Bill 25, *The Manitoba Evidence Amendment Act (Scheduling of Criminal Organizations)*

Brendan Jowett

I. Introduction

Provincial governments often face a conflict between public expectation and authority to legislate. On one hand, provincial governments face heavy political pressure to reduce crime and ensure the safety of citizens. On the other hand, the ability of the provinces to legislate in regard to the criminal law is severely hampered by section 91 of the Constitution Act, 1867, which assigns the power to make criminal laws to the Federal Government.

Bill 25, *The Manitoba Evidence Amendment Act (Scheduling of Criminal Organizations)*, is a mechanism intended to ensure the efficient operation of provincial laws which impose penalties for membership in a criminal organization. Heralded by the Honourable Andrew Swan, Minister of Justice and Attorney General for Manitoba, as “groundbreaking legislation” and “the first of its kind in Canada”, the Act was introduced to the Legislative Assembly of Manitoba as a dramatic step in the province’s fight against organized crime. Read in the context of *The Manitoba Evidence Act*, Bill 25 allows the provincial government to create a schedule of criminal organizations for use in proceedings under provincial laws which require

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proof that an organization is criminal. Under Bill 25, the placement of a group on the schedule serves as conclusive proof the group is a criminal organization. This eliminates the need to prove an organization is criminal in every proceeding against the organization, freeing up valuable resources and court time.

While Bill 25 has obvious merits, drastic legal steps often test boundaries. This legislation does not disappoint, putting pressure on the Charter, principles of fundamental justice, and most modern jurisprudence. The bill raises questions about appropriate standards of proof, privacy rights, ministerial transparency, the right to freedom of association, and the right to be presumed innocent. The most contentious provision in Bill 25, however, states that “the decision to add an entity to the schedule [or deny an objection] is final and is not subject to judicial review or appeal.”

Bill 25 received royal assent on 17 June 2010. The bill received support from both the New Democratic Party (“NDP”) government and the Progressive Conservative (“PC”) opposition. Although Bill 25 is clearly a voter friendly bill with a “tough on crime” brawn, there are problems within the bill that run sharply against the current of modern legal philosophy. As Dr. Jon Gerrard, Leader of the Manitoba Liberal Party, said in criticism of the bill, “...the principles of fundamental justice that were established by our forefathers and upheld in our courts must not be bypassed.”

This article will examine the structure and operation of Bill 25, its origins, and the process by which it passed through the Legislative Assembly of Manitoba. It will also examine some of the controversial provisions contained in the bill and propose possible solutions to address these problems, namely that the legislation should provide a judicial review process.

II. THE STRUCTURE AND OPERATION OF BILL 25

The following section offers an explanation of how Bill 25 operates. The section will cover the mechanisms which create the schedule of criminal organizations, the process by which an entity is placed on the schedule, the

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5 Act, supra note 2, s 68.11.
6 Manitoba, Legislative Assembly, Debates and Proceedings (Hansard), 39th Leg, 4th Sess, No 54B (1 June 2010) at 2626 [Debates (1 June 2010)].
process for an entity who objects to a recommendation that it be placed on the schedule, the process for an entity to request its removal from the schedule, and other features of the bill which are essential to understanding how it functions.

A. Creation of the Schedule

First, it should be noted that Bill 25 uses the definition of “criminal organization” as provided in the Criminal Code, which reads as follows:

467.1(1) ... “criminal organization” means a group, however organized, that
(a) is composed of three or more persons in or outside Canada; and
(b) has as one of its main purposes or main activities the facilitation or commission of one or more serious offences that, if committed, would likely result in the direct or indirect receipt of a material benefit, including a financial benefit, by the group or by any of the persons who constitute the group.

It does not include a group of persons that forms randomly for the immediate commission of a single offence.\(^7\)

The bill allows the Lieutenant Governor in Council [“LGC”] (ie, Cabinet) to establish a schedule of criminal organizations by way of regulation.\(^8\) An entity’s inclusion on the schedule is deemed to be conclusive proof in an action or other legal proceeding that the entity is in fact a criminal organization.\(^9\)

B. Application to Place Entities on the Schedule

Entities can be placed on the schedule in two ways, either directly by the minister or by application of the director, a senior departmental official whose position is created under section 68.13 of the bill.\(^10\) The director’s application, made in writing, must identify the entity that is the subject of the application and provide “...detailed information setting out the basis on which the director has determined that the entity is a criminal organization.” That information must include either “information obtained by the director

\(^7\) Act, supra note 2, s 68.1.
\(^8\) Ibid, s 68.2(2).
\(^9\) Ibid, s 68.3(1).
\(^10\) Ibid, s 68.13.
respecting the entity and its members” and/or “a decision, order or finding of a federal, provincial or territorial court that the entity is a criminal organization.”

