Fifth Session - Thirty-Sixth Legislature

of the

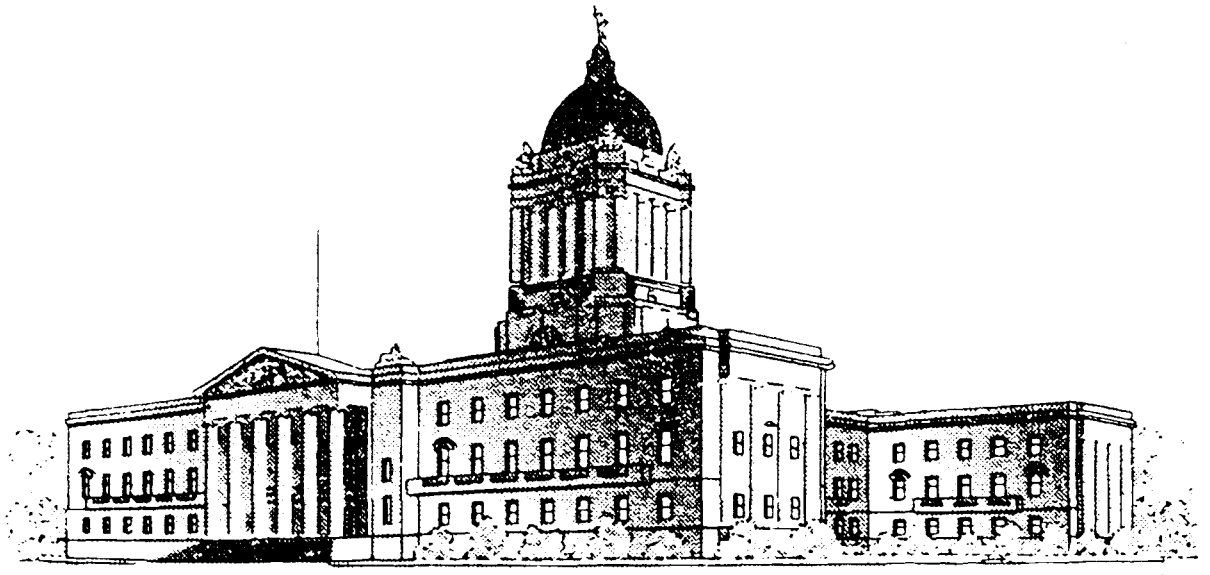
Legislative Assembly of Manitoba

Standing Committee

on

Industrial Relations

Chairperson
Mr. Edward Helwer
Constituency of Gimli



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Thirty-Sixth Legislature

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LEGISLATIVE ASSEMBLY OF MANITOBA

THE STANDING COMMITTEE ON INDUSTRIAL RELATIONS

Monday, July 12, 1999

TIME – 7 p.m.

LOCATION – Winnipeg, Manitoba

CHAIRPERSON – Mr. Edward Helwer (Gimli)

VICE-CHAIRPERSON – Mr. James Downey (Arthur-Virden)

ATTENDANCE - 8 QUORUM - 6

Members of the Committee present:

Hon. Messrs. Radcliffe, Toews, Tweed

Messrs. Downey, Mrs. Driedger, Messrs. Helwer, Mackintosh, Struthers

WITNESSES:

Bill 29–The Victims' Rights Amendment Act

Mr. Ken Mandzuik, Manitoba Association for Rights and Liberties

MATTERS UNDER DISCUSSION:

Bill 29–The Victims' Rights Amendment Act

Bill 34–The Court of Queen's Bench Amendment and Consequential Amendments Act

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Mr. Chairperson: Good evening. Will the Standing Committee on Industrial Relations please come to order. This evening the committee will be considering the following bills: Bill 29, The Victims' Rights Amendment Act; and also Bill 34, The Court of Queen's Bench Amendment and Consequential Amendments Act.

To date we have one person registered to speak to Bill 29, and I will read that person's name. Valerie Price is from the Manitoba Association for Rights and Liberties. If there are any other persons in attendance who would like to speak to one of the bills before the committee this evening and who have not yet registered, please see the Chamber staff at the back of the room to register and your names will be added to the list.

In addition, if there are written items to be handed out to the members of the committee, 15 copies are required. If assistance is required to make the photocopies, please contact the Chamber staff at the back of the room and copies will be made for you.

