

# The Protection for Persons in Care Act

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## I. INTRODUCTION

THE GENESIS OF *THE PROTECTION FOR PERSONS IN CARE ACT*<sup>1</sup> was a 1996 news story of the appalling conditions inside a Winnipeg personal care home. Mr. Molnar died after being attacked by his 77-year-old roommate at Holiday Haven, a Winnipeg personal care facility. Sadly, the namesake of the facility became a cruel joke when a second resident suffered a violent death due in part to a lack of supervision at the facility.

In order to solve the chronic problems, a former assistant director of nursing at Holiday Haven called for an independent public inquiry.<sup>2</sup> Complaints to Manitoba Health about this particular care facility were well documented and ranged from residents sitting in wet, soiled clothing, being tied to a toilet for long periods of time, and being physically rough-handled.<sup>3</sup>

Two key problems at Holiday Haven were inadequate staffing levels and a lack of movement by Manitoba Health on numerous complaints about this particular facility. Opposition health critic, Mr. D. Chomiak (as he then was) was quoted as saying, "I am sickened to think that this [second] death could have been prevented had the government taken responsibility last year to safeguard both patients and staff."<sup>4</sup> Subsequently, the management at Holiday Haven was replaced by a team from Extendicare (Canada) Ltd.. Mr. Chomiak's

<sup>1</sup> S.M. 2000, c.12 (Proclaimed 30 April 2001) [hereinafter *The Persons in Care Act*].

<sup>2</sup> "Second death reported at nursing home" *Western General News* (25 February 1997), online: QL (CPN).

<sup>3</sup> Paula Black, a former assistant director of nursing and former staff development coordinator, exposed the complaints against Holiday Haven. "Nursing-Home-Death" *Western General News* (26 February 1997), online: QL (CPN).

<sup>4</sup> *Ibid.*



1997 call for a public inquiry was rejected by, then Health Minister, Darren Praznik.<sup>5</sup>

In a bid to provide a response to the perceived crisis in personal care facilities, the government set up a complaint system in 1998. Under the system, relatives of elderly patients could report incidents of abuse or other concerns. Unfortunately, Mr. Chomiak noted, the service would not help patients without family members to speak on their behalf.<sup>6</sup> As opposition health critic, Mr. Chomiak introduced a private members bill (Bill 202)<sup>7</sup> to protect home care residents. The bill, based on existing Alberta legislation, did not make it to second reading.

In 1999, Mr. Chomiak publicly stated his commitment to improving the lives of residents in personal care homes. He announced that, as the government, he would introduce a bill in the next sitting of the Legislature that would require mandatory minimum staffing levels at nursing homes. He proposed a new statute, *The Protection for Persons in Care Act*, which would include a provision for the mandatory reporting of elder abuse and protection for nursing home employees who blow the whistle on fellow staff or management.<sup>8</sup>

Mr. Chomiak brought forward a new bill, in the First Session of the Thirty-seventh Legislature, as promised. The stated purpose of Bill 7,<sup>9</sup> *The Protection for Persons in Care Act*, did match Mr. Chomiak's stated objectives. The explanatory note, included in Bill 7, speaks to a mandatory reporting of abuse, including suspected abuse (s. 3), investigations of abuse (ss. 5–8), and protection for persons who report abuse (ss. 10 and 11).<sup>10</sup>

## II. THE EVOLUTION OF PROTECTIVE LEGISLATION

OVER THE LAST DECADE, THERE HAS BEEN A consistent movement in Manitoba to throw open the doors on abuse of the elderly and vulnerable. *The Health Care*

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<sup>5</sup> "Management replaced after nursing home death" *National General News* (21 February 1997), online: QL (CPN).

<sup>6</sup> S. Edmonds, "Manitoba Bans Extra Billing" *National General News* (13 May 1998), online: QL (CPN).

<sup>7</sup> Bill 202, *The Protection for Persons in Care Act*, 1<sup>st</sup> Sess., 36th Leg., Manitoba, 1999.

<sup>8</sup> A. Bray, "Families hire help at nursing homes: Women spends \$2,300 a month on aide for mother at north end facility" *Winnipeg Free Press* (23 March 1999).

