top civil servant within the tribunal, deals with it.

Of course, if the complaint is that somebody didn’t like a decision, that they didn’t like the decision of the adjudicator, that’s obviously not something we can deal with. That’s something that the person may take to Divisional Court.

**Mr. David Zimmer:** A question to do with accessibility: Sometimes there’s this sort of idea that sets in that the human rights world is Toronto-centric, if I can use that expression. What procedures and processes, and what kinds of initiatives, are you making to reach out to

those remoter parts of the province where access is an issue in terms of just getting there and finding lawyers and finding the process? It's much easier in Toronto. What are we doing for stuff out of far northern Ontario, for instance, or the rural communities?

**Mr. Michael Gottheil:** As I said, in terms of the consultation process that we engaged in, in the lead-up and ongoing, we got outside of Toronto. We were in the north and in southwestern Ontario, in Ottawa and so forth.

In the actual business of the tribunal, we have a policy, or rather a practice direction, on hearing and mediations outside of Toronto. I'll see if I can get these; we have I think 11 regional locations. We have Sarnia, Windsor, London, of course Toronto, Kingston, Ottawa, North Bay, Sudbury, Timmins, Sault Ste. Marie and Thunder Bay. In addition, if there is particular need for accommodation-related reasons, we will go to smaller centres.

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**Mr. David Zimmer:** An administrative question: Have you developed policies on scheduling of hearings, rescheduling requests, requests for adjournments, hearing dates and all that sort of stuff? Because one of the difficulties in the court system, and I rather expect in your system, is this whole business of multiple adjournments and cases dragging on. What do you do? How do you handle those? What's the policy on those issues; that is, moving the case along?

**Mr. David Draper:** I've been in this business for a while. That's a very good question, because it's one of the biggest headaches of every tribunal and the courts. We do have a policy on scheduling and adjournments that's quite tough, but everyone does; the issue is enforcing it.

I'm going to give you the "early days" answer. We have the policy; we are working through it. To be honest, reschedules recently have been a bit of a challenge for us and one we will need to face. But your question is a good one.

Our goal is to keep our hearing centre fully busy, and—

**Mr. David Zimmer:** You've alluded to some issues with rescheduling and scheduling. Just in a nutshell, what's the issue there?

**Mr. David Draper:** The biggest problem that we face, and it's faced by the places I've been before, are the cases where the parties are quite fine with the adjournment and they don't recognize the cost to the tribunal and to the taxpayer of that. Two lawyers may say at the last minute, "Well, you know what? Give us a little more time. We might be able to settle it," which isn't a bad thing, but it costs you that slot on the calendar. Balancing those "Let the parties determine the pace of the proceeding" cases, which isn't a bad thing, and enforcing the tribunal's right to use its resources efficiently is just that: It's a balance, and we have a policy that I think reflects that and one that we will be working to enforce. If we're back another time, you can ask the same question and I suspect I'll say, "It's a challenge, but I hope we're doing well at it."

**Mr. David Zimmer:** But you're keeping the pressure on?

**Mr. David Draper:** I think that's the answer: You keep the pressure on.

**Mr. David Zimmer:** My last question: I know you've only finished seven months, but I see you've got a business plan which covers the period 2009 through to 2012. That's a three-year business plan. Can you just give me an oversight of some of the highlights or the broader strategies in place for that three-year going-forward business plan?

**Mr. David Draper:** I think we've covered them. I think we've talked about the things that we're looking at there. We're looking at the numbers; we're looking at the staffing models; we're looking at the three streams and how that's going to play out. One of the issues that is reflected in that business plan is the fact that we're only funded in the transition cases through 2010. I suspect that is an issue we're going to need to talk about. The timelines on that make that pretty optimistic.

**Mr. David Zimmer:** What steps or intervals are in place to take periodic looks at the business plan over the years; that is, measured year to date, year to year and that sort of thing?

**Mr. David Draper:** We plan to use the annual report to do some of that. We will aim at the annual report to do the roll-ups for the statistics that are now six or seven months in for the year.

**Mr. David Zimmer:** Thank you, Chair.

**The Chair (Mrs. Julia Munro):** Thank you very much. We'll move on to Mrs. Elliott.

**Ms. Lisa MacLeod:** We're just going to split our time.

**The Chair (Mrs. Julia Munro):** Okay.

**Ms. Lisa MacLeod:** I have a very quick request and then a quick question, and then the balance of the time will be spent with Mrs. Elliott.

Just quickly, if it's possible for you, before you appear before us again, to provide the clerk's office with the MOU, as well as with your annual plan.

To follow up with Mr. Hillier's question about jurisdictions, there is no question that that was quite troublesome with the Maclean's issue, with jurisdiction-shopping not only here in Ontario, nationally, but also in British Columbia. I think that this committee, in order to make sound recommendations to the minister, should be well apprised of the jurisdictional issues and how you handle them. I appreciated you providing us with what you did today, but could you table that with the clerk?

As well, if you could provide us with any discussions you may or may not have had with respect to compensation for those who have been falsely accused or wrongly accused, who spent an enormous amount of money in terms of being the defendant. I know that is a question followed up by Mr. Hillier.

My question, though—I won't take a long time, but it is something that I asked each one of your appointees, those people who were either vice-chairs or members of your committee. It follows with respect to the Maclean's

issue and Mark Steyn's piece, which ended up going to human rights tribunals and various places across the land. Chief Commissioner Barbara Hall at one point said that the media should be seen through "a human rights filter." I asked everyone who appeared before this committee, "Does discrimination trump free press or does free press trump discrimination?"

You have a very unique position as a quasi-constitutional body. You have a code which we have put in place in the province of Ontario, but at what point does the code supersede constitutional rights in this country? I speak specifically of the freedom of expression under the Charter of Rights and Freedoms. I'm wondering: How do you adjudicate when you do have a Human Rights Commissioner in Ontario suggesting that the media should be seen through a human rights filter? For example, Alan Whyte supports media's freedom under the Charter of Rights to report stories "as they see fit," but then he qualified it; he said, "If there is some sort of discrimination that comes out in the reporting that is arguably contrary to the code, then I would also feel that it would be open to a complainant to challenge the reporting as being discriminatory on the grounds of race."

I think it's a legitimate question. It's a question that has been raised from coast to coast. It's one that, I must admit—since we decided to call the tribunal, my e-mail box has been filled by everyday Ontarians, but also by people from outside of this province. I'm wondering how you respond to that. How do you marry your quasi-constitutional role with the constitutional rights that every Canadian and every Ontarian has under the Charter of Rights and Freedoms and our Constitution in this country?

**Mr. Michael Gottheil:** If I understand, your question is whether human rights trumps free speech or if free speech trumps human rights.

**Ms. Lisa MacLeod:** Looking at it through your code, but also through the application of our Charter of Rights and Freedoms. I understand that that is difficult; I know you have a difficult job. But at some point, which is more important?

**Mr. Michael Gottheil:** I guess the short answer is, neither trumps either, because really, depending on the context in which you're speaking, freedom of speech is a human right. There's a variety of human rights that are set up in the Charter of Rights. The Human Rights Code is an anti-discrimination statute. What it does is, it specifies certain behaviour that's prohibited. Then, of course, there are international covenants, so there's a variety of documents, charters, codes and laws—

**Ms. Lisa MacLeod:** But would we agree, then—

**Mr. Michael Gottheil:** —that set out our fundamental freedoms.

**Ms. Lisa MacLeod:** —that the basis of our fundamental rights in Canada is the Constitution—

**The Chair (Mrs. Julia Munro):** Excuse me, just one at a time.

**Ms. Lisa MacLeod:** Sure. Sorry, Madam Chair.

**Mr. Michael Gottheil:** I'm sorry?

**Ms. Lisa MacLeod:** I'm just wondering what the basis of our fundamental rights and freedoms is in this country. Is it our Charter of Rights or is it a human rights code in the province? And by extension of that, I just explained that—

**Mr. Michael Gottheil:** With respect, Ms. MacLeod, we've probably spent two hours discussing that—the source of human rights. Human rights in this country existed before the code; they existed before the charter. It's in the common law; it's in the foundation of democratic political philosophy as expressed through court decisions. But if you're asking me which trumps—

**Ms. Lisa MacLeod:** I am.

**Mr. Michael Gottheil:** What I'm saying is, neither trumps either, because they're all human rights.

You said I had a difficult job; not always, but sometimes—and sometimes what you have is cases in which two human rights conflict; there are competing rights. Sometimes you have cases in which a human right conflicts with not a human right but a legitimate business interest, for example, or an economic interest. These are very challenging decisions. Certainly when it's two human rights that conflict, it's very challenging. I have to say, though, that although I sometimes have a difficult job, my job is made easier because my jurisdiction and the tribunal jurisdiction are related to the code. So it's really up to you, as parliamentarians, to decide whether there are exceptions in the code. For example, the only provision in the code that I know of that specifically deals with speech or expression is the section that says it's forbidden to announce an intention—or an announcement to discriminate. So in other words, the code says that it's improper for someone to put, for example in a job ad, "No Jews Need Apply," or on a restaurant window, "Blacks and Muslims not welcome."

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**Ms. Lisa MacLeod:** But through the content of our media—

**Mr. Michael Gottheil:** If I can just finish. That, arguably, is contrary to the code. On the other hand, the subsection there says that this is not intended to affect freedom of expression. So if we got that kind of case, that would be difficult, because there are competing values. But that tension between those rights doesn't exist because of the Human Rights Code; these are tensions and legitimate debates that exist in our society that go back hundreds of years. Take away the code, and the tensions don't go away. I agree with you 100% that they're very challenging issues.

**Ms. Lisa MacLeod:** Thank you, Mr. Gottheil. I wish I could question you some more today, but hopefully we'll get that opportunity, if the government acquiesces, and I'll let my colleague continue.

**Mr. Michael Gottheil:** Thank you.

**The Chair (Mrs. Julia Munro):** You have a short time.

**Mrs. Christine Elliott:** Okay. I'll try to condense my question. Basically what I'm interested in, Mr. Gottheil, is the degree of communication that exists between the

tribunal and the legal support centre, and then the tribunal and the Human Rights Commission, with respect to the kinds of cases that you're hearing, and what mechanisms exist in both cases to communicate what you're hearing to allow them to understand what legal resources should be employed or what kinds of issues of systemic discrimination on the commission side could be brought forward.

**Mr. Michael Gottheil:** On that level, I think the communications are formal, and are communications that are authorized and contemplated by the code. What I mean by that is that certainly we issue decisions that are publicly available, and I think we send them to a variety of stakeholders, including the commission and the legal support centre.

Secondly, the code provides that we may refer cases to the commission, in the sense that—not refer cases for adjudication, but when we decide a case, we may say to the commission that this is something they may want to look into. We have not done that to date, but that's in the code. The commission, of course, has the right under the code to request applications and responses. So they're entitled under the code to see every application we receive and every response that we receive. Those are the kinds of formal communications that would exist.

As I said earlier to a question, if there is a particular case in which an applicant is self-represented and we have some concern that perhaps the particular nature of the issue is one in which support and advice would be useful, we might put right in the decision that there are opportunities for legal support. I'm not sure I've answered your question. I tried to.

**Mrs. Christine Elliott:** Just one follow-up, because one of the issues that came up during the Bill 107 hearings was about how the commission could investigate systemic discrimination if they weren't fully aware of what was going on in the tribunal side of things to see the kinds of cases that were actually being brought forward. So I think, from what you were telling me, the tribunal can sometimes suggest that maybe they want to get involved. But on their side of things, how would they know on a regular basis—except that if you from time to time referred things to them—if there's a pattern of systemic discrimination happening?

**Mr. Michael Gottheil:** Well, as I say, they're entitled to see every application, and they have asked for that, and we send them. They are seeing every application.

**The Chair (Mrs. Julia Munro):** Thank you very much. Ms. DiNovo.

**Ms. Cheri DiNovo:** Again, I just thank you for coming and answering these questions.

I have a question about the full-time-equivalent component of your hearing adjudicators. How many do you have full-time?

**Mr. Michael Gottheil:** We have 22 full-time vice-chairs and myself as chair, so there are 23 full-time adjudicators.

**Ms. Cheri DiNovo:** Our concern, again, in the NDP is that you have enough money and enough adjudicators to

prevent what was problematic in the last system, which was the backlogs. That's the nature of that question.

Along the same lines, you said approximately 75% of your applications—or this was the hope—would be settled at the mediation stage. Has that proved true so far?

**Mr. Michael Gottheil:** In fact, in these early days, the settlement rate is lower than that. As I mentioned, in the new stream we've held just under 200 mediations—190—and settled 105, so that's definitely not 75%. We're obviously keeping an eye on that. But, as I've said, one of our core values is the opportunity to be heard. Unlike other tribunals, we don't force mediation. We don't force it in the sense that it's not mandatory. We want to ensure that applicants and respondents, if they say, "No, we want to be heard; we want a decision on this claim," have access to that—full access and meaningful access that's not restricted by money or lawyers.

At the same time, we're keeping an eye on that because I think that there's also a recognition that where the parties want to resolve an application through mediation, we will facilitate that. Oftentimes, not only is mediation quicker, but more importantly, it's a more common-sense, workable resolution for the parties. That the settlement rate at this point is a bit lower, we see that. On the other hand, I never studied statistics, but I would imagine that the numbers are not yet sufficient to make a prediction.

**Ms. Cheri DiNovo:** It's early days.

One of the other projections or hopes was that approximately 70% of the cases that do not settle at mediation can be disposed of in a two- to four-day hearing. Has that assumption been met?

**Mr. Michael Gottheil:** We're sticking with that assumption.

**Ms. Cheri DiNovo:** But has it been met?

**Mr. Michael Gottheil:** Well, we're only seven months in. We're starting to schedule hearings. We're pushing for that. That also ties back to Mr. Draper's answer to Mr. Zimmer with respect to scheduling. We want to ensure that hearings are completed within a year. To say it facetiously, unfortunately we have to deal with the parties, who sometimes aren't as keen in getting the matter on to a hearing. Of course, what do you do when we're serving the parties, and they are not interested in getting the matter on? We are. There's a bit of a tension. But we're committed to ensuring that matters are dealt with in a timely way, so we're certainly keeping an eye on all of those statistics.

