

The Charter Compliance Act

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I. INTRODUCTION

Bill 34—*The Charter Compliance Act*,¹ was introduced into the Manitoba Legislature on 6 June 2002. It passed first, second, and third readings without debate but was met with much media attention along the way and finally met official, as well as public, opposition at the Standing Committee on Law Amendments hearing on 24 July 2002. Nonetheless, Bill 34 was given Royal Assent without amendment on 1 August 2002, with many of its sections declared to come into force on 1 January 2003.

This bill amends 56 pieces of Manitoba legislation (see Appendix A) concerning the rights and responsibilities of common-law couples and brings these acts into compliance with the *Charter of Rights and Freedoms*.² In recognizing same-sex relationships, the law has been steadily broadened in recent years due to constitutional challenges to the existing legislation. Many of these challenges have ultimately been decided by the Supreme Court of Canada, which has consistently ruled against discrimination on the basis of sexual orientation. Rather than continuing the time consuming and costly practice of having individual pieces of legislation declared to be of no force or effect by the courts, a recent SCC decision, *M. v. H.*,³ ordered a proactive solution: to amend the offending legislation to comply with the new grounds of discrimination. Because of this, Manitoba's legislation had to be changed to ensure that it did not discriminate on the basis of sexual orientation or relationship status. Many of the amendments in Bill 34 add the definition of 'common-law partner' in s. 1 (the definition section) of existing acts, and add 'or common-law partner' directly after every usage of the word 'spouse.' According to a presentation made to the Standing Committee on Law Amendments, these amendments make

¹ S.M. 2002, c. 24.

² *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 [*Charter*].

³ [1999] 2 S.C.R. 3 [*M. v. H.*].

Manitoba's legislation "the most comprehensive in Canada, perhaps even the world"⁴ with respect to recognizing the rights and responsibilities of common-law couples.

Two different reasons for the emergence of this bill have come to light and, along with introducing these theories, this paper will explore the media and public attention this bill generated, the interesting position the Official Opposition took, and the merits of this legislation.

II. THE BILL ITSELF

Bill 34 amends 56 statutes in all, ranging from *The Adoption Act*⁵ to *The City of Winnipeg Act*.⁶ Generally speaking, this *Act* amends the other acts so that they include common-law couples that were previously excluded both formally (literally) and substantively (effectively). This has produced extended rights as well as duties for common-law couples. Even while conferring both benefits and burdens, this legislation has been welcomed by the gay and lesbian communities as a necessary step towards full equality. There was, however, a vocal minority who protested against the amendments, and their concerns will be discussed later in this paper.

A thorough analysis of the effect of each amendment is not within the purview of this paper. Accordingly, only some of the especially significant amendments will be highlighted. *The Adoption Act*, as it previously stood, enabled a homosexual person to adopt a child alone, but they were precluded from adopting jointly with their same-sex partner. To adopt jointly under that *Act*, they were required to submit either a marriage certificate, or a declaration that they had been living together as 'husband and wife.' This terminology expressly excluded same-sex couples. Sections 1(1), 1(2), and 1(3) of Bill 34 amended *The Adoption Act* by adding the definition of 'common-law partner' and broadening the definition of 'extended family' in s. 1 of the previous *Act*. This eliminates the exclusive language previously used, and makes it possible for same-sex common-law couples to adopt jointly, and also to adopt the child of their same-sex partner, which was previously not allowed. These changes extend further than this, however, and enable any two people to adopt jointly "where at the time the application is made (i) they are jointly caring for and maintaining the child, and (ii) either applicant has had care and control of the child and has maintained the child for at least two consecutive years."⁷ This goes

⁴ Manitoba, Legislative Assembly, *Hansard*, (24 July 2002) (Karen Busby).

⁵ C.C.S.M. c. A2.

⁶ S.M. 1989–1990, c. 10.

⁷ *Supra* note 1 at s.1(27).

beyond extending equality rights to common-law partners and enters into the realm of expanding adoption possibilities generally.

