Durham Community Legal Clinic
& Access to Justice Hub

Written Submissions to:

Standing Committee on Justice Policy

of the

Legislative Assembly of Ontario

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Re: Bill 168, *Combating Antisemitism Act, 2020*

DCLC
Durham Community Legal Clinic

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About

The **Durham Community Legal Clinic (DCLC)** is a Community Legal Clinic that provides legal services, information, education, and representation for historically marginalized and low-income residents of Durham Region. DCLC also engages in advocacy and law reform activities, in particular to ensure that our laws properly consider the perspectives of historically marginalized and low-income Ontarians, and appropriate harmonization of new laws. The main areas of legal services DCLC provides includes human rights, employment law, housing and tenancy issues, and social benefits. As part of the clinic's public legal education initiatives, DCLC offers community-based anti-hate programming, which includes combatting antisemitism.

The **Durham Access to Justice Hub®** (the "Hub") was established by the clinic in 2019 with the assistance of LAO. This inter-agency and inter-disciplinary initiative intended to provide legal services beyond the income thresholds and subject matter of LAO, and other social, financial, and psychological services. These cooperative relationships seek to foster better client-centered services, reduce administrative barriers and silos, and improve efficiency of services that are funded or subsidized by taxpayer dollars. Some techniques used to achieve these goals include recruitment of volunteers to contribute towards improving access to justice, and by embedding students into workflows and innovative projects through experiential education. Through the Hub, DCLC provides even broader services to focus on the root causes of poverty, and engages in deeper forms of poverty alleviation.

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Shaun Bernstein is a Durham Resident, and volunteer with DCLC. He sits on the Clinic's Outreach and Governance committees. He is a former journalist and employment lawyer who currently operates his own digital marketing agency in Oshawa, Ontario. As an advocate, he has been a long-term critic of anti-Semitism, and was vocally active on university campuses in both his undergraduate and long-term careers

Background

International Holocaust Remembrance

1. The international community has broadly recognized the importance of commemorating the Holocaust, with Canada taking formal steps to formally commit to taking special action in this regard.
2. On Jan. 26-28, 2000, the International Holocaust Remembrance Alliance (IHRA) hosted the Stockholm International Forum on the Holocaust, and issued a "Declaration of the Stockholm International Forum on the Holocaust," which became its founding document.[1] The IHRA is the only intergovernmental organization with a mandate to focus exclusively on Holocaust-related issues.
3. The Stockholm Holocaust Declaration recognized how the Holocaust challenged the foundations of civilization, with the magnitude of its horrors creating a shared responsibility in the international community to promote education, remembrance and research around the Holocaust.

[1] International Holocaust Remembrance Alliance, "Stockholm Declaration" [the "Stockholm Holocaust Declaration"], available at: <https://www.holocaustremembrance.com/about-us/stockholm-declaration>. To be differentiated from the Declaration of the United Nations Conference on the Human Environment, UNEP, UN Doc A/Conf.48/14/Rev.1 (1973) [commonly referred to as the "Stockholm Declaration" in international law].

4. The United Nations designed January 27 as International Holocaust Remembrance Day on Nov. 1, 2005,[2] following a special session marking the 60th anniversary of the end of the Holocaust.

Canada's Efforts to Combat Anti-Semitism

5. Between 2008-2013, Canada undertook the Community Historical Recognition Program to reconcile actions in the past inconsistent with our current values, including raising awareness around wartime discriminatory measures and immigration restrictions. These measures included the refusal to offer refuge to the over 900 Jewish passengers on the MS St. Louis escaping Nazi Germany, who were refused sanctuary in Canada in 1938, and the nearly 2,300 men from Austria and Germany interned in camps as "enemy aliens."[3] The Prime Minister offered a formal apology over the MS St. Louis in the House of Commons on November 7, 2018.[4]

[2] United Nations General Assembly Resolution 60/7 (2005), available at: <https://www.un.org/en/holocaustremembrance/docs/res607.shtml>.
[3] Government of Canada, "Canada's 2017 Country Report to the International Holocaust Remembrance Alliance (IHRA)," Mar. 20, 2018, available at: <https://www.canada.ca/en/canadian-heritage/services/canada-holocaust/international-remembrance-alliance/canada-report-2011-2017.html>.
[4] House of Commons Debates, "Official Report (Hansard)," Vol 148 No 351, 1st Sess 42nd Parl, Nov. 7, 2018, at 23390-23393 [Right Hon. Justin Trudeau], available at: <https://www.ourcommons.ca/Content/House/421/Debates/351/HAN351-E.PDF>. See also, Justin Trudeau, Prime Minister of Canada, "Prime Minister delivers apology regarding the fate of the passengers of the MS St. Louis," Nov. 7, 2018, available at: <https://pm.gc.ca/en/news/news-releases/2018/11/07/prime-minister-delivers-apology-regarding-fate-passengers-ms-st-louis>.

6. Canada became a member of the IHRA in 2009, commemorating International Holocaust Remembrance Day on January 27, and Raoul Wallenberg Day on January 17. Canada even chaired the IHRA from March 2013 to February 2014.
7. Canada hosted the second Inter-parliamentary Coalition for Combating Anti-Semitism Conference in 2010, which led to the "Ottawa Protocol on Combating Antisemitism."[5]
8. In 2015, the House of Commons adopted a unanimous motion condemning the rise of antisemitism globally.[6]
9. On January 27, 2020, the IHRA marked the 75th anniversary of the liberation of Auschwitz-Birkenau, and the 15th anniversary of the International Holocaust Remembrance Day. Canada participated in this commemoration by sending the Governor General of Canada to the Fifth World Holocaust Forum at Yad Vashem

