



First Session - Thirty-Fifth Legislature
of the
Legislative Assembly of Manitoba

STANDING COMMITTEE

on

LAW AMENDMENTS

39 Elizabeth II

Chairman
Mr. Jack Reimer
Constituency of Niakwa



VOL. XXXIX No. 1 - 8 p.m., TUESDAY, NOVEMBER 27, 1990



MANITOBA LEGISLATIVE ASSEMBLY
Thirty-Fifth Legislature

Members, Constituencies and Political Affiliation

NAME	CONSTITUENCY	PARTY
ALCOCK, Reg	Osborne	Liberal
ASHTON, Steve	Thompson	NDP
BARRETT, Becky	Wellington	NDP
CARR, James	Crescentwood	Liberal
CARSTAIRS, Sharon	River Heights	Liberal
CERILLI, Marianne	Radisson	NDP
CHEEMA, Gulzar	The Maples	Liberal
CHOMIAK, Dave	Kildonan	NDP
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CUMMINGS, Glen, Hon.	Ste. Rose	PC
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FILMON, Gary, Hon.	Tuxedo	PC
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HARPER, Elijah	Rupertsland	NDP
HELWER, Edward R.	Gimli	PC
HICKES, George	Point Douglas	NDP
LAMOUREUX, Kevin	Inkster	Liberal
LATHLIN, Oscar	The Pas	NDP
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McALPINE, Gerry	Sturgeon Creek	PC
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LEGISLATIVE ASSEMBLY OF MANITOBA
THE STANDING COMMITTEE ON LAW AMENDMENTS

Tuesday, November 27, 1990

TIME — 8 p.m.

LOCATION — Winnipeg, Manitoba

CHAIRMAN — Mr. Jack Reimer (Niakwa)

ATTENDANCE - 11 — QUORUM - 6

Members of the Committee present:

Hon. Messrs. Connery, Ducharme

Messrs. Cheema, Chomiak, Helwer,
Lamoureux, Maloway, Reimer, Rose,
Stefanson, Mrs. Vodrey

MATTERS UNDER DISCUSSION:

Bill 6—The Business Practices Act

* * *

Clerk of Committees (Ms. Bonnie Greschuk): Will the committee please come to order? We must proceed to elect a Chairperson for the Standing Committee on Law Amendments. Are there any nominations?

Mr. Eric Stefanson (Kirkfield Park): I will move the Honourable Member for Niakwa (Mr. Reimer).

Madam Clerk: I understand Mr. Reimer has been nominated. Are there any other further nominations? Since there are no further nominations, will Mr. Reimer please take the Chair?

BILL 6—THE BUSINESS PRACTICES ACT

Mr. Chairman: The Committee on Law Amendments is called to order. Bill 6 is considered today. Since there are no presentations regarding Bill 6, The Business Practices Act, we will proceed with detailed consideration of this Bill. Does the Minister responsible have an opening statement?

* (2005)

Hon. Edward Connery (Minister of Consumer and Corporate Affairs): No, I do not have any.

Mr. Chairman: The Bill will be considered clause by clause. During the consideration of a Bill, the Title, the Preamble and the first clause only, if it contains a short title of the Bill, are postponed until all other

clauses have been considered in their proper order by the committee. Let us start with Clause 1 under Definitions.

Mr. Connery : We have one amendment under Definition 1. Under Definitions, I move

THAT the English version of proposed section 1 of Bill 6, The Business Practices Act, be amended by striking out "Part IV" in the definition of "director" and substituting "Part II".

(French version)

Il est proposé que la version anglaise de l'article 1 soit amendée par substitution, à "IV", dans la définition de "director", de "II".

On that first page, you see "court" and then you see "director". On the second line where it says "Part IV", that should be "Part II".

It says "consumer", "consumer transaction", "court" and then "director".

* (2010)

Mr. Chairman: On the proposed motion of the Honourable Minister to amend Clause 1 with respect to both English and French text, shall the motion pass?

Mr. Connery: Just the English. They got it right in French.