**Ms. Cheri DiNovo:** Okay. Just to sum up, from our party's point of view, we're interested in exactly that, the access and transparency. That means statistics-gathering; it means looking at what's happening and measuring against what happened in terms of access.

I would very much like to see tabled with the clerk primarily the access to legal counsel or paralegal counsel on both the respondent's and complainant's part. I'd very much like to see some quantifiable statistics on things like mediation, applications being settled, how long for

the hearings etc., because this speaks to the potential for backlog, and backlog is a way of denying justice. So we're concerned about that.

We're also concerned about you being underfunded, for the same reasons. That's another paramount concern we bring forward: that if you don't have the money to hire the people to do the job, again, a kind of sidelight of that will be that people won't have access to justice under the Human Rights Code. So that as well.

We're also concerned, again, about the lack of statistics regarding complaints about the process itself at the tribunal. So, again, nobody, to your knowledge, has complained about the process to date—it's early days—but we would hope that, going forward, there would be some tracking of that, that if people do complain about the process of the tribunal, about their access to lawyers or any aspect of that process, that be tabled and looked at and brought forward the next time we perhaps meet here for this process.

All of that is important to us, because all of that ensures adequate access to justice in the final analysis.

Thank you for coming, and I'll look forward to seeing those figures.

**The Chair (Mrs. Julia Munro):** That completes the questions and comments from the committee. I want to thank you for being here this morning and being able to give us some insight into the tribunal.

I want to just inform members and the audience that the afternoon session will begin at 1:30. I would ask members of the committee to stay behind for a brief in-camera meeting. We have two items to discuss.

This committee, then, stands recessed until 1:30.

*The committee recessed from 1151 to 1330.*

**The Chair (Mrs. Julia Munro):** Good afternoon and welcome to the government agencies committee. This afternoon we will be hearing from deputants on the agency review for the Human Rights Tribunal of Ontario.

#### MARK STEYN

**The Chair (Mrs. Julia Munro):** I'd first like to ask Mr. Mark Steyn to come forward and join us. Please sit down and make yourself comfortable. Good afternoon, Mr. Steyn. I would just explain to you that we have 30 minutes set aside that you may use as you wish in making comments. Time that is left over then will be divided amongst the caucuses. So please begin if you're ready.

**Mr. Mark Steyn:** I'd just like to make a brief statement, and then I'm happy to answer any questions.

The present Ontario human rights regime is incompatible with a free society. It is useless on real human rights issues that we face today, and in the course of such pseudo human rights as the human right to smoke marijuana on someone else's property or the human right to a transsexual labioplasty, it tramples on real human rights, including property rights, free speech, the right to due process and the presumption of innocence.

Far from reducing racism or sexism, the Ontario human rights regime explicitly institutionalizes racism

and sexism through its inability to view any dispute except through the narrow prism of identity politics. It's at odds not just with eight centuries of this province's legal inheritance, but with the United Nations Universal Declaration of Human Rights. Canada likes that one so much, it sticks it on the back of the \$50 bill, even though Ontario's human rights regime is in sustained systemic breach of article 6, article 7, articles 8 to 10, 11, 12, 18, 19, 21 and 27 of the UN declaration. The good news is that Ontario is not in violation of as many articles as Sudan or North Korea.

All are equal before the law and are entitled, without any discrimination, to equal protection of the law. That's article 7. It's not true in Ontario. Last year, the Ontario Human Rights Commission effectively gave Maclean's and myself a drive-by verdict. They couldn't be bothered taking us to trial, but they decided to pronounce us guilty anyway. That neglects the most basic principle of justice: Audi alteram partem; hear the other side. Chief commissar Barbara Hall didn't bother hearing the other side; she simply declared us guilty. That is the very defining act of a police state: an apparatchik announcing that a citizen is guilty of dissent from state orthodoxy.

But here's the point: Maclean's and I have no fear of Barbara Hall, the commission or the tribunal. You're welcome to try and do your worst to us. We have deep pockets. We pushed back and we filled the newspapers with stories about all these wacky cases that Barbara Hall and others are so obsessed about. Like all tinpot bullies, the commission couldn't take the heat and backed down. But if you're just a fellow who happens to own a restaurant in Burlington, the Ontario human rights regime will destroy your savings, your business and your life for no good reason. The verdict is irrelevant; the process is the punishment.

I would like to say one further thing: When Mohamed Elmasry announced his suits against Maclean's, he was supported by Terry Downey of the Ontario Federation of Labour, and Ms. Downey, explaining her support for Dr. Elmasry, said, "There is proper conduct that everyone has to follow." Sorry; I pass on that one. For one thing, there is no "proper conduct" in the wacky world of pseudo human rights in this province. The rules are made up as they go along, so even if you wanted to follow them, you can't. In John Locke's words, they "dispose of the Estates of the Subject arbitrarily."

Secondly, it's all too easy to imagine the Terry Downeys of the day primly telling a homosexual 50 years ago that there's proper conduct that everyone has to follow, or a Jew 70 years ago that there's proper conduct that everyone has to follow. That's why free societies do not license ideologues to regulate proper conduct. When you subordinate legal principles to ideological fashion, you place genuine liberties in peril, and that's the state in Ontario today.

Thank you.

**The Chair (Mrs. Julia Munro):** Thank you very much. We will begin with the official opposition, Ms. MacLeod.

**Ms. Lisa MacLeod:** Welcome to our committee, Mr. Steyn. During the summer, this committee convened to interview and review the 22 vice-chairs and the 22 members of the Ontario Human Rights Tribunal. Throughout that process, your case, Maclean's versus the Ontario Human Rights Commission, as well as what happened in British Columbia to you as well as what happened federally to you, was front and centre on our minds. Consistently throughout that process I asked questions of the deputants, those seeking to be appointed to the Ontario Human Rights Tribunal, if they believed the free press trumped discrimination or vice versa. One of the deputants actually responded. Today, earlier, I asked the same question to the chair of the Ontario Human Rights Tribunal. He responded and said that neither trumps either. I would like your view on that, because it follows a logical set of questions that I have which are next with respect to freedom of expression and freedom of speech.

**Mr. Mark Steyn:** With respect to the witness this morning, that has become a standard equivocation at the Ontario Human Rights Tribunal. Whenever tribunal judges take away individual human rights, they do so under the guise of what they call balancing competing rights. So for example, going back to the Scott Brockie case, they claim to be balancing his right to freedom of religion with the right of the gay people seeking printed materials to be free from discrimination. In practice they almost never balance those rights. They always defer to collective rights, group rights, in favour of individual rights. I'm an absolutist on this. I agree with the view that the ultimate minority is the individual and classically, historically, common law has been entirely antipathetic to group rights, because who can speak for a group? The notion of group rights should be an abomination to a settled democracy as old as this province.

**Ms. Lisa MacLeod:** Has the experience that you and Maclean's faced, do you believe—in your opinion, has that chilled coverage of other controversial events in this province?

**Mr. Mark Steyn:** Yes, I would say that's undoubtedly the case. Essentially, Maclean's and I—Maclean's in the corporate sense decided the amount of money it was willing to spend to see off these assaults on freedom, and I made a personal calculation of the amount of money that I was willing to spend on that. I'm fortunate, unlike most people caught in the human rights trap, to have that amount of money that I can spend.

But the reality is that most editors and most publishers don't want to get caught in this business. What you see progressively is the shrivelling of the bounds of public discourse. People say to me, "Don't worry; you'll be acquitted eventually." That happened to that guy in Saskatchewan, in the Saskatoon StarPhoenix, the fellow who took out the ad, not even quoting the Biblical passages but just citing the chapter and verse. It appeared as an ad in the Saskatoon StarPhoenix. Four years later, that was overturned at the Saskatchewan Court of Appeal. But in reality, nobody can place that ad today. You couldn't take that ad to the Saskatoon StarPhoenix

and expect them to run it. So, in that sense, the public space, the space for public discourse, shrivels remorselessly under this regime.

**Ms. Lisa MacLeod:** You spoke earlier about the drive-by verdict of the Ontario Human Rights Commission. Could you inform us of other aspects of natural justice that were lacking in your experience before the Ontario Human Rights Commission?

**Mr. Mark Steyn:** Yes. There's a reason why—but let's start with the basic thing. For example, truth is no defence. No one was disputing the truth of what I wrote, nobody was arguing that it was libellous or seditious or false, for all of which there would be appropriate legal remedy. In essence, the plaintiffs were arguing that they'd been offended. Well, offensiveness is in the eye of the offended. I have no way of commenting on that one way or another. It's not possible in a legal sense to mount a defence to the accusation that you've offended somebody, which is why the human right not to be offended should not exist in free societies. That's the first and most basic thing that this system fails in.

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**Ms. Lisa MacLeod:** It's interesting that you bring that up. Murray Campbell, who's one of your colleagues here at Queen's Park—he works for the Globe and Mail—wrote a column on August 28 about this committee and the probe that we put forward with the appointees. He writes that: "Ms. MacLeod is right to explore the grey area between free speech and responsibility and to wonder how the tribunal will operate when it is handed allegations of discrimination from people who don't believe press councils or hate laws protect them." He specifically cites you. He says that it's time "for Attorney General Chris Bentley to get it going"—and that's more public debate—"before Mr. Steyn writes another book."

I say this because the defence of you and your freedom to express yourself and the freedom of your opinions—the support ranged from many different groups across Canada, from Egale to PEN to the Canadian Association of Journalists, as well as other journalists that work in the field, in addition to media ranging from the Toronto Star to Eye Weekly to, now, the Globe and Mail. Have you called for the censorship provisions of the Human Rights Commission to be appealed, and did it surprise you that you had so much support?

**Mr. Mark Steyn:** No, because I think it should be obvious. If anything, I was rather alarmed by the number of Canadian journalists who are quite happy to serve, in effect, as eunuchs of the politically correct state. I can't understand why anybody would want to do that.

It took a while. The organizations you mentioned were late getting on the bandwagon. In a sense, if you want to make this a right-wing, left-wing thing, the international left in the United States, the United Kingdom, Australia—people who loathe me personally—got the essence of this far quicker than the Canadian left did: that if you don't believe in free speech for people you loathe, you don't believe in free speech at all.

Every time you have someone like Haroon Siddiqui at the Toronto Star saying, "Oh, it's all about striking a

balance,” and all the rest of it—every time someone tiptoes down that primrose path, it leads only to tyranny. If you don’t believe in free speech for people you loathe, you hate, you revile, you don’t believe in free speech at all.

**Ms. Lisa MacLeod:** Thank you very much. I know my colleague Christine Elliott has a few questions for you—or my colleague Randy Hillier has a few questions for you.

**The Chair (Mrs. Julia Munro):** Okay. I just will warn you that we have about two minutes left for your caucus.

**Mr. Randy Hillier:** Thank you very much for being here. It is an absolute pleasure to hear people speaking forthrightly, such as yourself today.

The process, you’ve talked about. The process is the trap. The objective is not important in this whole process. Do you have any comments on if this human rights tribunal ought to be here at all, or how you might offer suggestions or recommendations to improve it?

**Mr. Mark Steyn:** I believe in the abolition of the commission, because I believe the commission is nothing but ideological activists. I have no objection to that; I’ve been accused of that myself, but I do it on my own dime and I don’t see why commissar Hall and her colleagues shouldn’t also do it on their own dime.

The tribunal, I think, needs to be brought within the codes and conventions of this country’s legal system. At the moment, it upends them. The burden of proof ought to be on the accuser. The accuser should not be allowed unlimited funds to frivolously torment people for no reason, beggaring them for something that serves no public purpose.

Whatever you think of the marijuana thing, it seems initially to arise from a defectively written law. But that great issue, the issue of where you can smoke medicinal marijuana—the burden of that should not be on Gator Ted. The transsexual labioplasty is perfect nonsense. Any sane person understands exactly what was going on when that doctor said that he was not willing to operate on these two transsexual women.

The idea that people should be essentially punished by a system that does not allow them equality with their accuser is a mark of great shame to this province. If there has to be a tribunal, it should be brought within the bounds of normal legal practice and this province’s 800-year legal tradition.

**The Chair (Mrs. Julia Munro):** Thank you very much. I’ll move on to Ms. DiNovo.

**Ms. Cheri DiNovo:** Mr. Steyn, if somebody puts a sign up in their store that says, “No Jews Need Apply,” would that be considered okay in your—

**Mr. Mark Steyn:** We’re not talking about “No Jews Need Apply.” It’s very interesting to me. Even at the time, for example, the famous No Irish Need Apply song, which became a famous hit song in the 19th century that Irish-Americans took up enthusiastically and made one of the biggest hit songs of the mid-19th century—when they actually went looking for “No Irish Need Apply” ads, in

the whole of the United States, they found exactly two. It’s easy to do. You can go now and search the entire archives of the New York Times, the Boston Globe, all the rest of it: There were only two. So even in its day, the “No Irish Need Apply,” “No Jews Need Apply,” “No Muslims Need Apply” was a very rare activity. Today, it’s almost entirely vanished. That’s not what we’re talking about. If you look at the tribunal—

**Ms. Cheri DiNovo:** But why not, if I might interrupt? If freedom of speech is absolute, your freedom of speech to put in your store window “No Jews Need Apply” or “No Muslims Will Be Served” or “Coloureds Sit at the End of the Counter” is surely covered by freedom of speech.

**Mr. Mark Steyn:** I think that’s to do with basic equality before the law. I recognize laws of public accommodation. I recognize, for example, that if you have a restaurant, you can’t say that the Jews sit at this table and the Muslims sit at that table.

**Ms. Cheri DiNovo:** Why not? It’s your freedom, as an individual freedom of speech, to be able to do so.

**Mr. Mark Steyn:** No, because I think that once you get into the business, as I said, of public accommodation, where you’re offering a service to the public—and again, I think there are exceptions to this. There’s the famous case in Mississauga, the latest to make this system a laughingstock, about the woman who claims she was dismissed as a stripper on age grounds. I’ve never been to this strip club in Mississauga, but it sounds like the top-of-the-line strip joint in town, and obviously they pay better than other strip clubs in that area. Why shouldn’t I go along and say, “Hey, you know something? I’d like to work as a stripper here and you’re discriminating against me on grounds of”—

**Ms. Cheri DiNovo:** To bring you back to point, though, the point of the Ontario Human Rights Code and of human rights codes generally is to prevent the “No Jews Need Apply” action. Without the Ontario Human Rights Code, without the Charter of Rights and Freedoms, freedom of speech, in its absolute and ultimate form, would rule the day. Clearly, hateful words lead to hateful actions.