One responsibility that this legislation imposes that seems contentious at first blush but has been welcomed by those who spoke in support of the bill is that of the mandatory disclosure of any conflict of interest. Some legislation requires disclosure of relationships that would or could influence a decision or opinion. For example, *The Civil Service Act*⁸ requires a city council member to disclose any relationship—personal, financial or otherwise—that may affect their voting or opinion on matters relating to those relationships. Thus a relationship must be disclosed, even if this means that relationship status or sexual orientation is revealed. This has been termed unnecessary ‘outing,’⁹ and the Manitoba Association of Women and the Law (MAWL) was a proponent of avoiding this¹⁰ until it was discovered that the gay and lesbian communities, whom MAWL thought they were advocating on behalf of, disagreed.¹¹ The Hon. A.C. Hamilton, commenting on the position taken by the gays and lesbians that the Review Panel spoke with, had the following to say:

whether they were aware of the Women and the Law presentation or not, [they] said there should be no exceptions or special provisions for gays or lesbians who are reluctant to make their relationship known ... people, whoever they are and whatever their sexual preference may be, who are concerned about disclosing their assets or personal living relationship, should either not enter public life or should be prepared to accept and abide by the law like everyone else.¹²

This sentiment was repeated at the Standing Committee on Law Amendments hearing for Bill 34. Kristine Barr, a private citizen and school board trustee presenting at the hearings, said that she felt it was very positive and very important to have this obligation to disclose spelled out in Bill 34, stating:

As a local school trustee, I am happy to see that my obligations regarding conflicts of interest have been clarified. It is only fair, just, and in the public

⁸ C.C.S.M. c. 110.

⁹ ‘Outing’ refers to having one’s sexual orientation revealed by someone or thing other than oneself.

¹⁰ Bonnie Macdonald, “Unequal Treatment of Same Sex Couples: Rights Denied” Manitoba Association of Women and the Law (April 2001).

¹¹ Manitoba, Legislative Assembly, “Review Panel on Common Law Relationships: Opinion of Hon. A.C. Hamilton Q.C., LL.D.” by Hon. A. C. Hamilton, (20 December 2001), online: <<http://www.gov.mb.ca/justice/publications/commonlawreviewpanel/final/common-lawpanelfinalreport.pdf>> [Hamilton].

¹² *Ibid.* at 38.

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good that I should have to disclose any conflicts publicly just like any other elected official in an opposite-sex relationship must.¹³

Some final notable amendments that are found in Bill 34 are those to *The Vital Statistics Act*.¹⁴ Previously, only the biological parents of a child could be registered on a birth certificate at the time of the birth. This precluded the social mother—the female non-biological mother and common-law partner of the biological mother—from appearing as a parent on the birth certificate. This also prevented the child from having the social parent’s last name. Now, the birth registration of a child born to a woman by artificial insemination can include either the husband or common-law partner/social parent. This, however, does not grant any legal status to the relationship between the social parent and the child. Thus, while these amendments were a good first step, it was hoped that the government would “amend *The Vital Statistics Act* yet one step further so that common-law partners and social mothers will be deemed legal parents by virtue of having their names on the birth registration.”¹⁵ This would grant legal rights and protect both the social parent and the child if anything happened to the biological parent, or if the relationship broke down.

The amendments in Bill 34 not only bring Manitoba legislation in line with new grounds of discrimination as promulgated by the Supreme Court of Canada regarding equality rights, they create the most comprehensive regime for equality rights in Canada, and perhaps even the world.¹⁶ This has been viewed as both a positive and a negative title for Manitoba to bear, as the amendments deal with contentious issues. Although the majority of Manitobans seem to favour this move towards broadening equality rights for common-law couples, there was a vocal minority who opposed it.

Both the proponents of the bill and those who opposed it focused on the well being of children, and most said that the children are really whom this bill affects most. The minority opposition believed that extending the rights of married people to common-law partners would make a mockery of the institution of marriage, and in turn would cause the downfall of the traditional family. Those in favour of the bill saw it as legalizing an already existing reality—many families are made up of common law partners—and believed that by extending legal rights to these families, children are better protected.

¹³ Manitoba, Legislative Assembly, *Hansard*, (24 July 2002) (Kristine Barr).

¹⁴ C.C.S.M. c. V60.

¹⁵ *Hansard*, *supra* note 13 (Erika MacPherson).

¹⁶ *Hansard*, *supra* note 13 (Karen Busby).

