The Domestic Violence and Stalking Prevention, Protection and Compensation Act

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I. INTRODUCTION

IN JUNE OF 1998, THE MANITOBA LEGISLATIVE ASSEMBLY enacted Bill 40, *The Domestic Violence and Stalking Prevention, Protection and Compensation Act*[1] ("*DVSA*"). This *Act* was a response by the government to fatal incidents of extreme violence perpetrated by stalkers and domestic abusers. These events were widely publicized throughout the province. The purpose of the legislation is to provide civil remedies and protective measures to victims of domestic violence.[2]

The *DSVA* is relatively short (19 pages) and pithy. Since peace officers and Justices of the Peace are integral to its administration, it was necessary to write the *Act* in a way that could be read by lay people. The *Act* creates no regulatory body and little is left to the discretion of regulation enforcers.

This framework is necessary as the legislation applies in emergency situations. Undue bureaucracy would inevitably slow the process, rendering many provisions useless. The results of bureaucratising protection were tragically illustrated by the incidents that inspired the creation of *DVSA*. Before *DVSA*, protection was simply too difficult, expensive, or ineffective to assist those people who needed it most.

Statistics describing the numbers of people involved in violent relationships, either as abusers or victims, suggest that this legislation is extremely important. Thirty per cent of women currently or previously married have experienced at least one incident of physical or sexual violence at the hands of their spouse.[3]

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1 R.S.M. 1998, c.41– Cap. D93 [hereinafter *DVSA*].

2 Manitoba, Legislative Assembly, *Debates* (13 May 1998) (Hon. V. Toews) [hereinafter *Debates* (13 May 1998)].

3 Statistics Canada, *Family violence in Canada: A Statistical Profile*, by R. Fitzgerald (Ottawa, 1999).

Women are eight times more likely than men to be victimized by a partner.[4] Of persons charged, 98% of sexual assault and 86% of violent crime perpetrators are men.[5] Between 1974 and 1992, the rate of women killed by their husbands, while separated, was greater than the rate of women killed who were living with their husbands.[6]

II. BACKGROUND

THE GOVERNMENT SAW A NEED TO INTRODUCE more effective protections from violence after three tragic events transpired in Manitoba during the early 1990's. The first took place in 1993. Ronald Bell stalked Terri-Lyn Babb. He was a practical nurse at a hospital where Terri-Lyn had been a patient. Ms. Babb complained to the police on numerous occasions that she feared for her safety. She eventually applied to the courts for a peace bond, prohibiting Mr. Bell from contacting her. Three months after a court ordered Bell to refrain from contacting Ms. Babb for the period of one year, he received a permit for a restricted weapon. He took that weapon and shot Terri-Lyn Babb in the head. She died instantly.[7]

When news of Terri-Lyn's murder hit the papers, Sherry Paul, another victim of stalking, contacted the Crown requesting that charges against Andre Ducharme proceed to criminal court. He had stalked her and uttered threats against her. Six days after the Crown was contacted, Ducharme broke into the Paul home and Sherry and her husband Maurice were killed while their two youngest children listened from another room. Andre Ducharme then committed suicide.[8]

Perhaps the most widely publicized occurrence of domestic abuse, resulting in murder in Manitoba, is the Lavoie case. Roy Lavoie had been in the court system on numerous occasions for abusing his wife, Rhonda. The involvement of police and the justice system began in 1993 when Rhonda called the police after Roy threw a pumpkin at her. Rhonda told Roy she wanted to separate. It ended tragically soon after Rhonda consulted a lawyer about a divorce.

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4 *Ibid.*

5 Statistics Canada, "Violent Crimes in Canada" *Juristat* 16:6, by H. Johnson (Ottawa: Canadian Centre for Justice Statistics, 1996).

6 Statistics Canada, "Criminal Harassment" *Juristat* 16:12, by R. Kong (Ottawa: Canadian Centre for Justice Statistics, 1996).

7 Manitoba Law Reform Commission, *Report Stalking* (Working Paper 98) (Manitoba: Law Reform Commission, 1997) at 1 – 2 [hereinafter *Stalking*].

8 *Ibid.* at 2.

She disclosed that Roy had attempted to kill her. The lawyer advised her to notify police. When Rhonda did so, additional charges were laid against her husband. Roy found out, through court documents, that she was seeking a divorce and that she had disclosed the murder attempt to police. On 16 January 1995, two days after the documents were served, Roy abducted Rhonda and drove her to a farm north of Gimli. He killed her and himself by exhaust asphyxiation. The report of the Inquiry into their deaths states:

> The manner of their deaths paralleled almost precisely Roy's earlier attempt to kill Rhonda and [to] commit suicide. Roy had restrained Rhonda with handcuffs and run a hose from the exhaust pipe of the van through a window of the van. As before, he had started the engine and let the van fill with fumes. This time he did not stop.[9]

Together, the violent events resulted in the long overdue realization that victims of domestic abuse and stalking had no simple or immediate legal recourse when in danger. The few remedies available to victims were, for the most part, expensive, time-consuming, and inapplicable to a variety of circumstances.

