

March 16, 2006

The Honourable Dalton McGuinty
Premier, Province of Ontario
Room 281, Main Legislative Building
Queen's Park, Toronto, Ontario
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Mr. Premier:

We are writing to express our grave concern with regard to the announced intention of 'reforming' the Ontario Human Rights Commission and the corollary revisions to the *Ontario Human Rights Code*. We join the large number of groups, organizations and individuals that have been appealing to you directly in recent days, in urging you to take a leadership role in resisting the introduction of the so-called "direct access" model. Any legislation and change on such a vital matter should **not** be introduced until there has been proper and adequate consultation with those most affected.

Established in Canada in 1875, B'nai Brith is Canadian Jewry's oldest and only independent community service organization. The League for Human Rights of B'nai Brith Canada is considered by many to be Canada's foremost human rights agency, dedicated to combatting antisemitism, racism, bigotry and hate in all its forms. We have enjoyed a long and fruitful association with the Ontario Human Rights Commission over the years, both as a partner and as a consumer.

It is ironic that the proposed changes to "modernize Ontario's human rights system" in order to "better respond to complex human rights issues that have an impact on groups of people as well as individuals":

- i) are based on a report that is 15 years old, which therefore does not take into account new constructs necessary to deal with new realities;
- ii) do not benefit from recent experiences in another province. The proposed model promotes a direct access system that was almost universally vilified in the 1980s when it was first attempted in British Columbia and has more recently been proven, once again, ineffective, inefficient and costly;
- iii) have the potential to deny the very equality and access to justice that they purport to advance, for a large number of vulnerable populations;
- iv) propose to "establish" infrastructures that were in place at the Commission 20 years ago (one of which, the creation of a Race

- Relations Directorate within the Commission, still remains as a legislative requirement in the current *Code* (s. 28(1) and (2));
- v) could well violate past Court and Tribunal orders that led to many of the delay-inducing safeguards and layers of procedural fairness that have been added to the complaints process.

It is also ironic that the proposal to create a process of human rights adjudication that is open, accessible and transparent, was developed virtually ‘in camera’ through a process whose impetus came primarily from those who appear to stand to benefit financially from its implementation, and without consultation with, or input from, those who stand to lose morally and substantively from its implementation – members of groups protected under the *Code*, complainants and respondents of the current human rights system, and human rights staff, were excluded.

In 1962, Ontario was the first jurisdiction in Canada to consolidate existing anti-discrimination legislation into a comprehensive *Human Rights Code*, and created the Commission to enforce it. From the outset, its intent was to create and nurture a social climate wherein the dignity and worth of each individual would be respected. Its founding visionaries recognized that the Commission’s extensive public interest mandate would best be served through a conscientious, interdependent and *integrated* program of compliance and enforcement, public education and community relations, and legislative and policy challenges. Such was its authority and influence that the Government granted the *Code* primacy over all other provincial legislation.

As the needs of society changed, so too did human rights legislation and the concomitant policies, programmes and systems. Grounds of protection were added, and public education and outreach were enhanced, leading to a tremendous increase in the number of cases coming forward to the Commission. Unfortunately, the requisite financial and human resources to support the resulting increase in demand for services did not keep pace, and a backlog was created. To now propose eviscerating the Commission – whose work formed the template for all subsequent provincial, federal and international human rights commissions – and replace it with a system whose track record elsewhere is less than stellar in the extreme is, we believe, shortsighted and potentially dangerous to the protection of human rights in Ontario.

For the above reasons, we urge you to set aside the proposed legislation and any changes regarding the Ontario Human Rights Commission and *Code*, and instead institute a full consultation process engaging all relevant stakeholders. There is no question that the Commission’s complaints process is in need of review, revision and refinement in order to operate more efficiently and expeditiously. And who better to inform that review than those who require and use the system. To hold hearings on a direct access Bill which many of the most affected advocacy groups and their constituents oppose, would be counterproductive.

