



Interview with Roland Penner ¹⁴⁷

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I would like to see a set four-year term. This way there is no fooling around with, "well, we'll do the unpopular stuff in our first year, and then gradually do better things so that when we are back on the public's good side, we can call an election." This is no way to run a province.

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I. INTRODUCTION

Roland Penner has been teaching law at the University of Manitoba for more than thirty years and served as a cabinet minister under former Premier Howard Pawley from 1981 to 1988. While serving in government, Professor Penner held key cabinet positions including Attorney General and Minister responsible for Constitutional Affairs.

An active participant in many of Manitoba's more notable legislative events, Roland Penner sat down with us to share his memories of how some of these events unfolded and provided a rare glimpse into the challenges faced by a government when an initiative is met with opposition.

II. THE FRENCH-LANGUAGE DEBATE

The bell-ringing incident, of course, was the twelve days of bells during the French-language debate. Can you give us just a brief introductory idea of your views on how the whole debate played out?

¹⁴⁷ Interviewed by E. Melrose (23 July 2002).

Penner: It played out substantially through ignorance—I use the word in its widest sense. Perhaps I should use the term ‘not knowing’. When I became Attorney General, the Bilodeau case had already been decided against Bilodeau at the Manitoba Court of Appeal. But I knew nothing about the Bilodeau case whatsoever. Then, not long after I became Attorney General, the then Clerk of Council, Michael Decter, called on me and said ‘I want to talk about the Bilodeau case with you.’ And he brought in from University of Ottawa, Joe Magnet, the constitutional law scholar, who hoped to make a career for himself in Manitoba through the Bilodeau case. He was being retained by the Society Franco-Manitoba (SFM). They explained the Bilodeau case to me and I realized we were bound to lose, on his challenge on constitutional grounds (heading to the Supreme Court). I came to the conclusion that we had to lose on constitutional grounds, i.e. the deliberate failure since 1890 of the legislature to enact laws in both official languages. What I didn’t think of fully was the consequences of a loss in Court. I assumed that in fact we would be faced disastrously with the complete disallowance of all Manitoba laws. It never occurred to me, as perhaps it should have, that the Supreme Court would not allow that to happen. I never thought far enough to see they could and would do what they ultimately did, namely suspend the declaration of invalidity for a certain period of time allowing us time to translate and re-enact. I was persuaded, perhaps far too easily, by Joe Magnet and Decter and people from the SFM that there was an “easy” and a principled solution, and the solution was that if we would agree to introduce a resolution to amend the *Manitoba Act* (the province’s constitution) to expand French language services, then Bilodeau would not go ahead with his challenge to Manitoba’s laws before the Supreme Court. We would not have to translate and re-enact all of the affected laws, just the major modern operative ones.

I began a long series of meetings with representatives of the SFM and their lawyers. There was a lot of going back and forth as to the kind of amendments that might be acceptable and I was getting wise enough to want a rather minimum package. But the SFM and its legal representatives thought they had the Government of Manitoba in a hazardous situation and they were pushing pretty hard.

Another mistake I made was insufficiently consulting Caucus and Cabinet. Caucus had no idea of what was going on, other than through the newspapers, and it might well have been the case that if I had involved Caucus and Cabinet more fully early on, then some of those like Vic Schroeder who pounded the table and said “this is like putting a bull in a china shop” would have perhaps tempered the unrealistic view that I had before I had committed us as much as I had. But I really thought the Franco-Manitoban minority had been dealt with very poorly, that we should resolve it in a rational way and I didn’t realize

sufficiently that no matter how right we might be in terms of constitutional law, politically we were dealing with irrational feelings, not rational reasoning on constitutional issues. I was arguing the constitutional issue, and I was right academically (as the Supreme Court eventually decided), but politically I was not astute enough to realize strongly political, even to some extent Franco-phobic, passions were being played out.

When I finally presented the total package to Cabinet there was so much paper, technical stuff and so on, that most members didn't fully comprehend the legal stuff. So, this leaky boat was launched on troubled waters. And, of course, as soon as the issue hit the fan, the opposition strenuously objected but from different points of view. Some were opposed ideologically. Most, I would think just opportunistically, thought this could defeat the government and that the opposition should do everything to make sure that this becomes a hot button political issue from which the NDP would never recover. In the short term, they were wrong in the result because in the next election (the 1986 general election), we were re-elected and I was re-elected. But we lost a couple of seats, including Andy Anstett's seat.