Before the enactment of *DVSA*, the Manitoba Law Reform Commission noted that it could take up to two weeks to obtain a peace bond, if entered into by consent, or months if there was no agreement between parties.[10] A peace bond could be issued for a maximum of one year.[11]

Under *The Family Maintenance Act*[12] a victim could get an ex parte non-molestation order issued by a magistrate. The order, however, applied exclusively to spouses or common-law partners. Those stalked or abused by someone other than a cohabitee were without recourse.[13] Prohibition orders were to be issued by a justice of the Court of Queen's Bench. They required the defendant to cease acting in a wrongful manner, but prohibition orders are injunctive remedies, so it was a prerequisite that the victim "file a statement of claim seeking to establish a cause of action against the claimant before such an injunction [could] be issued."[14] This prerequisite almost always required the assistance of a lawyer, and the process, therefore, was slow and expensive.

Another problem with the justice system response, prior to the enactment of *DVSA*, was that avenues of protection and redress for victims of domestic abuse and stalking were piecemeal. Remedies were scattered across statute and

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9 *Ibid.* at 11.

10 *Supra* note 7 at 10.

11 *Criminal Code*, R.S.C. 1985 c. C-46, s. 810.

12 R.S.M. 1992, c. F20 [hereinafter *Saskatchewan*].

13 *Stalking, supra* note 7 at 29.

14 *Ibid.* at 30.

common law. For instance, the *Criminal Code* contains provisions banning assault, sexual assault, criminal harassment, unlawful confinement, intimidation, uttering threats, false messages, trespassing at night, and mischief.[15] Tort law provides actions for battery, assault, false imprisonment, intentional infliction of nervous shock, trespass to land, private nuisance, watching and besetting, malicious prosecution and abuse of process, intimidation, defamation, privacy, and harassment.[16]

No single act contained an amalgamation of all, or even some, of these provisions prior to *DVSA*. It was difficult for a victim to identify which remedy should be sought and where to begin looking for help.

The Law Reform Commission was given the task of producing a report and draft legislation to deter stalking and compensate victims of such violence. Justice Perry Schulman researched and wrote the Lavoie Inquiry Report that examined the various ways in which the justice system, including police, victim services, and shelters, could have better served Rhonda and Roy Lavoie, and perhaps prevented their deaths. Based upon these two reports, the government of Manitoba elected to create one act to address the needs of domestic abuse and stalking victims.

III. THE EFFICACY OF A COMPREHENSIVE ACT

THE LAW REFORM COMMISSION APPROACHED this project from the perspective of creating adequate legal protection from harassing conduct. Stalking was the particular focus of the work. In developing and drafting the model act, the Law Reform Commission relied heavily upon Saskatchewan's *Victims of Domestic Violence Act*.[17] They applied and modified many of its provisions to address stalking behaviour.

In 1997, Professor Phil Osborne of the Faculty of Law, University of Manitoba, expressed concern to the Law Reform Commission that the differences highlighted in the report between domestic violence and stalking can be "arbitrary and artificial; each being an aspect of violence against women."[18] Professor Osborne suggested that the Commission be ready to address criticisms that the stalking legislation attacked the lesser of two evils, and calls to address the need for better protection of victims of domestic violence.[19] A

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15 *Ibid.* at 8 – 10.

16 *Ibid.* at 17 – 25.

17 R.S.S. 1994, c. V-6.02.

18 Letter from P. Osborne to the Manitoba Law Reform Commission (24 January 1997).

19 *Ibid.*

note was attached to the draft stalking legislation outlining Professor Osborne's concerns.[20] His letter might explain why stalking and domestic violence legislation was combined in one act.