Did the committee wish to use any time limits on the presenter?

Some Honourable Members: No.

Mr. Chairperson: No. That is fine then. We will proceed. There will be no time limits or anything like that. We will proceed with the consideration of presentations. Mr. Ken Mandzuik is going to replace Valerie Price. Am I right? Mr. Mandzuik, would you, please.

Bill 29–The Victims' Rights Amendment Act

Mr. Ken Mandzuik (Manitoba Association for Rights and Liberties): Is this where you want me?

Mr. Chairperson: Yes. That is fine. Great.

Mr. Mandzuik: I am happy to be here on behalf of the Charter of Rights and Legislative–

Mr. Chairperson: Excuse me, before you start, do you have any copies, or copies of your presentation?

Mr. Mandzuik: I think they should have been handed out already. They have not been here?

Mr. Chairperson: No, we do not have them.

Mr. Mandzuik: We will send them in later.

Mr. Chairperson: Okay. If we get them later we will distribute them. Carry on, Mr. Mandzuik.

Mr. Mandzuik: Mr. Chairperson, I am happy to be here on behalf of the Charter of Rights and Legislative Review Committee of the Manitoba Association for Rights and Liberties, and that is a provincial nongovernment nonprofit organization established in 1978 as a human rights and civil liberties advocacy body.

I begin by saying that we recognize and support the steps to compensate victims of crime. At the same time we have some concerns regarding the proposed amendments to The Victims' Rights Act.

First, as the act now reads, there is no ability to question the Director of Victims' Support Services decision on who is a victim. An affected inmate has no opportunity to challenge the director's determination of who is a victim of his or her crime. Similarly if the director determines that someone is not a victim of crime, that person similarly has no opportunity, there is no process for that individual to challenge that determination.

Second, the director has an absolute and unfettered discretion to determine what amount of compensation a victim or affected inmate is entitled to. There are no legislative guidelines for the director to follow, and there is no certainty that the same criteria would be applied in similar circumstances which could lead to different results in similar cases. The affected inmate has no input on what is an appropriate amount and neither does the victim. At the end of the day, neither the victim nor the affected inmate have any right to appeal the director's decision.

We submit that this lack of a hearing or appeals for the determination of who is a victim or what compensation is properly payable is a denial of natural justice.

The third, victims of crime are effectively given an exemption from The Limitation of Actions Act. If this is the intent of the Legislature, one wonders why only those victims that have affected inmates suing the government are given this exemption. I note that Section 28 of The Victims' Rights Act indicates that victims who apply for compensation from the Victims' Compensation Fund must do so within a year of their injuries.

Fourth, in its worst light, these amendments appear designed to dissuade affected inmates from exercising their rights to commence civil actions against the Crown. There are provisions in the Queen's Bench rules to strike frivolous or vexatious actions so this cannot be the intention of the act. If the amendments do not have this design, then why is the act limited to suits against government?

Therefore, we have a series of recommendations to make to the committee: First, just to simply do away with the amendments; the second, if the amendments are not done away with, institute a hearing process for these kinds of questions. The masters at the Court of Queen's Bench are ideally suited to determine issues of who is or is not a victim and they are ideally suited to determine what an appropriate amount of damages would be. Failing that, we submit that the committee amend the act to allow for some kind of appeal process. Even a final appeal to the Court of Queen's Bench to determine these issues is better than no appeal at all.

Another alternative would simply be to fix a percentage of any award an affected inmate is granted and send that percentage to the victims' compensation fund, and this will eliminate any problems of having to determine what is an appropriate amount and will eliminate the problem of what amount is appropriate. Finally, we ask that the committee address the issues of the limitations question that are absent from the act right now. Subject to any questions of the committee, those are my comments.

Mr. Chairperson: Are there any questions of the presenter, Mr. Mandzuik?

Mr. Gord Mackintosh (St. Johns): Thanks for your presentation. We share several of your concerns and perhaps from different vantage points because we are concerned if victims hold

out a hope of receiving some restitution under this scheme that that would be assured that there be some certainty, some predictability and that they not be subject to extensive proceedings, whether it be on the basis of denial of natural justice or perhaps constitutional argument. But in terms of the issue of the appeal of the director's decision, is it your view that there would nonetheless be a review available of that decision of court review?