Once the application is made by the director to the minister, the director must give public notice of the application which includes the name of the entity that is the subject of the application. The notice must state that if a member of the entity objects to the application, the member must file written notice of his or her objection within the specified deadline in order to make a submission to the review panel.12

C. Objecting to Placement of an Entity on the Schedule

If an objection is filed by a member of an entity before the deadline provided in the notice, the objector must be given a reasonable opportunity to review a summary of the information [“summary”] which led the director to determine that the entity is a criminal organization. The summary “must enable the objector to be reasonably informed of the basis on which the director determined that the entity is a criminal organization.” The summary cannot, however, disclose information which might reveal the identity of a confidential informant or jeopardize the safety of a person, or which might negatively affect an ongoing investigation or the utility of investigative techniques of a law enforcement agency. The objector then has 30 days following his or her review of the summary to provide the director with a written submission which responds to the information which supports the application and provides further arguments or evidence that support the objector’s position that the entity is not in fact a criminal organization.14

D. Review of Application and Objection by Review Panel

A review panel [“the panel”] is created under s. 68.14 of Bill 25 to review both applications to place entities on the schedule, and requests that entities be removed from the schedule. The panel consists of three or more non-government, non-law enforcement persons. There are no qualifications set out for members of the panel. Panel proceedings are confidential and neither

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11 Ibid, s 68.4(2).
12 Ibid, ss 68.5(1)–68.5(3).
13 Ibid, s 68.6(2).
14 Ibid, s 68.6.
the director nor members of the panel can be compelled to give evidence in
court relating to the placement of an entity on the schedule.

Regardless of whether an objector steps forward or not, an application
and information gathered by the director must go before the panel along with
any submissions received from objectors.\textsuperscript{15} The panel must review the
material provided to determine whether there are reasonable grounds to
believe that the entity is a criminal organization.\textsuperscript{16} The panel must then
provide the minister with a report of its findings and reasons, along with any
submissions received from objectors. If the panel advises the minister that
there are reasonable grounds to believe the entity is a criminal organization,
and based upon the submissions of both the director and any objectors the
minister feels s/he has reasonable grounds to believe the entity is a criminal
organization, s/he may make a recommendation to the LGC that the entity
be placed on the schedule.\textsuperscript{17}

\textbf{E. Request for Entity to be Removed from Schedule}

Once an entity is on the schedule, a member of the entity may make a
written request to the director for the entity to be removed from the
schedule, and must provide a basis for the position that the entity is not a
criminal organization. The director must then provide his or her position and
any information which supports that position. The person making the
request may then respond to the position taken by the director. These
statements would be given to the review panel which would then make a
submission to the minister. If the minister is satisfied that the entity is no
longer a criminal organization, he may recommend that the LGC remove the
entity from the schedule.\textsuperscript{18} A request for review cannot be made less than five
years from the time of an objection to an application of the director to add
an entity to the schedule, or from a previous request to remove the entity
from the schedule.\textsuperscript{19}

One of the most striking features of Bill 25 is section 68.11 which says
“the decision to add an entity to the schedule or deny [a request for removal]
is final and is not subject to judicial review or appeal.”20 The decision of the review panel, first to place an entity on the schedule and second to keep the entity on the schedule despite a request for removal, would therefore be untouchable until the next opportunity for an entity to request removal, five years after its initial request.

F. Collecting and Accessing Information

Section 68.16 of Bill 25 authorizes the director to collect information, including personal information, from law enforcement agencies in determining whether an entity should be placed on the schedule. While law enforcement agencies are authorized to disclose that information, the information that received is not accessible to the public notwithstanding The Freedom of Information and Protection of Privacy Act. Information as defined under The Personal Health Information Act would not be accessible to the director.21

III. THE ORIGINS OF BILL 25

Bill 25 appears to have its roots in section 83.05 of the Criminal Code which was enacted in 2001.22 Section 83.05 allows the Federal Minister of Public Safety and Emergency Preparedness to create a list of entities deemed to have “carried out, attempted to carry out, participated in or facilitated a terrorist activity.” That list now cites over 30 organizations as entities involved in terrorist activities;23 including Hezbollah, the Tamil Tigers, Al-Qaida, and Hamas. The following table offers a side-by-side comparison of section 83.05 and Bill 25:

<table>
<thead>
<tr>
<th>The MEA Act</th>
<th>Section 83.05 of the Criminal Code</th>
</tr>
</thead>
<tbody>
<tr>
<td>Who can add an entity to the schedule/list?</td>
<td>Ostensibly any Cabinet Minister, or the director may apply to have an entity placed.</td>
</tr>
</tbody>
</table>

