

The Employment Standards Code Amendment Act

J O H N J A C O B S

*Well, you know, Mr. Speaker, I'm being heckled by the opposition because I have actually taken about 14 minutes to talk about this bill. I think we can talk about this bill for 14 minutes after we've waited 30 years for it, 30 years. You had 12 years to do it. You did nothing. You blew your opportunity. I'm almost finished. You can just chill.*¹

- Nancy Allan, Minister of Labour and Immigration, at second reading of Bill 2, commenting on previous governments' failure to review employment standards legislation

I. INTRODUCTION

Manitoba's *Employment Standards Code*² (the *Code*) provides approximately 500 000 Manitoba workers with a basic floor of workplace rights. The *Code* received a major legislative overhaul in 2006, culminating in the *Employment Standards Code Amendment Act*³ and a revised *Code*. This paper will review the amendment process and explain some of the positions and motivations of the interested parties. Because of the broad scope of the *Code* and the multiplicity of amendments, this paper will concentrate on the amending process, its motivating factors, and its perceived failings rather than individual amended clauses.

¹ Manitoba, Legislative Assembly, *Debates and Proceedings Official Report (Hansard)*, Vol. LVIII No. 9 (November 27, 2006) at 307.

² *Employment Standards Code*, C.C.S.M. c. E110.

³ Bill 2, *The Employment Standards Code Amendment Act*, 5th Sess., 38th Leg., Manitoba, 2006.

II. THE EMPLOYMENT STANDARDS CODE

Manitoba's *Employment Standards Code* sets out statutory requirements and minimums in a broad array of matters such as vacations, holidays, bereavement leave, hours of work and overtime pay. A related set of regulations⁴ helps interpret the *The Code* and sets out Manitoba's minimum wage. *The Code* is viewed as a floor of rights which may be exceeded, but below which employers and employees must not contract.⁵ It is particularly important to non-unionized workers and workers in lower status jobs.

The *Code* applies to provincially regulated workers—federally regulated workers are governed by the *Canada Labour Code*.⁶ Manitoba workers and employers are also governed by other provincial acts. These include acts pertaining to workplace safety and health, workers compensation, craft licensing acts, and a retail holiday closing act. There are exemptions in Manitoba's *Employment Standards Code* for volunteers, agricultural workers, fur and dairy farmers, fishers, horticultural and market garden producers, certain domestic workers, family members in family businesses, some salespeople, professionals and related students, certain Crown employees, and temporary election workers. By definition, employers and independent contractors are not employees and the *Code* has no application to them.

The *Code's* predecessor was first assembled as a consolidation of other acts in 1957. A substantial amendment was made in 1970 reducing the maximum workweek to 40 hours and providing for paid general holidays. Parental leave was added in 1990. New millennium amendments have dealt with maternity, parental, and compassionate care leave. The *Code* has not had a major overhaul for over 30 years.

III. REVAMPING *THE CODE*: MOTIVATION

At every step of the amending process—throne speeches, readings and debate in the legislature, public hearing advertisements and committee records—we were reminded that the review of employment standards was intended to reflect the realities of the modern workplace and reflect the changing face of today's workforce. There was a growing sense that the contingent workforce had grown in size, and was not well served by an employment standards regime that was

⁴ Man. Reg. 6/2007.

⁵ Geoffrey England, *Individual Employment Law* (Toronto: Irwin Law, 2000) at 79.

⁶ *Canada Labour Code*, R.S.C. 1985, c. L-2.

built to handle full-time, single-income family breadwinners. Manitoba's legislation was out of step with other provinces in many areas, and this, according to committee records and Hansard, appears to have been a major motivating factor for its overhaul.

The actual decision to review and revamp *The Code* most likely resulted from input from several entities.

The Employment Standards Branch, which regularly deals with and resolves complaints from employees and employers, is well positioned to comment on current issues and report common complaints to legislators. The Branch was well aware, for example, of the recent Michalowski decision⁷ (which intensified calls for review of overtime and working hour exemptions). The Branch would be well aware of complaints from employees concerning call-in pay. Lobby groups on both sides of the employer/employee relationship make their views known to the appropriate MLAs. The Assistant Deputy Minister of Labour and Immigration meets with his counterparts from other Canadian jurisdictions as a member of the Canadian Association of Administrators of Labour Legislation.

In the fall of 2005, the legislature recognized that Manitoba was out of step with workplace realities and other jurisdictions. In light of lobby pressure, current issues, and recurrent complaints, the government decided it was time to act.