The combining of the issues is not without its own critics. During debate on the second reading of Bill 40 (draft version of the *DSVA*), the Honourable member for Osborne, Diane McGifford, noted that:

> The shame is that we have a single bill with a series of flaws, which, considered together, I think, weaken the strength of this legislation. We kind of have a watered-down version of what could have been two very good bills.[21]

Ms. McGifford asserted that, while these crimes sometimes overlap, those who are stalked are not usually victims of domestic assault, and vice versa. She did not provide sources to confirm this contention.[22] In contrast, a Statistics Canada report, *Juristat*, has noted that female victims of stalking are most frequently harassed by a current or former partner: 39% by an ex-husband; 2% by a current husband; 17% by a current or former boyfriend.[23]

Mr. Toews, then Justice Minister, responded to such criticism by noting that the government wanted to ensure a consistency of remedies for the separate offences because of the natural overlap between them. Furthermore, he stated that he "did not want to see a domestic violence victim getting thrown out of court because they were in the wrong court or proceeding under the wrong act." He added that his opinion was in accord with that of the Lavoie Inquiry Implementation Committee.[24]

The provisions available in a protection order, under *DVSA*, are slightly more expansive than those suggested by the Law Reform Commission. This is a result of the integration of domestic violence victims' needs into the *Act*. For instance, in s.7(1), the *Act* allows the applicant temporary possession of personal effects, the assistance of police in removing personal effects from the home, seizure of the respondent's firearms, and sole occupancy of a residence on an emergency basis.

Prevention orders are another remedy available under *DSVA* for people being stalked or abused. They are issued under the discretion and authority of a Court of Queen's Bench justice. These judges have the jurisdiction to order all forms of relief available with protection orders, and more. For instance, the court of Queen's Bench can order the seizure of any property the stalker or

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20 Interview by B. Macdonald with P. Osborne (7 November 2000).

21 Manitoba, Legislative Assembly, *Debates* (16 June 1998) [hereinafter *Debates* (16 June 1998)].

22 *Ibid.*

23 Violent Crimes, *supra* note 5.

24 Manitoba, Legislative Assembly, *Debates* (22 June 1998) (Standing Committee on Law Amendments) [hereinafter *Debates* (22 June 1998)].

abuser uses in furtherance of the abuse, such as a car. The judge can also order that the licence of the abuser or stalker be suspended.[25]

IV. THE LAW REFORM COMMISSION REPORT

IN 1997, THE LAW REFORM COMMISSION OF MANITOBA began the composition of their report and draft legislation on stalking. The first step the Commission took was to look at similar legislation in other provinces. Saskatchewan, Prince Edward Island and Alberta have such legislation. Their second step was to look at terminology employed by the federal government when they introduced criminal harassment provisions into the *Criminal Code*.

The Commission relied most heavily upon Saskatchewan's *Victim's of Domestic Violence Act* in drafting their own stalking legislation. Saskatchewan's *Act*, which served as a model for the Prince Edward Island and Alberta legislation, came into force February 1995. There are two important differences between the Saskatchewan and Manitoba versions of the legislation. The first is in the differing powers of enforcement, and the second is in regard to the application process.

A. Deviations from Saskatchewan's *Victims of Domestic Violence Act*

Manitoba's *Act*, although modelled on the Saskatchewan legislation, does not grant equivalent powers to those who enforce the provisions. This is especially true with regard to the powers of Justices of the Peace to provide certain forms of relief when granting protection orders.[26] Protection orders were designed to provide immediate protection. They can be issued by a magistrate, without notice to the respondent, and are based upon the sworn statement of the applicant.

The Commission suggested three criteria for obtaining such an order. First, the applicant has to demonstrate to the Justice of the Peace, on a balance of probabilities, that he or she is being stalked. Second, the applicant must show that he or she fears for his or her safety or the safety of anyone known to her. Finally, he or she must reasonably believe that the stalking will continue.[27]

In *DVSA*, there are only two criteria and they are listed in s. 6(1). The applicant must, on a balance of probabilities, show that stalking or domestic violence has occurred and that he or she believes it will continue. The requirement of fear has been left out, presumably because the definition of

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[25] *DSVA*, *supra* note 1 at ss.15(1)(2).

[26] *Stalking*, *supra* note 7 at 29.

[27] *Stalking*, *supra* note 7 at 64 – 65.

stalking in the *Act* requires that the victims reasonably fear in all of the circumstances of their situation.

Saskatchewan's *Victims of Domestic Violence Act*, in s. 3(3), provides that an emergency intervention order (the equivalent to Manitoba's protection order) may contain provisions for granting the victim and other family members exclusive possession of the family residence, police assistance in removing the respondent, or personal effects, from the residence, and an order restraining the respondent. Most importantly, s. 3(3)(e) is a discretionary clause allowing Justices of the Peace to make any order "necessary to provide for the immediate protection of the victim."[28]

The Manitoba *Act* does not grant as much power to its Justices of the Peace. Section 7(1) of this *Act*, which lists the provisions that may be added to a protection order, does not include a discretionary clause. As a result, Justices of the Peace are limited in how innovative or responsive their protection orders may be.