Mr. Mandzuik: There is not anything provided in the amendments as they now stand, so unless someone wants to go through the horrendous procedure of filing a judicial review of these kinds of decisions, whether that is possible or not, it is going to be that much more of an uphill battle for a victim. There is a simple and clear appeals process for both the victim and the affected inmate outlined in the acts. It would reduce a lot of uncertainty.

Mr. Mackintosh: Is it your concern that this legislation appears to be focused more on providing a chilling effect on potential tort litigants rather than providing compensation for victims?

Mr. Mandzuik: I think that is a concern. From the meter reports I understand that very few of these actions are even prosecuted in Manitoba, some 12 actions a year. So it is not an overriding concern, but at the same time I do not think it is going to help that many victims either.

Mr. Mackintosh: We had asked the minister at second reading if he could tell us, and we will ask him again tonight, of the number of claims that have been filed on an annual basis, excluding the claims around the Headingley riot, so there could be some predictability as to the impact of this legislation on victims. Did you say you had some statistics? You used the number 12.

Mr. Mandzuik: I think that is what I had read in the Free Press or heard on the radio.

Mr. Chairperson: Are there any further questions for Mr. Mandzuik? If not, I want to thank you for your presentation this evening.

Mr. Mandzuik: Thank you.

Mr. Chairperson: Are there any other persons wishing to make a presentation on this bill? If not, is it the will of the committee to proceed with clause by clause? Is there agreement of the committee that the clauses in the bill will be called in blocks of clauses conforming to the pages, with the understanding that the committee will stop at any clause where a member wishes to ask a question, raise that concern or move an amendment? Is that agreed?

Mr. Mackintosh: Before we begin clause by clause, I wonder if the minister has a response to the issues that were raised during the debate on second reading in the House.

Mr. Chairperson: I wonder if we will just wait. We will ask the minister for his opening statement here.

It was also agreed that any amendments that may be moved tonight will be considered to be moved with respect to both the English and French languages, unless otherwise noted. Is that agreed? [agreed]

Does the minister responsible for Bill 29 have an opening statement?

* (1910)

Hon. Vic Toews (Minister of Justice and Attorney General): No, I have made all my comments in the House.

Mr. Chairperson: I want to thank the minister. Does the member for the official opposition have an opening statement?

Mr. Mackintosh: I would not thank the minister for that, Mr. Chair. We had a series of questions for the minister. I guess we will start off with the issue of how many claims have been made by inmates against the Province of Manitoba in the years past, excluding the claims surrounding the Headingley riot. That is asked in order to, as I said earlier, predict whether this legislation will be useful for victims of crime.

Mr. Toews: Well, I do not have those statistics, but if it helps one victim of crime, I consider it an important step.

Mr. Mackintosh: So would I, and I would like to know if there is one or if there is more. It is a simple question. Certainly, the minister has within his knowledge the number of tort claims that have been issued and pursued to judgment or settled, and also the amounts of those claims. Has he not made such inquiries?

Mr. Toews: I will see if I can obtain that information. If it is available, I will produce it for the member.

Mr. Chairperson: Did you have another question, Mr. Mackintosh?

Mr. Mackintosh: As I said in the debate on second reading, victims will take what they can get from this government, but I am concerned that this legislation may not do as the minister said it was intended to do, accepting for a moment that the expressed intention is a real one and that it is not to simply dissuade potential litigants, which could also have the effect of encouraging irresponsible behaviour. Tort law is there to encourage responsible behaviour.

I am concerned that by the scheme set out in this legislation, which really underlies the entire bill, the director of victim support services is apparently given what amounts to a judicial function. The director will take a liquidated claim proven at a trial and decided on by a judge and then decide a proportion of harm and level of damages to be accorded to a victim. No hearing is required.

So there could be certainly a challenge that this offends principles of natural justice, I think. I think there could be a constitutional argument that the director is exercising Section 96 powers. I do not know.

I think it is incumbent on the minister in particular to assure us that steps have been taken to guard against that possibility, if not probability, in the interests of ensuring that victims can count on this legislation in the event that there are cases where money can be directed from.

With that in mind, can the minister provide this committee or describe to this committee any legal opinion he has which leads him to believe that the scheme set out here will withstand an administrative law or a Charter or other constitutional challenge?