20 Ibid, s 68.11.
21 Ibid, s 68.16.
22 Criminal Code, RSC 1985, c C-46, s 83.05 [Criminal Code].
23 Regulations Establishing a List of Entities, SOR/2002-284.
<table>
<thead>
<tr>
<th>on the schedule.</th>
<th>“Reasonable Grounds”</th>
<th>“Reasonable Grounds”</th>
</tr>
</thead>
<tbody>
<tr>
<td>Threshold for adding an entity to the schedule/list</td>
<td>“Reasonable Grounds”</td>
<td>“Reasonable Grounds”</td>
</tr>
<tr>
<td>Request for removal from the schedule/list</td>
<td>Positions of both the director and the objector are submitted for consideration by review panel.</td>
<td>Application for removal given directly to the Minister.</td>
</tr>
<tr>
<td>Appeal process</td>
<td>No judicial review or appeal.</td>
<td>Judicial review may be requested within 60 days of rejection of an application for removal.</td>
</tr>
<tr>
<td>Review process</td>
<td>No mandated review of the schedule.</td>
<td>Review of the list must take place every two years to ensure there are still reasonable grounds for an entity to be listed.</td>
</tr>
</tbody>
</table>

**IV. THE LEGISLATIVE PROCESS**

Through every stage of the legislative process, Bill 25 passed with relative ease. While concerns with the legislation were raised at both the second reading and committee levels, specifically concerns relating to potential civil rights violations arising from the legislation, the impetus behind the bill was simply too strong. Kelvin Goertzen, the Progressive Conservative [“PC”] Justice Critic, summarized the reasons for his party’s support of the legislation in light of these objections:

As an opposition member you’re faced with two options. You can kill the bill at this stage which wasn’t an option for me because I think the intention of it is too important, and hold it over for a year, or allow something to go through that you might have done in a small way differently.24

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24 Interview of Kelvin Goertzen, MLA for Steinbach (12 November 2010).
A. Introduction and First Reading

On 25 April 2010, Minister Swan introduced Bill 25 to the Legislative Assembly of Manitoba. He provided a broad explanation of how the schedule would work, and characterized Bill 25 as an important step in the fight against organized crime within the constitutional powers of the province, perhaps referring to the limited ability of the province to legislate in regard to criminal matters. At this point, further details of the provision were not discussed.

B. Second Reading

Minister Swan moved for second reading of Bill 25 on 1 June 2010. The minister began by explaining the bill in further detail. Minister Swan highlighted the purpose of Bill 25 was to relieve the burden faced by prosecutors in proving, time and time again, that certain groups are criminal organizations. He said this is “...akin to proving that rocks are hard and water is wet over and over and over again.” The effect of this measure would be to make it more difficult for criminal organizations to operate in Manitoba, presumably by expediting the trial process which would allow Crown attorneys and the courts to process more offenders. Minister Swan briefly outlined the application and processes detailed above, making it clear that the schedule would apply only to proceedings under provincial legislation. Conspicuously absent from his address, however, was mention of the fact that the legislation expressly denies any right to judicial review or appeal of a decision by a minister to add an entity to the list.

Dr. Jon Gerrard was next to speak to Bill 25. While Dr. Gerrard expressed his agreement that organized crime is a serious issue in Manitoba, he was also the harshest critic of Bill 25 at this point in its development. Dr. Gerrard first attacked the government for failing to address the root causes of organized crime and alleviate systemic conditions such as poverty, a flawed education system and mental conditions such as Fetal Alcohol Spectrum.

26 Debates (1 June 2010), supra note 6.
27 Ibid at 2624.
Disorders. He categorized Bill 25 as a punitive measure, whereas he felt that preventative measures would be more effective in reducing crime.  

Additionally, Dr. Gerrard criticised Bill 25 itself and identified many of the potential civil rights issues which arise from the legislation. He characterized the bill as:

> an attempt to bypass or usurp the court system, which looks at evidence and determines criminal guilt and innocence....If a minister places an organization, any organization, on the schedule, it’s automatically a criminal organization for court proceedings and there’s no further appeal process.  

Dr. Gerrard voiced three main concerns intrinsic to Bill 25. First, he stressed the importance of upholding the principles of fundamental justice which lie at the core of our legal system. Placing this unfettered power in the hands of Cabinet could lead to abuses of that power, such as placing entities on that list which don’t belong, such as religious organizations or anti-poverty groups.  

