

And Justice for All—Bill 47, *The Legal Aid Services Society of Manitoba Amendments Act*

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I. INTRODUCTION

The Right Honourable Beverley McLachlin, Chief Justice of the Supreme Court of Canada, addressed the importance of maintaining the public's confidence in our justice institutions so as not to betray the promise of a just society.¹ To achieve this, McLachlin C.J.C. suggested that focus on three factors in particular would be critical:

- (1) ensuring the high quality of our justice system;
- (2) *ensuring access to our justice system*; and
- (3) upholding the fundamental values that underlie our legal system.

Chief Justice McLachlin further stated that: "The finest justice system in the world is a failure if people cannot use it."² One of the greatest challenges in attempting to provide fair and universal access to justice is that of providing adequate legal aid to individuals who would have difficulty, or would otherwise be unable to obtain legal counsel due to the costs. Government funding is becoming inadequate for these individuals—as due to budgetary considerations, despite serious legal problems, they are denied assistance. Other problems arise when private practitioners refuse legal aid work due to the related economic burden. Work performed by staff legal aid lawyers is underfunded and unrecognized, and first in line to be affected by financial cuts. The outcomes for many people in low income brackets will hinge upon the degree of expertise or knowledge available to them, and upon the degree of legal access entitlement as afforded by case law and legislation,³ and unfortunately, many often have no alternative but to represent themselves.

¹ Rt. Hon. Beverley McLachlin C.J.C., "Preserving Public Confidence in the Courts and Legal Profession" (2003) 29 Man. L.J. 277 at para. 4 (QL) [emphasis added].

² *Ibid.* at para. 18.

³ People between the ages of 12 and 18 have a guaranteed right to legal assistance under the federal *Youth Criminal Justice Act*, (S.C. 2002, c.1). Adults are not equally entitled, whether

According to Chief Justice Richard Scott of the Manitoba Court of Appeal, because “lawyerless litigants”⁴ face huge barriers to justice, lawyers and courts must work together to remedy the phenomenon, both to stem the rising numbers and to assist the self represented accused. Although court clerks will provide instructions regarding which forms to file and certain applicable rules, they decline to offer legal advice, and rightly so, as the duties and expertise of the position do not carry a mandate of providing legal counsel. The self represented are at an even greater disadvantage when attempting to defend the allegations of an offence as it is very difficult to do so when the elements of the offence—such as causation, affirmative defences, etc.—are concepts that the unrepresented layperson would likely have little or no knowledge of. Judges themselves uphold the principle of fundamental justice of maintaining judicial impartiality, yet must explain the process to the unrepresented, as completely as time permits in the court room, without appearing to advise or steer the accused. Judicial impartiality is as important in appearance as it is in fact. This, however, becomes much less of a balancing act when the accused has access to legal counsel. Governments play an undeniable role in ensuring access for all to the legal system, however, positive words such as: “The government will work with provinces toward renewal of legal aid so that Canadians can have access to adequate legal representation before the courts”,⁵ are empty without follow up action and implementation.

II. THE BACKGROUND OF LEGAL AID

The institution of formal legal aid serves as the main resource for the underprivileged and the poverty-stricken who find themselves at odds with the

by legislation or by the *Canadian Charter of Rights and Freedoms*, s. 7, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, unless certain circumstances are present. As articulated in *R. v. Rowbotham*, ([1992] 9 O.R. (3d) 368), where the accused does not qualify within provincial legal aid plans, the *Charter* requires that funded counsel be provided and a court of appeal may so order per ss. 684(1), 694.1, (R.S.C. 1985, c. G46.), if the accused cannot afford it and if representation by counsel is essential to a fair trial. The disparity in positions of the Crown and the accused becomes too great for the court to ignore, as a layperson accused of a serious crime will have their s. 7 *Charter* rights at risk and will not usually be able to make arguments clearly, test the Crown's prosecution theory through effective cross-examination of witnesses, or make legitimate suggestions to the court as to how the law ought to be interpreted on any given point, (CBA Report 2002, “Making the Case...”).

⁴ Kirk Makin, “Lawyerless Litigants Slow Wheels of Justice” *The Globe and Mail* (14 January 2002) A1 (QL).

⁵ Canada, Privy Council Office, *Speech from the Throne to Open the Second Session of the 37th Parliament of Canada* (Ottawa, Information Resources, 2002), online: <http://www.pco-bcp.gc.ca/default.asp?Language=E&Page=InformationResources&sub=sftddt&doc=sftddt2002_e.htm>.

law. In principle legal aid dates back much farther than one may realize. The *in forma pauperis* procedure, which was introduced in thirteenth century Europe, ensured that the public in poverty circumstances (which included most of the public in that era) had access to legal services when the law of the day was poised to act upon them. This procedure became a part of Canadian law upon Confederation, based on a British statute, *An act to admit such persons as are poor to sue in forma pauperis* (7 Henry VII 1495, c.12).⁶ Poor people could then benefit from lawyers' services at no charge if necessary. This was the beginning of *pro bono* legal help by lawyers and firms, and eventually, legal aid. Incidentally, there have been many vocal advocates in recent years for the conscious commitment of the legal community to take on *pro bono* and legal aid work each and every year.⁷ The provision of these services to those without financial means is viewed by many lawyers and judges as a long-standing professional and ethical obligation that is at the very core of the profession.⁸ This professional ethos, if seriously heeded and practiced, could go a long way to alleviating some of the problems faced by unrepresented, legally naïve people in the court system.