Mr. Jim Maloway (Elmwood): Mr. Chairperson, I have an amendment under this section as well. I move, seconded by the Member for Kildonan (Mr. Chomiak), that the definition of "supplier" in Section 1 be amended by adding "or wholesale" after "on a retail basis".

An Honourable Member: Is the amendment written?

Mr. Maloway: Yes, we have one copy of it. We can get copies made. Perhaps I could explain the reason for the amendment. There is some concern that perhaps a company, and there are several examples, perhaps Costco, which is holding itself out as a company that sells goods on a sort of a wholesale basis, or I can think of in the travel business, Lew Miles sells travel packages to Las

Vegas. They sell directly to the public as well as through travel agents at the same price. I am wondering whether it might be beneficial for us to include in that definition of "supplier" people who hold themselves out as really retailers, but who are selling on a discount or a wholesale basis, who are not really wholesalers.

Mr. Connery: Talking with the department—we already have—if it is to the consumer, it is a consumer transaction, as defined under "consumer transaction" between a consumer and a supplier for the retail sale. If it is to the consumer, it is a retail transaction. If it is from a broker, in the travel industry there are a lot of them who put packages together but ultimately the travel agent does sell to the consumer, it is at that point that comes into play.

Mr. Maloway: I can accept the department's advice on this point; however, I would also ask though is there any harm in us putting this amendment in? Can you see any problems with us putting it in for safety's sake?

Mr. Connery: The intent of the Bill is a consumer protection Bill between a supplier, a retailer, whatever, and the consumer. It is not designed to interface with somebody supplying to, as in the industry, the travel agent. It is not designed for that. It is designed for the ultimate transaction between the consumer and a supplier of whatever nature.

Mr. Chairman: Shall I read back the motion?

THAT the English version of proposed section 1 of Bill 6, The Business Practices Act, be amended by striking out "Part IV" in the definition of "director" and substituting "Part II".

Motion agreed to.

An Honourable Member: On the amendment now. It is the amendment we have to vote on.

Mr. Chairman: Is Mr. Maloway going forth with this? The motion is:

THAT the definition of "supplier" in section 1 be amended by adding "or wholesale" after "on a retail".

(French version)

Il est proposé que la définition de "fournisseur", figurant à l'article 1, soit amendée par adjonction de "ou en gros" après "au détail".

Shall the motion pass? The motion is defeated.

A COUNTED VOTE was taken, the result being as follows:

Yeas 2, Nays 8.

Mr. Chairman: Clause 1 as amended—pass; Clause 2—pass.

Clause 3—shall it pass?

* (2015)

Mr. Maloway: I move, seconded by the Member for Kildonan (Mr. Chomiak),

THAT section 3 be amended by renumbering it as subsection 3(1) and by adding the following after subsection (1):

Circumstances to be considered

3(2) In determining under subsection (1) whether a supplier has taken advantage of a consumer, the circumstances that were known or ought to have been known to the supplier shall be considered, including

(a) whether the consumer was under undue pressure to enter into the consumer transaction;

(b) whether the consumer was unable to defend the consumer's interests by reason of physical or mental infirmity, ignorance, illiteracy or age, or an inability to understand the character or nature of the consumer transaction, or to understand the language used in the consumer transaction or any other matter related to the consumer transaction;

(c) whether, at the time the consumer transaction was entered into, the price grossly exceeded the price at which similar goods were available;

(d) whether there was a reasonable probability of full payment of the price of the consumer transaction by the consumer;

(e) whether the terms or conditions of the consumer transaction are so harsh or adverse to the consumer as to be inequitable;

(f) whether the consumer would receive a substantial benefit from the goods;

(g) whether the consumer transaction is excessively one-sided in favour of someone other than the consumer;

(h) whether the supplier made a misleading statement of opinion on which the consumer was likely to rely to the consumer's detriment;

(i) whether the supplier was providing goods

that met generally accepted industry standards;

(j) whether the supplier is providing services in a skillful and workmanlike manner.