<sup>9</sup> Bill 7, *The Protection for Persons In Care Act*, 1<sup>st</sup> Sess., 37th Leg., Manitoba, 2000.

<sup>10</sup> *Ibid.*

*Directives Act*<sup>11</sup> was one of the first pieces of legislation that moved toward empowering previously disempowered individuals.

*The Vulnerable Persons Living with a Mental Disability Act*<sup>12</sup> was passed into law in 1998. This piece of legislation came about due to a challenge of Part II of *The Mental Health Act*<sup>13</sup>. Originally, Part II of this Act stated that a person could be placed in an institution without notice, by an order of indeterminate duration, without any involvement of the individual, if the person required "supervision."<sup>14</sup>

Concurrent with the movement to empowerment, in the 90s, the court system in Manitoba began to steer elder abuse cases through a specialized system allowing for the expedition of these types of cases. On 17 September 1990, the Family Violence Court ("FVC") began operation in Winnipeg. This court was the first of its kind in North America. It handles first appearances, remands, guilty pleas and trials for spousal, child, and elder abuse cases.

There are, however, few elder abuse cases that actually make it into the court system. Only 13 cases of elder abuse appeared before the FVC in its first year.<sup>15</sup> Statistics on the frequency of elder abuse indicate that approximately 2.2 per cent of the elderly in the province of Manitoba are subject to abuse. Abuse is defined in a 1982 Manitoba study as physical assault or rough handling, isolation or inadequate attention, misuse or withholding of finances, or theft.<sup>16</sup> This meagre statistic suggests that there is a lack of functional mechanisms currently available to help abused persons in home care achieve justice

*The Persons in Care Act*, with its affirmative duty to report abuse, may be the tool necessary to quickly intervene in abusive situations that up until now have gone un-litigated.

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<sup>11</sup> S.M. 1992, c. 33.

<sup>12</sup> S.M. 1993, c. 29 (as amended).

<sup>13</sup> S.M. 1998, c. 36.

<sup>14</sup> J. Knowlton, "Personal Decisions: is there a trend to empower the dis-empowered and to extend decision making?" (Competence and Capacity Conference: The 2000 Issac Pitblado Lectures, Winnipeg, 27 November 2000).

<sup>15</sup> J. Ursel, "The Family Violence Court of Winnipeg" (1992) 21 Man. L. J. 100 at 10.

<sup>16</sup> "Lifestyles Interest" *National General News* (3 January 1987), online: QL (CPN).



### III. LAW REFORM COMMISSION REPORT ON ELDER ABUSE

IN 1999, THE MANITOBA LAW REFORM COMMISSION released an extensive report, entitled *Adult Protection and Elder Abuse*.<sup>17</sup> The project originated from a request by the Age and Opportunity Elder Abuse Resource Centre of Manitoba. The request specifically asked the Commission to investigate the current state of the law, "as it applie[d] to abuse of the elderly in the province of Manitoba."<sup>18</sup>

To this task, the Commission looked at the comprehensive adult protection regimes that exist in all of the Atlantic Provinces, and in British Columbia. They determined:

[W]hile comprehensive adult protection regimes may give agencies a "foot in the door" in cases of suspected or actual adult abuse or neglect, such regimes appear to compromise individual autonomy and due process rights.<sup>19</sup>

The Commission, for this reason, did not recommend that a comprehensive legislative scheme be adopted in Manitoba. The Commission gave no specific recommendation to enact legislation to protect Manitoba's elders in care facilities, nor did they offer suggested content for any future legislation. Although it is not clear that Manitoba's drafters relied on the *Adult Protection and Elder Abuse* report, when drafting Bill 7, the bill's emphasis on protecting the autonomy of personal care home clients suggests the drafters were cognisant of existing paternalistic legislation.

### IV. DRAFTING BILL 7

IN MANITOBA, THERE ARE THREE GROUPS involved in the drafting process: Legislative Counsel, Manitoba Department of Justice representatives, and legislative analysts. These three groups sit down at various stages of the drafting process to discuss the potential ramifications and viability of proposed legislation. The consultation process includes canvassing selected "interested" groups for input. In the development of Bill 7, the Senior's Directorate of Manitoba was consulted. They operate an elder abuse hotline. The Public Trustee department was also consulted.<sup>20</sup>

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<sup>17</sup> Manitoba Law Reform Commission, *Adult Protection and Elder Abuse* (Working Paper 103) (Winnipeg: Law Reform Commission, 1999).