III. LEGAL AID IN MANITOBA

*Mission Statement: Legal Aid Manitoba is committed to ensuring equal access to justice for all Manitobans.*⁹

Legal aid history in Manitoba dates back to 1937. The first "legal aid" program provided *pro bono* services in civil matters, and was organized in 1937 through the Law Society of Manitoba ("LSM") in which poor people applied to a special committee for a certificate appointing a lawyer free of charge.¹⁰ A "Poor Man's Lawyers Centre" was established, also with volunteer lawyers providing advice (nicknamed the "Thursday night club"). A decade later, LSM set up a similar criminal legal aid program for the poor, so that in 1949, members of the Bar were invited to join the roster, which assigned one lawyer to the magistrate's

⁶ Manitoba, Minister of Justice, *A Review of Legal Aid in Manitoba*, March 2004, online: <<http://www.gov.mb.ca/justice/publications/legalaidreviewfinal.pdf>> at 11 [LAM Review].

⁷ Canadian Bar Association, "CBA Position on Legal Aid," online: CBA.org <<http://www.cba.org/CBA/Advocacy/legalAid/>>.

⁸ Mr. Justice J.C. Major, "Lawyer's Obligation to Provide Legal Services" (1995) 33 Alta. L. Rev. 719 at 722.

⁹ Legal Aid Manitoba, "Our Mission Statement" (21 April 2006), online: Legal Aid Manitoba <<http://www.legalaid.mb.ca/>>.

¹⁰ N. Larsen, "Legal Aid in Manitoba" in C. Harvey, ed., *The Law Society of Manitoba 1877-1977*, (Winnipeg: Peguis Publishers, 1977) 158 at 161-162, ["Legal Aid in Manitoba"], cited in *supra*, note 6 at 10, n. 8.

court each week. These initiatives by the LSM were among the first of their kind in Canada.¹¹

By the 1950s and 1960s, the demand for free legal services was reaching huge proportions, but there were not enough participating lawyers to meet the need. Civil and criminal lawyers were taking on a higher caseload than had been anticipated when the program was launched. For example, the number of criminal certificates issued from 1964–1966 rose by 75%.¹² Pressure was exerted from the profession for a coordinated state funded legal aid system. It should be noted, however, that not all lawyers agreed on that point, believing that “it would be ‘unseemly’ for lawyers to accept payment for legal aid work.”¹³

The Legal Aid Services Society of Manitoba (“Legal Aid Manitoba”) was a statutory corporation established by an act passed by unanimous vote in the legislature in 1971.¹⁴ The launch of Legal Aid Manitoba (“LAM”) occurred in February of 1972, with the majority of its funding from the provincial government of the day, the New Democratic Party, while the federal government began sharing the province’s costs for criminal and civil legal aid on a per capita basis, which covered almost 50% of the program’s costs. The program existed as a “mixed system,” combining the English *judicare* model of publicly paid private lawyers with the American model of community or neighbourhood law offices staffed with legal aid lawyers.¹⁵ The first community law office was opened in Winnipeg in October 1972, with an all encompassing mandate of individual client service as well as an engagement in the “war on poverty.”¹⁶ In the words of Professor Roland Penner, who was a key driving force of the legal aid beginnings in Manitoba, “You remember, that’s the war the poor lost.”¹⁷

One of the goals at the time was to involve the poor/lawpeople in the policy management of the community law centre, to employ non-legal professionals such as social workers, and to utilize a portion of the staff lawyer time to work with client groups in the poor community in an activist resource capacity. In the absence of such groups, “[T]he poor do not organize themselves particularly well,” and the staff lawyers were to take an activist role in the organization of

¹¹ *Ibid.* at 162.

¹² *Ibid.*

¹³ *Ibid.* at 167.

¹⁴ *The Legal Aid Services Society of Manitoba Act*, S.M. 1971, c. 76; now the *Legal Aid Manitoba Act*, C.C.S.M., c. L105.

¹⁵ Roland Penner & Arne Peltz, “The State of Legal Aid in Manitoba in 1997” (1998) 16 *Windsor Y.B. Access Just.* 271 at 271 [Penner and Peltz].

¹⁶ *Ibid.* at 272.

¹⁷ Interview of Professor Roland Penner, Constitutional Law Professor, by Judy Eagle (1 November 2005) at Faculty of Law, University of Manitoba.

such groups.¹⁸ After the opening of the first community law office, others in different Winnipeg locations and smaller urban centres followed.

It quickly became clear that the practice of law itself for the poor¹⁹ was an all-consuming task in the centres, and that staff lawyers had neither the time nor the required skill set to engage the community in combating issues of poverty. Staff lawyers, therefore remained in the sphere of their training expertise, which was to advocate in the legal arena as lawyers.