III. BACKGROUND

In order to delve further into this bill, sufficient background information must be provided in the areas of 1) Case Law 2) Bill 41—*An Act to Comply with the Supreme Court Decision in M. v. H.*¹⁷ and 3) the Review Panel that provided advice contained in the reports “An Opinion Respecting Persons in Common-law Relationships”¹⁸, and “Review Panel on Common-law Relationships: Opinion of Hon. A.C. Hamilton, Q.C. LL.D.”¹⁹

A. Case Law

The Supreme Court of Canada has recently addressed the rights and responsibilities of common-law couples. For example, in *Miron v. Trudel*²⁰ it was held that distinctions between married and common-law spouses breached s. 15(1), the equality provision of the *Charter*, and was not saved by s. 1. In *Egan v. Canada*²¹, the Supreme Court established sexual orientation as an analogous ground of discrimination. In *M. v. H.*, it was held that it is unconstitutional to differentiate in legislation between same-sex cohabiting couples and opposite-sex cohabiting couples. The court in *M. v. H.* declared the offending provision of no force or effect, but gave legislatures time to comply with this ruling. This put the onus on the province to change legislation so that it would comply with the decision in *M. v. H.*

B. Bill 41—*An Act To Comply With The Supreme Court of Canada Decision In M. v. H.*

Manitoba’s response to the decision in *M. v. H* was to enact Bill 41—*An Act to Comply with the SCC decision in M. v. H.* This *Act* amended ten other pieces of Manitoba legislation to include same-sex partners regarding pensions and benefits. There was a lot of media attention given to this particular bill before it was passed into law, and 41 private citizens spoke at the Standing Committee on Law Amendments hearing. Members of the gay and lesbian community, while pleased that the government was taking a first step, were outraged at the limited scope of

¹⁷ S.M. 2001, c. 37 [Bill 41].

¹⁸ Manitoba, Legislative Assembly, “An Opinion Respecting Persons in Common-law Relationships” by Jennifer A. Cooper, Q.C. (31 December 2001), online: <http://www.gov.mb.ca/justice/publications/commonlawreviewpanel/vol1/common-law_panel_voll.pdf> [Cooper].

¹⁹ Hamilton, *supra* note 11.

²⁰ [1995] 2 S.C.R. 418.

²¹ [1995] 2 S.C.R. 513.

Bill 41. They pushed for amendments to the bill so that it would be more inclusive—particularly regarding adoption—calling “the province’s omission insulting and gutless.”²²

C. The Review Panel

On 19 June 2001, the Minister of Justice and Attorney General, the Hon. Gord Mackintosh, sent out a memo to the Hon. A.C. Hamilton, a retired judge, and Jennifer A. Cooper, Q.C., a family law lawyer. The Minister was seeking advice on a series of issues respecting persons in common-law relationships including adoption, conflicts of interest, and legislation dealing with property interests.²³ These two collectively became ‘The Review Panel’ and were asked to investigate these three areas and submit a report to the government with detailed recommendations. The panel began the process by publishing an advertisement in 56 newspapers across the province inviting written submissions from the public. They then met in groups comprising those persons who had provided written submissions to discuss the issues further. The panel also stated that they read the transcripts from the Standing Committee on Law Amendments hearings held on 18 and 21 June 2001, and took into consideration other reports that had been submitted to them.

In the subsequent report submitted by Ms Cooper, she states that while it was their original intention to provide one report, after the initial consultations, it was found that the two members of the panel had differing opinions and “wished to give the government the benefit of [their] separate analyses and thinking on the three issues [they] had been retained to consider.”²⁴ The panel then submitted two reports, each with extensive, detailed recommendations. Cooper recommended amendments to 32 existing statutes and Hamilton proposed 30 different changes that he thought ought to be implemented in order to attain *Charter* compliance and equality.

²² Leah Hendry “Same-sex parents call NDP gutless. New law gives sperm donor more rights to child than partner” *Winnipeg Free Press* (3 June 2001) [Hendry].

²³ Hon. Gord Mackintosh, Minister of Justice, Attorney General, “Terms of Reference: An Opinion Respecting Persons in Common Law Relationships” (19 June 2001), online: <<http://www.gov.mb.ca/justice/publications/commonlawreviewpanel/vol1/sched1.html>>.

²⁴ Cooper, *supra* note 18 at 4.

IV. ORIGINS OF BILL 34

While investigating the origins of Bill 34, it was discovered that there are very different opinions as to why this bill exists. They can be grouped into two ‘theories of genesis.’ The first theory cites Bill 34 as the second in a trilogy of legislation enacted in Manitoba after the Supreme Court decision in *M. v. H.*²⁵ The second theory states that this was a bill to bring Manitoba legislation into compliance with the *Charter* (thus it is aptly named), because there were several cases before the courts in which legislation was being challenged as offending the *Charter*.²⁶ While the first theory proposes that Bill 34 is a direct result of *M. v. H.*—one might even call it an extension of *An Act to Comply with the SCC decision in M. v. H.*—the second theory recognizes Bill 34 as a separate *Act* entirely, with its incentive being *Charter* compliance.