IV. REVAMPING THE *CODE*: PLAY-BY-PLAY

A. Announcement of Legislative Review

The notion of a thorough review of the *Code* was announced in a Speech from the Throne on 27 October 2005, at the 4th Session of the 38th Legislative Assembly. Lieutenant-Governor John Harvard stated that:

Proposals will also be introduced this session to modernize Manitoba's Employment Standards Code, the first such effort in over 30 years. The changes are designed to reflect trends in the modern workforce, such as introduction of new technologies and the demands placed on today's families.⁸

This announcement fell under a section of the Throne Speech titled "Empowering Citizens – L'affirmation des Manitobains et des Manitobaines."

⁷ *Nygaard International Partnership Associates (re)*, 2006 MBCA 115.

⁸ Manitoba, Legislative Assembly, *Debates and Proceedings Official Report (Hansard)*, Vol. LVII No. 1 (27 October 2005) at 9.

B. Public Hearings

A government press release followed the throne speech on 10 November 2005, soliciting input from the public on specific areas. The Minister of Labour and Immigration was quoted as saying the review was driven by the evolution of the workplace, the changing face of today's workforce, and the demands on today's families.⁹

The release was accompanied by a "Discussion Guide,"¹⁰ requesting public input in the following areas of employment law:

- Hours of work and overtime
- Agricultural worker exclusions
- Compliance and enforcement
- Termination notice
- Holiday pay for part-time workers
- Wage deductions
- Employment of children
- Unpaid leaves
- Work-life balance

Public Hearings were held in Winnipeg, Brandon, and Thompson. The hearings were chaired by an employment lawyer, an arbitrator, and mediator Michael Werier. Employment Standards Division Executive Director David Dyson and key members of his staff attended the hearings.

This ad hoc group met with the public on five occasions in December of 2005, heard thirty-eight oral submissions, and later received a total of seventy written submissions. Presenting parties included individuals, employers, unions, representatives of employer organizations, and special interest and lobby groups. The group produced a report on the public hearings on 26 January 2006, highlighting the positions taken by various parties and areas of concern and consensus.

C. Labour Management Review Committee – Structure and Report

The Labour Management Review Committee (the "LMRC") is an advisory committee created by a unanimous resolution of the legislature and falling under

⁹ Manitoba Government, News Release, "Province Calls for Input on Employment Standards Review" (10 November 2005), online: Government of Manitoba <<http://www.gov.mb.ca/chc/press/top/2005/11/2005-11-10-04.html>>.

¹⁰ Manitoba Government, *Discussion Guide: Employment Standards for Modern Workplaces and Modern Families* (2005), online: Government of Manitoba <<http://www.gov.mb.ca/labour/labmgt/resbr/pdf/emplstand5.pdf>>.

the umbrella of the Department of Labour and Immigration (the “Department”). The committee acts as a consultative body and is generally convened when the government contemplates changes to employment and labour law. The committee’s mandate is to “...promote a harmonious labour relations climate and to foster effective labour management cooperation in support of the economic and social well being of Manitobans.”¹¹ In the past, the committee has aided the government in legislative and regulatory changes regarding employment standards, workers compensation, labour relations, and the roster of provincial labour arbitrators. The committee has existed for over forty years and is unique to Manitoba.

The committee is comprised of labour and management representatives. Chair Michael Werier is appointed by the labour minister, and caucus members are appointed by “each other.”¹² At present, employee interests are represented by the President of the Manitoba Federation of Labour and three current or former union representatives (the labour caucus). Employer interests are represented by an employer-side labour and employment lawyer, and three human resource managers (the management caucus). Committee meetings are chaired but informal, few minutes are kept, and there is limited communication with the press. Representatives of the Department, including its Executive Director, often attend with voice but no vote and to act as a liaison between government and the committee.¹³

It is worth noting that there is no public interest representative on the LMRC. It is hard to imagine who that representative might be, or how the public interest might be determined, given that the Manitoba government is responsible to both employers and employees.

It is also worth noting that all members of the labour caucus are either active or recently retired union representatives. Generally, union members enjoy terms and conditions at work that well exceed the minimums granted by employment standards. As such, employment standards issues are a greater concern to the non-unionized. One might then ask: why are union representatives speaking for the non-unionized? Several answers come to mind.

¹¹ Manitoba Labour and Immigration, Research, Legislation and Policy, online: Government of Manitoba <<http://www.gov.mb.ca/labour/labmgt/resbr/lmrc.html>>.