Mr. Toews: Well, dealing first of all with the administrative law arguments, that is precisely why we have included the provisions we have. As the member well knows, administrative law ensures that the statutory provisions are carried out with. If a particular process is authorized by statute then that is an appropriate proceeding and the courts will not interfere with that decision.

Secondly, in respect of the issue of Section 96 functions, that is why this is an administrative function rather than a judicial function, because we want to avoid potential difficulties and not clothe the director with Section 96 powers. That is why this is in the context of a much broader scheme dealing with victims rights.

As one of the Ontario witnesses said in a recent case, Manitoba's act is the only one with an effective complaint resolution mechanism, and indeed this I think enhances that position.

Mr. Mackintosh: Is the minister saying he has a legal opinion then which assures us that this legislation would succeed given a challenge?

Mr. Toews: If I could make those kinds of assurances, we would not need judges. I have given you the opinion, and I believe it is a reasonable opinion. I believe that this is an appropriate way to proceed.

Mr. Mackintosh: Just specifically, even on the section that does not require a hearing to be held by the director, does the minister not have concerns that that could trigger a challenge?

Mr. Toews: Well, maybe if he can elaborate the nature of the challenge, I would be perhaps in a better situation to comment on that challenge.

Mr. Mackintosh: The concerns I think would be centred around the possibility of a challenge based on principles of natural justice. I just wonder if the minister could comment on that.

Mr. Toews: My understanding is that if a statute specifically excludes a necessity for a hearing, it then eliminates a challenge to a

process on the basis of the rules of natural justice.

Mr. Chairperson: Is it the will of the committee to proceed? [agreed] We thank the member. During the consideration of the bill, the preamble and title are postponed until all other clauses have been considered in their proper order.

Clause 1–pass; Clause 2–pass; Clause 3–pass; Clause 4–pass; Clause 5–pass; preamble–pass; title–pass. Bill be reported.

Bill 34–The Court of Queen's Bench Amendment and Consequential Amendments Act

Mr. Chairperson: We will move on to Bill 34. Does the minister for Bill 34 have an opening statement?

* (1920)

Hon. Vic Toews (Minister of Justice and Attorney General): No, I do not.

Mr. Chairperson: I thank the minister. Does the critic from the official opposition have an opening statement?

Mr. Gord Mackintosh (St. Johns): Well, we had three questions at second reading, and we will reiterate them again. First of all, the nominating committee is apparently dominated by persons appointed by the Lieutenant Governor in Council. That is not the case, as I understand it, in respect to the nominating process for Provincial Court judges. Why is this scheme different?

Mr. Toews: As a result of the decision of the Supreme Court of Canada in the judges case, which dealt with the independence not only of the judiciary but the independence of the executive from the judiciary, we have been examining legislation very closely. I think that legislation which places judges into a position, as some of the other legislation does, in making decisions that should properly be left with the executive gives rise as to an argument that the separation of the executive and the judiciary is being compromised. So in the course of this legislation, we have specifically tried to address that issue.

I am not suggesting that the other legislation is subject to a constitutional challenge. I am just saying that as a result of that decision, we have approached this legislation in a much more careful manner in view of trying to maintain that division between the judiciary and the executive.

What this does in fact, I think, does maintain that by appointing one lawyer, retired judge, or retired master to chair the committee and two community members. Then, again, there will be the presence of the Law Society and the Manitoba Branch of the Canada Bar Association. The input of the judiciary will take place on a consultative basis by consulting with the Chief Justice and a senior master who may provide comments in respect of the qualifications and suitability of the recommended candidates, but given the separation of the judiciary, the comments should not in any way be binding so as not to jeopardize that separation between the executive and the judiciary.

Mr. Mackintosh: Well, does the minister see any reason why the senior master or designate could not also be on the nominating committee here?

Mr. Toews: I think the process that has been agreed upon so far is that it will be at least one person who is either a lawyer, a retired judge, or a retired master–I think that essentially addresses that particular concern to chair the committee–and then two community members and then two others who are lawyers from the Bar Association and the Law Society.

Mr. Mackintosh: Does the minister not have concerns that by having cabinet appointments dominate the committee, he is effectively putting in place without other checks and balances a more political process than exists for the other appointments to the Provincial Court?