**Mr. Mark Steyn:** No. I would say—this is the classic human rights dodge, by the way, to identify a non-problem that you claim to be solving. Nobody is putting up “No Jews Need Apply” signs. As I said, historically—

**Ms. Cheri DiNovo:** They are paying women 71 cents for every dollar that men earn, however.

**Mr. Mark Steyn:** Yes.

**Ms. Cheri DiNovo:** That is going on. And in fact, they are still spreading a great many hateful words on the Internet—

**Mr. Mark Steyn:** Yes, exactly.

**Ms. Cheri DiNovo:** —and they are still denying transsexuals and transgendered folk employment or housing, quite legally.

**Mr. Mark Steyn:** Yes. Let me just talk about this “hateful words” business. This is again the sham of this

Human Rights Tribunal, in that it does not treat all hate equally.

You claim, for example, to be interested in women's rights. We have honour killings; we have arranged marriages against the wishes of the brides in this province. The Human Rights Tribunal is silent about that. The Human Rights Tribunal accepts implicitly the two-tier sisterhood whereby if you are a western woman and you're fired from the strip joint in Mississauga and you want to kick up a big fuss, they'll take up your case because you're tormenting some hapless white, male strip joint owner. But if you're 16-year-old Aqsa Parvez and you get killed in an honour killing, they accept implicitly that that's a two-tier sisterhood with multi-cultural sensitivities.

1350

**Ms. Cheri DiNovo:** No, that's simply not true.

**Mr. Mark Steyn:** No, no. You brought this up, madam. At the time my case came into the news, there was a fellow in Toronto who went on the Internet and explicitly urged the killing of a minister of the crown and Canadian troops, and nobody bothers to investigate him for hate speech.

**Ms. Cheri DiNovo:** No more questions.

**The Chair (Mrs. Julia Munro):** Thank you. Mr. Zimmer.

**Mr. David Zimmer:** Mr. Steyn, there was a well-known, indeed famous, American jurist, Oliver Wendell Holmes, who made a statement in which he expressed his view of the limit on free speech in a case in the 1930s, and I'm wondering if you agree or disagree with this statement. He said that nobody is free to yell "Fire" in a crowded movie theatre.

**Mr. Mark Steyn:** It wasn't the 1930s; it was 1919 that Oliver Wendell Holmes made that statement. It's interesting, that case. He was an American—

**Mr. David Zimmer:** I know, but do you agree with that statement or not?

**Mr. Mark Steyn:** Let me say this for a start: He was upholding espionage charges against an anti-war protester. So by his measure, thousands of Canadian liberals would have been rounded up for protesting the war in Afghanistan.

**Mr. David Zimmer:** But don't duck the question.

**Mr. Mark Steyn:** I'm not ducking the question.

**Mr. David Zimmer:** Do you disagree with that statement or agree with it?

**Mr. Mark Steyn:** Let me come at it one other way, in which it's not relevant to our discussion—

**Mr. David Zimmer:** No, no, but then answer the statement.

**Mr. Mark Steyn:** Because Oliver—

**The Chair (Mrs. Julia Munro):** Excuse me. Could I just have one speaker at a time?

**Mr. Mark Steyn:** Oliver Wendell Holmes said that the most stringent protection of free speech would not protect a man in falsely—falsely—shouting "Fire" in a theatre. The problem with the Human Rights Tribunal is that falsely shouting "Fire" is not at issue. It doesn't

matter whether the theatre actually is on fire, because under the Human Rights Tribunal, truth is not a defence.

In my own particular case, no one has ever pointed to a single fact in the Maclean's article, an excerpt from my book, that is inaccurate. So essentially—

**Mr. David Zimmer:** But back to Holmes's statement, is that a fair limitation on freedom of speech: You can't yell "Fire" in a movie theatre, just as a general proposition?

**Mr. Mark Steyn:** As I've tried to answer you, I think if the theatre is on fire, you're certainly entitled to point that out. By the way, that, as a metaphor, is simply a ludicrous metaphor. He was talking about gaslight, 19th century theatres. By 1919, the Winter Garden on Broadway—I don't assume you were there for Hitchcock of 1917; I wasn't either—was an electrified theatre, and it wasn't in danger of burning down. The metaphor is lazy and irrelevant.

**Mr. David Zimmer:** What about this, just paraphrasing Holmes: Nobody is free to yell provocative racial epithets in a multiracial society like Toronto or New York. Would you agree with that?

**Mr. Mark Steyn:** I think society should have a bias that makes it unacceptable to use, for example, the N-word, as they say down south—

**Mr. David Zimmer:** How would you enforce that?

**Mr. Mark Steyn:** —in public, but I think—well, that's the point.

**Mr. David Zimmer:** How would you enforce that?

**Mr. Mark Steyn:** A man, a member of the British Foreign—

**Mr. David Zimmer:** I agree with that. How would you enforce it?

**Mr. Mark Steyn:** A member of the British Foreign Office was arrested over the weekend for yelling, "Effing Jews. Kill the effing Jews."

**Mr. David Zimmer:** How would you enforce it?

**Mr. Mark Steyn:** I don't think he should have been arrested. I think he should be publicly shamed. This is not a hateful province. This is not a jurisdiction where people openly insult and use racist epithets. But what happens when you accord your tribunal the power to regulate speech is that you replace a social ill, people using racial epithets, with a worse ill. It's far worse to allow government the sole power to arbitrate what is acceptable speech or not. If a guy uses the N-word in a bar, I would rather somebody slugged him on the chin rather than him being dragged up before your tribunal.

**Mr. David Zimmer:** Let me ask just one last question. I understood your point. Your feeling is that an individual right should trump a group right, that you're an absolutist on that point, and I understand that. Now, supposing we have not a group right versus an individual right or individual freedom, but we have an individual right that's in conflict with an individual right of free speech. How would you settle that one? I understand you're saying that in a group right versus an individual right of free speech, the individual right should trump it. Let's take an individual right versus an individual right of free speech. How would you balance that?

**Mr. Mark Steyn:** I don't understand that question without something more specific. For example, my right to free speech: If I say that you like to dress in women's clothing and go out and pick up truckers on the QEW and that is not true, you have the right to sue me for libel. But if I say, in a more general sense, that I happen to disagree with your political views or whatever, then that's simply a matter of opinion.

Free societies should not be in the business of criminalizing opinion. When you go down that road, all you do is lead to the situation that you have in, say, Saudi Arabia. In Saudi Arabia, you can't start a newspaper and print what you think, so if you object to the House of Saud, the only thing you can do is blow stuff up.

I think, actually, we don't need sensitivity training in this jurisdiction; we need insensitivity training. We need to learn to rub along in a much more agreeable, rough-and-tumble fashion.

**Mr. David Zimmer:** Just my last thought, then, back to this paraphrasing of Holmes: Nobody is free to yell provocative racial epithets on a busy intersection in Toronto or New York.

**Mr. Mark Steyn:** I disagree—

**Mr. David Zimmer:** Would you let that person yell a racial epithet or not?

**Mr. Mark Steyn:** I think that if someone wants to yell things about Jews, obviously, in this town, they're free to do so. They were yelling explicitly eliminationist, genocidal rhetoric about Jews just a couple of weeks ago on the streets of Toronto, and neither the Ontario Human Rights Tribunal nor the Ontario Human Rights Commission seems in the least bit interested in it. So you are identifying essentially something that is not the business—the Ontario Human Rights Tribunal is not in the business of people shouting explicitly eliminationist, genocidal rhetoric on the streets of Toronto. That's not what this tribunal or its commission does. They couldn't care less about that.

**Mr. David Zimmer:** Thank you. I think that's it.

**The Chair (Mrs. Julia Munro):** One minute left.

**Mrs. Liz Sandals:** I just wondered if we could get a bit of clarification. Is it your understanding that one of the prohibited grounds that the tribunal is dealing with is freedom of speech? It was my understanding that that's strictly a federal issue.

**Mr. Mark Steyn:** No. I was caught—

**Mrs. Liz Sandals:** Not the commission; the tribunal.

**Mr. Mark Steyn:** Yes. I was caught, obviously, in the changeover. Essentially, Barbara Hall, I think, issued her press release about me—

**Mrs. Liz Sandals:** But you would agree with me that the tribunal has not entered into this area?

**Mr. Mark Steyn:** Ah. No, no, no. But this is the interesting thing about her press release: She thinks these are exactly the kinds of issues that the commission ought to be bringing before the tribunal, as it does—

**Mrs. Liz Sandals:** And is it in the Ontario Human Rights Code that this is a prohibited ground—freedom of speech?

**Mr. Mark Steyn:** I would not read it there as such, but given the expansion—

**Mrs. Liz Sandals:** So you would agree that this is not terribly relevant to the Ontario Human Rights Tribunal?

**Mr. Mark Steyn:** No, no, no. Given the expansion of the definition that has occurred in the years since the Taylor decision, and given the commission's own words on the kinds of cases it hopes to bring to the tribunal, I think it's clear that the tribunal will be dealing with essentially freedom-of-expression cases, whatever the Ontario code says, in the years ahead.

**The Chair (Mrs. Julia Munro):** Thank you very much. That concludes the time that we have available. Thank you, Mr. Steyn, for being here.

**Mr. Mark Steyn:** Thank you.

#### ONTARIO FEDERATION OF LABOUR

**The Chair (Mrs. Julia Munro):** I'd next like to call on Mr. Terry Downey, the executive vice-president of the Ontario Federation of Labour. Mr. Downey.

**Interjection:** It's Ms.

**The Chair (Mrs. Julia Munro):** Oh, sorry.

Welcome. Do make yourself comfortable.

**Ms. Terry Downey:** Thank you.

*Interjection.*

**Ms. Terry Downey:** That's okay. The funny story behind that was, because I'm from the 1960s generation, and my father thought that Kelly was a boy's name, they named me Terry, with a "y." I said, "What does he think Terry with a 'y' is?" So yes, you're not the first person to make that mistake.

Good afternoon.

1400

**The Chair (Mrs. Julia Munro):** Good afternoon. Just to let you know, we have 30 minutes in total, and the time you take then will be deducted from the question time for the members of the different caucuses.

**Ms. Terry Downey:** Thank you for allowing me the opportunity to speak on behalf of the Ontario Federation of Labour and our affiliates, as well as the community organizations like the African Canadian Legal Clinic, the Metro Toronto Chinese and Southeast Asian Legal Clinic, the Canadian Arab Federation and the Accessibility for Ontarians with Disabilities Act Alliance. I understand that the alliance will make their own presentation to the standing committee later this afternoon. However, for the record, I just want to say that, as you'll note from my bio, I have long experience with the Human Rights Commission, 18 years as a human rights investigator, and human rights has been advocacy work of mine with the federation. I hope the remarks you heard from Mr. Steyn, who I'm informed made some disparaging remarks about me, who's never met me, will not have any bearing on my presentation to you or my credibility today. It's unfortunate that he doesn't afford people the freedom of speech that he wants for himself. In any event, I'm not here to talk about him; I'm here to

talk about human rights and what that means to us here in Ontario.

Human rights are fundamental to any democratic society, and the struggle for these rights has been going on for generations. After 1948, when the United Nations issued its Universal Declaration of Human Rights, human rights statutes became more established in Canada, with both federal and provincial governments. As part of this process of change, and with the ongoing, persistent lobbying of community and union activists like Stanley Grizzle, Bromley Armstrong, Dan Hill and Alan Borovoy, a series of statutes and policies was enacted to promote a recognition of diverse groups and a more inclusive policy, thus the creation of the publicly funded Ontario human rights system in 1962, which included the Ontario Human Rights Commission and the Human Rights Tribunal of Ontario. Its mandate was to enforce the Human Rights Code. On December 4, 2006, the government passed Bill 107, An Act to amend the Human Rights Code. As you know, it was received with mixed reactions by diverse human rights advocates and organizations.

All agreed that Ontario's human rights system required reform, but there was no consensus on the practical implications of the changes proposed under Bill 107. Supporters of Bill 107 believed changes would lead to a more efficient human rights system, where complainants would have direct access to the Human Rights Tribunal. In their view, Bill 107 would strengthen and optimize the Human Rights Commission, not weaken it. Our group, however, questioned the assumption of fair access under the new system and argued that the changes brought about by Bill 107 would weaken the Ontario human rights system. For instance, under Bill 107, victims of discrimination are no longer safeguarded by the free expert service of the Human Rights Commission. This is because complaints are no longer publicly investigated and prosecuted without the cost borne by the victim. Rather, they now have to pay for legal counsel in order to have meaningful access to a system that was intended to be universal.

In this scenario, those with meagre financial resources are forced to choose between seeking justice and financial survival. Sadly, we know all too well that those communities most affected by discrimination are also disproportionately affected by poverty. Over half of the discrimination complaints are on the grounds of disability. Almost another half of those issues are on racialization, citizenship, sex, gender identity, family status, pregnancy and sexual orientation. While Bill 107 may allow complaints to be made directly to the tribunal, only those with financial means, in our view, would be able to do so.

Although Bill 107 does not exclude the commission from the complaints process, it has reduced the staff from 200 to 60 and severely constrained the commission's ability to meet the needs of those it is supposed to serve. In effect, Bill 107 has privatized the Ontario human rights system. Not only did Bill 107 eliminate the free investigative services of the commission, it has also re-

vised the administrative and operational functions of the commission and eliminated staff. So in theory, the commission maintains its ability to bring forward a complaint on its own or intervene in individual complaints, but the reality is that there is simply not enough staffing and infrastructure to do so, and despite fewer resources, the commission is still charged with following that mandate.

How are they going to take proactive measures to address systemic discrimination through public education, promotion and public advocacy, research and analysis without the proper staffing levels and no investigators to help them do that? Also, how are they going to be able to examine, review and make recommendations on any new statutes or regulations, and any program or policy that the commission feels is inconsistent with the intent of human rights legislation; to review discrimination problems that may arise and encourage coordinated plans, programs and activities to reduce or prevent such problems; or to promote, assist and encourage groups or persons to engage in programs to alleviate tensions and conflicts upon identification by prohibited-grounds discrimination? With only 60 staff serving all of Ontario, how can the commission possibly fulfill those critical responsibilities?