(French version)

Il est proposé que l'article 3 soit amendé par substitution, à l'actuel numéro d'article 3, du numéro de paragraphe 3(1), et par adjonction, après le paragraphe (1), de ce qui suit:

Circonstances à considérer

3(2) Afin de déterminer en application du paragraphe (1) si un fournisseur a profité ou non d'un consommateur, il faut considérer les circonstances que le fournisseur connaissait ou qu'il aurait dû connaître, y compris les circonstances suivantes:

a) le fait que le consommateur a été soumis ou non à une pression excessive pour qu'il conclue l'opération commerciale;

b) le fait que le consommateur était ou non incapable de défendre ses intérêts en raison de sa déficience mentale ou physique, de son ignorance, de son analphabétisme, de son âge ou de son incapacité de comprendre la nature de l'opération commerciale, les termes utilisés ou toute autre question liée à l'opération;

c) le fait qu'au moment de la conclusion de l'opération commerciale le prix dépassait de beaucoup ou non le prix auquel des objets semblables étaient offerts;

d) le fait qu'il était raisonnablement probable ou non que le consommateur paie le prix total de l'opération commerciale;

e) le fait que les modalités de l'opération commerciale ont été ou non dures ou défavorables pour le consommateur au point d'être inequitables;

f) le fait que le consommateur allait retirer ou non un avantage important des objets;

g) le fait que l'opération commerciale a profité de façon excessive ou non à une autre personne que le consommateur;

h) le fait que le fournisseur a fait ou non une déclaration d'opinion à laquelle le consommateur aurait pu se fier à son détriment;

i) le fait que les objets fournis étaient conformes

ou non aux normes généralement admises dans l'industrie;

j) le fait que les services ont été fournis ou non d'une manière soignée et professionnelle.

Mr. Connery: Mr. Chairman, after 14 weeks of consultation with—and I will list them again for the edification of the committee—we had both chambers, Winnipeg Chamber of Commerce, Manitoba Chamber of Commerce; we had the Canadian Federation of Independent Business; we had the Retail Merchants Association of Canada; we had the Better Business Bureau; we had the Manitoba Society of Seniors and the Consumers' Association of Canada, spending 14 weeks debating the Bill, going over the Bill in detail, they felt that the way the Bill was drafted—and this particular section came under a lot of scrutiny, and they felt that Section 3 was very broad, very wide, allowed all of the latitude that the department required.

I would have to oppose the amendment on the basis that we already have a Bill that has been approved by all the stakeholders. This is a major change to that Bill in the sense of the wording, of the multiplicity of reasons, and they are not necessary. Section 3, as it is in the Bill, allows us to do all of the things that are listed here. Thank you, Mr. Chairperson.

Mr. Maloway: We do not agree with the Minister on that point obviously. We do not feel that Section 3 is an adequate representation of what was in Bill 64, and we feel it is part of the reason that perhaps the groups that the Member mentioned are not here tonight and were out for the previous go-round on this Bill. They are satisfied that the Minister has withdrawn those sections of the Bill they objected to.

After all, that is reasonable to me as to why they are not here tonight; they are happy the Minister has taken out these sections. We have had at least two legal opinions that have indicated to us that Section 3 is nowhere near as strong as the sections that it is supposed to be replacing, that spelling out examples would be a preferable way of proceeding, so I believe that we should consider bringing these sections back into the Bill.

* (2020)

Mr. Chairman: On the proposed amendment, shall the amendment pass? A counted vote has been requested.

A COUNTED VOTE was taken, the result being as follows:

Yeas 4, Nays 6.

Mr. Chairman: I declare the amendment defeated.

Clause 4—(pass); Clause 5—pass.

Clause 6—shall it pass?

Mr. Kevin Lamoureux (Inkster): Mr. Chairperson, I do have some concerns regarding Clause 6, in the sense of the obligation of the employee. I am wondering if the Minister might want to comment or address the point of what type of obligation is the employee going to have in terms of the whole question of misrepresentation, in particular if the employee is not aware of that fact?

Mr. Connery: The misrepresentation does not necessarily have to be at the direction of the employer. The employee on his own volition to make a sale could be conducting, on his own, an unfair business practice, and therefore could be responsible on his own without the concurrence of the employer.

Mr. Lamoureux: My question would be: What provision in there allows for an employee to make an honest mistake, if the employee in selling a widget is not aware of something, then two weeks later the consumer returns to say, "You misled me" for whatever reasons, and that employee for whatever reasons just was not honestly aware of that fact?