[5] Canadian Race Relations Foundation, "Ottawa Protocol on Combating Antisemitism," July 14, 2015, available at: <https://www.crrf-fcrr.ca/en/news-a-events/articles/item/24188-ottawa-protocol-on-combating-antisemitism>. See also, Government of Canada, "Canada becomes first country to sign the Ottawa Protocol," Sept. 19, 2011, available at: <https://www.canada.ca/en/news/archive/2011/09/canada-becomes-first-country-sign-ottawa-protocol.html>.
[6] House of Commons Debates, "Office Report (Hansard)," Vol 147 No 179, 2nd Sess 41st Parl, Feb. 25, 2015, at 11676, available at: <https://www.ourcommons.ca/Content/House/412/Debates/179/HAN179-E.PDF>. See also, House of Commons Debates, "Office Report (Hansard)," Vol 147 No 178, 2nd Sess 41st Parl, Feb. 24, 2015, at 11631-11660, available at: <https://www.ourcommons.ca/Content/House/412/Debates/178/HAN178-E.PDF>, where the House debated the subject for four hours.

on January 22-24, 2020,[7] and travelling to Poland on January 27, to pay tribute to the 1.1 million people who lost their lives there.[8]

IHRA Definition of Antisemitism

10. On May 26, 2016, the IHRA adopted a non-legally binding working definition of antisemitism:[9]

> Antisemitism is a certain perception of Jews, which may be expressed as hatred toward Jews. Rhetorical and physical manifestations of antisemitism are directed toward Jewish or non-Jewish individuals and/or their property, toward Jewish community institutions and religious facilities.

11. Canada was deeply involved and instrumental in developing IHRA working definition, and in obtaining consensus from the 34 IHRA member states.[10]
12. Canada also supported the German chairmanship to have this working definition adopted by the Organization for Security and Co-operation in Europe (OSCE) in December 2016

[7] Justin Trudeau, Prime Minister of Canada, "Governor General of Canada to attend the Fifth World Holocaust Forum," Jan. 15, 2020, available at: <https://pm.gc.ca/en/news/news-releases/2020/01/15/governor-general-canada-attend-fifth-world-holocaust-forum>.
[8] Justin Trudeau, Prime Minister of Canada, "Governor General of Canada to travel to Poland for the 75th anniversary of the liberation of Auschwitz-Birkenau," Jan. 17, 2020, available at: <https://pm.gc.ca/en/news/news-releases/2020/01/17/governor-general-canada-travel-poland-75th-anniversary-liberation>.
Governor General of Canada to travel to Poland for the 75th anniversary of the liberation of Auschwitz-Birkenau
[9] International Holocaust Remembrance Alliance (IHRA), "Working Definition of Antisemitism," available at: <https://www.holocaustremembrance.com/working-definition-antisemitism>.
[10] Government of Canada (2018), *supra* note 3.

13. As part of its anti-racism strategy, Canada adopted IHRA's working definition of antisemitism, "as a non-legally binding tool," on June 25, 2019.[11]
14. While the IHRA definition has received some critique over concerns that it may be used to inappropriately prevent political criticism, the IHRA itself recognizes nuance in the definition, and focuses on comparative treatment of Jews to other people and nations around the world.[12]
15. Bill 168, *Combating Antisemitism Act, 2020*, seeks to adopt the IHRA definition of antisemitism, and amends s. 87 of the *Legislation Act, 2006*[13] to add this definition directly to the act.
16. DCLC supports the adoption of the IHRA definition of antisemitism, but suggests that it is better placed in other more relevant legislation, rather than the *Legislation Act, 2006*.

Analysis

17. The *Legislation Act, 2006* is a special legislation in the statutory scheme of Ontario. It was preceded by the *Interpretation Act*,[14] which was repealed on July 25, 2007.[15]

[11] Government of Canada, "Canada reaffirms its commitment to fighting antisemitism and remembering victims of the Holocaust," Jan. 20, 2020, available at: <https://www.canada.ca/en/global-affairs/news/2020/01/canada-reaffirms-its-commitment-to-fighting-antisemitism-and-remembering-victims-of-the-holocaust.html>.
[12] IHRA, *supra* note 9.
[13] SO 2006, c 21, Sch F [the "*Legislation Act, 2006*"].
[14] RSO 1990, c I.11 [the "*Interpretation Act*"].
[15] Bill 14, *Access to Justice Act, 2006*, SO 2006, c 21, ss 134-136.

18. The *Interpretation Act* was largely subsumed into "Part VI – Interpretation" of the *Legislation Act, 2006*, with some significant differences. These differences may ultimately be relevant to the application of the definition of antisemitism in Bill 168. The two statutes have slightly different distinctions to their application and exclusion of other statutes.[16]
19. The *Interpretation Act* applied to every act or regulation in Ontario, unless a provision was inconsistent with the intent or object of an act, would be inconsistent with the context, or is declared in the act to be inapplicable.[17] In contrast, the *Legislation Act, 2006* also applies to every act or regulation in Ontario, but only excludes a contrary intention on an application that is inconsistent with the context.[18]
20. In other words, an explicit derogation from a definition in another statute from the definition in the *Legislation Act, 2006* may not be valid. In legislative interpretation, the concern here would be the creation of unintended consequences. For this

[16] The new *Legislation Act, 2006* also dropped the extended definition of "writing," which was found in the *Interpretation Act*. The reason for this may have been because common practice was starting to assume that an electronic record was itself writing, which would have conflicted with the definition in the *Electronic Commerce Act, 2000*, SO 2000, c 17, which defined it as not writing, but a functional equivalent of the same. This particular change helps illustrate the need to only retain broad and procedural definitions in the *Legislation Act, 2006*, as opposed to an ambiguous and deliberately working definition as proposed by Bill 168. The needs of the business community in light of rapidly changing technology is not dissimilar from the needs of human rights institutions needing to adapt to rapidly changing contextual facts relating to discrimination and hatred.
[17] *Interpretation Act*, s. 1.
[18] *Legislation Act, 2006*, ss. 46-47.

reason, the list of defined terms in s. 87 of the *Legislation Act, 2006* are quite narrow indeed.