One of the reasons why we lost Andy Anstett's seat was that, as the debate on the French language issue proceeded, the wise people around the Premier put their heads together and said we've got to take Penner off the issue. He's too hot. We've got to put someone else in as House leader, someone who will carry the debate and not appear to be as controversial as Penner. Maybe that will get us out of this mess. So, they put Andy Anstett in as House leader. And poor Andy was front and center and he got defeated in the next election.

I went down to Ottawa during the bell ringing incident and met with Jean Chrétien, who was then Minister of Justice, to discuss the idea that the federal government should refer the matter to the Supreme Court. Eventually the matter of the validity of Manitoba's laws was referred to the Supreme Court. In a brilliant opinion written by Mr. Justice Dickson, the Court stretched the concept of the rule of law to require that there must always be operative law in Manitoba. For this reason, the effect of the judgment was suspended for three years so our laws would remain in effect until translation and re-enactment could take place.

What were your views on the opposition tactics used during the French Language debate?

I thought they were doing the "right thing" politically, but I certainly thought they were wrong on the principles involved. I thought the Speaker was wrong entirely, allowing the bells to ring. In my view, and we had done a lot of looking

at British and other Canadian precedents and so on, this was not proper Parliamentary procedure, and I deeply resented the opposition's holding the legislature for ransom, assisted by the Speaker's ruling. There are many things that government can do on its own, but you can't run the province by government, you have to run the province by the legislature, especially when, at some point, you will need budgetary approval and things of that nature. We were completely stymied and had no other course but to agree to a Court reference.

You felt Speaker Jim Walding should have intervened at some stage to stop the bells and force a vote to be taken?

Yes, definitely.

Some have suggested there may not have been precedents for the Speaker to intervene?

I can't cite the precedents now, but we certainly had them thoroughly researched, and we had Andy Anstett, who had been a Deputy Clerk and quite an expert on these matters, who researched and found the precedents.

Once the decision was made to prorogue the House, was there any consideration given to re-introducing the bill in the next session, or was it just left to the Supreme Court to decide?

What happened is Sterling Lyon, leader of the opposition, would frequently say during debate in the House, "let the courts decide, let the courts decide". Eventually the courts did decide, upholding the contention I had argued in the House, namely that all of Manitoba's laws passed in the English language only were, constitutionally, invalid. The day following the Supreme Court ruling, I rose in the House and said something to the effect of, "well, the courts have decided" and Sterling Lyon said something to the effect of, "what do they know?" So, the issue was really resolved by the Court and there was no point in re-introducing the Bill. In fact, it would have been political suicide to do so. It was close to that already. We were more than fortunate to be re-elected in the 1986 election.

Is there anything you would do differently in hindsight in how the matter was handled?

I would not have proposed to resolve the problem by amending the *Manitoba Act*. Once it became clear this was going to be politically a big issue for the opposition, and there was some polling to indicate it was not popular with the public—in fact, there was some opposition even within our own caucus—the

thing to do was to withdraw it and, at least in these circumstances, let the Court decide as Sterling Lyon suggested.

III. AMENDMENTS TO THE HUMAN RIGHTS CODE

The next fairly major initiative you undertook as Attorney General was the inclusion of sexual orientation in Manitoba's Human Rights Code.¹⁴⁸ Can you briefly outline how that issue was placed on the agenda?

We inherited a pretty good *Human Rights Act* which had been enacted by the Schreyer government. We commissioned a study led by Faculty of Law professor Dale Gibson which study proposed major amendments to the Act. There were some major issues that had to be addressed including the addition of sexual orientation as a prohibited ground of discrimination. We had a number of people working on the study, including Claudia Wright and Marek Debicki. Dale Gibson prepared the first draft and included in the draft, among other matters, was the issue of adding sexual orientation as a prohibited ground of discrimination. And I myself, both politically and on principle, was very committed to this issue.