Mr. Connery: If you look at Section 33, Clause 4, it allows for "(a) whether the unfair business practice was due to (i) a mistake"—the court shall consider this—"(ii) to reliance and information supplied by another person, or (iii) to the act of or default of another person, or (iv) to an accident or some other cause beyond the person's control;" so there is room if somebody did make a mistake—also, 33(4)(b) "whether the person took reasonable precautions and exercised due diligence to avoid the unfair business practice", so there is scope here to account for a mistake, an error, and ultimately the courts would make that decision.

* (2025)

Mr. Lamoureux: In addressing 33(4), it does it to the extent of the penalty. It does not really address the concern that we have, and to that effect, Mr. Chairperson, I would like to move an amendment.

It would be moved, seconded by the Member for The Maples (Mr. Cheema),

THAT the following be added after subsection 6(3):

Exception If employee acts In good faith

6(4) Notwithstanding any other provision of this section, no court action or proceeding may be taken and no order may be made against a supplier's employee under this Act if the employee has acted in good faith.

(French version)

Il est proposé que l'article 6 soit amendé par adjonction, après le paragraphe 6(3), de ce qui suit:

Exception

6(4) Malgré les autres dispositions du présent article, il est interdit soit d'intenter des actions en justice ou des procédures judiciaires, soit de rendre des ordonnances en vertu de la présente loi contre un employé du fournisseur qui a agi de bonne foi.

Mr. Connery: In consultation with legal opinion in the department, there has to be, first of all, a consumer loss before something would take place. If it was just strictly by mistake, then the consumer would be able to get a refund or whatever to ameliorate the problems concerned. If it was strictly a mistake, then the judge would not impose a penalty, and that is covered under 33(4)(a).

If something happened inadvertently, the consumer should still be compensated for that inadvertent act, but secondly, the courts would not impose a penalty on an employee for a mistake, an inadvertent act, in that they did not deliberately or intentionally mislead or attempt to defraud the consumer.

Mr. Lamoureux: Mr. Chairperson, in reading the Act, as a salesperson or any clerk or employee or potential employee, if one were to read through it one would be given the impression that whatever they might sell could come back to them, and they could be in violation of the law.

In 33(4), from what I understand, it is talking about, in determining the extent of the penalty, the judge is to consider (a)(i) through (iv). I do not see the difference or how that particular clause alleviates the concern of someone selling something and not being aware of it.

Mr. Connery: If the employee was acting on the instruction of the employer, he would be found by a court to be just acting on behalf of the employer

under instruction by the employer. The employer would be found guilty of an unfair business practice.

Keep in mind that the intent of this Bill—if you look to Clause 14, “The director may attempt to resolve consumer complaints of unfair business practices by mediation.”—we are not out to achieve a whole lot of fines, convictions and everything else. We are trying to make the marketplace a fair place to operate. In cases like that where obviously it was inadvertent or whatever, mediation would be the first thing that would take place, and we would hope that in cases you are talking about it would be mediation. Something took place, there was no real intent, so mediation and amelioration would take place. If the consumer was out something, there would be a refund or whatever to make it right, but not necessarily an attempt to prosecute.

Mr. Lamoureux: Mr. Chairperson, there are good-faith clauses in the legislation. I think it is important that it be strictly spelled out that employees do have some protection, and I think an amendment of this nature will do just that. I would suggest that we vote for it.

Just to further that, if we take a look at Clause 9(1) where it makes reference to good faith, we are actually asking the Minister to do something similar to that particular clause, and I just want to read over it.

Mr. Connery: Well, I was trying to see if there was opportunity for accommodation for the amendment. Really, the department of legal counsel say that it really is not a meaningful clause in that sense. Already, everything is in the Bill that needs to protect them. It says “where the employee has acted in good faith.” No judge is going to convict somebody who has acted in good faith. I am not trying to be obstinate on it. I would be quite happy if there was a meeting, it did not do any harm to the Bill and everything else to have it included, but I am told by legal counsel, and believe me, we have reviewed this Bill with a microscope, it does not help the employee in any way, shape or form.