Between 1972 and 1977, LAM had employed 25 staff lawyers and 3 paralegals, had quadrupled the number of cases handled from 12 000 to 50 000, and had managed a budget that increased from \$850 000 to \$3.2 million.²⁰ By 1977, more than 500 of the 1 000 lawyers in Manitoba were participating in the plan, and there were six community law offices. In the year ending 31 March 2003, LAM employed 131 staff, including 65 lawyers, and recorded a current budget of \$17 160 000 which handled the 22 498 legal aid certificates that were issued. Of those certificates, private practice lawyers dealt with 59%, while LAM staff dealt with the remaining 41%,²¹ with the bulk of the cases falling into the criminal law area. Currently, LAM operates Criminal and Family law offices in Winnipeg along with a Public Interest Law Centre, Collaborative Law Program, Aboriginal Law Centre and a University Law Centre which enables those who have been refused legal aid to access law student assistance with non-criminal or minor criminal matters. Outside city limits, there are community law offices in Brandon, Dauphin, The Pas and Thompson which practice mainly in criminal and family law.²²

IV. THE LEGISLATIVE JOURNEY OF BILL 47²³

A. Overview

Bill 47 was proclaimed on 10 August 2005, and although it is an amending act, it cannot be viewed in any way as simply a piece of housekeeping legislation. As far reaching as an originating bill, Bill 47 altered and added provisions to such a major degree, that the name of the institution itself was changed to "Legal Aid Manitoba", and its governance and operation was altered. A board of 12

¹⁸ *Ibid.*; See also Penner and Peltz, *supra* note 15 at 16.

¹⁹ Note: the author intends no adverse stereotyping with the use of this word.

²⁰ N. Larsen, "Seven Years with Legal Aid (1972–79): A Personal View of Some Events and Background Literature" (1981) 11 Man. L.J. 237 at 241, cited in *supra* note 6 at 10, n. 6.

²¹ LAM Review, *supra* note 6 at 98, 114.

²² Legal Aid Manitoba, "Special Programs," online: Legal Aid Manitoba <<http://www.legalaid.mb.ca/>>.

²³ Bill 47, *The Legal Aid Services Society of Manitoba Amendment Act*, 3^d Sess., 38th Leg., Manitoba, 2004 (assented to 9 December 2004, S.M. 2004, c. 50).

directors was replaced by a seven to nine member Management Council established to direct the business and affairs of LAM in an efficient and cost-effective manner. The number of council members includes three non-lawyers at a minimum, with three lawyers selected from seven nominees by the Lieutenant Governor in Council. Duties specifically listed are financial management, resource management, development of strategic policies, and evaluation of legal aid quality and cost-effectiveness. A tariff review of fees paid to private legal aid lawyers will take place at every two years, in consultation with the newly created advisory committee. Composition of the committee is unspecified, and it will provide advice on general or regional concerns, on needs of those receiving legal aid, and make recommendations on matters referred by the council. The appeal process for decisions regarding legal aid eligibility has been streamlined, in that the executive director's decision is now final.

The proposed provisions originally removed the applicant's choice of counsel; however, an amendment was adopted, which required that the director at least consider a request for counsel of choice. Applicants will also be required to complete a written authorization allowing third parties to disclose financial information about the applicant, for which any who make false or misleading statements to obtain legal aid, or fail to disclose changes in an applicant's income that may affect entitlement to legal aid, may be subject to a criminal summary conviction offence, punishable by a fine of up to \$10 000. LAM will be required to investigate the financial resources of applicants for legal aid who are charged with specified offences, such as a criminal organization offence, or any other offence prescribed by regulation.

Lawyers, when dealing with a legal aid client, will be required to advise LAM upon discovering that the client may not be eligible to receive legal aid, even though the information may surface during solicitor-client meetings. A lawyer employed by LAM, however, will not be found in conflict of interest with another lawyer of LAM, even if the same case involves each of their clients.

B. Backdrop to Bill 47

Problems with legal aid and its delivery have been evident for many years, fuelled by recurrent budget cuts within federal and provincial governments since the 1990s.²⁴ At that time, private bar lawyers in northern Manitoba who handled legal aid cases began a strike, while the Winnipeg Defence Lawyers Association appointed a committee to consider strike action. Again, after a decade of government decreases or freezes to funding, Manitoba's criminal defence lawyers voted to take no new legal aid certificates until the province

²⁴ Tom Onyshko, "Manitoba lawyers upset with 25% cut in legal aid tariff" *The Lawyer's Weekly*, 11:46 (10 April 1992) (QL).

addressed the cutbacks that had been made to the system.²⁵ LAM had announced a projected 2003 deficit of \$1 million if the cuts were not implemented.²⁶

Some exacerbating factors included the failed "mega-trials" of 35 Manitoba Warriors charged in 1998, and five Hells Angels members in 2003, which further strained the system's budget.²⁷ Enraged defence lawyers filed "Fisher applications"²⁸ in February 2003 for increased tariffs to properly compensate their legal counsel in the complex trials.²⁹ Disaster was narrowly averted when the board of LAM rescinded the cutbacks, the federal budget announced an additional \$1.5 million for criminal legal aid, and the provincial Justice Minister and Attorney General Gord Mackintosh added \$800 000 for legal aid family law cases.³⁰

Nevertheless, by October 2003, the funding issue emerged once again, when a criminal defence lawyer who had completed a complex and difficult murder trial for LAM did not receive the expected remuneration at the end of the matter, which had been so ordered by the court. Another lawyer had been ordered by the court to continue representing the client even though legal aid had unilaterally reduced his fees in the case.³¹ More members of the private bar began to refuse to deal with legal aid cases. By April 2004, a Statistics Canada report on legal aid resources and caseloads revealed that private bar lawyers were withdrawing from participating in legal aid plans in every province—a 15% decrease over a four year span.³²

All of these events culminated with Justice Minister Gord Mackintosh's request to Assistant Deputy Minister Ron Perozzo on 28 November 2003 to: "Undertake research and provide me with advice and recommendations on the

²⁵ Deana Driver, "Manitoba lawyers refusing to take legal aid certificates" *The Lawyer's Weekly*, Vol. 22, No. 39 (21 February 2003) (QL).