The first theory is built on the premise that the only reason Bill 34 was enacted was because Bill 41 of the previous session did not extend benefits for common-law couples far enough. Narrowly construed, the decision in *M. v. H.* pertained to benefits for common-law couples. Broadly construed, it affected the rights and responsibilities of common-law couples more comprehensively. In Manitoba’s endeavour to comply with *M. v. H.*—Bill 41—the government considered the narrow construction of the decision, and amended only ten pieces of legislation that concerned pensions and benefits. This created a public outcry, mainly from the gay and lesbian communities, who demanded a more complete approach based on a wider interpretation of what *M. v. H.* stood for.²⁷ This group was adamant about including amendments to *The Adoption Act* that would grant security to the children of common-law same-sex couples. The Attorney General defended the government’s position stating that “[i]n no way does *M v. H* say anything about children, parenting or adoption. It’s about financial support. To bring in changes to adoption law under the guise of *M v. H* could allow Manitobans to accuse us of sneaking in legislation.”²⁸

The public response to the government’s position was expressed in media reports, letters to the editor, and at the Standing Committee Meeting on Law Amendments. Noreen Stevens expressed her frustration

²⁵ Interview of Karen Busby, Professor of Law, University of Manitoba (1 October 2002) [Busby]; The first being *An Act to Comply with the Supreme Court of Canada Decision in M. v. H.*, and the third being Bill 53—*The Common Law Partners’ Property and Related Amendments Act*, S.M. 2002 c. 48.

²⁶ Interview of Hon. Gord Mackintosh, Minister of Justice, Attorney General, (14 November 2002) [Mackintosh].

²⁷ Busby, *supra* note 25.

²⁸ Hendry, *supra* note 22.

in the *Winnipeg Free Press*, saying “it's the cowardice of the NDP government not to take this issue on, they purport to represent social interests and gay and lesbian rights, but they chose to take the easy route and not ruffle any feathers or step on the toes of conservatively minded people.”²⁹ Letters to the editor cited personal examples of the effects these omissions would have on the lives of gay and lesbian Manitobans as well as their children, who would be denied rights without these amendments.³⁰

At the Standing Committee hearings on 18 and 21 June 2001, 41 people chose to make public presentations and there were six written submissions. Many of those who presented at the hearings commended the government for having made an attempt to move forward, but many more lamented the fact that only ten pieces of legislation were amended. One presenter noted that:

The amendments proposed by Bill 41 are the bare minimum requirements to bring Manitoba law into compliance with the Supreme Court of Canada's decision in *M. v. H.* I expected, however, that Manitoba's NDP government would do more than what was minimally required of them. Moreover, Bill 41, titled *An Act to Comply with the Supreme Court of Canada's Decision in M. v. H.* does not comply with the spirit of the *M. v. H.* case. It is unfair to make gay and lesbian Manitobans wait any longer and to require us to spend time, money and energy litigating cases on legal matters which courts will, in the end, grant to us.³¹

The first theory proposes the view that when the government heard this continuing dissatisfaction and outrage, it not only realised Bill 41 would not suffice, but that they also had to extend further rights to common-law couples. In order to decide what should be done, the government went directly to those expressing dissatisfaction and asked members of the gay and lesbian communities what they wanted. Their response was “everything.”³² The government had to atone for their omissions and create another bill that was comprehensive. They did this by introducing Bill 34, the second in the trilogy, and then Bill 53, the third in the trilogy. The second theory differs from the first in its emphasis. While the first theory emphasizes Bill 41's inadequacies in complying with *M. v. H.* as the impetus for Bill 34, the second theory emphasizes *Charter* compliance as the catalyst. The Hon. Mr. Mackintosh, Minister of Justice, made this difference clear by stating: “This legislation [Bill 34], is not *M. v. H.* compliant, but *Charter* compliant. There were cases

²⁹ *Ibid.*

³⁰ Letters to the Editor, (19 June 2001) in the *Winnipeg Free Press*.

³¹ Manitoba, Legislative Assembly, *Hansard*, Standing Committee on Law Amendments (18 June 2001) (Letter from Karen Busby dated 13 June 2001, presented by Ms. Patterson).