21. There are currently only 19 terms (or groups of terms) defined in s. 87 of the *Legislation Act, 2006*. These terms are fairly common terms, which can be found in numerous statutes in Ontario. The chart included in Appendix "A" is illustrative of some of these terms.

22. In contrast, the term antisemitism is only found in one other statute in Ontario, the *Anti-Racism Act*.[19] As explained further below, this statute is the best place to introduce the 2016 IHRA working definition, and not in the *Legislation Act, 2006* itself.

Statutory Interpretation Issues

23. The inclusion of this term under the s. 87 of the *Legislation Act, 2006* is what might be termed "inelegant" in statutory interpretation, and creates a number of potential problems, which might give rise to unnecessary confusion, misinterpretation, and unwarranted litigation. The following examples illustrate how terms of statutory interpretation could operate to render the IHRA working definition inoperable in Ontario law.

24. First, the term antisemitism defined in this way could themselves be defined contextually with the other terms in s. 87. Words in a statute and their interpretation

[19] SO 2017, c 15, s. 2(4).

should be guided by the other terms which they are associated with.[20] This would have the unusual effect of defining antisemitism in the context of the other terms listed in the chart at Appendix "A."

25. This interpretation may limit efforts related to combatting antisemitism, to the extent that they relate to these other terms and their use in other statutes, or may dilute its intention by inferring meaning into the term where it is not otherwise specified by the 2016 IHRA working definition.[21]

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[20] *Bland v. Agnew*, 1933 CanLII 25 (SCC), [1933] SCR 345 at 347; *Canadian Warehousing Association v. The Queen*, 1968 CanLII 58 (SCC), [1969] SCR 176 at 179-180; *National Bank of Greece (Canada) v. Katsikonouris*, 1990 CanLII 92 (SCC), [1990] 2 SCR 1029; *Reference Concerning Refunds of Dues Paid to the Dominion of Canada in Respect of Timber Permits in the Western Provinces.*, 1933 CanLII 375 (SCC) at 51; *R. v. Daoust*, 2004 SCC 6 (CanLII), [2004] 1 SCR 217 at paras 50-51, 60-61; 2747-3174; *Québec Inc. v. Quebec (Régie des permis d'alcool)*, 1996 CanLII 153 (SCC), [1996] 3 SCR 919 at 195-200; *Canadian Warehousing Association v. The Queen*, 1968 CanLII 58 (SCC), [1969] SCR 176 at 178-179; *Olivier & Vir v. Jolin*, 1917 CanLII 54 (SCC), 55 SCR 41 at 44-45. See also, *Warren v. Chapman*, 1984 CanLII 2930 (MB QB) at paras 5-7, 16; 1985 CanLII 3053 (MB CA) at paras 7-12; *Stan Seidenfeld Professional Corporation v Huihua (Linda) Peng*, 2016 CanLII 26939 (ON LRB) at para 27; *Fraser Valley (Distrioct of) v. Jeffries*, 1998 CanLII 6273 (BC SC) at paras 10-17; *The King v. Lee Guey*, 1907 CanLII 137 (ON CA) at 82-83; *R. v. Bluestein*, 1981 CanLII 2690 (QC CS) at paras 4-8; *R. v. Boodhoo and others*, 2018 ONSC 7205 (CanLII) at paras 26-28; Ruth Sullivan, Driedger on the Construction of Statutes, 3rd ed. (1994) at 142, 4th ed. (2004) at 173, 6th ed. (2014) at 230; I. Copi and C. Cohen, Introduction to Logic, 8th ed. (1990) at 142-43 and 480. See *contra*, *Attorney General for British Columbia v. The King*, 1922 CanLII 55 (SCC), 63 SCR 622 at 637-638.

[21] This could be particularly true if the term antisemitism is provided a broad and general interpretation under the principled approach, with a narrow interpretation to any exemptions, in order to achieve the act's general objectives (*Rizzo & Rizzo Shoes Ltd. (Re)*, 1998 CanLII 837 (SCC), [1998] 1 SCR 27 at paras 36, 40). While the *Legislation Act, 2006* itself indicates at s. 69 that a statute's preamble *may* (sic) be used for interpretive purposes, *Legislation Act, 2006* itself does not have a preamble when first enacted. Instead, the general objectives of this part of the act and its predecessor are for the purposes of statutory interpretation, making any anomalous definitions in s. 87 subject to the extensive case law on how both have been applied in different contexts. The determination of the same is not necessarily guided by the approach employed by the statute, especially where the legislature has implemented an ambiguous term in a statute that is itself used for statutory interpretation. This is effectively rendered in the hands of the judge or adjudicator in the case, and not necessarily bound by *stare decisis* given the multitude of contexts in which it could arise. This creates unnecessary and unforeseeable complexities in the law, and the amendment in this manner is therefore not advisable. The other issues of interpretation that follow this one creates similar challenges.

26. Second, the placement of this term under the s. 87 of the *Legislation Act, 2006* could conversely be understood as reading down the definition of antisemitism as narrowly as possible, to the exclusion of the other terms listed in s. 87.[22] This could have the effect of making the addition of this term to the act ineffectual entirely, especially as there is no class or category, or similarity between the term inserted in Bill 168 and the existing terms under the act.[23]

27. Third, because the 2016 IHRA working definition is itself vague, it is possible for courts and tribunals to interpret it in as restrictively as possible, by way of reference to the subject matter.[24] This would potentially force courts and tribunals to look for the context and subject matter of this enactment, but refuse to interpret the term