This section was the subject of lengthy discussion in the standing committee meetings. Then opposition justice critic, Mr. Mackintosh, suggested that Justices of the Peace be able to include any provision deemed necessary or advisable in a protection order.[29] This motion, however, was defeated.

Mr. Toews commented that leaving this level of discretion to Justices of the Peace would put the *Act* on shaky constitutional ground. He cited *The British Columbia Residential Tenancy Act* (presumably Mr. Toews meant to say "case" rather than "*Act*") to support his interpretation of the division of jurisdiction between federal and provincial judges. Mr. Toews gave, as an example, custody of children.[30] This issue is something a Justice of the Peace would, inappropriately, have the power to deal with if such open-ended wording was used in the *Act*.

The Saskatchewan *Act*, however, gives discretion to order measures felt necessary to ensure the safety of the victim. This safety is often tied to the safety of her children. Consider the following example. A mother is a victim of abuse from her husband. She is separated and the abuse occurs during the course of a weekend when he is exercising his visitation rights. She feels that she must leave the community to protect her personal safety, but she will not leave without her children. Under *DVSA*, a Manitoba Justice of the Peace cannot help her.

Mr. Mackintosh pointed out that the Saskatchewan courts had not experienced difficulty with this discretionary section. The Saskatchewan *Act*

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[28] *Supra* note 17.

[29] *Debates* (22 June 1998), *supra* note 24.

[30] *Ibid.*

sidesteps constitutional issues by requiring that any order given by a Justice of the Peace must be confirmed within three days by a Court of Queen's Bench judge who has received all the information from the original application.[31] By contrast, a Manitoba order is only filed at the Court of Queen's Bench. It is not reviewed unless the respondent chooses to challenge it.

B. Constitutional Validity of *DSVA*

Mr. Toews is correct that, under the current Manitoba process, a constitutional challenge could erupt over discretionary orders made by a Justice of the Peace. Without judicial review and a reasonable time limit on protection orders, anything a Justice of the Peace ordered with regard to property or child custody would result in a severe infringement of the respondent's rights.

Ms. Diane McGifford suggested in debates that the Saskatchewan legislation had indirectly survived a constitutional challenge. The Prince Edward Island legislation, modelled after the Saskatchewan *Act*, survived a constitutional challenge in 1995.[32] It is unclear why the Manitoba Department of Justice chose to draft untried provisions into an original act rather than follow a model that has been found to be constitutional.

The simple solution is, of course, to amend *DVSA* to allow for judicial review of Manitoba orders. There is, however, a problem with this simple solution. Manitoba's justices issue about 1500 protection orders a year, three times as many as Saskatchewan.[33] In Manitoba, there are 42 Court of Queen's Bench judges, seven of which are in supernumerary, or part-time, positions. In Saskatchewan, there are 32 full time Queens' Bench Judges and 10 supernumerary judges to handle its lesser load.[34]

C. The Application Process

The process of applying for a protection order was another controversial element of *DVSA* in contrast to the Saskatchewan *Act*. The Manitoba *Act* prevents the use of telephones as a way of accessing protection. It also limits the people through whom an application can be made. And, applicants are still forced to attend courthouses and police stations in search of protection orders.[35] According to Professor Karen Busby, of the Faculty of Law, University of Manitoba and member of the Lavoie Inquiry Implementation Committee,

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31 *Supra* note 17.

32 *Debates* (16 June 1998), *supra* note 21.

33 Interview by B. Macdonald with J. McPhail (10 November 2000).

34 Interview by B. Macdonald with K. Fulham (19 November 2000).

35 Interview by B. Macdonald with K. Busby (1 November 2000).

members of the committee felt strongly that peace officers and lawyers should not be the only people to whom applicants could apply.

This limitation is seen as problematic, especially in small communities where there may not be any lawyers. Such a case would force a person in need of protection to contact police. Charges are automatically laid in a domestic violence case because of Manitoba's zero tolerance policy. The committee feared that some applicants would choose to forgo the protection order rather than deal with the criminal justice system.[36]

During debate in the standing committee, Mr. Toews defended the limited number of people who could assist applicants in applying for a protection order. He stated that the term "peace officer" is applicable to a number of jobs, including mayors, wardens, and anyone else appointed under any act for the enforcement of the empowering act. He argued that the definition "peace officer" covers more people than one might suspect.[37]

One of the guest speakers, at the standing committee debates, defended the limitation. Ms. Marilyn McGonigal, a retired family lawyer, indicated to the committee that procedural safeguards are necessary. Abusers can take advantage of a more flexible system to bring unauthentic criminal charges to seek civil remedies from those whom they are abusing.