<sup>18</sup> *Ibid.* at 1.

<sup>19</sup> *Ibid.* at 101.

<sup>20</sup> Interview with D. Hill (17 November 2000) (Legislative Drafter) [hereinafter Hill].

The drafting process began at the request of the present Minister of Health, the Honourable D. Chomiak. The proposed bill went back to the minister many times during the drafting process for discussion on possible changes and to get feedback. The minister wanted this bill to be as effective as possible and he, internally, stated a willingness to consider any proposed amendment that would strengthen the bill's effectiveness.<sup>21</sup>

In designing the *Manitoba Act*, legislative drafters did turn to the existing Alberta model as a starting point in the drafting process. Alberta enacted legislation that specifically applied to individuals residing in personal care facilities in 1995. Alberta's statute is similarly titled *The Protection for Persons in Care Act*<sup>22</sup>

The Final Draft of Bill 7 included a number of important departures from Alberta's *Persons in Care Act*. These changes were made in response to feedback the Alberta Legislature had received post-enactment and to keep Manitoba's *Persons in Care Act* consistent with the wording of Manitoba's other health care legislation.<sup>23</sup>

## V. DEPARTURES FROM ALBERTA'S PERSONS IN CARE ACT

THERE ARE FIVE KEY areas where Manitoba's *Persons in Care Act* significantly diverges from Alberta's statute. Each of these areas will be discussed in-depth: highlighting some of the drafters' reasoning, interested parties commentary, and legal ramifications of the legislation.

### A. Definitions of Abuse

The first important departure is the definition of abuse in Manitoba's *Act*. Alberta's *Persons in Care Act* defines abuse to include only intentional actions:

- s. 1. In this Act, (a) abuse means
- (i) Intentionally causing bodily harm,
  - (ii) Intentionally causing emotional harm, including but not limited to, threatening, intimidating, humiliating, harassing, coercing or restricting from appropriate social contact,
  - (iii) Intentionally administering or prescribing medication for an inappropriate purpose,
  - (iv) Subjecting to non-consensual sexual contact, activity, or behaviour,
  - (v) Intentionally misappropriating or improperly or illegally converting money or other valuable possessions, or

<sup>21</sup> *Ibid.*

<sup>22</sup> S.A. 1995, c. P-19.5 [hereinafter *Alberta*].

<sup>23</sup> Hill, *supra* note 20.



(vi) Intentionally failing to provide adequate nutrition, adequate medical attention or other necessity of life without a valid consent:

In contrast, s. 1 of the Manitoba legislation defines abuse as follows:

“abuse” means mistreatment, whether physical, sexual, mental, emotional, financial or a combination of any of them, that is reasonably likely to cause death or that causes or is reasonably likely to cause serious physical or psychological harm to a person, or significant loss to the person’s property;

One of the drafter’s key considerations was to ensure that Bill 7 could thwart a repeat of the abuse at Holiday Haven. Under the Alberta Legislation’s definition of abuse, the assault by an incompetent resident upon another incompetent resident would not have been addressed, as the assault could not have been classified as “intentional.”<sup>24</sup>

Scholar, N. Inions notes that neglect of patients often involves intentional and unintentional behaviour. In reference to the Alberta legislation, she states, “[i]t may be particularly difficult for investigators to ascertain that intention existed in a particular case, without which an abuser cannot be held accountable under this legislation.”<sup>25</sup>

Another important consideration was to the need to promote consistency across the various health care acts of Manitoba. To this end, the legislative drafters pulled the definition of abuse out of *The Vulnerable Persons Living with a Mental Disability Act* and used it in Bill 7. This appropriation kept the wording consistent across these two pieces of legislation.