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[22] *Ontario Ombudsman v. Hamilton (City)*, 2018 ONCA 502; *National Bank of Greece (Canada) v. Katsikonouris*, 1990 CanLII 92 (SCC), [1990] 2 SCR 1029; *Ontario v. Canadian Pacific Ltd.*, 1995 CanLII 112 (SCC), [1995] 2 SCR 1031 at paras 20-21. See also, *Arcand v. The Queen*, 1954 CanLII 47 (SCC), [1955] SCR 116; *Canadian National Railways v. Town of Capreol*, 1925 CanLII 5 (SCC), [1925] SCR 499; *Nelson Estate (Re)*, 1971 CanLII 985 (BC SC) at 604-606; *Crispin & Co. v. Evans, Coleman & Evans*, 1923 CanLII 417 (BC CA); *Superior Pre-Kast Septic Tanks Ltd. et al. v. The Queen*, 1978 CanLII 193 (SCC), [1978] 2 SCR 612 at 618. See *contra*, *The University Club of Toronto v. The City of Toronto*, 1952 CanLII 83 (ON CA), suggesting that the two preceding approaches are effectively the same; *Assessment Commissioner (Stouffville) v. Mennonite Home Association*, 1972 CanLII 9 (SCC), [1973] SCR 189, cautioning not to push this approach too far; and *City of Halifax v. The McLaughlin Carriage Co.*, 1907 CanLII 57 (SCC), 39 SCR 174, where the language by the legislature is abundantly clear.

[23] see, for example, *John v. Ballingall*, 2017 ONCA 579, argued by the author on behalf of the appellant, where the court ruled against the appellant and departed from the interpretation of "newspapers" under s. 87 of the *Legislation Act, 2006* to provide a context for the statute being interpreted consistent with what they deemed the context of an online newspaper.

[24] *Klippert v. The Queen*, 1967 CanLII 73 (SCC), [1967] SCR 822 at 830; *McKay et al. v. The Queen*, 1965 CanLII 3 (SCC), [1965] SCR 798 at 803; *Canadian Wheat Board v. Nolan et al.*, 1950 CanLII 47 (SCC), [1951] SCR 81 at 112; *Espillat-Rodriguez v. R.*, 1963 CanLII 18 (SCC), [1964] SCR 3 at 15. See also, *Helfand et al. v. Royal Canadian Art Pottery et al.*, 1970 CanLII 231 (ONCA); *Hoem v. Law Soc. of B.C.*, 1985 CanLII 447 (BCCA); *Mountain Village Developments Ltd. v. Engineered Homes Ltd.*, 1985 CanLII 499 (BCCA); *Sinclaire v. South Trail Shell (1987)*, 2002 ABQB 378.

beyond this, even if the changing facts or circumstances around antisemitism evolves beyond the 2016 definition.[25]

28. Fourth, because the legislature is expected to choose its language with precision, confining the term antisemitism to the 2016 IHRA *working* definition could allow courts and tribunals to conclude that other forms of antisemitism that are not in this definition are necessarily excluded, as they should only attempt to fill the gaps with the existing definition.[26] It's unlikely that these adjudicative bodies would simply ignore pressing issues of this nature when confronted with them, but it would result in the invalidation and discrediting of the term that Bill 168 is intended to support. In this manner, the amendment to the *Legislation Act, 2006* may be contrary to the goals of those who would support combatting antisemitism.

[25] Sullivan, 3rd ed. (1994), *supra* note 20, at 247-48:
[26] *Law Society of Upper Canada v. French*, 1974 CanLII 24 (SCC), [1975] 2 SCR 767 at 773; *Bérubé v. Cameron*, 1945 CanLII 19 (SCC), [1946] SCR 74 at 80-81; *Ripstein v. Trower & Sons. Ltd.*, 1941 CanLII 40 (SCC), [1942] SCR 107 at 118-119; *Burns v. Minister of National Revenue*, 1946 CanLII 358 (SCC) at 814-815; *Maxwell v. Callbeck*, 1939 CanLII 20 (SCC), [1939] SCR 440 at 444; *Toronto General Trusts Corporation v. City of Ottawa*, 1935 CanLII 6 (SCC), [1935] SCR 531 at 538, 1935 CanLII 329 (SCC) at 340-341; *The King v. Crabbs*, 1934 CanLII 27 (SCC), [1934] SCR 523 at 526; *City of Windsor v. McLeod*, 1926 CanLII 3 (SCC), [1926] SCR 450 at 455; *Blackman v. The King*, 1924 CanLII 15 (SCC), [1924] SCR 406 at 422-423; *McLeod v. City of Windsor*, 1923 CanLII 4 (SCC), [1923] SCR 696 at 711-712; *The City of Ottawa v. Egan*, 1923 CanLII 1 (SCC), [1923] SCR 304 at 317; *Archibald v. Maher and Cook*, 1921 CanLII 53 (SCC), 61 SCR 465 at 476-477; *Grand Trunk Railway Co. v. Department of Agriculture of Ontario*, 1910 CanLII 61 (SCC), 42 SCR 557 at 568; *Trenton (Town) v. Dyer*, 1895 CanLII 10 (SCC), 24 SCR 474 at 478; *Quebec County Election Case*, 1888 CanLII 36 (SCC), 14 SCR 434 at 436; *Toronto Gravel Road and Concrete Co. v. York (County)*, 1885 CanLII 12 (SCC), 12 SCR 517 at 518-519. See also, *Miller v. Sutherland (Town)*, 1954 CanLII 187 (SKCA); *Gumpp v. Co-operators Life Insurance Co.*, 2004 BCCA 217 (CanLII) at paras 15-19; *R. v. Hemmingway Apartments North Inc. (Prov. Ct.)*, 1990 CanLII 6704 (ONSC); *July et al. v. Neal*, 1986 CanLII 149 (ONCA).