¹² Source: interview of Rick Rennie, Director of Research, Legislation and Policy Branch, Department of Labour and Immigration, November 2007. Somehow, per Mr. Rennie, the appointment process “just works.”

¹³ One party indicated, confidentially, that Department representatives are very influential in LMRC meetings, as government legislating power trumps the advisory power of the committee.

One, union representatives have always attempted to advocate for the working person, unionized or not. It is the “right” thing to do, and union representatives have the expertise and are familiar with the subject area. Two, no one else is organized to speak for the non-unionized. Three, speaking for the non-unionized may make unions look good in the eyes of the non-unionized—a shrewd organizing tactic. And finally, unions have always viewed minimum standards such as the minimum wage as an anchor that holds down the wages and benefits of people higher on the economic food chain. Advocating for and achieving higher minimum employment standards help union members—the union representative’s core constituency—achieve even higher terms and conditions at work.

The LMRC was tasked with reviewing proposed changes to the *Code* (as produced by the government and flowing from the public hearings). On 3 February 2006, only one week after receiving the report on public hearings, the Department presented the LMRC with plain-language draft proposals for legislative amendments. The committee also received an inter-jurisdictional comparison of employment standards across Canada.¹⁴ By May, the committee had met five times and reached consensus recommendations on most of the Department’s statutory proposals, with a separate study to follow on proposed regulatory changes.

The committee’s formal report on statutory changes, dated 18 May 2006, outlined the committee’s response to all seventeen of the Department’s proposed statutory changes, and also responded to proposed administrative changes outside of the original mandate. Some government proposals were agreeable to the committee; some were rejected as low-priority proposals that would get in the way of consensus on other issues, some resulted in recommendations for modification, and others resulted in a request for more time for further study. Chair Michael Werier noted that committee members worked very hard, “in a spirit of collegiality to reach a consensus which would serve the best interests of all Manitobans.”¹⁵

The LMRC’s report on regulatory changes was produced on 9 November 2006. The Committee had conducted five formal meetings, and a number of

¹⁴ Produced, according to Mr. Rennie (*supra* note 12), using a staff research study for the recently commissioned Federal Labour Standards Review in Ottawa. Mr. Rennie noted that one likes to be very careful to update such work, and to bear in mind that the written law may not reflect its actual application.

¹⁵ Manitoba, Labour Management Review Committee, *Interim Report of the Labour Management Review Committee on the Review of the Employment Standards Code*, at 14, online: Government of Manitoba <http://www.gov.mb.ca/labour/labmgmt/resbr/pdf/2006-05-18labour_mgmt_review_committee_rpt.pdf>.

individual meetings with other caucuses and constituencies. Consensus recommendations were reported on all eleven proposals, with modifications suggested on several issues. It must be noted that on the thorny issue of including agricultural workers in the definition of “employee,” and thus subjecting them to employment standards laws, the committee asked for and received more time. The issue was not dealt with until 2008.

It is remarkable that the LMRC reached consensus on so many important issues. The members of the committee, who would normally take strong positions in opposition to one another, appear to have wrestled their way to a compromise agreement behind closed doors. It was hard for any interested party to argue with consensus recommendations once employee and employer representatives had reached an agreement, as evidenced by the lack of hard lobbying during the formal legislative process (discussed below).

The Labour Management Review Committee was praised by the minister, the Opposition, and labour and employer representatives at every step of the review and legislative processes. Chair Werier noted that all the committee members “...donated significant time to reaching a consensus on issues that serve the best interests of all Manitobans.”¹⁶

D. Bill 2, 5th Session, 38th Legislature—The Employment Standards Code Amendment Act – First and Second Readings

The recommendations of the LMRC were transformed into a legislative bill touching on many areas of the *Code*. The actual drafting was done by a central pool of legislative drafters, in consultation with the Department of Labour Immigration.

Changes to the *Code* were announced in a Speech from the Throne on 15 November 2006, at the 5th Session of the 38th Legislative Assembly. The Lieutenant-Governor announced, in a section titled “Healthy Families—Des familles en santé”:

A set of changes will be introduced to modernize the Employment Standards Code to reflect the current realities of today's economy, the changing face of the labour force and the needs of families.¹⁷

¹⁶ Manitoba Government Labour Management Review Committee, *Report of the Labour Management Review Committee on the Review of the Employment Standards Code – Regulatory Issues*, at 14, online: Government of Manitoba <http://www.gov.mb.ca/labour/labmgt/resbr/pdf/2006-11-09labour_mgmt_review_committee_rpt.pdf>.