The first time I brought the issue to caucus, the majority of Caucus was very wary, very divided. The first time I presented it, I did not get a majority vote in caucus. About a year later, having worked day after day on the drafting of the bill designed to re-enact a totally new *Human Rights Code*, finally a majority of caucus who were present (and not everyone was present) agreed to the package including the sexual orientation section. But thereafter, there was a reaction from those members of caucus who had not been present at that meeting to try and persuade the Premier particularly to pull that section out. There was a lot of debate in caucus and delegations came into caucus on the issue and the Premier was beginning to waver.

Finally, a number of the political staff, led particularly by Ginny Devine, went to the Premier and said 'you've got to let this go through.' They were very eloquent, very persuasive, and very principled and Howard said, "Okay, we have to do this!" So finally, we put the package forward in the 1987 session and the opposition thought they had another French language hot button political issue and were organizing themselves to oppose it. They didn't want to be seen as opposing the whole package. They focused their opposition on the sexual orientation issue.

¹⁴⁸ Bill 47, *The Human Rights Code*, 2d Sess., 33rd Leg., Manitoba 1987 (assented to 16 July 1987).

The debate in the House would have been okay except for Don Orchard. He was just vicious about this and he stood up with some scandalous book about the practices of homosexuals in bathhouses in New York and he was reading this stuff into the record in a vicious sort of way and that, to put it mildly, was something less than illuminating. On the other hand, in the last hours of debate, a number of people in our caucus who had been uncertain about the issue gave some of the finest speeches I've ever heard saying the issue was not one of sexual orientation, the issue was discrimination and there should not be discrimination on any grounds.

Was the opposition, from not only the official opposition but also the public, something you had anticipated?

Yes, I had anticipated it. It was clear from the reaction we had within our own caucus right from the beginning that this was not going to be an easy thing.

IV. THE DEFEAT OF THE PAWLEY GOVERNMENT

Shortly thereafter, in 1988, was Jim Walding's vote with the opposition to defeat the Government. Did this come as a complete surprise to you?

No, it didn't come as a complete surprise. I must say I was a bit wary about Jim and I knew he was deeply disappointed that people like myself were immediately put into Pawley's first cabinet but he wasn't. He was named Speaker, but I believe he may have viewed that as something less of a challenge. What became really clear was that he was bitterly opposed to us on the French language issue. He really didn't think we had to go one step further than the law was at the time—no need for additional French language services or anything else. When he was replaced by Myrna Phillips as Speaker it was clear he was even more bitter, sitting deep in the back benches always glowering.

On the day in question, I was already beginning to get a little nervous because some members of the opposition were looking like the cat that swallowed the canary. Opposition members seemed to know something was developing. Certainly, they sensed what was about to happen. And on the night in question, they made sure every single member was there. There was one member with a broken leg who had missed a number of sessions, but they made sure and they carried him in for this one. And they were just all smiles on the front bench before the vote. Then as the vote came around and it finally came to Walding and he voted in favour of the opposition amendment, they just couldn't contain themselves.

Was there some discussion back in the caucus room as to what to do next or was it fairly clear there was only one thing to do?

When we went back to the caucus room, I think there was no question. I can't remember many or even any voices being heard saying let's persist. We all knew what had just happened.

V. INSIDE THE LEGISLATURE

There are some concerns there is presently too much power in the Prime Minister's or Premier's office and that backbenchers largely do what they're told to do. Do you believe this is true, and do you think this is a good thing?

One has to differentiate between the federal level, and the current situation with the current Prime Minister, and the provincial level. Currently, there's no doubt that the Prime Minister has far too much power. The Prime Minister is the one who appoints members of Cabinet. The Prime Minister and the Prime Minister alone decides who will be appointed to the Senate. The Prime Minister and the Prime Minister alone decides who will be appointed to the Supreme Court of Canada. You could keep going. Enormous power. And that power, of course, influences the caucus because those that are not members of Cabinet, and would like to be, have to behave and, particularly if they have a person like Chrétien, toe the line. Provincially, I suppose it varies from province to province depending on the traditions of the province and the style of the leader. Mike Harris, the previous Premier in Ontario, had pretty close control of his caucus; Ralph Klein, Premier of Alberta, to a lesser extent because Klein is something more of a democratic politician. Gordon Campbell in B.C., I think, is not much of a democratic politician. Howard Pawley was very much a consensus politician. If there was ever a caucus that had a voice, it was the caucus led by Howard Pawley.