29. Fifth, the express reference to the 2016 IHRA working definition could be interpreted as a distinction from other definitions of antisemitism that are used in law, either in Ontario, across Canada, or internationally.[27] This could create a potential conflict with the interpretation used in quasi-constitutional (i.e. human rights) or constitutional (i.e. *Charter*) contexts, but in both of these cases the Bill 168 definition would not prevail, as the legislature's ability to enact definitions that violate those principles is necessarily constrained.[28]

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[27] *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61 (CanLII), [2011] 3 SCR 654 at paras 65-66; *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*, 2004 SCC 19 (CanLII), [2004] 1 SCR 485 at paras 13-14; *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*, 2001 SCC 40 (CanLII), [2001] 2 SCR 241 at paras 26-28; *Hickman Motors Ltd. v. Canada*, 1997 CanLII 357 (SCC), [1997] 2 SCR 336 at paras 79-81; *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, 1990 CanLII 135 (SCC), [1990] 1 SCR 425; *Murray Bay Motor Co. Ltd. v. Bélair Insurance Co.*, 1973 CanLII 180 (SCC), [1975] SCR 68 at 592-593; *A.G. for Quebec v. Begin*, 1955 CanLII 54 (SCC), [1955] SCR 593 at 599-603; *Turgeon v. Dominion Bank*, 1929 CanLII 47 (SCC), [1930] SCR 67 at 70-71; *Metcalfe & Mansfield Alternative Investments II Corp., (Re)*, 2008 ONCA 587 (CanLII) at paras 97-100.

[28] The reason for this invalidation of certain statutes is a deliberate constraint on the power of the legislature in a constitutional democracy; *Canada (Attorney General) v. Mossop*, 1993 CanLII 164 (SCC), [1993] 1 SCR 554 at 582; *Nova Scotia (Workers' Compensation Board) v. Martin*; *Nova Scotia (Workers' Compensation Board) v. Laseur*, 2003 SCC 54 (CanLII), [2003] 2 SCR 504 at para 28. The need for courts and tribunals to assess these constitutional considerations in various regulatory contexts is central to the ability to analyze competing policy concerns; *Cuddy Chicks Ltd. v. Ontario (Labour Relations Board)*, 1991 CanLII 57 (SCC), [1991] 2 SCR 5 at 16-17. The interplay between the broad use of terminology in Bill 168 "in every Act and regulation" virtually guarantees some conflict with individual rights, including fundamental freedoms under the *Charter*. To the extent that Bill 168 is found in a specific context to be unconstitutional, courts may adopt an approach that reads the provision in a manner that is constitutional; *R. v. Sharpe*, 2001 SCC 2 (CanLII), [2001] 1 SCR 45 at para 33; *Slaight Communications Inc. v. Davidson*, 1989 CanLII 92 (SCC), [1989] 1 SCR 1038 at 1078; *R. v. Nova Scotia Pharmaceutical Society*, 1992 CanLII 72 (SCC), [1992] 2 SCR 606 at 660; R. v. Lucas, 1998 CanLII 815 (SCC), [1998] 1 SCR 439 at paras 64-66. Although many of these same cases confirm that the *Charter* cannot defeat the purpose of the legislation, the legislation in question here is the *Legislation Act, 2006*, the purpose of which in this part is to provide interpretation. A definition of antisemitism contained within a statute that has an explicit purpose to combat racism would be a more effective manner to provide this definition meaning in the law, and without creating a conflict with the constitution.

30. Sixth, because the 2016 IHRA working definition is already dated, an explicit reference to it by legislation in this act prevents it from being interpreted in new contexts. Although originalism has limited applicability in Ontario law,[29] there are some remnants of statutory interpretation that would seek to interpret legislation in the way it would be interpreted the day after it was passed.[30] This could again prevent courts and tribunals from using this definition to deal with new and growing threats of antisemitism.

31. Bill 168 may also create a conflict between the *Legislation Act, 2006* and other statutes in Ontario. Despite the express intent of the legislature to rely on the 2016 IHRA working definition, courts and tribunals have the ability to interpret the term in a manner that would be consistent with the interpretation of another statute,

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[29] For a fulsome discussion of the same, see Leonid Sirota and Benjamin J. Olipant, "Originalist Reasoning in Canadian Constitutional Jurisprudence," *UBC Law Review 50:2* (2017), available at: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2749224>; Benjamin J. Oliphant and Leonid Sirota, "Has the Supreme Court of Canada Rejected 'Originalism'?," *Queen's Law Journal* (2016), available at: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2749212>.

[30] *Perka v. The Queen*, 1984 CanLII 23 (SCC), [1984] 2 SCR 232 at 234, 264-265; Upper Canada College v. Smith, 1920 CanLII 8 (SCC), 61 SCR 413 at 439-440; *Bogoch Seed Company v. C.P.R. and C.N.R.*, 1963 CanLII 53 (SCC), [1963] SCR 247 at 256. Although policies are important for guiding administrative decision-makers, the Court's decision in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 (CanLII) ["*Vavilov*"] indicated at paras 130-131 that the failure to adequately address an established policy may be itself sufficient to render a decision unreasonable. The incorporation of informal commentary attached to the 2016 IHRA working definition into the definition in statute could give rise to this type of scrutiny, but likely in a manner that would encourage administrative tribunals to differentiate their positions from the defined term in the *Legislation Act, 2006*, thereby making this amendment futile. Policies cannot be used to undermine the lawful limits of an administrative body's authority (*Moya v. Canada (Citizenship and Immigration),* 2012 FC 971 (CanLII) at para 10), and this is especially true for the Human Rights Tribunal of Ontario. An interpretation cannot be adopted simply because it is available and expedient, and must include the text, context, and purpose (*Vavilov*, para 121). See also, *Minster Enterprises Ltd. v City of Richmond*, 2020 BCSC 455 (CanLII) at paras 116-117; *Budinsky v. Breakers East Inc.*, 1992 CanLII 7637 (ONSC); *Nova Scotia (Attorney General) v S&D Smith Central Supplies Limited*, 2019 NSCA 22 (CanLII) at paras 281-284.

especially if it is the constating statute of an administrative tribunal or regarding a similar subject matter.[31] Any later laws that are introduced around the same term, even in a different statute, would potentially repeal Bill 168 to the extent of an inconsistency,[32] unless Bill 168 is more specific.[33] Given the inherent ambiguities