So in theory, Bill 107 established a human rights legal support system, independent from but accountable to the government of Ontario. The purpose of this centre is to provide supportive services, including legal services, with respect to the applications under the code. The centre's services are supposed to include advice and assistance, legal and otherwise, with respect to the infringements of rights under part I of the code, and these services are supposed to be provided throughout the province. Presently, we know that there is only one single legal support centre serving the needs of all Ontarians. Although we are aware that the legal support centre has set up some resources in locations outside Toronto, many human rights advocates are skeptical that these services are adequate, especially for those outside the greater Toronto area, where the centre is located. In fact, anecdotal evidence shows that Ontarians are still seeking assistance from legal clinics in filing complaints. Some of the clinics are sending people back to the legal support centre. Others are trying to continue to assist clients whose first language is not English.

The full-time human rights director of my organization, the Ontario Federation of Labour, continues to assist both unionized and non-unionized workers with complaints simply because the initial paperwork is overwhelming and clearly a barrier to many individuals in terms of accessing the tribunal, especially for newcomers and those for whom English is a second or third language. It should be noted that the centre, such as it is, only opened its doors, as you know, on June 30 of last year, a mere seven months ago, and we're expected to know whether or not it's going to work. We can surmise that it's not, and it's probably going to continue down that path because, similarly, Bill 107 was also supposed to establish new anti-racism and disability rights secretariats. Both of those secretariats were to undertake, direct

and encourage research into discriminatory practices on the basis of race and disability. They were supposed to facilitate the development of provisions of public information and education programs intended to reduce and eliminate discrimination practices in those areas. To date, neither of these secretariats is up and running. This delay sincerely calls into question the Ontario government's commitment to equality.

Our goal as human rights activists is to make sure that the Ontario human rights system is inclusive, accessible and works effectively for all victims of discrimination and harassment, but with inadequate statistical data it's difficult to assess the effectiveness of this system and determine whether it is fulfilling its mandate. While we appreciate the information we've received from Kathy Laird of the Human Rights Legal Support Centre and the Human Rights Commission staff who assisted us with answering some of our queries on legitimate concerns that persist—Here are some of the concerns that still persist with us:

—Does the system address the financial and power imbalance between individual complainants with limited resources and well-funded employers in both the public and private sector?

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—What were the outcomes of many of the cases that were filed with the Human Rights Commission prior to the enactment of Bill 107?

—Are all complainants in a position to access the independent legal counsel that this government promised in a timely, expedient manner, even if there is not income testing?

—Is the new system too difficult for every citizen to access and navigate on their own without the assistance of a lawyer?

—Are complainants giving up because of red tape that causes confusion in the complaints process?

—Are cases being filed or abandoned because of delays due to inadequate staffing, inadequate funding or general limits on accessibility?

—Are complainants receiving funding for expert witnesses?

—Is geography a barrier to those seeking legal support through the legal support centre, especially for those who live outside greater Toronto, where the centre is presently located?

It's widely acknowledged that Bill 107 weakened the disabilities access legislation that the AODA and others lobbied the government to implement. Premier Dalton McGuinty promised to implement a disabilities law with effective enforcement through the Human Rights Commission process, yet Bill 107 removed the Human Rights Commission's enforcement abilities, stripped the entire investigative staff and cut the legal department in half. What's now being done about enforcement?

The Accessibility for Ontarians with Disabilities Alliance, the African Canadian Legal Clinic, the Metro Toronto Chinese and Southeast Asian Legal Clinic, the Canadian Arab Federation, the Ontario Federation of Labour, its affiliates and labour councils worked together

to challenge the pernicious aspects of Bill 107. Together we lobbied, attended meetings and made numerous presentations to this government. We agreed that the Ontario human rights system needed revamping, but we insisted that any changes must be brought about through meaningful and inclusive input from the communities, organizations and unions that represent victims of discrimination on a daily basis.

Instead, Ontario's new Human Rights Tribunal has set up a new set of complicated rules that are difficult for unrepresented persons to navigate. There is now a new longer, more detailed application form that poses challenges even to specialists. Incorrectly completing a form can jeopardize the viability of a case, making legal counsel a prerequisite in practice, if not in law, to pursuing human rights. Far from improving access, in our view, these and other changes have created new barriers and restricted access to those seeking basic fairness in their lives.

Despite these obstacles, we continue to encourage victims of discrimination to access the system. But in the absence of government leadership, we hope that the public and the media assist us in monitoring the effectiveness, or quite frankly the ineffectiveness, of the new system. Premier Dalton McGuinty promised that he would deliver a fair, inclusive and accessible human rights system for all Ontarians, but as it stands, the system falls woefully short of this goal. We urge the Ontario government to take meaningful action to redress this issue we have raised and ensure that the system works for all those in need, regardless of their personal, social or economic capital.

I respectfully submit this on behalf of the Federation of Labour and the communities that are laid out in my brief that have supported this presentation.

**The Chair (Mrs. Julia Munro):** Thank you very much. We'll begin with Ms. DiNovo.

**Ms. Cheri DiNovo:** Thank you, Ms. Downey, for that report. I couldn't agree more with all of it.

We heard this morning some testimony to the effect that legal counsel was not necessary in coming before the tribunal—that certainly complainants could defend themselves and make their cases quite well. There was, I think, quite an egregious lack of statistics in terms of who did come before the tribunal with or without counsel, either respondent or complainant. We've asked for that to be tabled with the clerk because that should be pretty simple to access. What do you think about what we're seeing here at the tribunals: a new way of doing law that doesn't absolutely need lawyers to make fair and equitable decisions?

**Ms. Terry Downey:** There's a saying that only fools will represent themselves as lawyers. I would say the same thing about human rights lawyers. It was a legal, complicated system before the changes to the rules of the tribunal and, as I said in my presentation, it's even more complicated now. An everyday layperson who is trying to address a wrong, that they feel they have been violated, who's trying to focus on that, who may not under-

stand the rules and procedures of the law, is definitely going to be frustrated and will find complications in how they would be able to deliver effectively. Even I, and I feel I know human rights a lot because I've worked in it for 18 years and had to read that piece of legislation almost every day and apply it to cases, would never represent myself at a human rights tribunal. It does not make sense. That's why in the past you had lawyers going forward, publicly funded, to help deliver the case on behalf of the government and the Human Rights Code in terms of making sure that folks were dealing with it from a third party process, and then the individual remedies would be redressed by the tribunal. I think it's no different now. Why should it be? So to those who are trying to say that perhaps you don't need a lawyer: Time will certainly tell about that, but in my experience and my knowledge of the law, you would certainly need a lawyer to navigate yourself through the process.

**Ms. Cheri DiNovo:** Apparently 60% of the complainants do not have a lawyer right now. This is a figure that we've heard. In your experience of dealing with complainants at the OFL who go forward under the new system, what has been your experience, on a case-by-case basis, of what's happened to them and if they've received redress or not?

**Ms. Terry Downey:** Our experience is, first of all, that they don't even know how to get access to the system or about the new procedures. They come to us because the federation, to them, sort of represents everything. We're spending an awful lot of time sitting down with them, as the commission would have done, hearing about what their issue was, whether or not it meets the ground of discrimination, what evidence they have to support their claim, and then spending a lot of time trying to direct them as to how they need to navigate themselves through the system, and sending them, quite frankly, to the legal support centre and to the tribunal. Whether they actually go there, I don't have stats on that. We asked for stats from both the tribunal and the legal support system and we got some vague results.

**Ms. Cheri DiNovo:** Thank you.

**The Chair (Mrs. Julia Munro):** Thank you very much. Ms. Sandals.

**Mrs. Liz Sandals:** Thank you, Ms. Downey. I understand from the information you gave us that you actually used to work at the commission. I didn't hear in that intro whether you actually have any experience appearing before the Human Rights Tribunal since the new legislation came in effect. Could you tell us if you have any actual experience appearing before the tribunal?

**Ms. Terry Downey:** No, I don't have any experience appearing before the tribunal in the new system.

**Mrs. Liz Sandals:** Okay. The material indicates that you're representing the Ontario Federation of Labour today.

**Ms. Terry Downey:** Correct.

**Mrs. Liz Sandals:** My recollection is that when we were discussing the new legislation, one of the formal concerns of the Ontario Federation of Labour and other labour stakeholders was a concern I've observed under

the old commission: that you could sometimes have a labour grievance that was unfolding and at the same time have a complaint to the tribunal—under the old case, the commission—that this could sometimes be a problem and that this gets sorted out. When we talked to the chair of the tribunal this morning, he spoke to us about the deferral rules, so that you're not having these two things going on at the same time, and that the labour union grievance procedure would be allowed to unfold first. I wonder if you could comment on your experience with that. Has that deferral rule under the new tribunal been working for labour, that the grievances are going forward first?

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**Ms. Terry Downey:** It's, I think, still too early to tell because we've only been seven months or so into the system. In terms of whether it's going to work, certainly deferral is much better than not having the matter go to a human rights process, period, because that's what used to happen, right? If there was another process, it got kicked to the curb because the commission didn't have enough resources to let the case sit there and deal with it. We haven't had an argument about that; it's the system in terms of other aspects of enforcement that we've been very concerned about, that our voices haven't been heard about, and it remains to be seen whether or not that will be a problem for labour.

**Mrs. Liz Sandals:** But at this point any experience that you have in terms of the grievance and the deferral issue is that today—and we all understand that this is a transition process, that we're only seven months into the process, and we all understand that the tribunal is just rolling out under this different regime—that concern that was brought to us as the primary concern by labour stakeholders is that in fact you're finding that those deferral rules aren't working.

**Ms. Terry Downey:** As I said, we're still encouraging folks to do both. As for it being problematic for unions who have to represent their members, we've not heard complaints yet.

**Mrs. Liz Sandals:** Okay, thank you.

**The Chair (Mrs. Julia Munro):** Ms. Elliott.

**Mrs. Christine Elliott:** I just have one brief question, Ms. Downey, and then I think my colleague Mr. Hillier has a few questions. I think, certainly, the theme that we've been hearing from all of the presenters today is how interconnected the tribunal is with the commission, with the legal support centre. I'm particularly interested in the role of the commission and how it works with the role of the tribunal in bringing forward issues of systemic discrimination. That was something that was a concern when we had the Bill 107 hearings as to how that would work since the prosecutorial duties were being removed from the commission. The question was: What would be the linkage between the commission and the tribunal so that the commission would be sufficiently informed what was going on with matters actually before the tribunal to be able to spot these trends? Can you tell me what, in your experience, has happened with that?

**Ms. Terry Downey:** I still don't know how the commission's going to be able to do that part of the legislation that requires them to do that because they have no staff who would be part of helping them to monitor that. They have some policy analysts, they have clerical staff and they have senior management staff there now. To be able to actually monitor cases that are going before the tribunal and intervene or even take cases yourself, you have to be able to be knowledgeable about the case, have information about the case, gather evidence about the case. There are no investigators. There's no staff there that would do that kind of enforcement that would help those decision-makers at the commission build that case and be able to assist the tribunal on the systemic barriers and to do that research. They have a number of policy analysts who may be able to do that for some huge, widespread systemic cases because it would look bad if they didn't, but how they're going to be able to achieve their goal, as I said in my brief, is, for me, mind-boggling, because again, I worked there and I know how much time it took for staff to do the work that it did when it had 200 staff. Now it has less than 60. There's no way it can meet the government's obligations.

**The Chair (Mrs. Julia Munro):** Mr. Hillier.

**Mr. Randy Hillier:** You mentioned earlier—you used the term “privatized human rights.” When I look at this, of course, we have three heads to the human rights hydra now: the tribunal, the commission and the support centre—and all of them are funded on the public purse. They fund complainants and the public pays for it all. The only one who doesn't get any public support, of course, is people who have been alleged to have made—an allegation of discrimination or whatever. I think that using that term, although it may sound right or may sound pretty—“privatized human rights” is nowhere near the actuality. We're paying significantly for it, dollar-wise.

But I wanted to ask a couple of things regarding human rights and what we've seen and heard, and how you square this one. The Human Rights Tribunal, and you've spoken quite critically of it since the bill first came before the House, does not use the tenets of civil rights, the concepts of “innocent until proven guilty,” “due process before the law”—there's a whole series of civil rights that it disregards in its quest for human rights. I'd like to just ask you: Do you think we can ever possibly find equitable, fair outcomes in human rights tribunals if we disregard those tenets of civil rights?

**Ms. Terry Downey:** In terms of finding a fair outcome, you have to have the evidence to be able to take before a tribunal to say, “This is why I was discriminated, and this is what the law states with respect to my rights as a person who is entitled to be protected and free from discrimination.” The tribunal is going to hear what information is put before it, which may not be the whole story. There are complicated rules that say that they get to determine what information is brought forward. It's totally different than what happened in the previous system before Bill 107, where you had someone who

would come forward with an allegation, you had publicly funded enforcement officers through the commission who would do the legwork and the investigation, and say, “This case merits going before a tribunal because it does have evidence to support discrimination under the law,” or, “It doesn't.” Right? Yes, it might have been nice to have direct access, but there is that fundamental difference where if you don't have that, there's no way of knowing.

That's kind of what brings me back to your first comments. The system, in our view, is privatized because previously, you had all of the elements of people not having to go out and pay for someone who's going to—before they maybe even get to the legal support system or after they get to the legal support system, if they can get some resources and help there—build a case through gathering evidence and information, which is doing an investigation, which they're going to have to pay for. There are no investigative powers or enforcement—

**Mr. Randy Hillier:** I think we're going a little bit off the track.

**Ms. Terry Downey:** No, you brought it up, in terms of saying that the system is not privatized. Someone who really wants to be sure that they have a successful complaint go through the tribunal will have to pay someone out of pocket, whether it's a lawyer or someone who does human rights law, to help them gather that evidence so that they can be successful, hopefully, at a tribunal.