¹⁷ Manitoba, Legislative Assembly, *Debates and Proceedings Official Report (Hansard)*, Vol. LVIII No. 1 (15 November 2006) at 5.

First reading of Bill 2 took place two days later. *The Employment Standards Code Amendment Act* (Bill 2)¹⁸ was moved by Minister of Labour and Immigration, the Honourable Nancy Allan, and seconded by the Minister of Healthy Living, Ms. Irvin-Ross. Ms. Allan stated briefly that Bill 2: "...implements consensus recommendations of the Labour Management Review Committee, introduces amendments that will improve and modernize our employment standards provisions to better meet the needs of today's workers, employers, families and young people."¹⁹A five-page news release followed, outlining the bill's provisions in some detail.

Second reading took place 27 November 2006, moved by Ms. Allan and seconded by the Minister of Finance, Greg Selinger. Ms. Allan gave a lengthy speech outlining the need for change to reflect the realities of the modern workplace and workforce, praised the LMRC for reaching consensus recommendations, and pointed out that all of the committee's recommended changes had been incorporated into Bill 2. The minister then presented a plain-language summary of the key elements of Bill 2.

Liberal Leader Jon Gerrard spoke briefly on Bill 2, generally supporting the bill, and stated that he would like to see something on advance workplace scheduling rules and a February holiday.

E. Bill 2 – In Committee

Bill 2 went to the Standing Committee on Social and Economic Development on 4 December 2006. There were two presenters and one written submission from the public.

Shannon Martin represents the Canadian Federation of Independent Businesses and their 4 800 Manitoba members. Mr. Martin trotted out a quiver of survey statistics showing what percentage of his members opposed specific clauses of Bill 2, but in the end noted that the minister went above and beyond in consulting stakeholders, and that the proposed legislation contained "some excellent compromises".²⁰

Darlene Dziejewit is the President of the Manitoba Federation of Labour and represents 96 000 unionized workers in Manitoba. She also sits on the Labour Management Review Committee's labour caucus. Her comments to the Standing Committee following second reading were congratulatory. She

¹⁸ *Supra* note 3.

¹⁹ Manitoba Legislative Assembly, *Debates and Proceedings Official Report (Hansard)*, Vol. LVIII No. 3 (17 November 2006) at 39.

²⁰ Manitoba, Legislative Assembly, Standing Committee on Social and Economic Development, in *Hansard* Vol. LVIII No. 1 (10:00 a.m. December 4, 2006) at 4.

endorsed the legislation because it was achieved through consultation, review, and consensus.

Bill Gardner is a Winnipeg labour and employment lawyer and President of the Manitoba Employers Council (and a member of the LMRC Management caucus). His written submission was presented but not read, and he was not present. His organization supported the bill as a compromise that strikes a reasonable balance between competing interests.

Questions were asked of the two presenters in attendance by Progressive Conservative Labour and Immigration Critic Ron Schuler, Liberal Leader Jon Gerrard, and Nancy Allan. There was also a line-by-line discussion and committee vote on the bill's clauses. Ron Schuler sought clarification on one item (agricultural exclusions) and objected to two others (qualifications for personal leave and graduated notice provisions/forfeiture). Mr. Schuler merely stated that small businesses in particular were not pleased with some aspects of the bill, but noted that the bill reflected the consensus process. Minister Allan stated politely that "I wouldn't want to cherry-pick this bill because I think it would come unravelled pretty quickly."²¹

Kevin Lamoureux also thanked the minister for her earlier Minister's Briefing—a meeting between the minister, the Deputy Minister, staff, and opposition critics Ron Schuler and Kevin Lamoureux. The meeting was held to explain the provisions of Bill 2 and allow for questions.

The committee passed all clauses of the bill without a hitch. Some questions were asked, and some dissent was registered, but due to the work of the LMRC, the committee stage was very quiet. There was little criticism of the restricted scope of the bill.

F. Bill 2 – Third Reading and Royal Assent

Third reading took place 6 December 2006, moved by Government House Leader Dave Chomiak and seconded by Minister Allan. Debate ensued the following day.