## B. Investigation Time Limits

The second notable difference between Alberta’s *Act* and Manitoba’s equivalent is the differing time requirements for reports to be filed. Alberta’s *Persons in Care Act* requires the following:

- s. 8 (1) the investigator must prepare a report for the appropriate minister on the progress of the investigation
- (a) within 30 days of the investigator’s appointment, or in the case of a referral under section 10, within 30 days of the referral, and
- (b) every 30 days thereafter until the investigation is complete.

Manitoba’s *Persons in Care Act* contains no reference to a specific time frame for the filing of reports. Section 12(3), however, does mandate that “a prosecution under this Act may be commenced not later than two years after the alleged offence is committed.”

On face value, this lack of mandatory timelines appears to exclude a sense of urgency from the investigative process. According to Ms. Hill, the legislative

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<sup>24</sup> Hill, *supra* note 20.

<sup>25</sup> N. Inions, “A Commentary on the Protection for Persons in Care Act” (1999) 8 Health L. Rev. No. 2, 22 at 4.

drafter, it was felt that there might be circumstances where a 30-day reporting requirement would not be appropriate. And, there was a concern that the Act could be ruled inapplicable if the investigation took more than 30 days before a report was issued. An internal process rule was designed, outside of the legislation, which requires that the investigation be finalized within 30 days, whenever possible.<sup>26</sup>

### C. Mandatory Reporting

The third significant departure from the Alberta Act is in the area of mandatory reporting. Section 8(2) of the Alberta Act makes it mandatory for the minister, or the investigator, to refer a complaint to the police if they are of the opinion that the subject matter could constitute a criminal offence:

s. 8(2) Notwithstanding this section, if the appropriate minister or the investigator is of the opinion that the subject matter of the complaint could constitute an offence under the Criminal Code (Canada), the minister or the investigator *must as soon as possible* refer the complaint to a police service [emphasis added].

Alberta's Act has received criticism over this particular section, as it is seen to intrude upon the autonomy of competent adults. Inions notes that the ultimate decision to report should be left with the client. They are the most appropriate party to determine what is in their best interest.<sup>27</sup> Control over the reporting of abuse, has been taken away in Alberta without any requirement for client consent, consultation or other involvement.<sup>28</sup>

In Manitoba, such an intrusion into a competent adult's autonomy would not be consistent with the trend in health care reform, which, as previously noted, has moved toward empowering vulnerable individuals. *The Persons in Care Act* of Manitoba has no corresponding section compelling the minister or an investigator to refer the matter of abuse to police. Section 8(1) states,

"[o]n receiving an investigators report under section 7, the [m]inister *may give* the operator of the health facility involved any directions the [m]inister considers necessary to protect the patient from abuse [emphasis added]."

The use of the word *may* is significant. One of the concerns with zero tolerance policies, for the reporting of abuse, has been the stark lack of client involvement in the process. Mandatory reporting to police can have a chilling effect that effectively stops clients from reporting incidents of abuse. Many elderly people want the abuse to stop, but they do not want the perpetrator criminally charged. In order to accommodate patients' wishes, s.7(2) was adopted. It states,

<sup>26</sup> Hill, *supra* note 20.

<sup>27</sup> Inions, *supra* note 25.

<sup>28</sup> *Ibid.*, at 13.



"[w]hen making a report, the investigator shall try, to the fullest practical extent, to involve the patient and to determine and accommodate the patient's wishes."

Ms. Hill indicates that the s.7(2) requirement, that investigators ascertain the wishes of the victim before proceeding, stands in the way of a client's privacy being violated.<sup>29</sup>

## D. Reporting Structure

The fourth difference between the two pieces of legislation involves each Act's reporting structure. Manitoba's *Persons in Care Act* was designed to funnel all initial complaints through the minister, or the minister's delegate, as per s. 14. This decision was made, according to Ms. Hill, to weed out superfluous complaints that originate from a lack of procedural understanding.<sup>30</sup> Under the Alberta Act, complaints are dealt with by the minister's delegates.

A review of Alberta's *Persons in Care Act*, after being in force for eighteen months, shows a total of 1176 reports have been made under this legislation.<sup>31</sup> "The highest incidence of alleged abuse by type was emotional abuse (775), followed by physical abuse (613). The two highest incidences by category of abuser were abuse by staff (593) and abuse by residents (510)."<sup>32</sup> Such high numbers can lead to a backlog of investigations and destroy the effectiveness of the legislation.