**Mr. Randy Hillier:** My question, though, is about the civil rights, and I think I've got the answer—

**Ms. Terry Downey:** We are dealing with human rights legislation under the Ontario Human Rights Code.

**Mr. Randy Hillier:** I'd like to just read a couple of comments, because our Human Rights Tribunal has come under significant scrutiny within the media and within the public at large. There are a few comments here, and I think this goes back to this squaring of civil rights with human rights, where we have disregarded those tenets of common law and our justice system—

**The Chair (Mrs. Julia Munro):** Mr. Hillier, you have, like, 30 seconds. Choose which one you're going to tell us.

**Mr. Randy Hillier:** Thirty seconds is not enough. Thank you.

**Ms. Terry Downey:** I thought I was talking about human rights here today, not civil rights.

**Mr. Randy Hillier:** They're connected.

**The Chair (Mrs. Julia Munro):** Thank you very much for appearing before us today.

**Ms. Terry Downey:** Thank you.

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CANADIAN ASSOCIATION  
OF COUNSEL TO EMPLOYERS

**The Chair (Mrs. Julia Munro):** Our next deputation: Patty Murray and Gita Anand. Good afternoon, ladies, and welcome to the Standing Committee on Government

Agencies. As you will have noted, we have 30 minutes, and you may use that time in the presentation. Whatever time remains will be divided amongst the caucuses for questions and comments. As soon as you're ready, please introduce yourselves for the purposes of Hansard. You may begin when you're ready.

**Ms. Patty Murray:** My name is Patricia Murray and I'm from the law firm of Hicks Morley. I'm here with a colleague today, Gita Anand.

**Ms. Gita Anand:** I'm here as part of the organization CACE, the Canadian Association of Counsel to Employers.

**Ms. Patty Murray:** As Ms. Anand has indicated, we're both appearing this afternoon on behalf of CACE. CACE is a national organization with a very broad membership. Our members represent thousands of employers in the province of Ontario. So I come here, I would say, wearing two hats, one of which is making some submissions on behalf of CACE. As well, I'm the chair of the human rights practice group at Hicks Morley. I have, I would say, fairly extensive practical experience, both working and litigating at the commission and now litigating at what I would say is the new, reinvigorated tribunal.

The employers that CACE represents: They represent a significant component of stakeholders who actually use and participate in the human rights system. In terms of my practice, I represent both employers who are respondents in the human rights system as well as other organizations; for example, service providers, who also may be named as respondents in a human rights application.

I think I'll be fairly brief today. I will be brief because the experience to date is quite limited. I want to preface my remarks by saying that I think it's very early days yet for the new tribunal, and certainly very early days in terms of all of our collective experiences with this new direct-access model. It's really too early to have real, substantive concerns or comments about the efficacy of the new tribunal, but the employer in the respondent community certainly has some comments to share as a result of its experiences. I'm really confining myself to the last seven months, since June 30, 2008.

We've done a survey of our members in terms of their experiences to date. I'll just break it into two areas. It really revealed two broad themes.

I think the first broad theme is that there has been recognition that the tribunal has performed positively in a number of areas, versus the experience of respondents under what I would consider the predecessor scheme. I think it's fair to say that the universal view is that, so far, the experience is that this tribunal is a much more effective mechanism for the enforcement of human rights and dealing with human rights and responding to human rights than the old commission-based system.

There are three areas of really positive comments from the membership, and then I'll touch on two areas that remain an area of concern for respondents who appear at the tribunal.

The first one really deals with probably the lead-up to the June 30 date. Obviously, you've heard from enough stakeholders and individuals that you know how transformative the changes are. The nature of those transformative changes, I think, caused a lot of concern for a lot of different stakeholders, and certainly some concern as well for the respondent community. But I think there's fairly universal appreciation for the efforts that the tribunal undertook in the consultation process leading up to June 30. There was an extensive, in-depth consultation process.

The perspective of respondents was that this process was open, that it was transparent, and there was certainly a sense that there was an opportunity to have meaningful input into the consultation process. There was certainly very broad-based community outreach, and the tribunal made itself very accessible to employers and to the employer side of the bar, the employment bar. I'm not sure that many employers availed themselves of those opportunities through the process, but the opportunities were clearly extended and there was a mechanism to be heard. Some members of the respondent community, the legal community, including my firm, took advantage of those opportunities. That was certainly a very positive development, from our perspective.

The second area that I want to touch on is positive from a negative perspective, if I can say that. What I want to touch on is the new process in terms of some of the challenges that we've seen.

You've probably heard some comments about the paperwork inherent in the new process. I think there are some challenges, because there have been a number of what I would consider housekeeping issues in terms of a lot of folks working with new forms, with new deadlines, with new requirements. I think it's fair to say there has been a lack of clarity around some of that; sometimes we get mixed messages. But when I say it's a positive coming out of a negative comment, what I mean is that there's certainly a fairly unanimous view that notwithstanding those housekeeping challenges, the conclusion is that the tribunal really does have good customer service in terms of working with the stakeholders to come up with solutions to the problems posed by some of the forms. When there are mistakes made, when there is confusion and when there is difficulty with deadlines or filing dates and it's not clear as to how the matter should proceed, our experience is that there is very open dialogue, that there's always someone on the other end of the phone to give you some advice, and we've been quite successful in working with people at the tribunal in order to move forward in terms of the particular application that we're responding to.

The third what I would call positive comment is that those of us who practised in what I would call the old commission model have a real respect and appreciation for the tribunal's stated mandate that applications will be dealt with expeditiously. It's not in anybody's interest, whether you're an applicant or whether you're a respondent, to have a matter drag on for years and years and years. This new process is certainly moving com-

plaints or applications through the stream at a very rapid pace. That commitment, and the ability of the tribunal to respect that commitment, is really in the best interests of all of the stakeholders.

Again, as I started out with in my submissions, certainly it's early days yet, but the process and the procedures for moving those applications quickly through the system seem to be working. The process and the procedures and the rules that have been enacted so far seem largely flexible and very responsive to the cases that are coming on, that we are defending respondents on.

Those are the three areas of what I would say are very positive comments. There are two issues of concern to the employer community. I don't think either of these two areas is going to be much of a surprise.

There is one gap in the rules and the manner in which complaints or applications are being handled that seems to be a significant concern. Right now, we're all struggling with what we see as an apparent lack of a mechanism to quickly dispose of cases at the front end that appear very unmeritorious or vexatious—not unmeritorious, but vexatious and frivolous—on their face. I know the tribunal has provided for a screening mechanism whereby they are supposed to be able to quickly dispose of cases that aren't within their jurisdiction. The difficulty is that there is, I think, a concern about how that screening mechanism is functioning. Right now, the rules require employers or respondents to applications to plead on the merits of these types of applications. As you can imagine, there can be a very significant amount of time, effort and cost associated with dealing with a complaint or an application that, on its face, is very clearly vexatious or frivolous, where it doesn't even appear, for example, that there was really any *prima facie* case or ground properly pleaded. That's very time-consuming and costly for respondents. Obviously, it is especially a very significant issue for smaller respondents or smaller employers who have to spend the time in responding to these types of applications. So there is definitely a consensus within the respondent community that the tribunal needs to establish a better process to avoid abuses of its procedure.

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The second one that really is related to what I've just said is an issue with respect to costs. Obviously, the legislation is silent with respect to the ability of the tribunal to order costs. The tribunal can only order costs pursuant to the SPPA if it sets that jurisdiction out in its rules. The rules do not provide that, so at the moment you've got employers or respondents who are faced with perhaps very frivolous cases where they've spent some time, money and resources and yet potentially with no ability to have any kind of remedy at the end of the day where there is a frivolous complaint or indeed a totally unmeritorious complaint. So there is certainly no threat of sanction for individuals who may choose to abuse the system.

Those are the comments that I have. Ms. Anand and I are both happy to answer questions, which is one of the reasons she came with me on behalf of CACE.

**The Chair (Mrs. Julia Munro):** Thank you very much. We'll begin over here with the government. Mr. Zimmer.

**Mr. David Zimmer:** I just have three questions around the issue of deferrals. The chair told us this morning about the rules that the tribunal has to deal with, this idea of a complaint that's made to the tribunal and there's also substantively the same complaint before the police complaints commission or the landlord and tenant body. What's your experience? How are these deferral rules working?

**Ms. Patty Murray:** I've had mixed success. I've had fairly good success on the issue where there's a deferral to the grievance arbitration process. I've had one or two other cases not so successful where, when I've received an adjudicator's decision, they've decided that the other process will not actively engage the human rights analysis and so they've chosen not to defer. But in terms of the grievance arbitration process, which is one of the questions I heard asked of one of the earlier presenters, I think that so far it has been a good process and that the deferral has worked to push the parties back to the private process.

**Mr. David Zimmer:** What is your understanding of the substance of the deferral rules? What's the test that has to be met to have a matter deferred to another body?

**Ms. Patty Murray:** Whether the issues litigated are the same issues, and under the grievance arbitration process it's fairly clear that arbitrators have the jurisdiction to interpret and apply the Ontario Human Rights Code, and often workplace parties would prefer to proceed down that route.

**Mr. David Zimmer:** How is the mediation process working?

**Ms. Patty Murray:** The mediation process has been quite effective. Obviously the fact that we get to a mediation very quickly allows the parties to really turn their minds to whether or not a resolution is possible in a very short period of time, perhaps before parties get entrenched or before parties have spent a lot of time, money and resources in engaging in their position.

**Ms. Gita Anand:** And the fact that vice-chairs are doing the mediation makes a difference, I believe.

**Ms. Patty Murray:** Absolutely. Under the old commission model, obviously, it was just the mediators.

**Ms. Gita Anand:** It was not the vice-chairs.

**Mr. David Zimmer:** This is more of a delicate question: How are you finding the effectiveness of the slate of new adjudicators?

**Ms. Gita Anand:** So far, so good. I haven't had a full-blown hearing, but in terms of the mediations, the vice-chairs are doing a good job. One of the lawyers in our office had a jurisdictional dispute and found that the hearing process went very well.

**Mr. David Zimmer:** The chair told us about the extensive consultations leading up to the tribunal—that is, before June and so on. Are those consultations continuing as they're sorting out administrative issues that they encounter as they're developing the work of the tribunal?

**Ms. Patty Murray:** No, I'm not aware of that. I know that right now the tribunal is in the process of developing or setting up an advisory committee, which will advise the tribunal on issues of practice which will, I believe, draw from stakeholders at large. That's probably the forum where that issue, in terms of the actual practice, will be addressed.

**Mr. David Zimmer:** I don't know if I have time.

**The Chair (Mrs. Julia Munro):** There's a minute, if you—

**Mrs. Liz Sandals:** I'm fine.

**The Chair (Mrs. Julia Munro):** Okay. Mr. Hillier.

**Mr. Randy Hillier:** Thank you very much for being here. You mentioned a couple of things. One was the lack of a threat of sanction for people bringing forth malicious or vexatious allegations. Do you think that having some possible sanction would be a significant improvement to the Human Rights Tribunal processes?

**Ms. Patty Murray:** I think that there should be a cost consequence associated with pressing a case to the very end. In certain circumstances it might be appropriate. Under the old legislation, there was a section which provided a very onerous test. I'm not suggesting that I would be proposing any particular test, but to be left without any ability to recoup costs, no matter how egregious the case, is a problem for our members.

**Mr. Randy Hillier:** Yes. I would agree that without any consequence for actions, it's a free and open ride to allege anything. So I see that as a significant shortcoming as well.

What about—and we've seen it with a number of cases that have gone before human rights tribunals and commissions in this province—the publicly funded opposition or complaint and the privately funded defence? What's your thought and view? We've seen where the cost to defend yourself in the Human Rights Tribunal can be so onerous that, really, justice can't be found on many occasions. It's better off to settle even though you may be totally without fault or without contravening the Human Rights Code, but you're still going to pay because it's just too onerous and too expensive to defend. Could you comment on that?

**Ms. Patty Murray:** That was certainly the experience in the past by the time you were at a tribunal, because typically you were talking many, many years before you got to a tribunal. I think that now with the new streamlined process, respondents may be more prepared to vigorously defend themselves on their principle because the hope is that they will get to a tribunal hearing more quickly, that it will be a more flexible, informal process and that they won't spend the same amount of resources to get there. I'm not sure if that answers your question.

**Mr. Randy Hillier:** A little bit. But when I look at the equation here, the scales of justice, on the one hand we have a publicly funded allegation, with no sanctions possible or consequences for improper use of the tribunal, and then an individual who's left alone out on the other side with no support. That's certainly not a balanced equation, in my view. Even though the new

system may be a significant improvement, it was clearly out of whack significantly before. Do you believe that it will be better under this system? It may only be a year now to get a ruling out of the tribunal instead of multiple years. Do you think that's a balanced approach to our Human Rights Tribunal?

**Ms. Patty Murray:** I'm not sure I know what the right answer to that question is. I can only compare it with past experience, which is that I think that the pendulum is moving in the right direction from the perspective of respondents. I think that's the only way I can answer that question.

1450

**Mr. Randy Hillier:** There has been a lot of criticism levelled at the human rights tribunals and commissions and the whole bundle of quasi-judicial approach to human rights. There's one quote here from in the paper, "the only remedies we can hope from the bureaucratic proliferation of kangaroo courts—'human rights' tribunals and the like—staffed by truly frightful people, whose ideological frothings are neither subtle nor fully sane." And there's a whole series—that's from the Ottawa Citizen a little while back.

Do you believe that this system, as it has been changed, will reduce the number of complaints about the human rights system, in that maybe one day this institution of Ontario's won't be considered a kangaroo court by many of the citizens in this province?

**Ms. Gita Anand:** Yes, I think the fact that it's a direct-access tribunal will help speed up dealing with complaints. A lot of the criticism that was levelled against the commission in the past had to do with the inordinate delay. Once a complaint was filed, it would be lost in a black hole for years and years. I think that if matters are dealt with expeditiously, that will take away a lot of the criticism.

**Mr. Randy Hillier:** However, we still have that significant shortcoming as well, that frivolous and vexatious complaints can come forward and turn hard-working small business people into victims of our justice system with no consequence to those making the complaint. That's all my questions.

**The Chair (Mrs. Julia Munro):** Ms. DiNovo?

**Ms. Cheri DiNovo:** Thank you, Madam Chair. Thank you for coming and deputing before us. You're a lawyer and, I'm sure, a good one, and you act on behalf of the respondents in these cases. I would just ask, because we've been having a hard time finding out how many of the respondents have lawyers versus how many of the complainants have lawyers when you go into hearings: Have you found yourself often being a lawyer for the respondent up against an individual representing themselves on the other side?

**Ms. Patty Murray:** My experience is mixed. I think it's both. Bear in mind, we're not really at a hearing stage under the new process. We're slowly moving towards the hearing stage, but in my experience, it's been both.