During debate, Ron Schuler reiterated the concerns of small business owners. In fact, Mr. Schuler asked the minister to state the status of agricultural exclusions for the record, as *Hansard* can be used as an interpretive tool. He also noted that the committee minutes could help interpret the status of agricultural exclusions. And finally, Mr. Schuler noted that at a predicted voting ratio of thirty-five to twenty, this bill was going to pass without modification. Liberal

²¹ Manitoba, Legislative Assembly, Standing Committee on Social and Economic Development, in *Hansard* Vol. 18 No. 1 (10:00 a.m. December 4, 2006) at 15.

MLA Kevin Lamoureux praised the process and the bill, thanked everyone involved, and spoke a little about final offer selection, which has nothing to do with employment standards. Jon Gerrard spoke about the obvious benefits of consultation, and expressed concern that agricultural exclusions, being part of the regulations under the *Code*, could be changed with the stroke of a pen.

Bill 2 passed by voice vote, received Royal Assent the same day, and came into force on 30 April 2007.

V. ANALYSIS OF THE PROCESS

A. Timelines

During Question Period, 21 November 2005, Progressive Conservative Labour Critic Ron Schuler criticized the government for tight timelines in the review process—only two weeks had been allowed between the review announcement and the deadline to register for a public hearing presentation, with a further one or two weeks to prepare for and attend one of the public hearings, and a further month to submit written submissions. Mr. Schuler also suggested that the review had a deliberately anti-business animus since it was scheduled over the Christmas shopping season—a time when the retail, wholesale, and restaurant industries are preoccupied with work and unable to focus on legislative analysis. Minister Allan replied that the timeframe was appropriate.²²

Many presenters at the public hearings complained about the short timelines and seasonal timing—it was difficult for presenters to canvass their constituents and articulate a position on the issues.²³ For example, the Canadian Centre for Policy Alternatives stated that the “quick and dirty” review process was intended to minimize participation by working people, and to encourage submissions from the “usual suspects”: union and employer representatives.²⁴

The Human Resource Management Association of Manitoba stated that proper consultation with employer representatives was impossible: “Not allowing enough time for us to obtain input from our membership is in fact a significant

²² Manitoba, Legislative Assembly, *Debates and Proceedings Official Report (Hansard)*, Vol. LVII No. 16 (21 November 2005) at 525.

²³ Manitoba, *Report on Public Hearings on the Manitoba Government Review of the Employment Standards Code*, online: Government of Manitoba <<http://www.gov.mb.ca/labour/labmgt/resbr/pdf/report.pdf>>.

²⁴ Canadian Centre for Policy Alternatives - Manitoba, *Presentation to Employment Standards Code Review Commission*, online: CCPA <http://www.gov.mb.ca/labour/labmgt/emp_standards/submissions/ccpa.pdf>.

lost opportunity for this government to get valuable insights from the people who work most closely with these issues.”²⁵

Clearly more time should have been allowed, especially in light of the importance of the issues, the number of people affected, and the length of time since the last review.

B. Scope of Study

The scope of changes to the *Code* was restricted from inception. The Department decided which eight areas of law would be studied and changed, asked the public to address those areas, and asked the LMRC to study those areas. Hearing and LMRC Chair Michael Werier heard public submissions that were outside the government’s call. While he stated that LMRC members felt that other topics could be added on with consensus, very little action was taken on outlying issues.

Presenters at the hearing stage had demanded legislative change in the following additional areas:

- Minimum wage
- Just-cause dismissal
- Additional holidays
- Increased vacations
- Benefits for part-time workers
- Workplace harassment
- Severance pay
- Paid breaks
- Reporting pay
- A closure tax

The LMRC did not address these issues as they were outside the mandate given by the Department. The government took no legislative action.

Some minor topics were added to the agenda. For example, the Department added a handful of suggestions on administrative matters. However, despite suggestions at public hearings, only one major change was made to the LMRC’s major areas of study: domestic worker exclusions were fine-tuned at the behest of public hearings submissions.²⁶

²⁵ Human Resource Association of Manitoba, *Submission to Employment Standards Review*, online: Government of Manitoba <http://www.gov.mb.ca/labour/labmgt/emp_standards/submissions/hrmam.pdf>.

²⁶ Oddly, this submission was not noted in the *Report on Public Hearings*, but was later added by the Department to the LMRC’s study mandate, “[a]s a result of submissions made at the public hearings.” LMRC, *Interim Report*, *supra* note 15 at 7.