³² Busby, *supra* note 25.

before the courts that were making it evident that many provisions would not withstand a *Charter* challenge.”³³ He explained that even before Bill 41 was drafted, there had been ongoing work investigating discriminatory statutes, as well as making Manitoba legislation compliant with the grounds of discrimination provided for in *The Human Rights Code*.³⁴ While *M. v. H.* brought the issues to the foreground, it had little effect on the eventual amendments in Bill 34. It did, however, clearly provide the impetus for Bill 41.

The Minister stated that although research into broadening the legal status of common-law couples was already in progress when the Supreme Court ordered the amendments to comply with *M. v. H.*, the government thought it best to construe that decision narrowly for several reasons. As stated above, a narrow construction avoided the risk of allegations that the government was ‘sneaking in legislation’ by reading *M. v. H.* broadly. Also, because the ongoing research had not yet concluded, the government felt that it would be best to confine Bill 41 to a strict interpretation of *M. v. H.*, and then wait for in-depth research to conclude before further amendments were made.³⁵ The Minister’s concern seemed to be that it would be better to wait and do it right the first time, rather than rush forward hastily and make mistakes that would be more difficult to fix later.

When proponents of either theory were asked about the alternate theory, they were opposed to its reasoning. However, in considering all of the factors together, it can be seen that they are actually compatible rather than contrary theories. The problem lies in the absolutism in each of the arguments. Theory one espouses that the public outcry at the shortcomings of Bill 41 was the only reason that Bill 34 was drafted. Theory two states that Bill 34 had nothing to do at all with Bill 41 or *M. v. H.* Both of these positions can be true without contradicting the other if they are not viewed in isolation, but rather are examined together. By taking into account all the information gathered, a reasonable conclusion is that the outcry at the narrow scope of Bill 41 contributed necessary public input into making Bill 34 as comprehensive as possible.

V. Debate

The Honourable Mr. Gord Mackintosh sponsored Bill 34. The first reading took place on 6 June 2002, the second reading on 22 July 2002, and on 1 August 2002 third reading was passed and Royal Assent was granted. Much of the *Act* came into force on this date, with ss. 1, 7, 10, 16, 24, 41, 50, 53 and 54 directed to come into force on 1 January 2003.

³³ Mackintosh, *supra* note 26.

³⁴ C.C.S.M. c. H175.

³⁵ Mackintosh, *supra* note 26.

The bill was never debated in the Legislative Assembly, although the Official Opposition did oppose every section, including the title, during the clause-by-clause reading at the end of the Standing Committee on Law Amendments meeting on 24 July 2002.

The only debate that occurred was at the Standing Committee hearing. At that meeting, 45 people made presentations and there were three written submissions. While most of the presenters favoured the bill, there was a vocal minority that opposed it. Much of the debate surrounded the amendments to *The Adoption Act* that would grant common-law couples the right to jointly adopt. Both sides focused on the children, and what they thought would be best for them. People cited social science,³⁶ the Bible,³⁷ case law,³⁸ and their own personal stories³⁹ in attempts to sway the government. While religious reasons were often cited as the cause of opposition to the bill, a Roman Catholic Brother spoke on its behalf, stating:

Now with the expected passages of Bills 34 and 53, members of the LGBT [lesbian, gay, bisexual and trans-gendered] community will finally have the capacity to participate fully, freely, and openly in Manitoban society with equal rights and, just as importantly, with equal responsibilities. Finally, as this legislation promotes honesty, transparency, commitment, fidelity, justice and sharing, this legislation will help to strengthen the moral and ethical foundations upon which any healthy society is built.⁴⁰

At the other end of the religious spectrum was Mr. Martin Paul Opitz. He began by stating that he was “concerned about this legislation being passed,” but this ‘concern’ quickly became an understatement as he proclaimed “[t]his is a living God who will bring His wrath and judgment ... judgment will come against this province, against this city and against this government and against this country.”⁴¹

Many of those opposed to the amendments to *The Adoption Act* seemed unaware that gays and lesbians could already adopt children on their own. Bill 34 widens the law only as much as to enable both parents to adopt together, and this really only benefits the child. As it stood before the bill was passed, only one of the parents was the legal parent. This created problems for simple things such as signing permission slips for school trips, to more serious issues like enforcing child support if the relationship ended. If the legal parent deceased, the child would not have any right to the estate, or worse yet, the child would be at risk of

³⁶ *Hansard, supra* note 4 (Robert Humphrey).

³⁷ *Hansard, supra* note 4 (David Reimer, Pastor, Shalom Family Worship Center).

³⁸ *Hansard, supra* note 4 (Karen Busby).

³⁹ *Hansard, supra* note 4 (Krista Piche, Virginia Larsson).