Second, Dr. Gerrard questioned the constitutionality of the bill with respect to the Charter, specifically the sections which provide the right to freedom of association and the right to be presumed innocent until proven guilty according to the law in a fair and public hearing by an independent and impartial tribunal. With regards to his freedom of association concern, Dr. Gerrard referred to the McCarthy era in the United States, during which anybody associated with the Communist Party was blacklisted and stigmatized. Dr. Gerrard expressed the fear that by listing groups as criminal organizations, members of those groups would be unfairly labelled as criminals, whether or not they had committed a criminal act. Dr. Gerrard did not elaborate on his concerns relating to the presumption of innocence, although this author believes this is a much more pressing issue.  

Third, Dr. Gerrard expressed his feelings that criminal organizations could circumvent Bill 25 by simply changing their names. In his opinion, “...the schedule is, in fact, only as good as the names which are on the

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28 Ibid at 2625–2626.  
29 Ibid at 2626, 2628 [emphasis added].  
30 Ibid at 2626.  
31 Canadian Charter of Rights and Freedoms, s 2(d), Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11 [Charter].  
32 Ibid, s 11(d).
schedule.” By changing the name of the organization, criminal organizations would no longer be listed and therefore the schedule would be ineffective.

Debate on Bill 25 adjourned following similar criticism from Mr. Kevin Lamoreaux, Liberal MLA for Inkster, and resumed on 10 June 2010. The only relevant events on this day were Justice Critic Kelvin Goertzen expressing support of the intention of the bill, and moving that the bill pass second reading. The house adopted the motion.  

C. Committee Stage

The Act then went before the Standing Committee on Justice (“the Committee”) on 14 June 2010. The only witness who appeared to speak to the bill was Mr. Michael Silicz, appearing on behalf of the Manitoba Association for Rights and Liberties (“MARL”). Mr. Silicz was an articling student-at-law at the time and provided a clear legal analysis of various issues surrounding the bill.

While MARL recognized the policy considerations behind Bill 25, the organization identified a number of deficiencies with the proposed legislation. These concerns were:

i. Under section 68.4(2)(c), a decision of a Canadian court determining the group to be a criminal organization is a sufficient but not a necessary condition for adding a group to the schedule. Such a decision should be necessary.

ii. The threshold of proof for adding a group to the schedule is “reasonable grounds”. The threshold should be the criminal standard of “beyond a reasonable doubt”.

iii. There is no requirement for the director or members of the review panel to be qualified to practice law in Manitoba. This should be a requirement.

iv. There are major restrictions on what information can be divulged by the minister or the review panel. This violates natural precepts of notice and may allow hearsay evidence which objectors would not have access to. The process has to be more transparent.

v. There is no judicial notice or right of appeal; a decision of the government is final. There is no way to ensure standards of due process were adhered

33 *Debates* (1 June 2010), supra note 6 at 2627.

34 Manitoba, Legislative Assembly, *Debates and Proceedings*, 39th Leg, 4th Sess, No 60B (10 June 2010) at 2926 [Debates (10 June 2010)].

35 Manitoba, Legislative Assembly, *Standing Committee on Justice*, 39th Leg, 4th Sess, No 1 (14 June 2010) at 10 [Committee (14 June 2010)].
to. Judicial review should be allowed to import judicial authority into the statutory regime.

vi. There are potential Charter issues under sections 2(d) and 7. These were not explored in great detail, but MARL indicated they would provide a written Charter analysis if the Committee would find it helpful.36

According to Mr. Silicz, most of these concerns could be alleviated by allowing judicial review of the decision of the minister to place an entity on the schedule.37 This would legitimize any decision made by the minister, whether or not the director or review panel were qualified to practice law. It would also provide a decision of a Canadian court deeming the organization to be criminal where that status is contested. Furthermore, the criminal standard of proof would be upheld by the courts. At this point, however, Mr. Silicz did not have a recommendation for how the judicial review process might take place.38

D. Third Reading and Royal Assent

The Act was passed following its third reading on 16 June 2010,39 and received Royal Assent the next day.40 The provision was integrated into The Manitoba Evidence Act41 as section 68.

E. The Current State of the Act

As of June 2011, no regulation has been established to create the schedule of criminal organizations. Minister Swan has explained that his department was currently gathering information on criminal organizations, but that the rigorous process required time; the decision to place entities on the schedule will not be supported by a two page executive summary, but “literally binders of information” regarding each of these groups.42 The

36 Ibid at 10–12.
37 Ibid at 12.
38 Ibid.
39 Manitoba, Legislative Assembly, Debates and Proceedings, 39th Leg, 4th Sess, No 63 (16 June 2010) at 3125 [Debates (16 June 2010)].
40 Manitoba, Legislative Assembly, Debates and Proceedings, 39th Leg, 4th Sess, No 64B (17 June 2010) at 3232.
41 The Manitoba Evidence Act, supra note 4.
42 Interview of Andrew Swan, Minister of Justice and Attorney General (9 May 2011).
provision has received little in the way of media attention, garnering only brief mentions in Manitoba newspapers when Minister Swan first mentioned the schedule in December 2009,43 and following first reading in April 2010.44 Reports on the legislation have been more informational than evaluative, informing the public about the function of the legislation but not assessing the merits of the legislation. Perhaps the true significance of this legislation will be reflected by the media upon the addition of entities to the schedule.