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[31] *Barreau du Québec v. Quebec (Attorney General)*, 2017 SCC 56 (CanLII), [2017] 2 SCR 488 at paras 70-73; *Sharbern Holding Inc. v. Vancouver Airport Centre Ltd.*, 2011 SCC 23 (CanLII), [2011] 2 SCR 175 at para 117; *Therrien (Re)*, 2001 SCC 35 (CanLII), [2001] 2 SCR 3 at para 121; *R. v. Gardiner*, 1982 CanLII 30 (SCC), [1982] 2 SCR 368; *2747-3174 Québec Inc. v. Quebec (Régie des permis d'alcool)*, 1996 CanLII 153 (SCC), [1996] 3 SCR 919; *R. v. McIntosh*, 1995 CanLII 124 (SCC), [1995] 1 SCR 686 at paras 21-22; *Goldhar v. The Queen*, 1959 CanLII 86 (SCC), [1960] SCR 60 at 77; *Claridge Development (Hawthorne) Ltd. v. British Columbia*, 2000 BCCA 104 (CanLII) at paras 10-11, 18-26; *Deaville v. Boegeman*, 1984 CanLII 1925 (ONCA); *Gulf Canada Resources Ltd. v. Arochem International Ltd.*, 1992 CanLII 4033 (BCCA); *Wedekind v. Ontario (Ministry of Community and Social Services)*, 1994 CanLII 1659 (ONCA); *Vaughn-Hulbert (Re)*, 1983 CanLII 632 (BC SC) at paras 9-13. Although the interpretation of an earlier act can be adopted in a subsequent statute on occasion, it is generally fallacious to treat an act as controlling the interpretation where it is not of a similar subject-matter; *Foy v. Foy (No. 2)*, 1979 CanLII 1631 (ONCA). The broad and ambiguous nature of the subject-matter in Bill 168 makes this principle difficult to employ, especially in the human rights context; *Ontario (Human Rights Commission) v. Ontario*, 1994 CanLII 1590 (ONCA).

[32] *Saumur v. City of Quebec*, 1953 CanLII 3 (SCC), [1953] 2 SCR 299 at 388; *Liebling v. The King*, 1932 CanLII 47 (SCC), [1932] SCR 101; *Sun Life Assur. Co. Of Canada v. Superintendent of Insurance*, 1930 CanLII 74 (SCC), [1930] SCR 612 at 620-621; Human Rights Commission v. Workplace Health, Safety and Compensation Commission, 2005 NLCA 61 (CanLII) at paras 13-18; *L'Abbe v. Southam Press Ltd. et al.*, 1970 CanLII 541 (ONSC); *Alberta v. Lefebvre*, 1986 ABCA 236 (CanLII) at para 71-72; *Re Otto Bartel Homes Ltd. and City of Calgary et al.*, 1972 CanLII 1051 (AB CA) at 187-194.

[33] *Frenette v. Metropolitan Life Insurance Co.*, 1992 CanLII 85 (SCC), [1992] 1 SCR 647; *Re Constitutional Questions Determination Act, Re Vancouver Incorporation Act*, 1945 CanLII 312 (BCCA) at 643; *City of Ottawa v. Town of Eastview et al.*, 1941 CanLII 9 (SCC), [1941] SCR 448 at 461-462; *Strachan v. Melfort (Town)*, 1979 CanLII 2411 (SKQB) at paras 6-7; *Miller v. St. Lina (Municipal District)*, 1933 CanLII 484 (ABQB); *Old Kildonan Municipality v. Winnipeg (City)*, 1943 CanLII 457 (MBQB) at 272-275.

The most common reason for this exception is that if the legislature provides its special attention to a separate subject and creates a provision for this, the courts presume that the subsequent general enactment is not intended to interfere with a special provision unless that intention is very clearly expressed. The different enactments must be construed specifically to their own subject-matter and own terms; *Barker v. Edge*, [1898] A.C. 748, at 754. The subject matter in Bill 168 is too broad to provide insight into the nature of the subject-matter, especially when inserted into a general interpretive statute, as opposed to statute that has a specific purpose for combatting racism.

While a potential conflict between human rights and insurance legislation was contemplated in *Insurance Corporation of British Columbia v. Heerspink*, 1982 CanLII 27 (SCC), [1982] 2 SCR 145 at 152-153 on the basis that the human rights legislation was more general and subsequently enacted, the Court was able to reconcile these differences by reinterpreting some of the statutory terms. The placement of the

in the 2016 IHRA working definition,[34] it is unlikely that Bill 168 will prevail in this context.[35]

Legislation Act, 2006 as an interpretive tool itself, and the quasi-constitutional nature of human rights, may not allow the same approach if the situation were to arise in Ontario with Bill 168 as it is currently constructed.

[34] There is clear authority in the case law that the courts must apply principles of interpretation to terms that contain ambiguity. The presence of ambiguity is defined as where a word is reasonably capable of having more than one meaning, when considering the entire context. The context of Bill 168, where a working (i.e. changing) definition is being employed, with some explicit reference to commentary that itself is changing, necessarily creates exactly this type of ambiguity. See, for example, *Marcotte v. Deputy Attorney General (Canada) et al.*, 1974 CanLII 1 (SCC), [1976] 1 SCR 108 at 114-115; *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42 (CanLII), [2002] 2 SCR 559 at paras 29-30 ["*Bell ExpressVu*"]; *Canadian Union of Postal Workers v. Canada Post Corporation*, 2016 FC 252 (CanLII) at paras 28, 46; *R. v. Skakun*, 2014 BCCA 223 (CanLII) at paras 15-16; *R v Big River First Nation*, 2019 SKCA 117 (CanLII) at paras 18-23; *R. v. Fontaine*, 2002 MBCA 107 (CanLII) at paras 34-39, 45; Beattie v. National Frontier Insurance Co., 2003 CanLII 2715 (ONCA) at paras 13-14; *Sparks v Nova Scotia (Assistance Appeal Board)*, 2017 NSCA 82 (CanLII) at paras 28-30, 45. Because the intention of the statute where the word is found is also used to assess ambiguity, the placement of the term "antisemitism" in a statute that is used for statutory interpretation, i.e. the *Legislation Act, 2006* as opposed to the *Anti-Racism Act*, this tool of interpretation only ensures further ambiguity; *Rooke v. Canada (Attorney General)*, 2002 FCA 393 (CanLII) at paras 23-24; *Alberta (Minister of Infrastructure) v. Nilsson*, 2002 ABCA 283 (CanLII) at paras 74-75. See *contra* Sullivan, 6th ed (2014), supra note 20, at 485–487, though the Court's decision in *Bell ExpressVu* presides over this position.