* (2030)

Mr. Lamoureux: I want to again refer to “advertise” in Clause 9(1), in which it reads “A person who, on the behalf of a supplier, prints, publishes, distributes, broadcasts or telecasts an advertisement in good faith”. We are seeing the term “good faith”, and if that can apply for the good faith

here, I am wondering why we could not have that particular amendment go through.

Mr. Connery: There is no relationship between 9(1)—the “good faith” in 9(1) is dealing with advertising, and somebody takes an ad on the basis that that is what it is. The broadcaster or the newspaper, whoever would print the advertisement is taking it on the basis in good faith that it is a proper ad. The employer or the person taking the ad out would still be responsible for misleading advertising or for unfair business practice.

If there was something of an advantage in it, just because it is an amendment to the Bill—if it was something that enhanced the Bill—We are not after an employee, but anybody can take action. Even if they acted in good faith that does not mean that somebody cannot take action against them, but a judge would then determine whether there was any validity to that action, and if people have acted in good faith, no court is going to convict them.

Mr. Chairman: On the proposed motion of Mr. Lamoureux to amend Clause 6 with the respect to both English and French text, shall the motion pass? In my opinion, the nays have it.

Clause 7—pass; Clause 8—pass; Clause 9—pass; Clause 10—pass; Clause 11—pass; Clause 12—pass; Clause 13—pass; Clause 14—pass; Clause 15—pass. Clauses 16 to 29—pass.

We are on Clause 30.

Mr. Lamoureux: Mr. Chairperson, I realize that we passed it, but I am wondering if we could have leave then to go back to Clause 14, and then we could go up to Clause 30.

Mr. Chairman: Clause 14, Mr. Lamoureux?

Mr. Lamoureux: Mr. Chairperson, I did want to move amendment to Clause 14. Our concern lies with the fact that the director has the power to refuse to investigate or to mediate. Mr. Chairperson, I do not see anything wrong with having the director not have the power to refuse. He can limit his investigation, but I do not think we should be allowing the director to outright refuse, for obvious reasons. I do not really need to debate this particular clause, and I would just be interested in the Minister’s comments, and then we can have a vote on it.

Mr. Connery: I assume that you are looking at 14(2)—

Mr. Lamoureux: That is right.

Mr. Connery: —where it says “may refuse to mediate or investigate a complaint if the subject matter of the complaint more closely relates to other applicable federal or provincial legislation or to municipal by-laws or for any other reason.” Is it the “any other reason”?

Mr. Lamoureux: Yes.

Mr. Connery: The concern for having this in here is that you could have just a whole myriad of frivolous complaints to tie up the department and to do investigations on frivolous complains. We are putting in this legislation to protect consumers, but as the Member well knows, there are lots of times when—we see lots of it in our department that is frivolous of nature. Somebody is mad at somebody, so they just want to raise some problems for them. Where it is obviously of a frivolous nature we want to be able to say no, we are not going to deal with it.

Mr. Lamoureux: I guess the point here is, as the Minister said, the “or for any other reason” that we are concerned with. We are not trying to put on any limitations or minimums in terms of the investigations. The director can have one telephone call, or two telephone calls can be the limit to the investigation. What we are suggesting is that he does not have the right “for any other reason” to say no, because what might be trivial to the director is likely not going to be trivial to the consumers who feel they have been burnt, if you will.

I move, seconded by the Member for The Maples (Mr. Cheema),

THAT subsection 14(2) be amended by striking out “, or for any other reason”.

(French version)

Il est proposé que le paragraphe 14(2) soit amendé par suppression de “pour toute raison, notamment”.

Mr. Connery: We do get people who really are angry at somebody and it is of a frivolous nature. As you know, we are not in times of abundant money for the department to work. We are trying to do the best we can with the numbers of people we have, and if we start chasing frivolous complaints around, we just will not have the time to deal with the very obviously serious ones that need to be dealt with. There was good reason and good thought put into why this part was in here. If the department started to chase down 10 or 15 frivolous complaints a week

or a month, it would tie up staff from really going after where there are obviously unfair business practices taking place, misleading, whatever. We are saying in all sincerity that we cannot just be having to chase down frivolous situations.