**Ms. Cheri DiNovo:** A little bit of both.

**Ms. Patty Murray:** A little bit of both.

**Ms. Cheri DiNovo:** When you look forward—and you heard Terry Downey and her deputation from the Ontario Federation of Labour. Our concern, in the NDP, is getting some fairness, in a sense, for the people who are opposed to you, the applicants or the complainants in this situation. Obviously, I would hope, as a member of the bar, that you would hope for access to legal counsel for both sides of any hearing. Is that your opinion?

**Ms. Patty Murray:** Yes. I have found that when there have been applicants that have been unrepresented, they come into this process usually with a good understanding. The tribunal's process is fairly accessible in terms of the website, in terms of explaining what needs to be done. There's a lot of paper out there that explains to both applicants and respondents how the process will work. I haven't heard that complaint. I've had applicants who've had the assistance of resources through the legal support centre who have come, either with somebody from the legal support centre or having consulted at the legal support centre. My perspective is obviously a biased perspective, but I haven't seen a difficulty with that yet.

**Ms. Cheri DiNovo:** Apparently only about 20% come through the legal support centre and about 60% of the complainants are without legal counsel. That's a concern. You earn your fees. I'm sure you're good at what you do. Presumably the reason you earn your fees is that it's better to have you there than not. Our concern is, of course, for the complainant who doesn't have the means to hire a lawyer. It's out of their ability. Do you see a problem in that structure?

**Ms. Patty Murray:** That structure wasn't really any different than the structure which existed before in terms of complainants using the commission system on their own and representing themselves through the system.

**Ms. Cheri DiNovo:** But before, they had someone working on gaining evidence—you heard Ms. Downey's deputation—looking into the case, providing them with evidence etc. etc. So they don't have that now. It seems that precious few of them have legal counsel, certainly the kind of legal counsel that's going to follow them right through. They might have some consultation but not something that's going to carry them through the entire process. Again, in terms of fairness from a more general—I know I'm asking you to look at the bigger picture here. As a lawyer, don't you think that they need to be represented?

**Ms. Patty Murray:** Not necessarily, no.

**Ms. Cheri DiNovo:** Not necessarily. Would you say the respondent needs to be represented?

**Ms. Patty Murray:** Not necessarily.

**Ms. Gita Anand:** Not necessarily. Many of them don't hire legal counsel; they act on their own behalf.

**Ms. Cheri DiNovo:** It will certainly be interesting to see, when we see the statistics, how many respondents have lawyers versus how many complainants have lawyers, because that's certainly a concern.

You heard her testimony too. Is there anything that you would agree with in her deputation or do you think that it was incorrect?

**Ms. Patty Murray:** She just has a different perspective, I think, in terms of the efficacy of the commission. I've done this work for 20 years and I have a different perspective on the commission and its efficacy in enforcing the code.

**Ms. Cheri DiNovo:** Of course we're dealing with the very short term too, so it's difficult for the other side to comment. Thank you very much.

**The Chair (Mrs. Julia Munro):** Thank you very much for being here today. We appreciate you coming and the comments that you've been able to provide to us.

#### RICHARD MOON

**The Chair (Mrs. Julia Munro):** I would just like to make sure everyone understands that our next speaker is coming to us via teleconference. Good afternoon, Mr. Moon.

**Mr. Richard Moon:** Yes, I am here.

**The Chair (Mrs. Julia Munro):** Yes, thank you very much for making yourself available this way for us. As you might have had explained to you, we have 30 minutes set aside in which you are able to make a presentation. Any time remaining then will be used by the members of the committee to ask questions and make comments. If you are ready to proceed, we are as well.

**Mr. Richard Moon:** Thanks for inviting me to speak to you and for accommodating me in this way. I want to make sure you can hear me all right.

**The Chair (Mrs. Julia Munro):** Yes, we can.

**Mr. Richard Moon:** Okay. I assume that I was asked to speak to you because I recently wrote a report for the Canadian Human Rights Commission dealing with section 13 of the Canadian Human Rights Act, and that's the section of the act that prohibits Internet hate speech, understood as communication that is likely to expose the members of an identifiable group to hatred or contempt. In a minute, I'll say something about my report and its recommendations, but first I wanted to comment on the current debate in Canada concerning the regulation of hate speech in human rights codes.

Let me start by saying there is certainly a serious debate to be had about the legal regulation of hate speech, about whether it should be regulated, about the scope of regulation and about the legal mechanisms for regulation. But the debate in Canada has been infected by a style of political comment that's relatively new in Canada but better known in the US. There are a number of right-wing critics in Canada who, instead of offering serious and plausible criticism of the Human Rights Code regulations, engage in baseless personal attacks. Without compunction, they accuse the civil servants who are mandated to implement human rights legislation of corruption. They use the term "corruption" freely and very loosely, but always in a way that suggests a significant breach of public trust. The accusations have no substance; they are pieced together out of nothing. But what they achieve, what the commentators want them to

achieve, is a general sense that there is a serious problem, even if the specifics of the problem are unknown.

I suspect that my invitation to speak to you today shows that these commentators have been successful in their smear campaign against human rights commissions. I urge the committee not to be taken in by these individuals. They don't care about the truth; they make things up.

I want to give an example of this. The night before my report was released in November, Ezra Levant posted on his blog a comment about the report. The title of his posting was, "Richard Moon's Report Was Redacted by Jennifer Lynch." Jennifer Lynch, as many of you may know, is the chief commissioner of the Canadian Human Rights Commission. The claim or suggestion was that the report was not my own work, that I was told by the commission what to say. The claim was false—I was given complete independence—and when my report was released the following day and recommended the repeal of section 13 of the Canadian Human Rights Act, the falsity of Levant's claim was obvious. Levant had just made it up. He thought he knew what I would say and he sought to discredit the report in advance by attacking me and the commission rather than the arguments I might make. Had I recommended something different, that section 13 be retained with certain amendments—a perfectly reasonable position—then Levant's false claim about the report might have seemed plausible to some people, and it would have been difficult for me to refute decisively.

#### 1500

This is his general style and that of others. Over the last few years, these commentators have made a series of baseless accusations against the members and staff of the Canadian Human Rights Commission, and these claims have leaked into the mainstream media, into the National Post and into the columns of the Globe and Mail. Believe none of it. As I said at the outset, there are some serious questions to be addressed, but I have come to the conclusion that certain individuals who have played a large role in the campaign against human rights laws and human rights commissions, particularly in the context of hate speech, have no interest in serious debate or in the truth.

In my report, I took the position that "censorship by the government should be confined to a narrow category of extreme expression—that which threatens, advocates or justifies violence against the members of an identifiable group, even if the violence that is supported or threatened is not imminent. The failure to ban the extreme or radical edge of discriminatory expression carries too many risks, particularly when it circulates within the racist subculture that subsists on the Internet. Less extreme forms of discriminatory expression, although harmful, cannot simply be censored out of public discourse. Any attempt to exclude from public discourse speech that stereotypes or defames the members of an identifiable group would require extraordinary intervention by the state and would dramatically compromise

the public commitment to freedom of expression. Because these less extreme forms of discriminatory expression are so commonplace, it is impossible to establish clear and effective rules for their identification and exclusion. But because they are so pervasive, it is also vital that they be addressed or confronted. We must develop ways other than censorship to respond to expression that stereotypes and defames the members of an identifiable group and to hold institutions such as the media accountable when they engage in these forms of discriminatory expression."

I also took the position that "a narrowly drawn ban on hate speech that focuses on expression that is tied to violence does not fit easily or simply into a human rights law that takes an expansive view of discrimination, emphasizes the effect of the action on the victim rather than the intention or misconduct of the actor and employs a process that is designed to engage the parties and facilitate a non-adjudicative resolution of the 'dispute' between them."

Finally, I argued that the process, through the commission and tribunal—and, of course, within the Canadian system, it continues to be the case that the commission performs a filtering function—put too great a burden on the complainant. "Hate speech harms the group and the community. It is a public wrong. The state, not private citizens, should be responsible for the enforcement of the law." The process is too costly to the complainant, not just in terms of time and money, but because the speech that is caught by section 13 of the Canadian Human Rights Act is so extreme in character, complainants have sometimes been subjected to threats of violence.

I recommended the repeal of section 13 so that the Canadian Human Rights Commission and the Canadian Human Rights Tribunal no longer deal with hate speech, and in particular hate speech on the Internet. Hate speech should continue, in my view, to be prohibited under the Criminal Code.

Now, the question is whether any of this has any relevance to your hearings on the Ontario code and the process established under it. There is no equivalent in the Ontario code to the provision in the Canadian Human Rights Act that was the subject of my report. Section 13 in the Ontario code does prohibit the publication or display before the public of a notice, sign, symbol, emblem or other similar representation that indicates the intention of a person to infringe a right in the code or is intended by the person to incite the infringement of a right in the code. There are no recent cases and it's difficult to say very much about the provision.

Certainly there is every reason to ban the indication of an intent to discriminate in the form of a sign at a business that indicates that members of a particular group will not be served. The question, I suppose, is whether the second part of section 13, a representation that is intended to incite others to engage in discrimination, might be interpreted broadly so as to raise freedom-of-expression concerns. There are, as I say, very few cases

even in other jurisdictions dealing with this, and I'm not sure they can be of much help.

It is also, I think, important to note that the Ontario provision is limited in several ways. In contrast to some of the similar provisions in other provincial codes, the Ontario provision does not extend to publications, it includes an intention requirement and extends only to incitement to breach the act itself, and in that way can be seen as tying in with the general objectives of the code.

I will say that originally I had not actually intended to make an opening statement of sorts, and certainly not with the content that this one had until I realized that Mark Steyn was also to be speaking to you today. So another issue, it seems to me, has to do with the role of the commission in monitoring and commenting on patterns and instances of hateful or discriminatory speech in the province. The comments made by Barbara Hall regarding the Mark Steyn article were criticized by some. The commission decided that it did not have jurisdiction, but nevertheless observed that the article was discriminatory.

In my report I argued that the law—and my focus was on the federal act—should not prohibit expression that defames the members of an identifiable group, that we should instead consider other ways to respond to such speech. The Mark Steyn article, in my view, should not be censored, nor should it go unanswered. It was unfair and deceptive in its content and glib and sometimes juvenile in its style. How are the members of the Muslim community to respond to the suggestion in Canada's national newsmagazine that they are violent or sympathetic to violence? They do not have Mark Steyn's platform.

There may be a role for the commission to play in responding to defamatory, discriminatory speech in the community. Its mandate is to educate and advocate. As an institution, as it's currently designed, I am not sure how well suited the commission is to such a role. In my report I advocated a strengthening of the voluntary press council system, but I certainly would not want to rule out the possibility that the commission may also have a role to play. Those are my opening remarks.

**The Chair (Mrs. Julia Munro):** Thank you very much. We'll begin, then, with the official opposition. Ms. MacLeod.

**Ms. Lisa MacLeod:** Hi, Mr. Moon. How are you?

**Mr. Richard Moon:** Hello.

**Ms. Lisa MacLeod:** My name is Lisa MacLeod. I'm the Progressive Conservative MPP and am also the vice-chair of this committee. I'll be splitting my time with another Progressive Conservative, Christine Elliott, who is our Attorney General critic. I was the person who contacted you to call you in to discuss your report. It was very important and very timely. I didn't call you in, I guess, to make accusations and call people liars on this forum, and I was quite disappointed because, having read your biography and having read your report, I was expecting a very open discussion on hate speech and just ensuring that the Human Rights Tribunal in this province,

as you rightly point out, follows its mandate, which doesn't include regulating freedom of expression over the Internet or in magazines. The one thing I do find disappointing, having gone through this process and also bringing forward folks who sit on this tribunal, is asking that very important question—bluntly, how do we have a discussion about freedom of expression and freedom of the press in this province?

I came across something from another, like me, rabid, right-wing extremist, Rex Murphy, who wrote about the Mark Steyn issue. I'll quote two paragraphs from him:

“What I do not associate with this deep and noble concept is getting ticked off by something you read in a magazine—or for that matter hear on television—and then scampering off to a handful—well, three—of Canada's proliferate human rights commissions—seeking to score off the magazine: this is what four Osgoode Hall law students and graduates—a very definition of the ‘marginalized’—under the banner of the Canadian Islamic Congress have done after reading an excerpt from Mark Steyn's *America Alone* in *Maclean's*. The complainants read the article as ‘flagrantly Islamophobic.’

“*Maclean's* magazine? Well, we all know what a hotbed of radical bigotry and vile prejudice *Maclean's* magazine has been. Go away ... for what seems like a century *Maclean's* was no more ‘offensive’ (that is the cant term of choice these days) than a down comforter on a cold day and if Mark Steyn's article offended them: so what? Not every article in every magazine or newspaper is meant to be a valentine card addressed to every reader's self-esteem. *Maclean's* published a bushel of letters following the article's appearance: some praised it; others scorned it. That's freedom of speech; that's democracy; that's the messy business we call the exchange of ideas and opinions.”

I may not be Rex Murphy and I may not be able to do his traditional rant, but when I read that, I realized that it's not just one side of the political spectrum or the other side that has a concern with the human rights system in Ontario. That is why, sir, we are having these hearings; not because we were pressured into it and not because we feel that one side of the spectrum or the other is being slighted.

**1510**

We are here to have an open discussion, one that we should be having here in the province of Ontario, to discuss freedom of expression, freedom of speech, but also the process, so that those people who actually are discriminated against are getting the services they need in a timely and efficient manner so that the process works for those people who need it most.

I'll allow you to respond, but the further questioning will be from my colleague Christine Elliott, who is our Attorney General critic. Thank you.

**Mr. Richard Moon:** Okay. Thank you. I think I do need to reply. I wrote what I hope is considered to be a serious report on the particular issue of how hate speech is dealt with by the Canadian Human Rights Act. In the

course of preparing that report, what I came across, of course, and what I held my tongue on and made only a brief allusion to in my report, was a number of, not serious arguments about the regulation of hate speech, but personal attacks directed at members of the commission. I mean accusations of corruption and so forth which, when investigated by the privacy commissioner, by the RCMP and so forth, have all been found to be groundless. There are more and they continue. It's a style of rhetoric that has distorted. I'm seeking initially to simply say, can we clear the decks of these personal accusations and can we have a serious conversation about how one regulates this so we may not be operating on different pages?