While Minister Swan has generally made it clear that the power of the provinces to legislate with respect to criminal law is limited, he has also mentioned that provincial legislation of this type may put pressure on the federal government to establish a similar list which would apply to the Criminal Code, and one of the aims of Bill 25 to influence the federal government.45 Mr. Kelvin Goertzen, PC Justice Critic, also felt that this legislation may have that effect, although he pointed out that a higher standard of proof would be required in criminal legislation than in the province’s civil legislation.46

V. ASSESSMENT OF THE ACT

The Act relieves prosecuting authorities of the burden of proving, in provincial proceedings, one of the elements necessary to impose civil sanctions for involvement with a criminal organization. This runs in sharp contrast to many principles of fundamental justice as well as constitutionally protected principles, such as requiring the Crown to prove all elements of an offence beyond a reasonable doubt, and the presumption of innocence.

This author agrees with the intention of the Act. Firstly, the legislation is a novel attempt to make it more difficult for gangs to exist in Manitoba. While this author agrees with Dr. Gerrard that better preventative measures such as increased funding for social programs and focus on family and

45 Owen, supra note 43.
46 Committee (14 June 2010), supra note 35.
community building are a critical factor in reducing gang involvement, the fact is that gangs exist and will continue to exist even with strong preventative measures. If members of these organizations are forfeiting property and suffering other civil sanctions, the ability to run grow operations, brothels, gaming houses, obtain liquor licences, and commit other gang-related activities is severely hindered. The hope is that this will create a hostile environment for these organizations and thus make it less appealing to set up shop in Manitoba. In an interview, Minister Swan pointed out that this would also reduce opportunities for young people to join criminal organizations.  

Furthermore, this author also recognizes that Crown attorneys are often overworked which impedes the operation of the justice system. The court will not take judicial notice of an essential element in a case, placing a major burden on prosecutors every time this element needs to be proven. By relieving the burden of proving facts that are not case-specific, Crown attorneys can handle more cases. This means more gang members would suffer penalties for their membership in a scheduled organization.

While the intention of the legislation is laudable, there are fundamental principles of justice which simply must not be bypassed. The Act as it stands offends a number of those principles. The following will canvass some of the concerns which arose through the legislative process of Bill 25, as well as other concerns that have arisen through study of this legislation. Concerns regarding the impact of the Act on the right to freedom of association will be considered and rejected. Then, as a broad proposition, this author will argue that most of the other concerns can be addressed by allowing judicial review of the minister’s decision to place an entity on the schedule. A starting point for the appeal process may be contained in the federal Criminal Code provision.

A. Freedom of Association

During second reading, Dr. Gerrard raised the concern that creating a schedule of criminal organizations would impact the right to freedom of association as protected under section 2(d) of the Charter.  He was not clear whether this impact would arise from the potential social stigma faced by

47 Swan, supra note 42.

48 Charter, supra note 31.
members of criminal organizations, or whether it would be through the state-imposed sanctions that arise from being a member of an organization deemed to be criminal.

The Act itself does not impose sanctions for involvement in a criminal organization; those sanctions come from legislation such as The Criminal Property Forfeiture Act,\(^{49}\) where membership in a criminal organization can lead to forfeiture of property owned by that individual. The Act is only an evidentiary provision; it is the legislation to which this provision applies which may legally impact the right to associate freely. If rights under section 2(d) of the Charter are in fact infringed upon in these other pieces of legislation, this infringement occurs with or without the operation of the Act. The provision does not, therefore, impact the right to freedom of association through civil sanctions.

Dr. Gerrard also argued that the social stigma which would attach itself to members of scheduled entities would unfairly prejudice members of these organizations, including those who had never participated in criminal activity. He argued that this would infringe on the Charter right to security of the person.\(^{50}\) Without an established criminal intention, a government-created social stigma violates this right. The case of \textit{R. v Vaillancourt}\(^ {51}\) elevates this proposition to a principle of fundamental justice.

With regards to the Act, the potential Charter violation is more concerning as the people who are stigmatized have not been tried or convicted of an offence. Mere membership in a criminal organization is not, in and of itself, illegal. To label an organization as criminal, stigmatizing all members without establishing any sort of criminal intention, is contrary to the aforementioned principle of fundamental justice. The provision would therefore require a Charter section 1 analysis.