According to Ms. McGonigal, it is common practice for an abusive partner to seek a protection order against the person he or she is abusing. It makes the complainant look less like a victim and more like a participant in the behaviour. Protection orders, in the hands of abusers, can be used as tools against their victims: Ms. McGonigal spoke of women who had been charged with breaching protection orders when they called their abuser, at his invitation, to see how the children were doing.[38] In later debate, Mr. Toews supported the policy of limiting application hearings for orders to lawyers and peace officers.[39]

The Law Reform Commission utilized the definition of criminal harassment from the *Criminal Code* and used it to set the parameters of the definition of stalking. For convenience the original definition is reproduced here:

> Criminal Harassment
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> 264. (1) No person shall, *without lawful authority* and knowing that another person is harassed or recklessly as to whether the other person is harassed, engage in conduct referred to in subsection (2) that causes that other person reasonably, in all the circumstances, to fear for their safety *or the safety of anyone known to them* [emphasis added].

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36 *Ibid.*

37 *Debates* (13 May 1998), *supra* note 2.

38 *Debates* (22 June 1998), *supra* note 24 at 85.

39 *Ibid.*

Prohibited conduct

(2) The conduct mentioned in subsection (1) consists of

(a) repeatedly following from place to place the other person or anyone known to them;
(b) repeatedly communicating with, either directly or indirectly, the other person or anyone known to them;
c) besetting or watching the dwelling-house, or place where the other person, or anyone known to them, resides, works, carries on business or happens to be; or
(d) engaging in threatening conduct directed at the other person or any member of their family[40] [emphasis added].

There are slight but important differences between the *Criminal Code* definition of criminal harassment and *DVSA*'s definition of stalking. *DVSA* refers to "lawful authority" or "excuse", yet "excuse" is not found in the *Criminal Code* section. In addition, *DVSA* does not contain the phrase "or the safety of anyone known to them."

The explanation for these deviations can be found in the standing committee debate records.[41] Mr. Mackintosh, of the official opposition, proposed that the stalking definition include the aforementioned phrase.[42] This motion was defeated. According to the Justice Minister, Mr. Toews, it would have been redundant. Section 2(3) of *DVSA* defines stalking behaviour as communicating directly or indirectly with anyone known to the subject who is not able to feel fear because of age or mental incapacity.[43]

Mr. Toews, therefore, claimed it was not necessary to repeat the phrase in the definition of stalking in the body of the *Act*. Additionally, Mr. Toews wanted to avoid a situation where one person could apply for an order on behalf of another mentally competent adult because of fear for the safety of that person. He stated that mentally competent persons must "take responsibility for their own actions".[44]

V. THE LAVOIE INQUIRY

THE OTHER HALF OF THE GOVERNMENT'S project was completed by Justice Perry Schulman. He produced the Lavoie Inquiry Report at the request of Rosemary Vodrey, then Minister of Justice. In his Report, Mr. Justice Schulman made 91

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40 *Criminal Code*, R.S.C. 1985, c. C-46, s. 264.

41 *Debates* (22 June 1998), *supra* note 24.

42 *Ibid.*

43 *Ibid.*

44 *Ibid.*

recommendations, ten of which were directed toward legislative reform. An implementation committee was formed to determine how to apply the recommendations.

The Law Reform Commission did not work with the Lavoie Inquiry during the report stage. Instead, the drafting of the domestic violence and stalking legislation took place after both reports were submitted to the Department of Justice.

Many of *DVSA*'s provisions, specific to victims of domestic violence, result from Mr. Justice Schulman's Lavoie Inquiry. It is important to note that at the time of writing the Lavoie Report, Justice Schulman did not contemplate the enactment of an entirely new piece of legislation to assist victims of domestic violence. As a result, many of his recommendations suggest changes to *The Family Maintenance Act*, where procedures relating to non-molestation and restraining orders were found. Most of Justice Schulman's recommendations were eventually written into *DVSA*.

The Report made recommendations that can be divided into six categories. The first recommendation suggested the name of *The Family Maintenance Act* be changed to something more neutral. This change was not adopted because the new *Act* made the recommendation moot. The second recommendation proposed a new part be added to *The Family Maintenance Act*, entitled "Preventative Justice," which would give an expansive definition of who can apply for protective relief and in what circumstances.[45] The *DVSA* incorporates this recommendation.

Definitions in *DVSA* are more inclusive. For example, "cohabitant" can be interpreted as married or common-law partner (of opposite or same sex couples), and a child of any of these unions, regardless of the duration of cohabitation. This differed from the *Family Maintenance Act*, which provided protection only to married couples or opposite sex common law couples that had lived together for five years (one year if there was a child of the union). A criticism of *DVSA* is that couples whom do not cohabit are excluded from the definition of domestic violence. Hence, boyfriends and girlfriends in abusive relationships, who do not cohabit, are excluded protection under the *Act*.