It is not our intention in this communication to offer alternative models; we would, however, be most pleased to participate in a consultation to this end. In the interim, we offer the following concerns relating to the announcement, for your consideration:

1. Rather than **improving the complaints process**, the proposed model would make it more onerous for the consumers by requiring them to conduct their own investigations and gather evidence, within an environment that is already poisoned by the very filing of a complaint. The resulting **power imbalance** mitigates against justice being done since, as well, respondents may be in a better position to afford legal representation. There is an inherent bias as, unlike the respondent, the complainant would have neither the perceived authority nor experience to access the relevant documents and witness statements (the basis for evidence) necessary to conduct a thorough investigation and effect a fair resolution.
2. If there is an extensive **caseload** in an agency replete with experienced officers, operating within a system with which the public has had a familiarity for 44 years, one queries the assumption that a new system conducted by 'neophytes' and navigated by members of the general public would not create a backlog. The gatekeeping function would, as a result, not be eliminated; it would, of necessity, have to be re-instated at the Tribunal level – a Tribunal which, we understand, is already burdened with cases. One need only look at the backlog within the civil and criminal court system to appreciate how **direct access** may play out.
3. **Lack of resources** required to perform optimal work is an ongoing concern at the Commission. Rather than infusing a new system -- which has proved to be, in other jurisdictions, far more costly than the existing system -- with additional funding, it would be more expedient to perform an administrative audit of the Commission and increase its funding in the appropriate areas to allow it to fulfil its mandate more effectively.
4. In the realm of **apprehension of bias**, one of the positive aspects of the separation of Commission investigations and the Tribunal process is the autonomy under which both operate. The Tribunal is currently viewed as a distinct 'court of next resort', separate from the Commission process. To now render the Tribunal investigator, judge and jury would cast aspersions on the neutrality and objectivity of the human rights process.
5. The need for **legal representation and advice** – currently a statutory right – will put an unnecessary, unfair and onerous burden on the majority of complainants, who are already victimized by alleged discrimination, and would potentially have a profoundly negative impact on small businesses. The offer of some form of legal aid in the Attorney General's announcement would benefit only those who fall within a certain income category. We understand, despite this assertion on the part of the Attorney General, that Legal Aid – an already overtaxed system --

is not in a position to adequately fund such a programme, nor are many community legal aid clinics in a position to, or willing to, have carriage of these complaints. We fear that this will create an ethos of ‘justice by means test’ wherein justice will be beyond reach of the average person, rather than more accessible. Should a party to a complaint choose to proceed unrepresented, one need only look once again to the Court system to appreciate the delays and chaos resulting from unrepresented parties.

6. Given that the financial remedies stemming from individual complaints are not considerable, many lawyers would be unprepared to engage in a lengthy process for small remuneration. This opens the door for exploitive paralegals or others unfamiliar with human rights, acting as agents for complainants, further rendering justice a distant hope. As well, rather than expediting cases at the Tribunal level, it has been suggested that the process would become even more protracted, as respondent lawyers will seek preliminary objections, motions to produce, motions to dismiss, and adjournments to accommodate their schedules. In addition, the power of the Tribunal to award costs against the complainant would have a chilling effect on the filing of meritorious complaints and abort the process of justice. It is worth bearing in mind that 73% of cases at the Commission are settled through a process of publicly funded mediation, investigation or conciliation, without the need to hire and pay for lawyers.
7. The League for Human Rights for some years was involved in the process to secure a strong and effective **Ontarians with Disabilities Act**. One of the key recommendations was the creation of a separate enforcement agency to ensure barrier-free access in all sectors for persons with disabilities. Although the proposed Act was less than hoped for, those engaged in the process agreed to the passing of the Legislation with the proviso, and on the assurance of this Government, that such an agency was not required because the Commission would be sufficiently strong to deal with relevant complaints, policies and programmes. It is unconscionable to now remove this avenue of complaint and redress, and expect persons with disabilities to truly achieve justice.
8. The proposal indicates that the Commission will retain authority to engage in **systemic research and investigations**. Yet it is primarily its investigating and compliance function, its ability to see each case through to completion, which highlights areas and trends that require systemic measures and policy directions. Otherwise, such efforts will be informed by anecdotal information and hearsay, rather than fact and statistics. In particular, mediation and investigation functions are necessary to fully address racial complaints because of the socio/political/historic factors involved.
9. In the proposed system, the complainant has responsibility for carriage of his/her complaint of discrimination. However, individual complaints result in individual remedies, and impair the potential for **human rights advancement**. In a direct access model, individual complainants and their lawyers, where present, at the