The Oakes Test\(^ {52}\) is a legal test created by the Supreme Court of Canada used to determine whether a provision that infringes on a Charter right can be justified under section 1 of the Charter.\(^ {53}\) In this case, the most relevant

\(^{49}\) \textit{The Criminal Property Forfeiture Act}, SM 2004, c 1.

\(^{50}\) \textit{Charter}, supra note 31, ss 2(d), 7.


\(^{53}\) \textit{Charter}, supra note 31, s 1.
element of the test asks whether the legislature has a pressing and substantial legislative objective. While the courts generally show substantial deference to legislating bodies, this provision may still prove to fall short on this front. The objective of expediting judicial proceedings to allow for more efficient prosecution of members of criminal organizations does not resonate the same way as direct public protection measures. The court may be reluctant to justify legislation which infringes on Charter rights whose purpose comes dangerously close to circumventing due process.

It may be possible for a judicial review process to remedy this problem. Courts regularly make decisions that certain organizations are criminal; the argument could be made that where such a finding is made by a court, the stigmatization of members of the organization deemed to be criminal is necessarily incidental to the administration of justice. A schedule of criminal organizations subjected to judicial scrutiny may arguably carry the same stigma as findings made in ordinary court proceedings; the stigma would attach itself to the organization whether the entity was scheduled and subjected to judicial review or whether a court made a finding of fact that an organization was criminal. The obvious response to this argument is that a schedule would be easily accessible to the general public and would be explicitly endorsed by the government, exacerbating the stigmatization effects.

B. No Judicial Review

Section 68.11 of the Act denies an individual or organization any form of judicial review process regarding a decision made by the minister to add an entity to the schedule. This is in striking contrast to the section 83.05 provisions of the Criminal Code, which provide a process for both request for removal from the schedule of criminal organizations as well as an appeal process.

The result of the denial of judicial review is that the accused, the courts, and the general public simply have to trust the government to act honestly and in good faith. This is especially dangerous when the state itself is one of the parties to the litigation. The following issues could all be resolved if section 68.11 was revised and a process for judicial review was established under the Act.

In an interview with the Justice Minister, this author asked why a judicial review process had been omitted from the MEA Act and why this was important to the legislation. Minister Swan has explained that a judicial review process was omitted from the Act because the judicial review process
contained in the Criminal Code provision was excessive given that liberty rights are not at stake under the Act. Instead, the government chose to ensure a more robust scheduling process with an independent review included in the legislation.\textsuperscript{54} The necessarily rigorous scheduling process should be reflected in a higher standard of proof within the legislation, as will be argued below.

C. Presumption of Innocence

Section 11(d) of the Charter establishes the right “...to be presumed innocent until proven guilty according to the law in a fair and public hearing by an independent and impartial tribunal.”\textsuperscript{55} Simply put, a law which essentially allows the prosecution to unilaterally decide a question of fact which is an essential element of an offence infringes on that right. When an accused person walks into the courtroom, one element of the offence is already established before the beginning of the proceedings.

A section 1 Charter analysis on this point would centre around the question of whether the legislation, in trying to achieve its objective, impairs the Charter right as little as possible.\textsuperscript{56} If the government objective can be achieved by means which lessen the impact on a Charter right, it is incumbent on the government to use those means. In the case of the Act, allowing the right to judicial review would most certainly minimize the impact of the legislation on the right to guilty presumption of innocence. While it may be pre-determined that an organization is criminal, that decision would have been made before an impartial, independent tribunal following established legal procedure, rather than being made by the individual’s accuser in the privacy of the offices of the legislature.

D. Abuse of Power by the Government

Another major concern that arises from the legislation is that without any checks and balances, the government or Cabinet may abuse the power given to them under this statute. Dr. Gerrard used the examples of religious groups, anti-poverty groups, or political parties which could be criminalized to suit the will of the government.\textsuperscript{57} The argument appears to be that if a few

\textsuperscript{54} Swan, supra note 42.

\textsuperscript{55} Charter, supra note 31, s 11(d).

\textsuperscript{56} Oakes, supra note 52.

\textsuperscript{57} Debates (1 June 2010), supra note 6 at 2626.
members of an organization commit criminal acts, the government could use that as a basis to determine that the organization itself is criminal. Cabinet would not have to satisfy any other party that this was an accurate finding.

While it seems unlikely that the government would use the Act to schedule organizations which are generally seen to be acceptable but for the actions of a few members, lines become blurred when borderline groups are considered. While little controversy would arise from adding the Hells Angels to the schedule, other lesser-known groups like the Mad Cowz or mafia syndicates may be placed on the schedule. Furthermore, with such discretionary power, the government may face political pressure to add entities to the list, and the final decisions would be untouchable by the courts. This decision-making process has to remain de-politicized.