I think the Member understands that. I understand what he is getting at. The director does not have that power just to say it is a frivolous one. They do not just turn their back on it, because he or she, whoever the director is, or employee of the director under the guidance of the director, would have to take some sort of look at it to determine if it is frivolous. How would he know it was frivolous if somebody phoned up and said “I have a complaint against ABC Retail.” What is he going to say, it is a frivolous complaint? He has to then take a look at it to see if it is frivolous, but if it is obviously frivolous in nature, then to refuse to proceed further. Obviously the employee or the department have to do an investigation before they even know it is of a frivolous nature. They have to take that first step.

Mr. Chairman: I should remind Members that leave has been given to reconsider Clause 14.

Mr. Maloway: I too would like to support this amendment that the Member has made and point out to the committee that just a few months ago, when the Minister introduced this Bill under Bill 64, the clause was exactly as the Member would have it. It basically leaves out the four words “or for any other reason”, and so obviously this whole concept of frivolous actions all came about coincidentally at the time that the Minister withdrew this Bill from committee back in March. Coincidentally at the time, the chamber of commerce got hold of this Bill, hijacked this Minister, this Government and this Bill and basically rewrote it the way they wanted it. That is what happened.

Mr. Connery: As the Minister, with our staff of legal counsel, we feel that we have to not support the amendment.

Mr. Chairman: On the proposed motion of Mr. Lamoureux to amend Clause 14, with respect to both the English and French text, shall the motion pass? All in favour say aye. All against say nay. In my opinion, the nays have it.

We are moving on to Clause 30.

* (2040)

Mr. Maloway: I move, seconded by the Member for Kildonan (Mr. Chomiak),

THAT Section 30 be struck out and the following substituted:

Applicability of this Act

30 This Act applies to all consumer transactions arising on or after the date this Act comes into force, and also to those consumer transactions arising before the date this Act comes into force that are renegotiated, revised, extended, renewed, or otherwise modified on or after the date on which this Act comes into force.

(French version)

Application de la Loi:

30 La présente loi s'applique aux opérations commerciales qui ont lieu à partir de la date d'entrée en vigueur de la présente loi ainsi qu'aux opérations commerciales qui ont lieu avant la date d'entrée en vigueur de la présente loi mais qui sont renégociées, révisées, prorogées, renouvelées ou modifiées autrement à partir de cette date.

Mr. Chairperson, if I might just explain the proposed amendment, you will see that this too is a reversion back to the previous Bill 64, that in March of this year the Minister saw fit to bring forward a Bill which contained this clause that I have just read into the record, and since then he has brought in this more watered-down version of the Bill, which basically suggests that the Act should not apply to any unfair business practice committed before the day the Act comes into force.

This amendment would allow people who have been aggrieved in the past, who have an ongoing grievance that has not been satisfied over the last year or two, provided certain conditions are

reached, to actually get some satisfaction under this Act. If we follow the Minister's current train of thought, anybody who had a grievance up until now would be excluded, and only people who have had something happen to them after the proclamation of the Act would be covered.

Mr. Connery: The motion does not say how far back we would go. Is it going to be a 20-year-old—Anything that has taken place would be grandfathered, but if a change to a previous contract takes place after the Act comes into being, is proclaimed, it would still come under that, so any changes would be something that was done after the Bill was proclaimed, would still be considered in the light of the legislation. What the Member is suggesting would still take place with this wording of Section 30.

Mr. Chairman: On the proposed motion of Mr. Maloway to amend Clause 30, with respect to both English and French text, shall the motion pass? All in favour say aye. All against say nay. In my opinion, the nays have it.

A COUNTED VOTE was taken, the result being as follows:

Yeas 4, Nays 6.

Mr. Chairman: Clause 31—pass; Clause 32—(pass); Clause 33—(pass); Clause 34—pass; Clause 35—pass; Preamble—(pass); Title—pass. Bill as amended be reported—pass.

Mr. Chairman: Committee rise.

COMMITTEE ROSE AT: 8:45 p.m.