Tribunal, would have no incentive to look beyond individual remedies in favour of public interest. The benefit of the current system, and the prime function of the *Code* and Commission is to **represent the public interest** in remediating human rights violations. Its integrated function ensures that cases that proceed through the system are dealt with for wide-ranging policy considerations, legal implications, opportunities for public education, and with an eye to the public interest component, such that both individual *and* substantive, societal remedies are effected, thus having a stronger potential to prevent and eliminate discrimination on a broader basis. Individual complainants and their lawyers at the Tribunal, in a direct access model, would have no incentive to do so. Philosophically, the proposed model will transform human rights adjudication from a conciliatory, remedial process to an adversarial, punitive one – not one conducive to good will, or to the concept of human dignity, respect and worth.

10. We are concerned about the perceived conflict of interest inherent in having the Commission operate under the aegis of the Ministry of the Attorney General – whose lawyers defend government respondents in human rights cases. More fundamental is the inherent unfairness of requiring complainants to hire their own lawyers, while government respondents will have the benefit of paid career government counsel.

We support wholeheartedly the strengthening of the Commission's ability and mandate to address systemic issues – proactively and through complaints -- as we do the re-establishment of a race relations entity to not only advise, but to research and address race-based issues in the community. As mentioned at the outset, some 20 years ago the Commission had, in addition to its Compliance, Legal and Public Education Branches, a separate Systemic Investigations Unit, a Unit for the Handicapped and a Race Relations Division – all of which performed groundbreaking work which provided essential jurisprudence, policy and programmes in their respective areas, and which inform much of contemporary human rights at home and abroad. We are pleased that their benefit is once again being recognized, but query their effectiveness if the Commission is divested of the appropriate enforcement mechanisms.

It is perhaps coincidental, and the final irony, that this discussion is taking place on the eve of the International Day for the Elimination of Racial Discrimination, March 21 -- a day which stands as a universal symbol of the need to raise our individual and collective voices to oppose racism and discrimination. It reminds us of the responsibility of all member states to recognize the inherent dignity and equal rights entitlement of ALL members of the human family, and the commitment to universal freedom and justice. We in Canada, and in Ontario, are fortunate, indeed. We live in a democracy where injustice and discrimination are condemned by political philosophy, and punishable by law. And therein lies the irony – because we believe that what is being proposed by this current reform, is neither fair nor respectful of Ontario's pluralism and diversity.

This government promised during its 2003 election campaign that it would strengthen the human rights system in this province, not dismantle the Commission. We look to you to honour this commitment. This issue provides a golden opportunity for Ontario to once again stand in the forefront of progressive, dynamic human rights advancement which will nurture its reputation as a province dedicated to the enhancement and equality of all of its citizens. We therefore urge you to give full consideration to the concerns about the proposed model you have already received, and those which you have yet to receive, from individuals and groups who would be most directly affected by the proposed changes. To pass inadequate legislation and create a less than effective process would be an insult to the victims of discrimination in this province, and to those who advocate on their behalf. **Please, do not permit a hastily drafted Bill, without the benefit of adequate consultation, to be introduced in the House.**

We wish us all productive deliberations, and look forward to celebrating their fruition.

Your truly,

Toni Silberman
Immediate Past Chair
League for Human Rights – Ontario Region

c.c. Honourable Michael Bryant, Attorney General of Ontario via facsimile (416) 326-4016
Honourable Sandra Pupatello, Minister Responsible for the AODA via facsimile (416) 325-1498
Honourable Dwight Duncan, House Leader via facsimile (416) 325-7755
Ms. Barbara Hall, Chief Commissioner, Ontario Human Rights Commission via fax(416)314-7752
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