Allowing judicial review would not only ensure that groups placed on the schedule are in fact criminal organizations under the Criminal Code definition, but it would also allow the government to take the risk of adding borderline groups. The court would then be permitted to review the information and determine whether that decision was correct. Additionally, if the government were to cave to political pressure and place a group on the schedule, the independent judiciary could provide a sober second thought on the issue and make its own determination. Judicial review would provide the necessary checks and balances for decisions made by Cabinet, prevent politicized decision making, and leave the concern of setting boundaries to the courts rather than to the government.

Additional concerns for government abuse arise through section 68.16 of the Act, which allows the director to collect personal information from law enforcement agencies.58 This section also authorizes those agencies to disclose that information to the director.59 Further, the minister may enter into an agreement with any law enforcement agency for the disclosure of information.60

Section 68.16 creates major potential for abuse by the director and by Cabinet. The power to collect information on citizens contained in the Act is extremely broad. As the proceedings of the review panel are confidential, virtually no safeguards are in place to prevent government abuse. If the

58 Act, supra note 2, s 68.16(2).
59 Ibid, 68.16(3).
60 Ibid, 68.16(4).
information collected by the director is subject to judicial review, this will ensure that the information is collected in a fair and selective manner. Where there are unjustifiable infringements on the right to privacy, evidence will not be taken into account by a judge and the director will be accountable for the abuse of power.

E. Standard of Proof

Under the Act, the standard of proof required for Cabinet to add an entity to the schedule is “reasonable grounds.” Section 9 of The Criminal Property Forfeiture Act stipulates that any finding of fact under the legislation is to be made on a “balance of probabilities.” This presents the anomalous situation wherein it is actually easier to get a group permanently listed as a criminal organization than to prove this on a case by case basis under the forfeiture legislation. Furthermore, there is no process by which the evidence for placing a group on the schedule can be reviewed by an independent body to determine that the evidence meets even that low threshold of reasonable grounds.

In the committee stage, Mr. Michael Silicz, speaking on behalf of the Manitoba Association of Rights and Liberties, said that this standard of proof was not well defined. As a result, the definition of reasonable grounds it is not clear and the threshold must be met for placing an entity on the schedule is uncertain. Mr. Silicz recommended that the standard of proof be set at the criminal level of “beyond a reasonable doubt.”

This author would argue that the appropriate standard of proof for the Act is a balance of probabilities. The purpose of the Act is to remove the burden of repeatedly proving that groups are in fact criminal organizations. The purpose is not to lessen the standard of proof required for provincial laws relating to membership in a criminal organization. The schedule is supposed to serve as a substitute for the process of proving that a group is a criminal organization; it should be as close a substitute as possible.

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61 Act, supra note 2, ss 68.2(2), 68.8(1), 68.9(a).
62 Supra note 49, s 9.
63 Committee (14 June 2010), supra note 35 at 12–13.
64 Ibid.
65 Ibid.
meeting the same standard of proof as required under the legislation to which the schedule would apply, it becomes a much more equal substitute.

Furthermore, Minister Swan’s reliance on the rigorous review process for denying judicial review requires some sort of legislative assurance that this process will be followed. By elevating the standard of proof for adding entities to the schedule, what is expected of the director, the review panel, and Cabinet would be clearer.

Although sections 68.2(2), 68.8(1) and 68.9(a) would ideally be changed so that the minister would require proof on a balance of probabilities in order to place an entity on the schedule, this seems unlikely to happen. The standard of proof is “reasonable grounds” even in the Criminal Code provisions creating a list of terrorist organizations.66 A proper independent review process, however, would at least ensure that certain standards were adhered to in determining whether an entity should be placed on the schedule. A reviewer might even consider the listing of an entity in the context of civil proceedings, and interpret “reasonable grounds” as a “balance of probabilities” in civil cases. This independent reviewer should be a member of the judiciary in order to provide the necessary judicial authority to the Act.

F. Unqualified Director and Review Panel

At the committee stage, Mr. Silicz recommended that the director and members of the review panel should be qualified to practice law in the Province of Manitoba.67 According to Mr. Silicz, those with a legal background would better understand the evidentiary requirements and the process for proving facts in court. They would also review proposed additions to the list in light of the standard of proof which applies to the Act.

Mr. Silicz raises an excellent point. Most people who have gone through law school and the articling process have read dozens of cases which cover topics such as “reasonable grounds” and “balance of probabilities.” Qualified legal practitioners also understand how to weigh evidence, with an eye towards hearsay, speculation, and conjecture. Furthermore, the phrase “reasonable” takes on an entirely different meaning in a legal context. Having predominantly laypeople on the review panel would almost certainly give rise

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66 Criminal Code, supra note 22, s 83.05(1.1).
67 Committee (14 June 2010), supra note 35 at 13.
to misunderstandings of these legal definitions and lead to misapplication of the law. With no review process, important judicial decisions could be made by individuals who do not know the meaning of “standard of proof”. While the director is required to be a senior official, this could still be simply a bureaucrat who has managed to climb the ranks without acquiring the formal legal training invaluable to legal analysis.