²⁶ Deana Driver, "Manitoba Bar angered at cutbacks in legal aid funding" *The Lawyer's Weekly* Vol. 22, No. 38 (14 February 2003) (QL).

²⁷ "Mass prosecution," Editorial, *Winnipeg Free Press* (22 November 2005) A12.

²⁸ *R. v. Fisher*, (1997) S.J. No. 530 (Q.B.). In which the Saskatchewan judge trying Fisher for murder provided guidance for other trial judges in considering whether state funding of counsel should be ordered at rates exceeding those of the provincial legal aid program. Note: Manitoba legal aid tariffs were the lowest in Canada at that time.

²⁹ *Supra* note 25.

³⁰ Deana Driver, "Manitoba's legal aid crisis eases as government raises funding" *The Lawyer's Weekly* Vol. 22, No. 42 (14 March 2003) (QL).

³¹ Deana Driver, "Battle over funding of legal aid plan heating up once more in Manitoba" *The Lawyer's Weekly* Vol. 23, No. 25 (31 October 2003) (QL).

³² Cristin Schmitz, "Report confirms Bar's flight from handling legal aid cases" *The Lawyer's Weekly*, Vol. 23, No. 45 (2 April 2004) (QL).

future delivery of legal services to indigent persons in Manitoba.”³³ Specifically, the report was to examine the best way to move toward greater reliance on staff lawyers and a corresponding service delivery model; and what legislative, policy and organizational changes would be necessary to implement the changes. As well, Mr. Perozzo’s mandate stated that consultation with the Manitoba Bar Association (“MBA”), Criminal Trial Lawyers Association, Legal Aid Services Society, Law Society, and any other organizations or individuals was authorized in the development of the report recommendations. The final summary report was to be in the minister’s hands by 15 March 2004.³⁴

To date, most of the recommendations of the 136 page report have been legislated, except for the establishment of a separate LAM office staffed with 10 additional criminal lawyers. As will be seen, the report raised the ire of organizations and a few individuals for various reasons.

C. Tabling of Legal Aid Manitoba Report; Introduction of Bill 47

Mr. Perozzo’s 134 page report, *A Review of Legal Aid Manitoba*,³⁵ (“LAM Review”) was tabled by the Attorney General (“AG”) in the Manitoba Legislative Assembly on 27 May 2004, who then moved for the first reading of Bill 47, seconded by the Minister of Finance, Mr. Greg Selinger.³⁶ At this time, Justice Minister/AG Mackintosh noted that the legislative proposal gave no right of choice of counsel for legal aid applicants, so that LAM could select staff lawyers to conduct the defence of those accused in complex trials. Conflict of interest was, in effect, waived for legal aid staff lawyers; legal aid would not be available to criminal organizations; mandatory investigations into the assets of individuals charged with certain criminal offences would apply; and the investigative and collections powers of legal aid were strengthened as well as focusing the governance of legal aid overall. The motion to read Bill 47 for the first time was adopted by the Assembly.

D. Second Reading

Justice Minister Mackintosh moved for second reading of Bill 47, and that the Bill be referred to a committee of the House on 1 June 2004, seconded by the Minister of Education, Citizenship and Youth, Peter Bjornson.³⁷ He went on to note the salient features of the bill, by mentioning other points and

³³ LAM Review, *supra* note 6 at Appendix A.

³⁴ *Ibid.*

³⁵ LAM Review, *supra* note 6.

³⁶ Manitoba, Legislative Assembly, *Debates and Proceedings*, Vol. LV No. 45B (27 May 2004) at 2705–2706.

³⁷ Manitoba, Legislative Assembly, *Debates and Proceedings*, Vol. LV No. 47 (01 June 2004) at 2804–2807.

incorporating greater detail into his comments than when he had spoken briefly on the bill during its introduction.

AG Mackintosh referred to private lawyers speaking publicly about withdrawal of their services for legal aid cases, given the presence of more complex cases and associated increased costs. He reminded the Assembly that there were actual instances of disruption of private bar legal aid in recent years. To maintain a stable and reliable legal service for low-income Manitobans, he stated that Bill 47 would allow for new approaches to managing resources and a renewed focus on the public interest. The new official name for the arms-length corporation would be Legal Aid Manitoba, and it would operate with a Management Council to direct its business affairs with particular attention to service quality and cost effectiveness. An advisory committee would be established and would be the only one of its kind in legal aid organizations throughout Canada. It would be the vehicle to provide a formal mechanism for stakeholder voices to be heard by the council in its policy decisions, and consultations on proposed tariff increases would be mandatory.³⁸

The minister concluded his remarks by mentioning the summary conviction offence created by Bill 47 for making a false statement in order to obtain legal aid, and that any lawyer on a case would be obliged to advise LAM if they discover that the client is no longer eligible to receive legal aid during the course of legal representation.

Kevin Lamoureux, the Liberal MLA for Inkster, spoke on the bill and urged public input at the committee stage. He noted that the ramifications of the bill were far-reaching, and that there were issues surrounding it that needed to be addressed,³⁹ such as the fact that tariff amounts for lawyers have not kept pace with inflation. The general thought in Mr. Lamoureux's political circles is that legal aid must be fixed, and while he supported some form of change, the change must be just to both lawyers and the clients who rely on legal aid services.