It remains to be seen whether the Minister of Health for Manitoba can realistically accomplish a funnelling process, and if not, to whom the minister will delegate this responsibility [see postnote].

There is no provision in place that outlines the qualifications required of either the minister's delegate or investigators, appointed under the Manitoba Act. This lack of clarification leaves the door open on whether the appointed individuals will have the necessary investigative skills, reasonable background in health care, and working knowledge of the legal concepts embedded in this Act.

## E. Scope of Disciplinary Actions

A fifth difference between the two Acts involves the scope of disciplinary actions that each Act allows.

Alberta's Act goes further than Manitoba's, in its scope of disciplinary abilities, by giving power to the investigator to recommend, under s. 8(3)(b), that the care agency involved in the complaint take disciplinary action against an employee or service provider. This power to recommend employee discipline

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<sup>29</sup> Hill, *supra* note 20.

<sup>30</sup> *Ibid.*

<sup>31</sup> Inions, *supra* note 25 at 9.

<sup>32</sup> *Ibid.*



may contravene unions' processes in place for disciplinary actions. According to Ms. Hill, the Alberta government has decided to back away from enforcing this particular section because of criticism.<sup>33</sup>

Inions points out that notification of the alleged abuser is not addressed within the *Alberta Act*.<sup>34</sup> I conjecture that this may not be a serious legislative deficiency as s. 11 of the *Charter* guarantees only "[a]ny person charged with an offence has the right (a) to be informed without delay of the specific offences." As the investigation occurs *before* a criminal charge is laid, lack of notice to an abuser would not appear to jeopardize the legislation.

Manitoba's *Persons in Care Act*, similarly, does not require that the alleged abuser receive notification of an investigation, or of its results. Section 9(1) states:

If the minister believes on reasonable grounds that the person has abused a patient or has failed to comply with a duty to report under section 3, the minister *may refer the matter* to the body or person that governs the person's professional status or that certifies, licenses, or otherwise authorizes or permits the person to carry on his or her work, profession or occupation [emphasis added].

The narrower scope of disciplinary actions in the *Manitoba Act* states the minister may refer the matter—but, the minister has no power to recommend disciplinary action, *per se*. This tightly scribed ministerial power will not supersede existing onus on employers to show just cause for terminations.

Even an allegation of abuse could be disastrous to a person's professional reputation. And, it is likely that some allegations will be motivated by malice. Although s. 12(2) of Manitoba's *Act* does outline the offence of making a false report, the offence only carries a maximum fine of \$2 000 on summary conviction. This penalty may not provide sufficient deterrence.

The lack of regulated standards of care may cause problems with fairly prosecuting persons found in breach of the *Act*. As breaches of the *Persons in Care Act* constitute regulatory offences, once charged, the onus is on the crown to prove the incident occurred, on a balance of probabilities.<sup>35</sup> Once the act is established, the accused may mount a due diligence defence, arguing she met a reasonable standard of care, on a balance of probabilities. The issue then becomes: what is a reasonable standard of care? Staffing levels are notoriously low in personal care facilities. In some circumstances, a reasonable standard of care may not be feasible until higher staffing requirements are legislated into action.

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<sup>33</sup> Hill, *supra* note 20.

<sup>34</sup> Inions, *supra* note 25 at 13.

<sup>35</sup> Virtually all regulatory offences are strict liability offences.



There are other mechanisms in place, in Manitoba, that give unionised employees protection from disciplinary actions. These protections must be considered in conjunction with s. 9(1) of the Manitoba Act. According to Mr. M. Craddock<sup>36</sup>, approximately 75 percent of personal care homes in Manitoba are unionised. These employees, predominantly members of CUPE, have the right to be notified of allegations that have been made against them, and the right to grieve employment terminations. The standard of proof required, by the employer, to meet its burden is "clear, convincing and cogent evidence" of the alleged act.<sup>37</sup> This standard is more rigorous than the civil standard. Employees may be found guilty of abuse, by a civil standard yet not guilty in a grievance arbitration of their termination. For this reason, the Act should not be perceived as hammer that can be used to terminate employees—it provides a civil remedy for acts of proven abuse.