Some mandated issues were deferred: the issue of the *Code's* exclusion of agricultural workers was left on the LMRC's agenda, not to be dealt with until after Bill 2 was enacted. During Question Period, 23 May 2006 (during the LMRC's study but before first reading), Progressive Conservative Member of the Legislative Assembly for Lakeside, Ralph Eichler, asked the government for the Minister of Agriculture's position on whether agricultural workers would remain exempt from the *Code*. Mr. Eichler stated that agricultural workers have a unique status that is a poor fit for the *Code*, and that sixty-eight percent of agribusinesses in Manitoba would suffer if agricultural workers were included in the *Code*. Minister Allan replied that, under s. 144(4) of the *Code*, consultation is required before any such change. That consultation was deferred at the request of the LMRC and the government did not then make changes to the definition of agricultural workers. This is a very thorny issue, alive in many legislative jurisdictions in Canada,²⁷ and one wonders if the LMRC would have achieved consensus on all issues had they tackled this issue in earnest and within a tight timeframe.

Just four months after passage of Bill 2, the government did introduce a bill creating a new February statutory holiday.²⁸ The issue of a February holiday, not part of the Department's proposed changes, had been demanded at the public hearing stage by several labour groups. In committee, after second reading of Bill 16, Shannon Martin of the Canadian Federation of Independent Business was highly critical of the fact that the government introduced the bill without consultation. The LMRC had apparently only been used to work out details of when the holiday would take place, beginning with the assumption that there would be a new holiday. The new February holiday was not well received by employers. Hansard records indicates that a newspaper poll and a hugely successful public petition (promoted by local radio station 92 CITI FM) led to Bills 16 and 21—indicating that public hearings and government initiative are not the only way to impel change and that employment standards laws may change without full consultation with stakeholders.²⁹

In all, the government set the scope for *Code* review, and largely ignored or deferred calls for reform outside of that scope. That there was no public outcry at the Standing Committee on Social and Economic Development after second

²⁷ Witness the legal squabbling over the UFCW's attempts to certify a group of farm workers in Manitoba in 2006/2007.

²⁸ Bill 21, *The Statutory Holidays Act (Various Acts Amended)*, 5th Session, 38th Leg., Manitoba, 2006, and Bill 16, *The Statutory Holidays Act (Various Acts Amended)*, 1st Session, 39th Leg., Manitoba, 2007.

²⁹ Manitoba, Legislative Assembly, *Debates and Proceedings Official Report (Hansard)*, Vol. LVIII No. 30 (18 April 2007) at 947.

reading indicates either that all issues had been dealt with by the LMRC, or that the wind had been knocked out of the public sails through the earlier public hearing process.

VI. INFLUENCE OF, AND COMPARISON TO, OTHER JURISDICTIONS

Analysis of *Hansard*, committee minutes, public hearing, and LMRC documents shows that the legislation in other Canadian provinces was a powerful influence in creating and passing Bill 2.

For example, from the LMRC's Interim Report on statutory changes, "...a primary factor used by the committee when evaluating each proposal was a desire to consider Manitoba's current legislation as compared to other Canadian jurisdictions."³⁰ And from a government news release following first reading, "The proposed legislation would bring Manitoba into the Canadian mainstream in many areas... ."³¹ In this regard, Manitoba followed, not led, other provinces in statutory employment rights.

Manitoba simply does not lead in the area of employment law reform. For example, although calls were made in public hearings for workplace anti-bullying legislation, and although Manitoba Liberals have proposed such legislation in the past,³² Bill 2 did not address this issue. Only Quebec (and recently Saskatchewan) have successfully legislated proscriptions on workplace non-human-rights-code bullying.

Likewise, the February holiday issue shows that comparison with other provinces is influential. At second reading of Bill 21 (*The Statutory Holidays Act* which ultimately gave rise to the February holiday), Minister Allan noted that adding a February holiday would help bring Manitoba's labour laws further into the Canadian mainstream. And the LMRC accepted a proposal on graduated notice provisions because, "The Committee considered the graduated notice provisions in other Canadian jurisdictions and believed that the proposed changes were appropriate."³³

Clearly, Manitoba is playing catch-up in Canadian workplace law.

³⁰ LMRC, *Interim Report*, *supra* note 15 at 8.

³¹ Manitoba, News Release, "Province to Introduce Amendments to Employment Standards Code" (17 November 2006), online: Government of Manitoba <http://www.gov.mb.ca/labour/labmgt/resbr/pdf/2006-11-17news_release.pdf>.