[35] This tool of interpretation may be limited in Ontario, given the Ontario Court of Appeal's decision in *Demers v. B.R. Davidson Mining & Development Ltd.*, 2011 ONSC 2046 (CanLII); 2012 ONCA 384 (CanLII) at para 43, incorporating s. 56 of the *Legislation Act, 2006*, that an amendment of a regulation does not imply anything about the previous state of the law. However, this case has not been widely adopted yet in Ontario or Canada, and other Canadian jurisdictions, and there is strong authority still affirms the final authority of the judiciary in determining the meaning of the *Legislation Act, 2006*. See for example, *Bathurst Paper Limited v. Minister of Municipal Affairs of New Brunswick*, 1971 CanLII 176 (SCC), [1972] SCR 471; *R. v. Cuerrier*, 1998 CanLII 796 (SCC), [1998] 2 SCR 371; *R. v. Ulybel Enterprises Ltd.*, 2001 SCC 56 (CanLII), [2001] 2 SCR 867 at paras 33-35; *Henry v. Saskatchewan (Workers' Compensation Board)*, 1999 CanLII 12241 (SKCA) at paras 25-28; *Singh v. Canada (Employment and Immigration)*, 1982 CanLII 2998 (FCA) at para 6; *Silicon Graphics Ltd. v. Canada*, 2002 FCA 260 (CanLII), [2003] 1 FC 447; *Zacharias v. Zurich Insurance Company*, 2012 ONSC 4209 (CanLII) at paras 34, 50-51; *Santarsieri et al. v. Deputy Minister of Finance (Manitoba)*, 2014 MBQB 114; 2015 MBCA 71; 2016 CanLII 12136 (leave to SCC ref'd).

Recommendations

32. DCLC's recommendation is that the 2016 IHRA working definition of antisemitism be added to s. 1 of the *Anti-Racism Act*. This would avoid the problems of adding it to the *Legislation Act, 2006*, a special statute that is used for specific statutory interpretation purposes, and allow it to be used for the purpose that it is actually intended for, to combat racism.
33. The Anti-Racism Directorate created under the *Anti-Racism Act* already has the mandate of combatting antisemitism. The Government of Ontario has already committed significant funding to this Directorate to further these goals. An amendment to the proper statute would avoid many of the complexities and the inelegance created by Bill 168.
34. The proposed amendment would appear as follows:

Anti-Racism Act amendment

2 Section 1of the *Anti-Racism* is amended by adding the following definition:

"antisemitism" has the meaning set out in the working definition of antisemitism, and the list of illustrative examples of it adopted by the International Holocaust Remembrance Alliance plenary on May 26, 2016 are intended as flexible examples to analyze the context of antisemitism; (antisémitisme")

Conclusions

35. The commitment of all levels of government in combatting antisemitism is commendable, and should be supported by all institutions in Ontario, especially those connected in any way with the justice system.
36. The 2016 IHRA working definition provides a useful basis for which to commence efforts to combat antisemitism, and its accompanying commentary allows for adequate latitude for it to encompass new and emerging threats, as well as balance other important rights in a free and democratic society.
37. However, the 2016 IHRA working definition has always been intended as a flexible and working definition that is a practical tool, and not a legally-binding term. Supporters of the use of this working definition in Canada reinforce this flexible and practical approach, to avoid legal challenges, or ineffectual legislative measures that ultimately are counterproductive.[36]
38. A better approach than the one proposed in Bill 168 would be to ground this definition in the *Anti-Racism Act*, which would provide the ambiguous definition a greater purpose connected to a specific statutory regime. It would also allow for this definition to be tied specifically with programs and funding.[37] The *Legislation*

[36] B'nai Brith Canada, "IHRA's 2016 Working Definition of Antisemitism," available at: <https://d3n8a8pro7vhmx.cloudfront.net/bnaibrithcanada/pages/2948/attachments/original/1581608487/IHRA's_2016_Working_Definition_of_Antisemitism.pdf?1581608487>.
[37] Jonathan Bradley, "Ontario government spending $1.6M to fight racism, supporting community-based anti-hate initiatives," July 29, 2020, available at: <https://www.thewhig.com/news/ontario-government-spending-1-6m-to-fight-racism-supporting-community-based-anti-hate-initiatives/wcm/7fe73d4f-39ce-

Act, 2006 is not a mechanism for the legislature to signal policy priorities, and attempting to do so in this manner will invariably have unintended consequences.

39. Instead of hasty measures attempted for what might be symbolic purposes, Bill 168 should be implemented in a manner that is consistent with Ontario's existing legislative schemes, and to strengthen and embolden our human rights institutions. This includes a commitment to ensuring a functioning and effective human rights tribunal in Ontario.[38]

40. Our human rights institutions are the primary basis for combatting hatred in Ontario, and require full and complete support to achieve their mandate, including tackling antisemitism.