If a judicial review process were integrated into this regime, the final decision to keep an entity on the schedule would not be left to those who may be unfit to make important legal decisions. Furthermore, even if it was required that the review panel and director be qualified to practice law in Manitoba, a review panel of at-pleasure appointees hardly seems to meet the level of independence required for this type of legislation. A process for judicial review would examine decisions made by such a panel.

G. Review Panel Confidentiality

Under the Act, all proceedings of the review panel are confidential and neither the director nor the members of the review panel may be compelled to give evidence in court. This has huge implications. The ability of an accused person or group to assess the case against them and to answer to allegations levelled against them is extremely important. As a result, this ability should only be limited where absolutely necessary. By shielding the director and review panel from answering any questions about the decision to place an entity on the schedule, a scheduled group faces the Kafkaesque situation of confronting a remote, invisible accuser on invisible allegations with no basis for putting forward a defence. The case against them could contain hearsay information, misunderstandings, rash assumptions, and unsubstantiated accusations, and the organization and its members would have no point of recourse.

With a judicial review process, a judge could independently examine the information put forward by the director and the information put forward by an objector, censoring documents so as to protect the identity of confidential informant or preserve an ongoing investigation. The process would therefore be more transparent, scheduled groups would be able to assess the case against them, and the concerns surrounding investigative techniques would be addressed.

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65 Act, supra note 2, ss 68.14(3), 68.15.
H. Proposed Process for Judicial Review

The Criminal Code provision which creates a list of terrorist organizations contains a process for a group to both object to placement on the list and request judicial review. If a group’s application for removal from the list is rejected, that group has 60 days to apply to a judge for judicial review of the decision. The judge must then:

i. Privately examine intelligence reports considered in listing the applicant.
ii. Hear any other evidence which supports the decision of the Minister, in the absence of the applicant if the judge is of the opinion that disclosure of the information would injure national security or endanger the safety of any person.
iii. Provide the applicant with a summary of the information presented to the judge so as to reasonably inform the applicant of the reasons for the decision without disclosing any information which would injure national security or endanger the safety of any person.
iv. Provide the applicant with a reasonable opportunity to be heard.
v. Determine if the decision to place the applicant on the list is reasonable. If not, s/he must order the applicant no longer be a listed entity.
vi. The judge may hear any evidence that is, in his or her opinion, reliable and appropriate, even if it would not be admissible in court. His or her decision may be based on that evidence.69

In the case of Hussain v Canada (Minister of Citizenship & Immigration),70 the process for review of a decision to place an entity on the list was activated in the context of an immigration dispute. The federal government sought to deport Hussain, a refugee, under the exclusion that he was a member of a listed terrorist organization. He brought an application for judicial review. The judge followed the process as prescribed in the legislation. With regards to the applicable standard of review, the judge said:

[i]t was not in dispute before me that the appropriate standard of review on a matter such as this... is one that, while falling short of a balance of probabilities, nonetheless connotes a bona fide belief in a serious possibility based on credible evidence.71

The judge went on to find that the evidence did not establish with specificity any acts of terrorism committed by that group. The judge granted the application and ordered the removal of the entity from the schedule.

69 Criminal Code, supra note 22, ss 83.05(5), 83.05(6), 83.05(6.1).
70 2004 FC 1196, 133 ACWS (3d) 502.
71 Ibid at para 13.
Hussain shows the importance of a judicial review process. The decision made by the board under section 83.05 of the Criminal Code did not even meet the low threshold of “bona fide belief in a serious possibility based on credible evidence.” Had there been no review process, Hussain would have been excluded from protection as a refugee and deported.

The Act could import similar provisions to allow for a judicial review process. If the government was concerned about requests for review flooding the court system, it may consider using masters rather than judges. This does not seem to be a major concern, however, since entities would only be able to appeal the decision once, and the courts would presumably be cleared up by the legislation itself. Furthermore, the risk that information would “injure national security” could be replaced with the risk that information might negatively affect an ongoing investigation or an investigatory technique.

VI. CONCLUSION

While the intention of Bill 25 seems to be something that most people can agree with if not happily endorse, the legislation has several flaws which may severely impact the civil rights of people involved in organizations which are deemed to be criminal. The provision is a drastic step in the province’s fight against crime, and it will be interesting to observe the judicial reaction as entities are listed and the schedule is engaged in court.