A third set of recommendations deal with the issue of immediate relief upon application. All of Justice Schulman's suggestions for relief are included in s.7(1) of *DVSA*. His recommendations include procedures to be followed when obtaining a protection order: designated magistrates may make the order, it may be made ex parte, and it is to be based upon evidence of the applicant, given under oath.

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[45] Manitoba, *Lavoie Inquiry Implementation Committee Report* (Winnipeg: Lavoie Inquiry Committee, 19) (Chair: E. Jane Ursel).

One recommendation that did not make it past the implementation committee was the suggestion that protection orders expire automatically after six months. The Law Reform Commission found that "an automatic expiration date in a protective order could re-victimize the person claiming protective relief."[46]

The fourth of Justice Schulman's recommendations suggested that magistrates receive training on legal principles that need be applied regarding "reasonable and probable grounds". According to Professor of Children and the Law, Anne McGillivary, such training is underway at present, more than one year after *The DVSA* came into force.[47] The fifth recommendation advocated that protection and prevention orders be registered on a law enforcement database for universal access.

His final recommendation, which was put off until the *Act* was in force and the accompanying regulations written, was that victims of domestic violence be given information sheets:

> Advis[ing] them they may be at increased risk after the order is served on the offender;
> Recommend[ing] they develop a safety plan; and
> Refer[ing] them to the Women's Advocacy Program and other available resources.[48]

VI. DEBATES AT THE LEGISLATURE

THE DEBATE ON *The Domestic Violence and Stalking Prevention, Protection and Compensation Act* was relatively brief. Substantial debate, however, did take place after the second reading and when the standing committee met to pull apart the draft legislation section by section. The relative brevity of debate may be partially attributable to the fact that citizen's groups, women's advocates, lawyers from the public and private sectors, and other concerned individuals were part of the vetting process. This legislation was, to a large extent, the product of community contributions.

One group was willing to voice concern over the content of Bill 40. The Manitoba Association for Rights and Liberties ("MARL") submitted in writing: [w]e feel the bill in its current form may be over-broad in a number of respects, and ought to be reconsidered and redrafted with an eye to minimising the infringement of the civil liberties of a "respondent".

Their major concerns were that: domestic violence is too broadly defined; the standard of a balance of probabilities is not stringent enough; and to have a

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46 Manitoba, *A Study of Domestic Violence and the Justice System in Manitoba* (Manitoba: Commission of Inquiry, 1997) at 3 – 11.

47 Interview by B. Macdonald with Professor A. McGillivary (15 November 2000).

48 *Supra* note 46.

protection order set aside, the respondent is in a situation where he or she must prove, on a balance of probabilities, that stalking or domestic violence did not occur. Given that it is nearly impossible to prove a negative, MARL suggested that upon review, the respondent should have to prove the prohibited conduct took place.[49]

MARL, in bringing up valid points, demonstrated how close this legislation is to being criminal law, but without procedural safeguards in place. One way to alleviate this concern would be to have the legislation provide for an automatic judicial review of all protection orders granted. Their second concern, that the standard of proof is not stringent enough to legitimise the penalties. This cannot easily be remedied in a civil statute.

The first reading of Bill 40, on 29 April 1998, consisted of the Honourable Mr. Toews, Minister of Justice, presenting the *Act* to the Legislative Assembly. Much the same occurred for the second reading, on 13 May 1998, but here it was moved that the legislation be referred to a committee of the Assembly. There was debate in later sessions regarding the merits of the legislation. At no time was there any disagreement between the government and official opposition as to the necessity for an act to deter and prevent domestic violence and stalking. Rather, the debate surrounded perceived shortcomings in the bill and potential solutions.

The second reading highlighted some of the most important provisions of Bill 40, such as prevention and protection orders, and the fact that this bill would make Manitoba the first province to legislate a tort of stalking.[50] The opposition had no comments at this time.

On 15 June 1998, Mr. Gord Mackintosh (MLA for St. Johns) responded to Mr. Toews speech. He began by castigating the government for waiting until the Lavoies were dead before implementing legislation. He pointed out that the NDP had recommended such legislation in its 1995 Task Force on Violence Against Women. He also criticized the bill for not going far enough—he referred to the Bill as the weakest of its kind in Canada. Mr. Mackintosh's main objections to the bill were:

> [I]t includes no provisions for granting exclusive occupation of the residence, not even on a temporary basis (interestingly, Justice Schulman did not think this was necessary in Manitoba);
> [O]nly peace officers and lawyers can assist with applications for protection orders; Justices of the Peace have no discretionary power;
> [P]ublication bans, available under Bill 40, could exclude names only—the proceedings themselves are still subject to publication;

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[49] Manitoba, Legislative Assembly, *Debates* (18 June 1998)Manitoba Association of Rights and Liberties, written submission to the Manitoba Legislative Assembly Standing Committee on Law Amendments).