On the question of the Mark Steyn article and the complaints brought against it: The complaint was brought to the Canadian Human Rights Commission and, ultimately, it was determined that it should not proceed to the tribunal stage. It was not adjudicated. In my report I addressed some of the problems or issues with having the commission serve a filtering process when dealing with hate speech simply because it's a protracted process. It's required to be that because of the requirements of natural justice that the courts require. I think that raises, even if it's ultimately almost inevitable that a particular complaint will be dismissed by the commission and not proceed to adjudication, freedom-of-expression issues. That's one of the reasons I recommended that this issue be dealt with under the criminal law exclusively.

If one looks at the British Columbia process, I think it's worth noting—and certainly the individuals who sat on the tribunal and wrote the tribunal judgment in that case expressed some frustration that Maclean's did not take advantage of the procedural motion that could be taken in advance of the hearing in which they could request dismissal of the complaint on the grounds that it was unlikely to succeed following a hearing. Well, Maclean's decided not to do that. I don't know whether they would have been successful at that stage, but clearly they wanted a hearing; they embraced the hearing. I think it's worth noting and remembering that rather than saying, as many have, what an oppressive and horrible process it is. There are problems with any of these processes, but we ought not to inflate them.

So, yes, I think there's a serious debate to be had and I'm certainly not aiming to make personal attacks or challenges against anybody on this committee, but I want people to be aware that some of the general things that are floating around out there about human rights committees are baseless personal attacks.

**The Chair (Mrs. Julia Munro):** Thank you. Very brief time, Ms. Elliott.

**Mrs. Christine Elliott:** Okay. Good afternoon, Professor Moon. I have a question really relating to the structure of the new system—I was involved in the Bill 107 committee hearings, and there were several concerns expressed to us at that time—first of all with respect to the kinds of complaints that are being heard by the tribunal which are primarily individual complaints, fact-

based complaints, versus the commission's mandate to examine issues of systemic discrimination and bringing that before the tribunal. It was expressed at that point that there was a sort of disconnect there, and how would one really know what the other was doing so that the commission would be sufficiently informed about what sorts of things should be going before tribunal? Would you have any comment on that?

**Mr. Richard Moon:** First, I obviously have to confess that the focus of my report has been on the Canadian Human Rights Act and the system that operates here. I can't claim to have any particular expertise on the Ontario process and, certainly, as it has been reconstituted. Any knowledge or interest I have, I suppose, really stems from the possibility of discriminatory expression or representation and how those might be dealt with.

It does seem to me that inasmuch as the Ontario code deals with that—and it's not clear to what extent it really does deal with that, but section 13 does seem to me to be a provision that would be individualized, that the wrong we're speaking of is very much an individualized wrong; that is to say, an intent to discriminate, yes, against the members of a group, but presumably individuals who may feel they have been excluded as the consequence of a particular sign or indication will bring the complaint—that it may be different in its character from a straightforward prohibition on hateful speech. But given that there's just no case law, no judgments on this section, it's very difficult to know.

**The Chair (Mrs. Julia Munro):** Thank you very much. We'll move on to Ms. DiNovo.

**Ms. Cheri DiNovo:** Thank you, Madam Chair. Cheri DiNovo here, Professor Moon, from the Ontario New Democratic Party.

Apparently, the Ontario Human Rights Commission did respond to your deputation. I'm just wondering if you could comment on their response. I'll just read a couple of lines—

**Mr. Richard Moon:** Yes; I've not seen it.

**Ms. Cheri DiNovo:** —for everyone else's information.

The right to freedom of expression comes with a responsibility to confront hate expression, they said. A human rights approach offers broad tools for confronting hate expression without trampling on freedom of expression, and state and non-state actors, including government, human rights commissions, other public sector institutions and the media have a responsibility to address issues of hate expression.

What do you think about their response to what you've written?

**Mr. Richard Moon:** I guess I could really only reiterate what I wrote originally. I think that any kind of regulation of speech ultimately needs to be confined to a fairly narrow category, that there are too many risks and costs to trying to regulate any broader category of defamatory speech or speech that stereotypes. I think that even if we frame it as being a kind of conciliatory process etc., ultimately, it engages serious freedom-of-

expression values or concerns. I actually think that, in the end, out of a commitment to freedom of expression, we need to focus on the most extreme forms of expression. It's not even a practical option to talk about trying to eradicate, through censorship, stereotyping or group defamation.

If we're going to focus through law on censoring, on regulating or restricting—however we'd frame it—these most extreme forms of expression, well, they are extreme in character, and I'm not sure that conciliation is actually the ideal model to respond to this.

If you look at the cases that have been recommended, that have moved from the Canadian Human Rights Commission to the tribunal stage, at which the tribunal has almost invariably found a breach of section 13, we're talking about seriously extreme expression in which you see individuals, in effect, calling for violence against the members of an identifiable group. It seems to me that that's what we should be focusing on. That is not the kind of stuff that we deal with effectively through, I suppose, the kind of conciliatory process of human rights commissions.

**Ms. Cheri DiNovo:** In a sense, you are right in saying that your comments, however interesting to us, are outside of the realm of what this committee is looking at with the implementation of Bill 107 and the Human Rights Tribunal and what happens there. Our concern, as a party, with a human rights tribunal is the access. Apparently, only 40% of complainants have legal counsel, and certainly the kind of counsel one would expect to carry them through the entire process. We're also finding that there's not enough staff or funding to really investigate some of the issues, clearly.

Our problems with the Human Rights Tribunal are more its effectiveness in terms of promoting and defending human rights on the individual basis here—and of course, ultimately, systemically, I suppose—than anything else.

Have you looked at Bill 107, and did you have any comment?

**Mr. Richard Moon:** Unless you're contemplating including a more robust restriction on discriminatory speech or unless section 13 of the current code has some new life breathed into it, you're right: I'm not sure that I'm the most useful person for you to speak to.

1520

**Ms. Cheri DiNovo:** Fair enough; thank you very much.

**The Chair (Mrs. Julia Munro):** Thank you very much, and we'll go to Mr. Berardinetti.

**Mr. Lorenzo Berardinetti:** Thank you, Madam Chair, and hello, Professor Moon. My name's Lorenzo Berardinetti, for the Ontario Liberal Party, and I'm also a Windsor law school alumnus; many years ago. So it's a pleasure to hear from you today.

**Mr. Richard Moon:** Before my time, I'm hoping.

**Mr. Lorenzo Berardinetti:** Yes, yes. Back in the 1980s.

I had just a couple of quick questions for you. I just wanted to ask if you ever had any occasion yourself to

appear at the Human Rights Tribunal or interact directly with the Human Rights Tribunal as opposed to the Human Rights Commission.

**Mr. Richard Moon:** I have not—either the commission or the tribunal.

**Mr. Lorenzo Berardinetti:** Okay. In the study that you prepared—I have to confess that there's so much paper in front of us, I haven't had a chance to read all of it—it seems that it deals primarily with hate speech and not discrimination claims in general.

**Mr. Richard Moon:** No, I was directed specifically to discuss section 13, which deals with what we could roughly describe as hate speech.

**Mr. Lorenzo Berardinetti:** Would you see that, then, as being the reason—you're saying section 13—

**Mr. Richard Moon:** Section 13 of the Canadian Human Rights Act.

**Mr. Lorenzo Berardinetti:** The Canadian Human Rights Act.

**Mr. Richard Moon:** Yes, not to confuse it with the code section.

**Mr. Lorenzo Berardinetti:** Okay. I'm just trying to see how we can put that into what we're looking at today, which is basically the tribunal, and if you would have any recommendations as to how the tribunal could better function.

**Mr. Richard Moon:** Again, I don't claim any sort of expertise in dealing with the more familiar forms of direct and effects discrimination in the context of employment, services and so forth. Any legal academic is capable of having opinions about everything and anything, but I think it would be presumptuous of me to suggest I had any useful opinions on this for you.

**Mr. Lorenzo Berardinetti:** Those are all my questions. Thank you.

**The Chair (Mrs. Julia Munro):** All right, thank you very much. This concludes the presentation. Thank you very much, Professor Moon, for joining us.

**Mr. Richard Moon:** Thanks again for accommodating me.

#### ACCESSIBILITY FOR ONTARIANS WITH DISABILITIES ACT ALLIANCE

**The Chair (Mrs. Julia Munro):** Our next presenter, the Accessibility for Ontarians with Disabilities Act Alliance, and David Lepofsky, the human rights reform representative.

Good afternoon, Mr. Lepofsky. As you will know from the earlier deputations, we have 30 minutes set aside. You will have the opportunity to make comments in that time and whatever remains will be divided among the caucuses. So please begin when you're ready.

**Mr. Orville Endicott:** Good afternoon, members. My name is Orville Endicott and it falls to me to introduce to you our main presenter this afternoon, David Lepofsky, and also our other colleague Lesley MacDonald. If I may just say a word about myself first, I am not part of the leadership of the AODA Alliance but I am one of the

architects of it, and when I say a few words about Mr. Lepofsky you will get a sense of the history of how the AODA Alliance came into being.

My other colleague is Lesley MacDonald, who is the national coordinator of accessible design services for the Canadian National Institute for the Blind. She has, with the blessing of CNIB, made her skills available to the AODA Alliance for its work.

Now, David Lepofsky, who is going to be presenting to you today, is a graduate with honours from Osgoode Hall Law School and went on to do a Master of Laws at Harvard Law School in the early 1980s. Even before that, he was very active in a volunteer capacity and continues, to this day, to be a volunteer advocating for reforms to the law that will secure better rights for people with disabilities. He was one of the most articulate and persuasive voices that gave us, in the Canadian Charter of Rights and Freedoms, the guarantee of equality for persons with disabilities. He had the same impact here in this province with respect to the inclusion of protections against discrimination on the grounds of disability in the Ontario Human Rights Code.

If I were questioning him I might ask him how long it is going to take him to get Canada to ratify the United Nations Convention on the Rights of Persons with Disabilities, which was passed at the UN and signed by Canada more than two years ago.

Beginning in the mid-1990s, David was the organizer and the driving force in the Ontarians with Disabilities Act Committee. That committee achieved, through the Conservative government in the 1990s, the Ontarians with Disabilities Act, 2001. Then, of course, he went on to ensure that we have the Accessibility for Ontarians with Disabilities Act, the AODA, passed in 2005.

Whenever I ride on the Toronto Transit Commission's subways or buses, I can't help thinking of David because I take advantage, just like people with visual impairments do, of the very clear and timely announcement of every stop. It's a very dulcet and clear voice that I hear, but it's really David Lepofsky's voice, which you will hear in just a minute.

I left out that we would not be hearing that voice had David not successfully gone to the Human Rights Tribunal of Ontario, first to ensure that the TTC would announce subway stops and then a little while later that they would announce all bus and streetcar stops.

David received the Order of Canada in 1995, the Order of Ontario in 2007, and too many honours for me to list. He is a prolific author, both of published and unpublished documents, one of which you have before you today. He is the human rights reform representative for the AODA Alliance.

David.

**Mr. David Lepofsky:** Thank you, Orville.

It's an honour to be able to appear before you. You have a brief before you that we've submitted. I know that this hearing is being televised. If anybody else wants to get a copy of our brief, we'd be delighted to e-mail it to

them. They need simply send a request to aodafeedback@rogers.com.

We're honoured to be here particularly because we wanted to make these points about two and a half years ago at standing committee hearings on Bill 107, which we were promised, which the government scheduled, which the government advertised and which the government, over the commendable opposition of the opposition, cancelled through an unprecedented closure motion to muzzle public debate on human rights reform. I regret that what we are here to do today is to tell you what we were trying to warn you of three years ago and unfortunately appears to be coming true as a result of the government's changes to the Human Rights Tribunal and the related agencies it works with.

The coalition which I have the privilege of serving is made up of individuals and organizations, like Orville and Lesley, who, some 30 years ago came to this building to fight to get discrimination because of disability into the Human Rights Code. We were delighted to win two rights back in 1982. First was a legal ban on discrimination in the workplace and access to goods and services, housing and the like, based on disability. But that wasn't the only right we won. The second right we won was a legal guarantee that our human rights would be publicly investigated and publicly prosecuted by a public law enforcement agency called the Human Rights Tribunal. As long as the complaint was within their jurisdiction, not trivial and incapable of being settled, their job was to investigate it and, where appropriate, to litigate it. Those were two important rights that we won. In the 1990s, we united as a disability community to fight for and win the Accessibility for Ontarians with Disabilities Act, a new law to build on, not replace, the Human Rights Code.

#### 1530

We're here today to draw your attention to the promises that the government made in 2006 when it decided to pass Bill 107 to privatize the enforcement of human rights, and to demonstrate through the government's own data by those responsible for implementing this law that those promises have, sadly, not been kept.

In 2006, the government, over the commendable opposition of both opposition parties, opted to repeal the right that we won to have our human rights claims publicly investigated and, where warranted, publicly prosecuted by the Human Rights Commission. The government decided to privatize it: to put the job of investigating and litigating our human rights on the backs of discrimination victims themselves, a population that the government always recognized is vulnerable, disadvantaged, often impoverished and least able to take on that privatized duty on their own.

What did the government promise it would do? By privatizing the human rights enforcement process, by telling us that we have to take our cases right to the Human Rights Tribunal, investigate them ourselves and try to get the support of the Human Rights Legal Support Centre, if they choose to represent a claimant, the

government said that they would clear the backlog, which we all agreed was too long and too big, at the Human Rights Commission. The government said that this legislation would create new access to the Human Rights Tribunal; that any discrimination claimant would have the right to a hearing. Indeed, we were told about a hearing within a year of filing a complaint. We were told that the hearings would become more accessible and more fair, and we were told that, as a vanguard to support this, the government was not abolishing the role of the Human Rights Commission; we were told it was going to be strengthened and it would be in the vanguard of litigating human rights cases on a systemic or public interest basis. That's what we were told by the government, and if you look at appendix 1 to our brief, we provide quotations from the record to prove all of that.

So what has happened? This is from data that we requested from the Human Rights Commission, the Human Rights Legal Support Centre and the Human Rights Tribunal. Appendix 2 to our brief sets out the information requests. To the extent that we weren't able to get everything we wanted because of time limitations or they don't collect the data, we urge you to ask them for this same data that we weren't able to get.