Mr. Lamoureux then alluded to the issue that ignited the whole examination of legal aid—the gang issue in conjunction with the mega-trial.⁴⁰ He further remarked that there was a great deal of concern in terms of legal costs to Manitoban taxpayers when gangs in Quebec were proved to have brought in over \$100 million in profit to their criminal organizations.⁴¹ He also posed concerns about the government's apparent intention to move toward staff lawyers, thereby marginalizing the private bar's involvement in legal aid cases. In his view, a movement toward either a purely public system or toward a

³⁸ *Ibid.* at 2805.

³⁹ *Ibid.*

⁴⁰ *Ibid.* at 2806.

⁴¹ *Ibid.*

subsidized private sector would not properly serve the population. Mr. Lamoureux stated that the tariff fees must be reconsidered in this process, in order to become competitive, and that the Liberal party views the legislation as positive in general, in that it will generate some necessary discussion on the issue.⁴²

When the Speaker asked if the House was ready to vote on the question of second reading, a member indicated otherwise, whereupon Peter Dyck, the Progressive Conservative ("PC") MLA for Pembina, successfully moved that debate be adjourned, which was seconded by John Loewen, the former PC MLA for Fort Whyte.⁴³

Bill 47 waited until 8 June 2004 to be passed for second reading.⁴⁴ It was the will of the House for the bill not to remain standing in the name of Mr. Dyck, and the House re-entered debate. PC Gerald Hawranik, the justice critic of the official opposition, voiced concerns such as whether or not the LAM Review of 2004 should have been commissioned at all by the Justice Minister. Mr. Hawranik also referred to the pressure exerted on legal aid due to the Hells Angels "mega-trials," and with great relish, reminded the Assembly that Justice Minister Mackintosh should simply have adopted the planks of the PC party on the issues that were presented in Question Period during the last provincial election. Those planks mirrored four of the five major recommendations of the 2004 LAM Review, and according to Mr. Hawranik, the Minister could have saved the public much money by heeding the Opposition in the first place.⁴⁵

While essentially pleased with the favour shown towards the LAM Review's recommendations, Mr. Hawranik raised concerns from defence lawyers regarding the accuracy of the Review's numbers pertaining to the hiring of 10 staff lawyers who were forecasted to handle 280 criminal cases per year. Economically, if 280 cases are not handled each year by each lawyer, then the whole model would crumble, so that hiring 10 more staff lawyers becomes pointless. Doubts of the ability to deal with that many cases were raised also, as prosecutors themselves barely handle 210 files per year. These are Mr. Hawranik's unverified numbers, however, and this writer admits to some scepticism when he stated that prosecutors, "[H]ave to do all the paperwork in the file. They have to deal with all of those issues which [are] more time-consuming than what a defence lawyer might handle in that particular file."⁴⁶ Yet, Mr. Hawranik finished by agreeing that 280 cases per year is achievable in

⁴² *Ibid.* at 2807.

⁴³ *Ibid.*

⁴⁴ Manitoba, Legislative Assembly, *Debates and Proceedings*, Vol. LV No. 51 (8 June 2004) at 3075–3076.

⁴⁵ *Ibid.* at 3075.

⁴⁶ *Ibid.* at 3076.

accordance with the Perozzo report, although he was entirely unclear on how that deduction was reached.

Finally, another concern for defence lawyers that Mr. Hawranik presented was the removal of choice of counsel, but he pointed out that was one of the planks in the PC campaign for the prior provincial election. "We did not believe that an accused criminal should be allowed counsel of choice...", but that legal aid should have that power because of public money paying for their defence.⁴⁷ (Author's note: an accused is not necessarily a criminal, nor is deemed to be a criminal, until a full answer and defence to the charge has been mounted, followed by the court rendering a conviction).

Dr. Jon Gerrard, the MLA for River Heights and Liberal party leader, simply added to the record that there are some positive aspects of Bill 47, but that the true cost-effectiveness of the measure must be carefully considered, as well as whether or not in some circumstances there would be too many conflicts experienced by staff lawyers to be workable.⁴⁸

E. The Standing Committee on Justice

Ten people, either as organization representatives or private citizens, presented on Bill 47 to the standing committee from 6:30 to 9:33 p.m., chaired by Doug Martindale, the NDP MLA for Burrows.⁴⁹ Thirty-six pages of recorded minutes of the committee's interactions with the presenters tell the tale of how the bill was received and by whom, and are summarized in the following table. The presenters alluded to further points raised in their presentation copies which were submitted to the standing committee and the table reflects the presenters' discussions at the committee's sitting of 18 November 2004.

⁴⁷ *Ibid.*

⁴⁸ *Ibid.*

⁴⁹ Manitoba, Legislative Assembly, *Standing Committee on Justice*, Vol. LV No. 2 (18 November 2004) at 11–47.