⁴⁰ *Hansard, supra* note 4 (Thomas Novak).

⁴¹ *Hansard, supra* note 4 (Martin Paul Opitz).

becoming a ward of the state because the non-legal parent had no legal rights to custody. The supporters of the bill argued that the amendments to *The Adoption Act* rectify these problems, resulting in better protection for children.

1. Lack of Debate—Official Opposition

The Opposition were perceived to be early supporters of the bill, and during the summer of 2001 “the Tories publicly criticized the NDP for not including adoption rights in [Bill 41]” (emphasis added), but in fact they voted against every clause during the voice vote of Bill 34.⁴² Justice Critic Joy Smith did not respond to attempts by this author to clarify the opposition position. However, the *Winnipeg Free Press* reported that “Tory justice critic Joy Smith said her party voted against the clauses because they have unanswered questions about them, not because it doesn’t support the bill.”⁴³ The issues that Mrs. Smith did raise at the Standing Committee meeting were issues that had been brought up by presenters who opposed the bill. They included allegations that the NDP attempted to slide this legislation through during the summer when many concerned were on vacation and could not be involved. Hon. Gord Mackintosh responded to these claims at the committee meeting, saying that this bill had been introduced in the Legislative Assembly about seven weeks before the hearing, and this should have provided ample notice that the committee hearing would occur. He also noted that “strangely, around this legislation I think we have had more press conferences and releases [than usual].”⁴⁴ He later mentioned that really this claim was a little ridiculous, as this bill stirred up such a great deal of controversy in the public that it would be difficult to have it go unnoticed.⁴⁵

The other issue that Mrs. Smith raised at the committee meeting was that more time should be given to investigate the long-term effects of same-sex adoption. This query was responded to by Mr. Tim Sale, who effectively dismissed this point as moot by saying that:

[T]hose in the child welfare system have been working with the issues of same-sex adoption for at least 10 years. The changes the began in the late-eighties and mid-eighties in terms of foster families and same-sex adoptions are hardly new to any child welfare worker ... same-sex couples were adopting, and the

⁴² Mia Rabson “Tories flip-flop, vote against adoption rights for gay couples” *Winnipeg Free Press* (2 August 2002) A2.

⁴³ “Tories vote against same-sex couples bill” *Winnipeg Free Press* (26 July 2002) A6.

⁴⁴ *Hansard*, *supra* note 4 (Hon. Gord Mackintosh).

⁴⁵ Mackintosh, *supra* note 26.

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only impediment was both partners could not be named as the parent. But this has been an issue for many years now, so it is hardly news.⁴⁶

The opposition had nothing to say during debate on second or third reading in the Legislative Assembly. The only issues they did raise at the committee stage were those mentioned and researched by public presenters, as the opposition did not bring any dissent of their own to the table. Still, they felt it necessary to vote against every single clause. It is difficult to discern the true stance of the opposition regarding this bill. The record shows their public opposition, yet the media has reported that they did support this bill in the past. Because Ms Smith has failed to answer any telephone calls or email messages from this author, it seems the mystery will go unsolved.

VI. PUBLIC INPUT

Other than the public input presented at the committee stage, many other groups had written reports on the topic of extending rights to common-law couples. The Manitoba Association of Women and The Law (MAWL) introduced a report in April 2001 entitled “Rights Denied: Unequal Treatment of Same-sex couples.”⁴⁷ They canvassed all Manitoba legislation and made four recommendations. The first recommendation is that any amendments should be done on an act-by-act basis to avoid the risk that substantive equality would be lost while formal equality requirements were satisfied. Secondly, where an Act confers a benefit or a right on a spouse, it should be extended to include married, cohabiting and same-sex couples. The third and fourth recommendations were in regard to acts that confer a responsibility. MAWL recommended that if it was a responsibility that could be privately or publicly met, it should be extended to common-law couples. However, they recommended that if it must be publicly and openly fulfilled, that common-law couples should be excluded, so as to avoid any unwanted ‘outing.’⁴⁸ The Review Panel considered this report in their consultations, and asked that gays and lesbians to speak to how they felt about the recommendations. Both panellists reported that no one they spoke with agreed that there should be different laws for common-law couples. When MAWL heard this they retracted that recommendation, stating that they were under the impression that unwanted or unnecessary ‘outing’ should be avoided, but if this was untrue then they would not endorse it.⁴⁹

⁴⁶ *Hansard*, *supra* note 4 (Mr. Tim Sale).