[50] *Debates* (13 May 1998), *supra* note 2.

> [N]o sections are included that provide for counselling children: and
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> [N]o provisions exist to deal with accomplices to abuse or harassment.[51]

Nonetheless, Mr. Mackintosh did support the bill in principle.[52] Mr. Kevin Lamoreaux (MLA for Inkster) responded to this assault by applauding the government's efforts and labelling them as groundbreaking in Manitoba. His questions related to the overall cost of implementing and enforcing proposed amendments.[53] His comments seemed to suggest it is better to have a mediocre piece of legislation than no *Act* at all.

When debate resumed on June 16, opposition member Ms. Diane McGifford (MLA for Osborne) began by chastising the government for allowing pieces of legislation to languish on the shelves. She spoke of her reluctant support for Bill 40. She did not think it unnecessary, but thought it did not go far enough. Ms. McGifford was firmly in favour of legislation that would follow the Saskatchewan model and of the enactment of something akin to the Law Reform Commission's draft stalking legislation as a separate act.[54]

Her final criticism of Bill 40 was that it does not adequately address the needs of children living in homes affected by domestic violence and stalking. There are no provisions in the bill directed specifically toward children.[55] In the Saskatchewan model, Justices of the Peace are required to consider the best interests of the children when making orders.

The standing committee met on 18 June 1999 to discuss Bill 40. The hearing appears to have been hurriedly arranged—both private citizens invited to speak before at the hearings got copies of Bill 40 only the night before they were to present their submissions. Additionally, one of the private citizens had a job interview she had to leave the meeting to attend, suggesting she had been invited to speak at the last minute.

Diane Peters was the first person to speak to Bill 40. She is a victim of her ex-husband's violence and obsessive behaviour. She related some of her experiences when trying to protect herself from her ex-husband. She explained that she has given up calling the police and now has a $2 500 personal protection German Shepherd donated to her by a local Masons group. Mr. Mackintosh asked Mrs. Peters generally about the four suggested amendments to the legislation he had proposed during second reading. She agreed they were all

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51 Manitoba, Legislative Assembly, *Debates* (15 June 1998) (Standing Committee on Law Amendments).

52 *Ibid.*

53 *Ibid.*

54 *Debates* (16 June 1998), *supra* note 21.

55 *Ibid.*

necessary to ensure the protection of abused women, and voiced her special concern that children's needs are not addressed in the bill.[56]

Mr. Toews responded to this submission by suggesting that s.14(1)(j) of the bill authorizes the government to enforce payment to cover the cost of children's counselling. The section reads:

> s. 14 (j) a provision requiring the respondent to pay compensation to the subject for any monetary loss suffered by the subject as a result of domestic violence or stalking, which may include
>
> (ii) expenses relating to new accommodations, moving, counselling, therapy, medicine and other medical requirements and security measures.[57]

There is no guarantee that this section will be interpreted to include children's counselling expenses. While this list is not necessarily exhaustive, the fact that children's counselling costs are not expressly included could lead a judge to interpret its absence as intentional. Also, this measure is only available by applying for a prevention order through the court of Queen's Bench, which can be costly to obtain. And, it does not address custody difficulties during emergency situations.

Marilyn McGonigal was the next private citizen to speak on Bill 40. She related some of her experiences in the practice of family law and with domestic abuse victims. In addition to her concerns regarding abuse of the system, which has been noted, Ms. McGonigal raised the issue that a respondent could fight a protection order and have it overturned without the court issuing notice to the original applicant. The standing committee declined to suggest any provision be added to the *Act* to deal with this matter.[58]

Mr. Toews questioned this speaker whether she thought the legislation went too far. Ms. McGonigal's response was, "I am one of those people who think you cannot go too far very easily to protect women from the abuse and stalking incidents in the community."[59]

All suggested amendments, put forward by Mr. Mackintosh, were defeated. He has since become the Minister of Justice under the new NDP government and has formed a working group to examine the legislation and its efficacy. This is an effort to "see where the legislation can be strengthened."[60] The government is also studying the legislation to see if it can be utilized to address the problem of elder abuse.

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56 Manitoba, Legislative Assembly, *Debates* (18 June 1998) (standing committee).