³² Bill 210, *The Workplace Safety and Health Amendment Act (Harassment in the Workplace)*, 4th session 38th Leg., Manitoba, 2006, was introduced by Jon Gerrard but did not become law.

³³ LMRC, *Interim Report*, *supra* note 15 at 9.

This is not to say that all employment standards in all jurisdictions were matched by Manitoba through the Department's mandate or the review process. The issue of pro-rated benefits for part-time workers, not in the Department's mandate, was brought up by more than one presenter. Despite this being law in Saskatchewan, no action was taken.

VII. COMPARISON TO THE FEDERAL LABOUR STANDARDS REVIEW—PROCESS AND OUTCOME

In 2004 the federal government announced a review of the *Canada Labour Code, Part III*.³⁴ This code is roughly equivalent to Manitoba's *Employment Standards Code* and provides basic workplace protections for approximately 840 000 federally regulated workers. Commissioner Harry Arthurs consulted 35 scholars, who commissioned 23 research studies from leading scholars around the world. Nine "staff studies" looked into the operation of the federal code, extensive public hearings were held across Canada (generating response from 171 groups and individuals), 154 formal briefs were received, and private meetings were held between the commissioner and industry and labour stakeholders. There were two advisory panels—one of impartial experts, and one of labour and management representatives.

The result is a thorough and complete report. Unlike the process in Manitoba, the commission's mandate was a complete review of the *Code* and its operation, with a much broader scope of suggested areas of study. The process was comparatively open. All issues could be canvassed, and there was plenty of "lead time" to consult constituencies and prepare submissions—nine months were allowed for oral presentations, and eleven months for written briefs.

The federal review process garnered rave reviews from some. The Canadian Centre for Policy Alternatives produced a 22-page report arguing that the commissioner's recommendations follow employee-friendly European trends, rather than American trends, and noted that many unions endorse the federal report almost without reservation.³⁵

³⁴ *Supra* note 6.

³⁵ Brian B. McArthur, Canadian Centre for Policy Alternatives, *In Praise of the Arthurs Report on Canadian Federal Labour Standards*, online: CCPA <http://www.policyalternatives.ca/documents/National_Office_Pubs/2007/Federal_Labour_Standards.pdf>.

While interested parties did indeed have their say, it would appear that all was for naught. The final, 300-page report³⁶, two years in the making, was submitted to the Federal Minister of Labour in October 2006. No legislative changes have been made or are rumoured to be made. By comparison, the Review in Manitoba was restricted in scope, had a volunteer study committee, commissioned no reports, and was rushed. But changes were made to Manitoba's employment standards laws, and not to federal labour standards. Perhaps it is better to have a little of something than a lot of well-analyzed nothing.

VIII. EFFECTIVENESS OF THE CHANGES

The review of the provincial *Employment Standards Code* was intended to reflect the realities of the modern workplace and reflect the changing face of today's workforce. Did Bill 2 effect positive change in the workplace and at home?

Certainly the restricted scope reveals the major flaw, since there were proposals outside the scope of review that would have helped meet the Department's goals. Public hearings witnessed a desire for change to non-mandated aspects of employment standards (as noted above under "Scope of Changes"). How and why the Department arrived at a list of eight study areas, not less and not more, without considering such also-submitted issues—such as just-cause dismissal (available to all unionized employees in Manitoba), psychological harassment (available to all employees in Quebec and Saskatchewan), employee reinstatement in non-union workplaces (available to federally regulated employees), and minimum vacations (much higher in some countries, as noted by more than one public-hearing presenter)—remains a mystery to the outsider. Perhaps in the absence of the LMRC consensus these outlying, non-mandated issues would have received more attention—and at least would have made a bigger noise—in the committee stage following second reading.

As for the issues that *were* tackled by Bill 2, the following is a summary of the major changes:

- Easier qualifications for holiday pay;
- Introduction of leave for bereavement and family reasons;
- Expansion to definition of family for various leaves;
- Introduction of graduated notice of termination of employment ;

³⁶ Harry Arthurs, *Fairness at Work: Federal Labour Standards for the 21st Century*, online: Government of Canada <http://www.hrsdc.gc.ca/en/labour/employment_standards/fls/final/page00.shtml>.

- Clarifications of overtime and hours of work exemptions for managers and higher-status employees;
- Clarification of overtime rules for pieceworkers;
- Changes to rules regarding employment of children ;
- Restrictions added to permissible wage deductions;
- Introduction of reporting pay;
- Easing of qualification for protection of domestic workers;
- New compliance rules including fines for repeat offenders;
- Changes to rules regarding overtime averaging permits and hours of work variances;
- Limits added to director's liability;
- Improvements to wage recovery.