In non-unionised personal care homes, there are no rules in place to ensure an employee knows that an investigation, involving them, is being conducted.<sup>38</sup>

## VI. BREACH OF A PATIENT'S CHARTER RIGHTS

AT ISSUE, WITH THIS STATUTE, is the right of the minister to gather facts prior to the initiation of an investigation. There is no legislated protection for the alleged victim or abuser's privacy at the investigative stage of fact-finding. This, however, may be a moot point. If a crime has been perpetrated, the personal home care attendant may not have standing to challenge the fact-finding actions. In *R. v. Edwards*<sup>39</sup>, Cory J., writing for the majority of the Supreme Court of Canada, stated that a claim for relief under s. 24(2) of the *Charter*<sup>40</sup> can only be made by a person whose *Charter* rights have been infringed.

The appellant in *R. v. Edwards* was convicted of drug possession, after his drugs were found in his girlfriend's apartment. Edwards argued that his girlfriend's *Charter* rights had been violated, by the unauthorized search of her apartment, and as such the evidence obtained should be ruled inadmissible. The Supreme Court of Canada held Edwards did not have standing, noting in paragraph 55 of

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<sup>36</sup> Interview with M. Craddock (19 November 2000) (National Representative, CUPE, Health Care Sector) [hereinafter Craddock].

<sup>37</sup> *Manitoba Development Centre (Re)*, [2001] M.G.A.D. No. 8 (D.I. Marr, arbitrator).

<sup>38</sup> Craddock, *supra* note 36.

<sup>39</sup> [1996] 1 S.C.R. 128 [hereinafter *Edwards*].

<sup>40</sup> *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982 (U.K.)*, 1982, c. 11.

the decision, “s. 24(2) provide[s] remedies only to applicants whose *own* Charter rights have been infringed.”<sup>41</sup>

In the context of Manitoba’s *Persons in Care Act*, if a resident’s privacy is invaded in order to secure evidence for a conviction, the alleged perpetrator can not argue that the evidence is tainted due to a breach of the patient’s Charter right—for example, the unreasonable search and seizure of a patients records.

It is up to the minister, and the delegated investigator assigned to the case, to forward information to the Crown. The breach of a client’s privacy may simply be deemed necessary for the fulfilment of justice and the protection of society.

## VII. REGULATIONS?

SECTION 13 OF THE ACT STATES THE Lieutenant Governor in Council may make regulations “(b) respecting any matter the Lieutenant Governor in Council considers necessary or advisable to carry out the purposes of this Act.” According to Ms. Hill, there are no *Persons in Care Act* regulations under development.<sup>42</sup> The government, however, is currently piloting a standards manual for personal care facilities.<sup>43</sup> This is a three-year project, and the standards will eventually be enacted by an Order in Council, attaching them to *The Health Services Insurance Act*.<sup>44</sup>

A review of health care regulations found only one that applied uniquely to personal care homes and no regulations on standards or guidelines that apply specifically to the operation of such care homes. The *Personal Care Homes Designation Regulation*<sup>45</sup> was registered on 11 August 2000 and it is attached to *The Health Services Insurance Act*. It provides a list of facilities in Manitoba that have been designated as personal care homes. This registration clarifies which facilities Manitoba’s *Persons in Care Act* will apply to when it comes into force in January 2001.

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<sup>41</sup> Edwards, *supra* note 39.

<sup>42</sup> Hill, *supra* note 20.

<sup>43</sup> *Ibid.*

<sup>44</sup> C.C.S.M., c.H35.

<sup>45</sup> Man. Reg 108/2000.



## VIII. DISCUSSION AT FIRST READING

THE HONOURABLE DAVE Chomiak introduced Bill 7 with a short speech. He indicated that he was honoured, on behalf of the government, to introduce this bill, particularly because one of the individuals who had inspired the proposed legislation was in attendance.<sup>46</sup> The minister referred to the fact that this individual had first visited him, concerning the abuses that occurred at Holiday Haven personal care home, when he was a member of the official opposition. The minister recalled how this individual “had implored [his party] to have a bill of this type to allow for protection of employees and others who need and may require from time to time, on those rare occasions, to be able to report matters of this kind.”<sup>47</sup> To this end, Bill 7 creates a duty on service providers and others to report the abuse of patients and creates protection from personal liability, illegitimate employer disciplinary actions, and interruption of service for clients who report abuse.