57 *DVSA*, *supra* note 1.

58 *Ibid.*

59 *Ibid.*

60 Interview by B. MacDonald with Hon. G. Mackintosh (November 2000).

In what may be seen as a perverse result, this legislation has the potential to infringe, in a fundamental way, upon the accussed's rights. The burden of proving that there is no need for a protection order falls, generally, on the accussed's shoulders. The cost relating to challenging protection orders is also born by him. A lack of judicial review can further result in unwitting violations of rights by Justices of the Peace.

The Manitoba Department of Justice has opted to build legislation around the deficiencies that led to a lack of effective response in the previous tragic incidents. A woman's safety cannot be protected without protection orders that are responsive to her particular situation. The rights of respondents cannot be protected without limits and automatic judicial review of orders granted. If more judges need to be hired, if more Justices of the Peace need to be trained in domestic violence issues, if the legislation needs to be changed to provide sensible and just relief for all parties, then it should be done. Effective legislation ought to be the basic responsibility of lawmakers.

VII. THE *DVSA*

DEBATE ABOUT THE STRENGTH AND EFFECTIVENESS of *DVSA* did not die when it came into force. In 1999, the Law Reform Commission issued a report on *Adult Protection and Elder Abuse*[61] that included a critique of *DVSA*. The Law Reform Commission made several recommendations for amendments that would make the *Act* more responsive to victims of violent crime within the domestic sphere.

Their first recommendation was that the definition of domestic violence be changed to approximate that found in Prince Edward Island's *Victims of Family Violence Act*. That *Act's* definition of violence is:

> Including certain forms of conduct which gives designated justices of the peace and the court some leeway in determining whether conduct that does not fall squarely within the list of specified conduct (such as financial abuse, for example) should be characterized as violence in particular circumstances.[62]

The second recommendation made by the Commission suggests that *DVSA* be amended to extend its protection;

> ... in respect of persons who have easy and frequent access to another person's household, regardless of whether the persons are related to one another by blood, marriage, or

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61 Manitoba Law Reform Commission, *Adult Protection and Elder Abuse* (Working Paper 103) (Manitoba: Law Reform Commission, 1999) [hereinafter *Adult Protection*].

62 *Victims of Family Violence Act*, R.S.P.E.I. 1988, c. V-3.2.

shared responsibility for the care of children, or whether they reside or have resided together. [63]

This extension would provide protection to elderly people who have abusive caregivers and to victims of abusive dating relationships who have never lived together.

The third recommendation addresses whom can assist an applicant in making an order application. As noted earlier, the restriction on those who can provide assistance to applicants is problematic. According to the Law Reform Commission, this is a serious shortcoming and *DVSA* for there are cases in which contacting the police or a lawyer is not feasible for the victim. In other jurisdictions, victims assistance coordinators, social workers, and sometimes even friends or relatives are able to apply on behalf of a victim. The *DVSA* should be amended to include a greater range of people who are authorized to provide assistance with attaining both protection and prevention orders.[64]

The Law Reform Commission joins others in recommending that Justices of the Peace be given discretion in crafting protection orders. This would include the ability to make temporary orders regarding protection of victims, subjects and their children. It should also extend to addressing custody and property matters and to determining a specified termination date for orders granted.

The Commission also found that amending the *Act* to require a respondent to seek counselling may be beneficial and advocated a specified time limit on such orders. It found that amending the Act to require that a respondent seek counselling might also be beneficial. In addition, it argued that specific provisions, to address the needs of children, such as direct compensation for monetary loss suffered by children of subjects, and publication bans be available. They recommended that a person be able to apply for protection orders based on a "reasonable fear" for the safety of someone known to them.

And finally, it was suggested that *DVSA* be amended to grant peace officers the right to enter premises with a warrant where there is reason to believe that a person is being abused and where police are being denied access to possible victim.

VIII. Conclusion

The *DVSA*, although a step in the right direction, it needs to address the serious shortcomings discussed by the Law Reform Commission and others. Lack of judicial review and time limits means that protection afforded victims of violence and stalking is needlessly constrained by untested concerns of the legislation's constitutionality.

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[63] *Adult Protection*, *supra* note 61 at 45.

[64] Ibid. at 49.

While it a hopeful sign that the new Justice Minister has the insight to realize that *DVSA* requires change, I question the efficacy of forming a working group, to review legislation flaws, which is composed of many of the people involved in the creation of the original legislation. The NDP may be a new government but the bureaucracy upon that they rest represents the ghosts of governments past. Is it realistic to expect that the people who informed and drafted the legislation for Vic Toews two years ago will be able to determine whether that same piece of legislation is effective? Only time will tell.