4a4c-95a5-4d5b112b86e9>. See also, Government of Ontario, "Ontario Helping to Protect Communities against Racism and Hate," July 28, 2020, available at: <https://news.ontario.ca/en/release/57771/ontario-helping-to-protect-communities-against-racism-and-hate>, which indicates that the Anti-Racism Directorate created under s. 15 of the *Anti-Racism Act* will be collaborating with community groups in Fall 2020 to shape and design this new grant program. The Directorate's 2017 Strategic Plan explicitly mentions antisemitism on page 30 as one of the major issues facing Ontarians; Government of Ontario, "A Better Way Forward: Ontario's 3-Year Anti-Racism Strategic Plan," 2017, available at: <https://files.ontario.ca/ar-2001_ard_report_tagged_final-s.pdf>.

[38] Anita Balakrishnan, "Tribunal system 'in crisis,' group says," Law Times, May 20, 2020, available at: <https://www.lawtimesnews.com/practice-areas/litigation/tribunal-system-in-crisis-group-says/329780>. See also, Tribunals Watch Ontario, "Statement of Concern About Tribunals Ontario," May 14, 2020, available at: <https://tribunalwatch.files.wordpress.com/2020/05/statement-of-concern-may-14.pdf>. Even with all of the vacancies filled at the HRTO, the Tribunal and the Commission remain underfunded in light of their mandate, which includes fighting antisemitism in Ontario.

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Appendix "A"

Term under s. 87	Statutes	Regulations	Other Notes
"Act"	1,142	3,490	This would likely be found in every statute in Ontario
"Assembly"	438	177	Despite this definition referring to the "Legislative Assembly," there are examples that deviate from this practice, i.e. *Citizens' Assembly on Electoral Reform*, O Reg 82/06, s. 1.
"Legislative Assembly"	238	18	A specific statute further defines and contextualizes this term; *Legislative Assembly Act*, RSO 1990, c L.10.
"Court of Appeal"	18	14	This definition really just clarifies that it is the Court of Appeal for Ontario. The legislature would not have the ability to constrain the powers or abilities of the court through a definition in this statute in this manner, as it is more thoroughly defined and addressed in the *Courts of Justice Act*, RSO 1990, c C.43, ss. 2, 6-9.
"Divisional Court"	215	27	Similarly, this term only identifies the appropriate court in the definitions, and does not attempt to describe the role of the court in this provision. See instead, *Judicial Review Procedure Act*, RSO 1990, c J.1
"Her Majesty"	302	84	This term is also used interchangeably with "His Majesty," i.e. it is not about the person, but the role, and a literal interpretation is not possible.
"holiday"	87	137	Despite purporting to define this exhaustively in s. 88, the term is defined differently in other statutes, i.e. *Rules of Civil Procedure*, RRO 1990, Reg 194, s. 103 provides further definitions for and where certain holidays also fall on a Saturday or Sunday.
"individual"	457	647	While specifying that this individual is a "natural person," there are numerous statutes that effectively state that a corporation or body has the same powers as a natural person, or in other words, an individual, i.e. *Corporations Act*, RSO 1990, c C.38, s. 126.1.
"legally qualified medical practitioner"	52	39	Despite this term, the main statute establishing the regulatory regime for health care practitioners does not even use it; *Regulated Health Professions Act*, 1991, SO 1991, c 18.
"Legislature"	257	43	Although defining the term here as the Lieutenant Governor acting by and with the advice and consent of the Assembly, the term is used elsewhere to refer to the Assembly itself; *Legislative Assembly Act*, RSO 1990, c L.10.

"Lieutenant Governor"	885	193	The preceding definition conflating the two terms here could create enormous confusion, without the application of interpretation to avoid absurd results.
"Lieutenant Governor in Council"	796	156	A similarly absurd situation would arise here, if the Lieutenant Governor is assumed to be the Assembly, which would then be acting on the advice of the Executive Council
"mentally ill"	14	4	The main statute governing this area does not even use the term, and prefers "mentally disordered;" *Mental Health Act*, RSO 1990, c M.7, s. 32.
"newspaper"	96	108	See commentary above at fn 23 regarding the interpretation of the term in *John v. Ballingall*, 2017 ONCA 579 for online newspapers.
"peace officer"	56	14	An expansive and non-exhaustive definition is provided here, and is explicitly expanded upon in other statutes; *Police Services Act*, RSO 1990, c P.15, s. 15.
"person"	926	2,086	Although defined as including a corporation, there are countless examples in statutes where a person cannot in fact be a corporation; *Ontario Disability Support Program Act*, 1997, SO 1997, c 25, Sch B; *Workplace Safety and Insurance Act*, 1997, SO 1997, c 16, Sch A; *Human Rights Code*, RSO 1990, c H.19; *Services and Supports to Promote the Social Inclusion of Persons with Developmental Disabilities Act*, 2008, SO 2008, c 14; *Accessible Parking for Persons With Disabilities*, RRO 1990, Reg 581; *Blind Persons' Rights Act*, RSO 1990, c B.7. As a result, this is perhaps one of the most ineffectual definitions in the statute.
"proclamation"	604	106	A procedural term that will be found in many statutes.
"regulation"	827	3,490	The frequency of this term approaches that of the use of the word "Act."
"rules of court"	123	17	This definition explicitly refers to another part of another statute as the authority for defining and delineating a specialized term, which is an appropriate approach when dealing with a specific term requiring some additional context and expertise; *Courts of Justice Act*, RSO 1990, c C.43, ss. 65-70.1.

Notes:

1. This is not a comprehensive review of all statutes and regulations in Ontario, and may inadvertently omit various unpublished statutes or those not listed on CanLii, the public-facing database of statutes and regulations.
2. Several terms from s. 87 were omitted in this overview, especially where they were synonymous with the one listed here, i.e. "His Majesty"
3. Other terms were omitted here, such as "now", "next", "heretofore" and "hereafter," given its common use in language in numerous other ways
4. The commentary here is not exhaustive, and does not attempt to illustrate all of the many inconsistencies between definitions in the *Legislation Act, 2006* and other statutes, or how courts and tribunals in Ontario have repeatedly departed from the definitions provided in this act or its predecessor