Presenters Consultation	Elimination of Choice of Counsel	Consent Financial Disclosure	Financial Investigation/ Category 2 Charge	Criminal Offence/Financial Disclosure	Elimination LAM Lawyers' Conflict of Interest	Management/ Advisory Bodies
1. Manitoba Association of Rights and Liberties (MARL)–Ken Mandzuik; Dir.	Solicitor/client relationship based on trust; -will most negatively impact Aboriginal males in criminal law & females in civil family law; -no reason that only the rich allowed to choose; -perpetuates the perception that the poor are 2 nd class citizens	Mandatory consent of applicant authorizing 3 rd party breaches right to privacy; -consent required in bill is overbroad; -no limit in bill for legal aid discretion in determining who must disclose -amendment requested that s.11(2) specify 3 rd parties	Individuals accused of particular crimes singled out for more thorough investigations; -improper for higher standard based on alleged offence; -amendment requested to remove s.11(1).	"Failing to promptly advise of applicant's change in finances" too vague in wording when creating an offence; -amendment requested that s.11(4) specify defined period i.e. 30 days	Creates lower standard for LAM lawyers vs. private bar lawyers; -if choice of counsel has been removed legislatively, clients will have no choice when LAM lawyer is in conflict	
2. Public Interest Law Centre (PILC) –Byron Williams, Director	Poverty: complex issue, absence of dignity, and self-respect; -removing choice equals another step away from inclusion; -most LAM clients are not gang members; -amendment to general rule of choice s.14					
3. Manitoba Bar Association (MBA)–Veronica Jackson, President	Echoes concerns of MARL and PILC				LAM lawyers enabled to breach ethical obligations; -obligation exists for client protection; -poor are not entitled to less -amendment to remove s.20(2)	Should include 2 members of MBA on council, not only 3 from LSM; -amendment to s.5(4) for two MBA and two LSM members

4. Legal Aid Lawyers' Association -David Joyce, Vice President	Echoes above concerns of MARL, PILC and MBA				Lower standard of care for one group; -many constituents will be unprotected if poor enough; -amendment to remove s.20(2)	
5. Law Society of Manitoba (LSM)- Allan Fineblit, CEO	Echoes above; -hire more LAM lawyers; -retain choice by cost-effective management				Courts will find problem with conflict; -a tenet of justice system is relationship of loyalty to client; -wording overbroad; -amendment to ensure no conflict	Disagrees with MBA on council; -MBA role to oversee interests of the profession -council's decisions will affect finances for profession
6. Manitoba Criminal Defence Lawyers' Association- Sheldon Pirux, President **	No choice thwarts equal access to justice; -private bar in criminal cases offers quality; -no choice may result in wrongful convictions -amendment to drop s.14				Legislation is unconstitutional; -ongoing perception of conflict; -courts will decide ultimately	
7. Michael Williams- lawyer/private citizen	LAM choices limited in child protection, collaborative law; -no choice precludes access to qualified pool					Clarify role of Advisory Committee
8. Sarah Inness- lawyer/private citizen	-Aboriginal people most affected; -echoes all above; -maj. of work is not criminal organisations					
9. Laura Friend- criminologist/private citizen	No choice disenfranchises further those with little choice					
10. Val McCaffrey-retired teacher/private citizen	Supports all initiatives in proposed legislation					

It is interesting to note that, of all the presenters at the committee, The Manitoba Association of Rights and Liberties ("MARL") and The Public Interest Law Centre ("PILC") exhibited the greatest number of concerns with the proposed legislation, and also referred most strongly to the actual people whom legal aid represents. When asked by Mr. Hawranik, MARL emphasized that the choice of counsel issue would not necessarily require legislation, but could be managed within the existing parameters of legal aid.⁵⁰ PILC, however, strongly mentioned the symbolic impact of the removal of choice and the message that would be sent to society as a whole, in terms of different entitlement between poverty and wealth circumstances.⁵¹ The plight of women in domestic violence situations requires a choice of legal counsel for the victim at a time of powerlessness; criminal defence for a serious charge may call for a choice of more specialized and experienced counsel. According to PILC, choice of counsel is much more important than a symbolic right.⁵²

When Justice Minister Mackintosh made his opening statement after the presentations were heard, he commented that it was unfortunate to have received no feedback from the general public on the Review.⁵³ The minister added that the LAM Review 2004 had been posted on the Department of Justice website, and although there was feedback from some of the various organizations present, none had come from the general public.

Presumably, the minister was hoping for input from the legal aid user population as well as others. The general population, however, who has no need of legal aid services, will not be moved to involve themselves in an amending bill that will have no impact on their lives. Unfortunately, the poor do not usually have ready access to the Internet to either read the Review or to offer their points of view, nor is there sufficient advance notice of committee times. As the presenter Val McCaffrey mentioned, she had registered only that evening after learning of the committee meeting one half hour beforehand, leaving her no time to prepare. Ms. McCaffrey supported the amendments, and explained that the average working person is likely too busy with their jobs and families to be able to take the time required for this type of preparation and appearance.⁵⁴ In his opening statement, justice critic Hawranik voiced concerns that there were only two private citizens who were not lawyers presenting at the committee, and reiterated that it would have been useful to hear from people who would benefit from using the legal aid system.⁵⁵

⁵⁰ *Ibid.* at 14.

⁵¹ *Ibid.* at 15.

⁵² *Ibid.*

⁵³ *Ibid.* at 38.

⁵⁴ *Ibid.* at 37.

⁵⁵ *Ibid.* at 39.