## IX. DISCUSSION AT SECOND READING

MS. DREIDGER, MEMBER FOR CHARLEWOOD, raised a number of concerns with the legislation’s initial form. She took exception to the wording in s. 3(1) that imposes a duty to report when a patient is “likely to be abused”. Ms. Dreidger commented, “How can somebody act on somebody’s personal and subjective opinion? Where are the reasonable and probable grounds?” Where is the evidence and onus of proof?<sup>48</sup>

Ms. Dreidger’s key concern with Bill 7 was that it did not balance or protect all stakeholders’ rights, particularly the rights of alleged perpetrators. She wanted to see a penal consequence for malicious reporting of abuse included in the Act.

Ms. Dreidger also referred to the perception of fairness. She asked if there were enough safeguards in the legislation to ensure independence from ministerial influence. Her perception was that Bill 7 gave the health minister power to be “judge and jury”<sup>49</sup> for the minister must authorize any investigation under s. 5(1) of the Act. It states, “[o]n receiving a report of abuse under the Act, the minister shall inquire into the matter and shall consider whether a more extensive investigation is warranted.”

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<sup>46</sup> Manitoba, Legislative Assembly, *Debates* (25 April 2000) (Hon. D. Chomiak).

<sup>47</sup> *Ibid.*

<sup>48</sup> Manitoba, Legislative Assembly, *Debates* (24 July 2000) (M. Dreidger).

<sup>49</sup> *Ibid.*

Ms. Dreidger pointed out that the Act neither adequately defined “investigator,” nor did it list the qualifications necessary to be appointed as an investigator. She commented:

I think that it would have been much more prudent to have [qualifications] defined more clearly in the Act in order to ensure fairness, balance, and a proper understanding by the investigator as somebody who understands the nuances of health care for individuals, particularly those with complex physical and other cognitive care implications.<sup>50</sup>

Finally, she noted that protection of a patient’s privacy needed further discussion.

## X. DISCUSSION AT COMMITTEE STAGE

ILLUMINATING INFORMATION ON THE DEVELOPMENT of Bill 7 is contained in the standing committee’s report.<sup>51</sup> Eleven members of the committee were present to discuss Bill 7. The committee hearing was held 48 hours after the second reading. Although no private individuals made presentations during the discussion of Bill 7, the forum did, however, provide an opportunity for discussion of the policy reasons behind some of the Act’s wording. For example, the phrase “likely to be abused” was included intentionally, according to the Hon. D. Chomiak, as a preventative measure; in order to catch threats of abuse under *The Persons in Care Act*’s mandate.

Ms. Dreidger moved that a clause be added following s. 5(3), entitled “notice to others.” She proposed that it require the minister to notify the health facility where the suspected abuse is occurring and the person suspected of committing abuse (with some reservations). This clause was suggested as a way of protecting the alleged perpetrator’s rights and of reinforcing the care facility’s duty to rectify a potentially abusive situation as soon as possible. The clause would also prevent having to wait for a report to be completed and filed with the minister before notice was given. The motion was withdrawn after it was agreed that the issue would be discussed with the legislative drafters. No further discussion of this issue occurred. Possibly, it was determined that the CUPE collective agreement, that governs most personal care homes, requires immediate notification, as discussed previously.

On the issue of legislating qualifications for investigators, Mr. Chomiak advised the committee that there was no precedent in Manitoba for this type of criteria in Manitoba’s regulatory bodies or throughout Manitoba’s other health care legislation.

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<sup>50</sup> *Ibid.*

<sup>51</sup> Manitoba, Legislative Assembly, *Debates* (26 July 2000) (Standing Committee on Public Utilities and Natural Resources).