What did we learn? First, what we have learned is that a very substantial proportion of the people who used to come forward to approach the human rights system appear not to come forward and approach the human rights system at all. According to the annual reports of the Human Rights Commission before its main functions were eviscerated, it would receive, in the mid-2000s, in the range of 50,000 to 65,000 calls per year. That's first contact, and if somebody doesn't make first contact, they're not going to go any further.

What have we learned under the new system? We understand that the intake role, the first-contact role, has been transferred to the Human Rights Legal Support Centre. The data that they've provided to us is that in their first six months, they've gotten approximately 10,000 calls. It sounds like a lot of calls, but it's actually less than half that would have come in in the same time period under the old system. Unless somebody can show that those people are otherwise engaging the system, that suggests to us that a substantial proportion, more than half of the people who might have come forward, may not be coming forward at all, even to make first contact. That alone ought to cause serious concern for everybody.

But that's not all. What has happened to the people who have come forward? We were told that the government would clear the backlog. The data that we've got on the caseload before the Human Rights Tribunal suggests that the backlog is as big as ever. The numbers we've been given—you heard some this morning, and they're in our brief—are that the new applications still not settled number about 1,000. The number of cases that jumped from the old system between June and December still not settled—some of them have been; I'm talking about the unsettled ones—is another 800. There's 1,800. We were also told that there are another 700-and-some

that the Human Rights Commission has before the tribunal under the old system, but a number of them are class action, so we boiled that down to 400 to be cautious in our numbers. That's 2,200 cases. If you file a complaint tomorrow, you join a lineup behind 2,200 other cases.

That backlog is not lower than it was if you take into account the following: There are, from what the Human Rights Commission has told us, another 2,000 cases that were at the commission in December of last year, not resolved, and the commission has had all of its residual powers to deal with them taken away. So they've got the right to jump into the new system. Those are cases which, if they do jump in, mean that you would be in line, if you come forward with a new case, behind 4,200 cases.

If you look at the statistics of the Human Rights Commission backlog that was the subject of a massive government critique, and properly so, when Bill 107 was brought forward, and the number of cases that were at the tribunal, and you combine them together, you won't see that there is progress. If anything, we've got a matter of concern.

Can they clear the backlog? You'll say this is early. They've got 22 full-time adjudicators at the tribunal and 22 part-timers, and I wasn't able to get figures on how many full-time-equivalents they are. If those 22 full-timers work every day, every night, don't go to the bathroom, don't eat and don't sleep, I don't believe that they can deliver a hearing to every complainant within the year that we were told to expect under this new system.

The government might say, "Oh, but it's a transition period"—not a fair answer. It's not a fair answer because we warned the government, and wanted to warn the Legislature, but of course we were muzzled by a closure motion, that their transition provision was going to do exactly what's happening. Moreover, the government gave itself 18 months after it passed Bill 107 to try to fix this problem and proudly announced last April that they were giving unprecedented money to fix it. So if they gave themselves the time they decided to give, gave themselves the money they thought was unprecedented, and still couldn't fix it, they can't turn around and say, "Ah, but it's a transition period." A new claimant is going to get into a longer backlog than ever. This is a serious, serious problem.

If that alone was the problem, that would be bad enough. It gets worse. The government promised us hearings that would be more accessible. This morning you heard Mr. Gottheil, the chair of the tribunal, talk about the new rules they've adopted. We reviewed those new rules, offered detailed proposals about them, expressed serious concern, and, I regret, were mostly disregarded, or our views were rejected when the tribunal set up its new rules.

Given the rules that the tribunal has adopted, a discrimination claimant would be foolhardy to try taking on the Human Rights Tribunal process without a lawyer.

The rules number 28 pages, I believe. They have fully 24 forms, any number of which you may have to fill out. There are detailed procedures; they are complex and they serve as a trap for the unrepresented. I'm not saying they were meant as a trap, but anyone who goes before that tribunal unrepresented goes forward at their own peril. They need to have legal representation, we believe. We warned the tribunal, and all the plain language in the world in their rules or their forms doesn't remove that need.

Given that, what is the situation? What is the reality before the tribunal?

The government promised us that there would be free, independent legal representation for all discrimination claimants. The quotations documenting that are in appendix 1 to our brief. Have they delivered it? Again, don't ask us; ask the tribunal. The data they gave us was that only 40% of new claimants came to them with legal counsel. The figure I believe they gave this morning may have been as low as 20%, but let's assume it's 40%. Let's give them the benefit of the doubt. That means 60% of new claimants are unrepresented. That's a far cry from everyone being represented when taking on rules which one needs legal training to navigate and to avoid risk in the presentation of your case.

Now remember, under the old system this wasn't as much of an issue because the case didn't go to the tribunal unless the Human Rights Commission had investigated it, tried to settle it and assigned counsel who was supposed to have carriage of it before the tribunal. Under the new system, you're on your own, and that is a serious problem under the new system.

I just talked about how many people are unrepresented among the claimants who bring new claims. What about the 900 or so people who were in the old system last June and decided to jump to the new system this fall? According to the website of the Human Rights Legal Support Centre I quoted in our brief, they opted as a matter of policy not to represent any of them. That's none of them. That's their policy. I don't know if they departed from it, but all we know is that that's their policy. That's a far cry from full legal representation for all claimants.

**1540**

We have a very serious, troubling system. The question came up this morning, and we commend those members who raised it: What about the respondent? Is the respondent, the party accused of discrimination, represented?

Let me talk personally for a moment. As Mr. Endicott indicated, I brought two cases against the TTC, one to get them to announce subway stops and one to get them to announce all bus stops so that we blind people, and, by the way, you sighted people, can know where the heck we are—an outrageous human rights claim, of course. One would have thought it so obvious that they would have done it, but they didn't. Instead, under the old system, the TTC went and hired lawyers. Between the two cases that I fought against them—and freedom-of-

information requests that I brought and documented—the Toronto Transit spent a grand total, between the two cases, of 450,000 taxpayer dollars on lawyers to oppose calling out all bus and subway stops reliably for the benefit of blind passengers.

I'm not saying that every respondent is going to spend that kind of money, but many of the biggest ones can, and it is not a fair fight for an unrepresented, disadvantaged discrimination claimant, who may have lost their job for trying to get access to a basic government service, to be up against the muscle that can be marshalled against them when many respondents are legally represented and the complainant may not be.

You asked the tribunal this morning, in how many cases is the complainant unrepresented but the respondent isn't? They told you they don't have that data. We asked that same question. With respect, they should have that data. The issue of proper legal representation was a central concern during the much-focused-upon and much-covered public debates over Bill 107. Even the proponents of Bill 107—those who were on the other side of the debate from our coalition and others who support us—many of them, from the community groups, agreed how important it is not to throw in an unrepresented complainant against a represented respondent.

Time is short. Let me jump to some other considerations. Again, if all of that was the only thing that's gone wrong, it would be bad enough, but I regret that it gets worse.

When the government brought forward Bill 107, the government and its proponents said that one of the big problems with the old system was that there was a gatekeeper at the gate of the Human Rights Tribunal of Ontario. It was the Human Rights Commission that would decide which cases went forward, and they repeatedly talked about how few cases actually go to a hearing. They said the new system would have no gatekeeper.

We believe that the data before you will show that they've just changed gatekeepers. There's a new gatekeeper; it's called the Human Rights Legal Support Centre. They get 10,000 calls in six months. They do, I am sure, the very best they can; they are dedicated and hard-working people. They interview, I believe, a proportion of the people who call them, they have advised a smaller proportion, and they have ultimately drafted complaints or applications for, we've been told, about 200 or so applicants and another couple hundred more coming—a very small fraction of the 10,000. That is de facto a gatekeeper role.

Again, if that wasn't bad enough, we'd have a lot to be worried about, but it gets worse. We were told that the Human Rights Tribunal would adopt proceedings that would be fair. The Human Rights Tribunal, over our objection and those of many other community groups, opted to use the power that the government gave it to override the requirements of fairness in the Statutory Powers Procedure Act. Mr. Gottheil this morning made it sound like we're trying to come up with old technical criminal law proceedings at the tribunal—far from the

truth. With respect, it's just not our position. We want some basic fairness.

We quote in our brief one ruling that should give members of this committee concern. I don't want to talk about the merits of the case; I don't know anything about the merits of the case. But in a case called Persaud, one tribunal adjudicator, a Mr. Mark Hart, decided, before a hearing began, to dictate to the parties how long they could examine in chief or cross-examine each of the witnesses listed—an hour for this one in chief, an hour in cross, a half-hour here in chief, a half-hour in cross—and he said, “If you've used up your time, or if you're not happy with this, I'll consider an extension, but you've got to first identify, or prove to me, that you used your time effectively.”

With respect—and I'm not commenting on the merits of the particular case there—this is exactly the kind of potentially unfair proceeding about which we are very concerned. It is impossible in advance to have an adjudicator who does not know the witness, hasn't interviewed the witness and doesn't know all of the ins and outs of the case to know better than counsel calling the witness how long they need to examine them or cross-examine them. The tribunal gave the same time for chief and for cross. It's not unusual in cases for a witness to be very short in chief, very long in cross, or the other way around.

Finally, the tribunal, deciding that they would give people the opportunity to ask for an extension after or near the end of their time—after they've already used it up—puts counsel in a hopeless position. You have to know how much time you have before, not after you've used it.

I know my time's just about up, but I just want to talk about my last area of concern. A hugely important issue—by the way, I can't say how prevalent that practice is; I'm just simply advising that that is a decision which is an indication of an area of concern which merits, I believe, more attention by this committee into the powers the tribunal is using.

Final area of concern: public interest remedies. It's not enough when somebody is discriminated against, if they prove their case, to give them some money and say, “Go away.” If that happens, the claimant may be happy to get some money and go away, but that doesn't prevent it from ever happening again. That's why we need public interest remedies. The party that was in the lead of seeking public interest remedies under the old system was the Human Rights Commission. Of course, they're ahead of the game for most of these. We are very concerned. We wrote the tribunal and asked how many cases they're giving public interest remedies in settlements and we haven't gotten any answers on that yet. We hope they're able to pull that information together.

But of course, there are six reasons that I'm going to summarize, then I'll conclude, why you should be very concerned about this under Bill 107.

First, the government said that under Bill 107, the Human Rights Commission, even though it was out of

the business of dealing with individual cases, would be in the vanguard of bringing public interest cases. Guess how many they've brought under Bill 107? Zero. That's their number, not mine. Under the old system, they've got one still outstanding. They've done one inquiry so far, but they've brought zero commission-initiated complaints so far. That's one of my six.

Number two, the government said that the Human Rights Commission could intervene in individual cases. This was an avenue, for example, to bring forward public interest concerns. How many of the 1,200 new applications have they intervened in under the new system? According to the Human Rights Commission, one. Well, that's one more than zero.

The government told us that the commission would retain investigative powers, but look at schedules or appendices 4 and 5 appended to my brief. They've laid off all their investigators. How can they investigate without investigators?

Fourth, the government said that the Human Rights Commission would be empowered to do this through two new secretariats that Bill 107 requires them to establish, the anti-racism secretariat and the disability rights secretariat. You go down to the Human Rights Commission—you can go all through the building and look for them—they don't exist, contrary to the requirements of the Human Rights Code.

Finally—I only have time for five—the government said that we could be confident that disability would be a priority among the commission's work. You'll see that while they have done some important work in disability, and I'm sure they'll do some more, their priorities set out in their strategic plan, which we quote, set mental health as one of their priorities but no other disability issues—a bunch of others. We're very concerned that we're going to fall, potentially, to the lower end of the priority spectrum.

Let me conclude by thanking you again for giving us the opportunity. I wish we would have been able to do this three years ago. We welcome the chance to come back to talk more about this as you get more data. We encourage you to have full hearings and invite not just those of us who are here today but anyone else of the hundreds of groups who were frozen out.

Finally, we encourage you, on all sides of the House, to unite to have the government keep the promises that it said it would under Bill 107. Thank you very much.

**The Chair (Mrs. Julia Munro):** Thank you very much. You did mention that you had six and that you went to five. We are certainly here to hear number six if you want to add that.

**Mr. David Lepofsky:** Okay. That's fine. I just wanted to make sure I didn't go over my time.

**The Chair (Mrs. Julia Munro):** No, no. Go ahead.

**Mr. David Lepofsky:** All right. The sixth concern is this—this is really fundamental to us. Remember I said that the disability act that we fought for and proudly won in 2005—the underpinning of it was the Human Rights Code. We're very proud that the government brought it in and we're very proud that both opposition parties

united to support it. That was an incredible day back in 2005, when it was passed.

Let me talk about what happened leading up to that bill. One of the things that Premier McGuinty promised our coalition in the 2003 election was that that disability act would have effective enforcement. When Premier McGuinty got elected, his government asked us what effective enforcement we wanted. We said we would like a new enforcement agency to enforce the accessibility requirements, independent of the government. We had a long discussion with the government and the government ultimately elected not to give us that new enforcement agency. I was the lead negotiator for our side of the table. They were very good negotiations and in good faith we were told, I believe, that the government believed that we would have enough to be able to continue to use the investigative and prosecutorial functions of the Ontario Human Rights Commission. We didn't get everything we wanted in that bill, but we shook hands and celebrated its passage as an overall good deal.

A year later, the government turned around and ripped out the Human Rights Commission's investigative teeth and its enforcement teeth. In other words, the very enforcement agency that we were supposed to be able to

fall back on was essentially eviscerated. That, we say, is not fair. It undermines the Human Rights Code, but it also undermines the disability act for which all three parties so properly and wisely united to pass. That is a breach of faith; it is a breach of commitment; it is fundamentally unfair. It is also something that we wanted to be able to say to a committee of the Legislature three years ago, only a closure motion precluded us from being able to say it in here. We had to do it at press conferences or in letters to the editor.

**The Chair (Mrs. Julia Munro):** Thank you very, very much. We appreciate your being here today. As you might have realized, we have exhausted the time that is available, but I'm very pleased that we were able to offer you the opportunity to make your final comment. Thank you very much for being with us today.

**Mr. David Lepofsky:** Thank you very much.

**The Chair (Mrs. Julia Munro):** Ladies and gentlemen, that concludes the business for today. The committee stands adjourned until you have the closed session at 9, the open session at 9:30 tomorrow.

*The committee adjourned at 1553.*



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