The committee examined and passed each of the proposed clauses, with amendments to proposed s. 6 to demand review of the fee tariff to private lawyers at least every two years. The Management Council must consult with the advisory committee, which is to meet at least four times per year and the Council must also report the tariff review to the minister. The proposed s. 11(2), which dealt with the mandatory consent of the legal aid applicant, went through an amendment directly from MARL's presentation earlier, and added wording to remove the overbreadth of the scope of consent from third parties about the applicant's financial status.⁵⁶

Another amendment at committee, in proposed s 8.1, clarified the roles of the Management Council and advisory committee, providing for annual information to the advisory body regarding the number of applications received and approved, as well as the number of applicants who had requested and received the lawyer of their choice. The MBA amendment suggestion to nominate two members to the Management Council, however, was not enacted.⁵⁷

Proposed s. 12(3) stipulated that a criminal organization (according to Criminal Code s. 2) would not receive legal aid under the group eligibility section, prompting both Mr. Hawranik and Mr. Lamoureux to question the minister's attempt to appear tougher on gangs to the public.⁵⁸ Mr. Hawranik could not resist reminding the minister that a Hells Angels gang could not apply for legal aid under the group eligibility clause, but an individual of that gang would still be able to apply and qualify. The amending legislation on this dilemma was, by all appearances, relatively impractical. But both members opposing it specifically stated that they were not suggesting deletion for that amendment.

Minister Mackintosh repeated more than once that the concept of moving more complex criminal casework into LAM remains. The three main components of the concept were removal of the automatic right to choice of counsel, implementation of new legislation to remove conflict of interest for LAM lawyers, and the installation of the new management structure for LAM.⁵⁹ When all budget considerations were completed, the decision will be made regarding moving to a greater ratio of casework by LAM staff lawyers. The hiring of 10 more staff lawyers will not be decided until the provincial budget. (NOTE: The provincial budget was brought down in early 2005; at the time of this writing in December 2005, the number of LAM staff lawyers had not changed).

⁵⁶ *Ibid.* at 42.

⁵⁷ *Ibid.* at 40.

⁵⁸ *Ibid.* at 43.

⁵⁹ *Ibid.* at 46.

The Standing Committee on Justice delivered its report on 23 November 2004, moved to be received by Chair Martindale, seconded by Ms. Irvin-Ross of Fort Garry.⁶⁰

F. Third Readings & Royal Assent

Before third reading took place, a motion was made by Mr. Lamoureux to amend part of Bill 47 to allow the selection of two members of the MBA from a list of seven nominees to the Management Council of LAM. This change would complement the two members selected from seven LSM nominees for the council, and would effectively dispatch the concerns of MBA representation voiced at the Standing Committee.⁶¹

Mr. Lamoureux spoke to the amendment by saying that the MBA represented 1 200 lawyers in Manitoba, and there had not been a clear reason as to why MBA representatives on the Management Council were not desirable in the amendment scheme.⁶² Dr. Gerrard seconded the motion, and followed Mr. Lamoureux in saying that the MBA has an important role in ensuring the workings of the justice system.

However, Mr. Hawranik spoke against the motion, stating that the Management Council provision allows for the assignment of between seven and nine members, so that two from both the MBA and LSM weights the council too heavily in favour of lawyers over non-lawyers.⁶³ Bill 47 called for three lawyer members from the LSM and at least three layperson members with an appointed chairperson to comprise a council of seven to nine members. Further, Mr. Hawranik reviewed the possibility that all three LSM council members could also be CBA members. Finally, he believed that the principle of the Management Council was to enable inclusion of those who use the services of legal aid because legal aid exists for the benefit of clients, not lawyers.

Lastly, the Acting Minister of Justice and Attorney-General, Dave Chomiak, also spoke against the motion—for the same reasons as Mr. Hawranik, whereupon the motion put to the Assembly for the amendment to Bill 47 failed.⁶⁴

After Bill 47 entered its third reading, opposition justice critic Hawranik spoke at length. He pointed out that the justice minister had caused a crisis within legal aid the previous year when he failed to discuss the proposal and

⁶⁰ Manitoba, Legislative Assembly, *Debates and Proceedings*, Vol. LVI No. 2 (23 November 2004) at 25–26.

⁶¹ Manitoba, Legislative Assembly, *Debates and Proceedings*, Vol. LVI No. 13B (9 December 2004) at 555–566.

⁶² *Ibid.* at 555.

⁶³ *Ibid.* at 557.

⁶⁴ *Ibid.* at 556–558.

implementation of a change and/or a tariff review with lawyers in the province.⁶⁵ Mr. Lamoureux asserted that, when eight out of 10 committee presenters were lawyers, the minister simply “caved in,” with amendments to Bill 47 according to their concerns, rather than putting the ordinary people’s needs front and centre.⁶⁶

Mr. Lamoureux and the PC MLA for Lakeside, Ralph Eichler, also voiced the same opinions as Mr. Hawranik, and their comments turned into lengthy diatribes about the Hells Angels gangs and the availability of legal aid to individuals versus groups. It should be noted that the Hells Angels have never applied as a group for legal aid. All involved decried the LAM Review of 2004 as a waste of taxpayers’ funds, and that the motion for MBA members on the Management Council was not successful.

In the end, Bill 47 passed third reading with the support of those who spoke in lengthy criticism of it, and received Royal Assent on 9 December 2004. Bill 47, *The Legal Aid Services Society of Manitoba Amendment Act*, S.M. 2004, c. 50 was proclaimed and came into force 10 August 2005.

V. CONCLUSION: LONG SHADOWS

Many of the legislated changes are not unique to Manitoba. The mixed model of staff and judicare (private bar) lawyers to deliver legal aid is common to other provinces; particularly with Quebec, Saskatchewan, Newfoundland, Nova Scotia, and Prince Edward Island using mainly staff systems supplemented with members of the private bar.⁶⁷ The remaining provinces use the judicare model to deliver legal aid—while the debate continues in all jurisdictions about the comparative cost-effectiveness, the matter of which model is best has not yet been resolved.