Currently, caucus whips play a fairly significant role and make sure backbenchers, all members of a caucus, will tow the party line. Do you think the power of the whip should be reduced so backbenchers and other MLAs can feel free to vote with their consciences or constituencies, or is there some benefit to knowing how members of a particular party are going to vote?

Much of why people vote for 'Smith' instead of 'Brown' may have to do with how much 'Smith' is liked in the community, but far more is attributable to Smith's politics. People will determine if they're going to vote Liberal or NDP. So, Smith is elected because he's Smith, but also because he's NDP. He's elected to be a member of the NDP caucus. I believe Smith should be able to play a powerful and independent role in caucus in the debate that ought to take

place, and usually does, on legislative policy. Each member of caucus should be able to play a major role and there should be votes in caucus and the government should not go ahead if there is some split in the caucus until they've resolved it in some way. Once caucus has resolved an issue as a matter of caucus policy that this is what we're going to do, then I believe there should be a whip. It may well be the case that an issue, such as sexual orientation, will raise a matter of deep religious conviction. There, I think, that someone who says to caucus, 'I simply cannot vote for this initiative on religious grounds; if you want I will not vote at all,' I believe that member should be allowed to abstain or say no without discipline.

Do you think an opposition still has tools available to stall and make a fuss to make a political point, or have those tools been gradually whittled away and, if you have a majority, you can pretty much do whatever you want?

The latter. If you have a majority, you will ultimately prevail, particularly with the ability to move closure and bring a bill to a vote, now that the House cannot be held up by the failure of the opposition to attend for a vote.

But, with our current first past the post system, you can have a majority government elected with less than 40 percent of the popular vote, and we've seen that on a number of occasions. So, you have a majority elected with significantly less than a majority of the vote, but they now have the power to do whatever they want.

That's a matter of deep concern to me. I am currently working on an article on judicial power, because there has been a lot of debate about judicial activism, particularly from social conservatives who don't like many of the *Charter* decisions of the Supreme Court. So, they are saying this is incredibly undemocratic; we should leave everything up to Parliament. The rule of law encompasses the supremacy of Parliament. I say in response: "let's talk about the supremacy of Parliament and whether or not Parliament is fully democratic". Number one, if you're lucky, in a general election you'll get a 70 percent turnout at the polls, the government could get a commanding majority with 40 percent of those votes, so they're there by the will of 28 percent of voters. More importantly, who runs the country? It's cabinet, not caucus. Who runs cabinet? It's a Prime Minister with a huge amount of power. To my knowledge, there is no other Prime Minister or President in the democratic world who has as much power as the Prime Minister in Canada. It is assumed that Parliament is a much more democratic arena than the courts, but look beneath the surface. A lot of improvements could be made in the first past the post system. Let's not be so bemused by the appearance of democracy that we mistake it for the real thing.

VI. PROPOSALS FOR REFORM

One proposal is the introduction of some form of proportional representation—for example, the introduction of an additional number of seats that would be used to compensate parties which were underrepresented by the first past the post system. What are your views on that kind of system?

I don't have any strong views, at least not in particular. I just feel the present system is inadequate; indeed I would go so far as to say the current system is undemocratic. The true feelings of the electorate are not represented. Almost everyone would agree something should be done. Precisely what, I don't know. It has been said that the introduction of a PR system could result in a multitude of parties, where even small single issue parties will obtain some seats and hold the balance of power. So there is a real danger in strict PR, a danger that the Government will be held up to political ransom. How to resolve that, I don't know.

As a final question, if there was one improvement you could make to how the legislature functions, what would that improvement be?

I would absolutely like to see a definite sitting time, or calendar, introduced with exceptions, of course, for calling the House to consider emergency measures. For example, a rule that the House must meet from January 15 until June 30 and then again from September 15 until December 1. I would also like to see a set four year term. This way there is no fooling around with, "well, we'll do the unpopular stuff in our first year, and then gradually do better things so when we are back on the public's good side, we can call an election." This is no way to run a province. There should be less consideration given to popularity with the public at particular times of a mandate, and more consideration given to what is in the best interests of the province at any given time.