⁴⁷ Bonnie Macdonald, *supra*, note 10.

⁴⁸ *Ibid.* at 16.

⁴⁹ Hamilton, *supra* note 167; Cooper, *supra* note 174.

The reports from the Review Panel state that they also considered submissions from the Manitoba Human Rights Commission, the Manitoba Federation of Labour, Equality for Gays and Lesbians Everywhere (EGALE), REAL Women of Canada, and representatives from Winnipeg Child and Family Services as well as individual citizens.⁵⁰ This shows a commitment by the government that in creating the Review Panel it wanted to hear what people had to say, and wanted to implement this into the legislation.

The media kept a close eye on the movement of this bill through the legislative process. They were particularly fond of the Tory ‘Flip Flop’ as it had come to be known, and also took an interest in telling the personal stories of those who would be most affected by the legislation.⁵¹

VII. OTHER PROVINCES’ LEGISLATION

While all of the other provinces have enacted some sort of legislation to comply with the SCC decision in *M. v. H.*, none are as comprehensive as Bill 34. One of the Manitoba Justice lawyers who worked on drafting Bill 34 said that they did look to other jurisdictions to see what they had done in this area:

For example, you can see that in the approach taken in Bill 34 to remove any expanded definitions of “spouse” from acts, and include a gender-neutral definition of common-law partner (a definition that includes both same and opposite-sex partners) is consistent with the approach taken by the federal parliament in the *Modernization of Benefits and Obligations Act*.⁵²

VIII. MERITS

The NDP government has done a commendable thing in enacting Bill 34. While there is a vocal minority who opposes extending rights to common-law couples, this view condones discrimination. The *Charter* protects “equality before and under the law” and “equal protection and equal benefit of the law without discrimination.” These rights are for everyone—especially those “who need more in law because they have less in life.”⁵³ To withhold fundamental human rights and dignities is

⁵⁰ *Ibid.*

⁵¹ Shelley Vivian “Same-sex couple applauds proposed provincial legislation” *Brandon Sun* (22 July 2002).

⁵² S.C. 2000 c. 12.; Interview of Colette Chelack, family law lawyer with Manitoba Justice (November 2002).

⁵³ Dr. Sheila Martin, Q.C., “Equality: What’s Left to be Done?” (Lecture, Isaac Pitblado Lectures, November 2002).

not only an affront to the *Charter*, but to humankind, and that is why not enacting this legislation would have been a travesty.

One difficulty that this bill does not address is the issue that lies in equating same-sex common-law couples with opposite-sex common-law couples. The way the law has evolved in the Supreme Court is that these same-sex unmarried couples have been termed common-law couples and as such are likened with opposite-sex unmarried common-law couples. This is inherently flawed because same-sex common-law couples do not have the option to marry. Bill 34, in using 'common-law', includes opposite-sex common-law couples who have the right to marry, but perhaps are not doing so in order to avoid the legal rights and responsibilities that come along with marriage. While it may be that they were expressly 'opting out' of the legislative regime by not marrying, they now will find themselves enmeshed within it.

On the other hand, if marriage is avoided for other reasons, perhaps this over-inclusiveness is beneficial to opposite-sex common-law couples as well. They will receive equal protection of the law without having to ascribe to religious or patriarchal values and beliefs that they do not share. Because Bill 34 is limited to proactive events, the problem of it being overbroad is eliminated. While this legislation was intended to extend rights to same-sex couples—and has done so—it has avoided the issue of the ability of same-sex couples to marry. This is not within provincial jurisdiction, as it is listed under federal jurisdiction pursuant to s. 91 of the *Constitution Act*.⁵⁴

Another point worth mentioning is the unease felt by some at passing omnibus legislation. There is a fear that when too many things are done at once, something will get lost in the shuffle, and inevitably slip through unnoticed. Although this may be a reasonable concern, in the circumstances it seems it was best to proceed in this fashion. The MAWL report also recommended that the amendments be made on an act-by-act basis in order to ensure both formal and substantive equality. Colette Chelack commented on this issue saying:

[A]lthough Bill 34 is described as an omnibus bill, you can see from reviewing its contents that it does amend each *Act* individually. That is, rather than providing, for example, that acts X, Y, and Z are amended by changing "spouse" to "spouse or common-law partner", the bill goes into each *Act* in order to address the issue in a way that works within each *Act's* framework.⁵⁵

Notwithstanding its extensive nature, the drafters did take into account how to best address the acts individually, and found that an act-by-act basis was possible if done in this fashion.