A final concern was raised by Ms. Dreidger regarding the lack of disclosure on what regulations will be attached to the bill. A regulation is usually made or approved by the Lieutenant Governor in Council, a minister, an individual, a board, or commission whose members are appointed under legislative authority. Accordingly, the *Persons in Care Act* of Manitoba enables the Lieutenant Governor in Council to make regulations, for an undisclosed range of matters.

## XI. AMENDMENTS AT REPORT STAGE

TWO MOTIONS TO AMEND BILL 7 WERE put forward by the Hon. D. Chomiak at the report stage of the legislative process.<sup>52</sup> One amendment reduced the maximum fine, payable by an individual, to \$2 000 from \$10 000. It became s.12(1)(a) of the Act. There was no discussion as to why this reduction was proposed or accepted. The second amendment came as a result of Ms. Dreidger's concern regarding malicious reporting. Section 12(1.1) was added and, somehow, it became s. 12(2) of the Act: "A person who makes a report of abuse under this Act, knowing it to be false, is guilty of an offence and is liable on summary conviction to a fine of not more than \$2 000."

## XII. DISCUSSION AT THIRD READING

MS. DREIDGER ROSE TO OFFER one last substantive commentary on the remaining areas causing her concern.<sup>53</sup> She noted that many of the amendments she had put forward in the committee hearing had originally been in the private member's Bill 202, a product of Mr. Chomiak in his past as opposition health critic.

It is unclear whether Ms. Dreidger actually had knowledge of the drafters' rationale for altering the wording of key sections found in the initial Bill 202. Specifically, she continued to suggest that the minister of health be obligated to report, as soon as possible, complaints of abuse to police service. This indicated that she did not fully understand the empowerment afforded to patients, under s. 7(2).

Ms. Dreidger reiterated her concern that this Act puts the minister of health in a "micromanagement" position regarding reports of abuse in personal care facilities.<sup>54</sup> And, she echoed her original concern that criteria for the selection of investigators were not included in the legislation.

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<sup>52</sup> Manitoba, Legislative Assembly, *Debates* (15 August 2000) (Report Stage of Standing Committee on Public Utilities and Natural Resources).

<sup>53</sup> Manitoba, Legislative Assembly, *Debates* (17 August 2000).

<sup>54</sup> *Ibid.*

### XIII. CONCLUSION

THE PROTECTION FOR PERSONS IN CARE ACT of Manitoba has securely met its honourable objectives. The legislation is clearly worded, and purposive in design. The distinct lack of legalese makes the legislation usable by clients and employees in the nursing home industry. The Act is able to function as an education tool, to help individuals equip themselves with an understanding of their rights and obligations under the law.

Although many care facilities had mandatory “abuse reporting” directives in place, such policies were not an industry requirement. Employees, themselves, were often at risk for termination if they decided to become a “whistle-blower” on abuses they witnessed. Section 2, the duty to protect patients from abuse, and s. 3(1), the duty to report abuse, now provide global protection for all residents of care homes.

The fact that this Act was passed speaks well of Manitoba’s commitment to the protection of the vulnerable citizens in our province. The mandatory reporting of abuse to the minister of health, however, might prove itself to be an unwieldy bottleneck in the process of investigation. And, depending on the number of investigators the minister appoints, the consistency between investigations is an issue that may need to be addressed in the future. Perhaps, the matter could be dealt with by the enactment of investigation regulations.

The concerns raised throughout the discussion of Bill 7 were for the most part articulate and relatively informed. In future, it would assist the debate to ensure that all Members of the Assembly are apprised of the legal rationale behind the legislative drafters’ choice of provisions and specific wording.

### POSTNOTE: SEPTEMBER 2001

In May 2001, the government announced that a 15-member team of investigators had been assembled to look into allegations brought to the Protections of Persons in Care office, which opened on 1 May 2001.<sup>55</sup> The appointment of ministerial delegates does address the concerns raised by s. 14 of the Act. This section states that all initial complaints must be funnelled through the minister, or his delegates. Although it is clear that the infrastructure is in place, it is too early to determine its effectiveness.

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<sup>55</sup> M. Rabson, “Province Protects People in Care Homes” *Winnipeg Free Press* (1 May 2001).



## 260<sup>s</sup> UNDERNEATH THE GOLDEN BOY