With the exception of changes to the definition of domestic workers, all of these changes are well within the Department's original mandate.

Some changes clearly helped the Department achieve its stated goal of responding to the changing face of today's workforce and workplace. For example, the recent increase in part-time work, and of workers who hold multiple part-time jobs, results in workers who would not qualify for holiday pay under the old *Code*. This led to calls for a new holiday pay system. Bill 2 removed threshold provisions, so that such workers receive holiday pay as a percentage of hours worked regardless of days worked. This is a victory for the multitude of part-time workers in Manitoba. Further, employees now receive three unpaid bereavement days and three unpaid family responsibility days. This is a gain for many workers, and recognizes the reality that the single-income-male-breadwinner family, if it ever existed, is not the only family model. Some protection has been granted for those who must juggle work and family responsibilities.

Other proposals were a partial win. The new graduated notice provisions are an improvement over the old *Code*, but are still exceeded by the common law. This leaves all workers with improved protection through the Employment Standards Branch. However, workers who do not receive an amount of notice (or pay in lieu of notice) commensurate with the common law must turn to the courts and file a lawsuit.

Changes made to overtime and hours of work exemptions for managers and higher-status employees will help clarify a lingering issue highlighted by the recent Michalowski case. Abuse of lower-paid employees through unpaid overtime is now clearly proscribed, but only employee rights awareness and enforcement of the law will stop the practice—whether awareness and enforcement are likely or possible remains to be seen.

Clarification of overtime rules for pieceworkers, restrictions on wage deductions, the introduction of reporting pay, improvements to wage recovery, and re-jigging the definition of a domestic worker may seem insubstantial from afar, but in reality may mean a lot to lower paid workers. As with many other issues, awareness and enforcement are key. Many lower-status workers may be unaware of their rights, and many employers may be taking advantage of them. In that regard, the law, while improved, may be of little help.

Changes to rules regarding overtime averaging permits and hours of work variances bring up a very political issue. On the one hand, some workers want scheduling flexibility to assist them with work-life balance. On the other hand, if we enable more flexible scheduling some employers may take advantage of workers by disguising as consensual that which is truly unilateral. Further, by transferring the hours of work variance approval scheme from the Labour Board to the Director of Employment Standards, we have taken the decision from an independent tribunal and given it to a government body, opening up the possibility of political interference.

The introduction of administrative penalties for repeat *Code* offenders is a good idea. By keeping this in the Department's control, speedy punishment could be meted out. While only time will tell if the Director will actually apply the fine system, a significant deterrent effect is produced.

In my view, these amendments are substantial enough to merit approval. However, Bill 2 only targeted a few specific issues. The very people employment standards are meant to protect are still without meaningful standards. This amending process did not substantially approach the problems of living on minimum wage, lack of benefit equity with regular, full-time employees, and juggling multiple part-time jobs with home and life issues. To approach these issues would require wide-open input, careful study, serious research, extensive debate, and (most daunting) a shift in the way we think about and value work. It is possible to create employment standards legislation that offers equitable treatment to all, including disadvantaged groups in non-standard employment relationships. But this requires a re-evaluation of the way we think about different groups of workers, and the amending process surrounding Bill 2 was not up to the task.

IX. CONCLUSION

The Labour Management Review Committee's consensus process was, in my opinion, a very positive way to legislate. Stakeholders were consulted and managed to agree to a package of proposals they themselves modified. Members of the LMRC put aside their usual positional stances and worked together to achieve something both sides of the labour/management divide can live with.

The existence of consensus was also a major factor in silencing criticism in the legislature and at the committee and report stages. The minister's comments, quoted on the title page of this paper, were in response to what can only be seen as minimal criticism in the legislature. The review process dampened opposition heckling, and quieted down the public at committee hearings following second reading. That the Manitoba government has created a committee that can do this strikes one as a major coup for any representational democracy.

Nonetheless, there are outstanding issues in the working lives of today's families that were not tackled by this process. The scope of this review was decided by the government behind closed doors and, despite public demands for wider scope, little was added. A more thorough canvass of workplace issues (involving the public and properly researched) would reveal how well our current employment standards legislation serves the goal of providing basic protection to Manitoba workers.

If the public wants to see more change in employment standards legislation, it would appear they need a petition from 92 CITI FM.