⁵⁴ *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5.

⁵⁵ *Supra* note 52.

While this bill has some imperfections, they are but slight. The government should receive only applause and acclaim, primarily for recognizing the need for this legislation, but also for carrying this vision to fruition.

VIII. CONCLUSION

Bill 34 created debate all along the road to its inception, except in the Legislative Assembly. The public hotly debated the issues while the Official Opposition put forth nary more than a 'nay.' The proponents of the bill even argued amongst themselves over its genesis. Regardless of the veracity of any genesis theory, the good news is that this legislation exists. Amending 56 pieces of Manitoba legislation in order to comply with the *Charter*, brings this province to the forefront of equality rights for all its citizens.

APPENDIX 1—ACTS AMENDED BY THE CHARTER COMPLIANCE ACT

- The Adoption Act*, C.C.S.M. c. A2.
The Agricultural Producers' Organization Funding Act, C.C.S.M. c. A18.
The Anatomy Act, C.C.S.M. c. A80.
The Animal Liability Act, C.C.S.M. c. A95.
The Builders' Liens Act, C.C.S.M. c. B91.
The Certified General Accountants Act, C.C.S.M. c. C46.
The Change of Name Act, C.C.S.M. c. C50.
The Charities Endorsement Act, C.C.S.M. c. C60.
The Chartered Accountants Act, C.C.S.M. c. C70.
The Child and Family Services Act, C.C.S.M. c. C80.
The Civil Service Act, C.C.S.M. c. C110.
The Communities Economic Development Fund Act, C.C.S.M. c. C155.
The Consumer Protection Act, C.C.S.M. c. C200.
The Cooperatives Act, C.C.S.M. c. C223.
The Corporations Act, C.C.S.M. c. C225.
The Credit Union and Caisses Populaires Act, C.C.S.M. c. C301.
The Defamation Act, C.C.S.M. c. D20.
The Dental Association Act, C.C.S.M. c. D30.
The Denturists Act, C.C.S.M. c. D35.
The Development Corporation Act, C.C.S.M. c. D60.
The Discriminatory Business Practices Act, C.C.S.M. c. D80.
The Elderly and Infirm Persons' Housing Act, C.C.S.M. c. E20.
The Elections Act, C.C.S.M. c. E30.
The Employment and Income Assistance Act, C.C.S.M. c. E98.
The Executions Act, C.C.S.M. c. E160.
The Family Farm Protections Act, C.C.S.M. c. F15.
The Farm Lands Ownership Act, C.C.S.M. c. F35.
The Department of Health Act, C.C.S.M. c. H20.
The Highway Traffic Act, C.C.S.M. c. H60.
The Human Tissue Act, C.C.S.M. c. H180.
The Infants' Estates Act, C.C.S.M. c. I35.
The Judgments Act, C.C.S.M. c. J10.
The Landlord and Tenant Act, C.C.S.M. c. L70.
The Law Enforcement Review Act, C.C.S.M. c. L75.
The Law of Property Act, C.C.S.M. c. L90.
The Law Society Act, C.C.S.M. c. L100.
The Legislative Assembly Act, C.C.S.M. c. L110.
The Legislative Assembly and Executive Council Conflict of Interest Act, C.C.S.M. c. L112.
The Marriage Act, C.C.S.M. c. M50.

The Medical Act, C.C.S.M. c. M90.
The Mental Health Act, C.C.S.M. c. M110.
The Municipal Act, C.C.S.M. c. M225.
The Municipal Assessment Act, C.C.S.M. c. M226.
The Municipal Conflict of Interest Act, C.C.S.M. c. M255.
The Off-Road Vehicles Act, C.C.S.M. c. O31.
The Powers of Attorney Act, C.C.S.M. c. P97.
The Privacy Act, C.C.S.M. c. P125.
The Property Tax and Insulation Assistance Act, C.C.S.M. c. P143.
The Manitoba Public Insurance Corporation Act, C.C.S.M. c. P215.
The Public Schools Act, C.C.S.M. c. P250.
The Registered Respiratory Therapists Act, C.C.S.M. c. R115.
The University of Manitoba Act, C.C.S.M. c. U60.
The Victims' Bill of Rights Act, C.C.S.M. c. V55.
The Vital Statistics Act, C.C.S.M. c. V60.
The Vulnerable Persons Living with a Mental Disability Act, C.C.S.M. c. V90.
The City of Winnipeg Act, S.M. 1989–90, c. 10.