* (1930)

Mr. Toews: Well, I have to respect what the Supreme Court of Canada said in the judges case. They made clear that not only does the judiciary have to be independent of the

executive, but the reverse of that coin is also true, that the executive must maintain independence from the judiciary. So I thought this was a suitable solution to a very difficult problem. It is either giving the judiciary the power to control appointments by a predominance of those members or to the executive. Essentially it is the government who has to make the final decision and be accountable for the decision. That is, I think, what this in fact does.

Mr. Mackintosh: Has the minister prepared legislation to remove the judge position from The Provincial Court Act in that case?

Mr. Toews: I do not believe there is any legislation being contemplated in this session.

Mr. Mackintosh: The second area of concern is with regard to the number of names that are to be provided to the minister at the conclusion of the nominating committee's work. As I recall, there are to be six qualified candidates for each position. As I recall, The Provincial Court Act required between three and six. Why is there a difference for this scheme as compared to The Provincial Court Act scheme?

Mr. Toews: I saw a recent reference to this in Alberta legislation, where the thinking behind that was that certainly, if 50 or 60 lawyers apply for a position and one only puts forward three names to the minister, the implication is that all 47 were not qualified or competent. If a potential of six are being allowed, certainly there must be a good reason why only three are being put forward.

There may be reasons, for example, maybe only four people apply, and one of them may not be qualified, but then the committee should indicate that to the minister. So what this is ensuring is that qualified candidates are brought forward to the limit of what is allowed. If there is less than a limit there, then the committee has to certify that that is in fact the case. I think it is only fair that as many names as possible are brought forward to the committee if they are qualified. I think to suggest otherwise might leave the erroneous but somehow inferential conclusion that the other 47 and the 50 were not competent.

Mr. Mackintosh: Well, our concern is that it again increases the potential or the ability of political considerations to come to the fore. There are more names available now to the Minister of Justice. I say that without regard to what government is in power at the time. I think we have to be careful that the public, being assured that these kinds of appointments, whether they are to the Provincial Court or to the masters, are based on merit and not on partisanship.

Mr. Toews: And that is exactly why the committee has to certify that the other three are not qualified. If they are qualified, those names should be brought forward. Certainly we are looking for qualified candidates. We are not looking for people who are not qualified, and so the committee has to certify that there are no other qualified candidates. I think it is a very reasonable step.

Mr. Mackintosh: The last question was relating to how complaints are filed. The complaint here is to the Chief Justice. I am just wondering why it is not to the senior master. If you look at the similar provisions in The Provincial Court Act, it would go to the Chief Justice. So, if you were going to mirror that here, it should go to the senior master. I am just wondering what arguments were adopted by the minister in going this route.

Mr. Toews: My understanding is that the masters are very different than ordinary judges. They somehow fall somewhere between a very senior government official and a judge. In respect of their judicial functions, they report to the Chief Justice, all masters. So it would be appropriate for those complaints to go to the Chief Justice. So that I agree with that reasoning, it makes sense to me.

Mr. Mackintosh: Just a practical matter of how this legislation will be implemented in terms of the compensation. The Judicial Compensation Committee has given jurisdiction now over the remuneration benefits of masters. I am just wondering if there will be a change in the request to the Judicial Compensation Committee that I believe has already been struck or whether this will be only for a future Judicial Compensation Committee.

Mr. Toews: I am not aware because I do not deal directly with compensation of whether there are any outstanding compensation claims, but certainly, once this legislation is proclaimed, it will deal with any future claims for compensation. I know that government brought in certain legislated increases or was talking of doing that. I am not sure where that is at. So government legislated across the board for the masters a same percentage increase as the provincial judges received. It was seen as the fairest way of dealing with it when there was no compensation committee in place. But I think, for any future considerations, there has to be a compensation committee. I think that is fairly clear. There are some other alternatives that were considered and rejected and, mainly because of the constitutional issue raised by the provincial judges case of the Supreme Court of Canada, dealt with compensation recently.

Mr. Chairperson: During the consideration of the bill, the preamble, the title and the table of contents are postponed until all other clauses have been considered in their proper order.

Clause 1–pass; Clause 2–pass; Clause 3, which encompasses pages 3 to 19–pass: Clause 4–pass; Clause 5–pass; Clause 6(1)–pass; Clause 6(2)–pass; Clause 7–pass; Clause 8–pass; preamble–pass; table of contents–pass; title–pass. Bill be reported.

Committee rise.

COMMITTEE ROSE AT: 7:32 p.m.