What is clear in Manitoba is that the year 2003 became the catalyst for changes to legal aid. The annual incremental shrinkage of federal funding, a decade of tariff rates neglect, and the “mega-trial” failures with subsequent private bar rebellion, factored into the press announcement by Justice Minister/A.G. Mackintosh. The release stated, “[...]ew ways of delivering services that adapt to the challenges [are] being posed in light of the evolving legal environment of complex cases and increased costs.”⁶⁸ Because the average costs per criminal case in Manitoba vary from \$619 for the private bar to \$490 for

⁶⁵ Deana Driver, “Manitoba defence bar labels legal aid plans ‘deplorable’” *The Lawyers Weekly* Vol. 24, No. 9 (2 July 2004) (QL).

⁶⁶ *Supra* note 61 at 559.

⁶⁷ LAM Review, *supra* note 6 at 38.

⁶⁸ Government of Manitoba, News Release “Legal Aid to be Reviewed, Change on the Way: Mackintosh” (25 November 2003).

staff,⁶⁹ the decision to move to more staff lawyers became the major recommendation for the LAM Review, and corresponded with the initial request from the minister to advise how the move could be implemented.

Equally clear is that all of the Bill 47 amendments are geared toward ensuring that a fuller complement of staff lawyers will be able to effect the cost savings of criminal cases over the first few years of start-up. A full-time chairperson of the Management Council would presumably be better able to oversee the monthly operation than a half-time chairperson. This, however, raises the spectre of the possibility of general micro-management, or even encroachment into the areas under the purview of an Executive Director. Will the term "management" change the operational aspect of what was previously termed a "board?" The latter obviously carries the inference of a policy body; while the former may imply a much more active role.

Diluting the applicant's right of choice of legal counsel provides a stronger administrative position in the matter, possibly enabling more effective case management. The establishment of a separate criminal law office with staff lawyers currently operates in Saskatchewan in order to eliminate concerns of conflict of interest in the representation of co-accused, although that province uses several satellite offices with different lines of accountability. Newfoundland and Labrador also utilizes separate community law offices, each with its own board, and has legislated that each is to be considered a separate law firm, thereby eliminating any possible conflicts of interest.⁷⁰ The intent in Manitoba is slightly less, in that only one office was recommended, and as mentioned earlier, this part of the proposed changes has not yet come about.

No one would argue that criminal organizations receiving legal aid services probably should not be eligible, but that is something which a bill cannot completely address. An individual is innocent until proven guilty in our legal system, such that they are not necessarily precluded from legal aid even if that individual is a member of a criminal gang. The legislation's attempt at foresight was a hindsight reaction from 1998 and 2003. Yet, overall, how many of the 20 500 legal aid certificates issued by March 2004 and 22 500 in 2003 were assigned to gang members versus poor individuals?⁷¹ While the wisdom of planning for possible future *en masse* trials is indisputable, care must be taken that the delivery of legal aid does not change so greatly that the people who need its services lose the access that it currently offers.

It also remains to be seen whether or not staff lawyers can offer the legal experience to an accused in an extremely serious criminal charge that senior, private bar lawyers who handle these legal aid cases have over the years. While

⁶⁹ LAM Review, *supra* note 6 at 2.

⁷⁰ LAM Review, *supra* note 6 at 47.

⁷¹ Legal Aid Manitoba, Thirty-second Annual Report (31 March 2004) at 18.

Mr. Currie has concluded that quality of legal aid lawyers' service results in the same outcomes for accused persons as private bar service, those conclusions are based on a broad examination of criminal charges.⁷² It is simply unknown how or if outcomes for the most serious criminal matters will differ.

Fiscal responsibility is desired and demanded, more today than ever, and it appears that government continues to move to purely budgetary considerations in the delivery of legal aid. Whether or not Legal Aid Manitoba can adhere to its original and ongoing founding philosophy—to function effectively *for the poverty-stricken population* who are entitled to access to justice—is an issue which strikes at the core of principles of fundamental justice. Supreme Court Chief Justice Beverley McLachlin suggested that the focus must change from the question of how legal aid is delivered to an examination of its role as a component of the justice system.⁷³ The human element should not be disregarded. The debate on effectiveness and cost-efficiency is inconclusive and masks the human costs of narrowed access caused by budget constraints. If qualifying for legal aid becomes more stringent, these human costs could include: further loss of dignity, alienation from community and society, and an increased likelihood of conviction. In the words of Chief Justice McLachlin, "Providing legal aid to low-income Canadians is an essential public service. We need to think of it in the same way we think of health care or education."⁷⁴

VI. AUTHOR'S AFTERWORD

In a personal interview with Justice Minister Mackintosh in the Manitoba Legislative Assembly on 15 December 2005, one of the questions posed was whether LAM will be able to truly embrace its original founding philosophy of assisting the poor to access justice, and whether poverty issues will be stifled in light of the recently enacted amendments. The Minister stated that the government was attempting to enhance legal aid's ability, and that: "Legal aid is critical to society and the functioning of the justice system."⁷⁵ The Minister also pointed to the dramatic decrease in legal aid funding from the federal government, saying that: "A paramount concern is federal support waning, now at 50%."⁷⁶

⁷² Albert Currie, "Legal Aid Delivery Models in Canada: Past Experience and Future Developments" (2000) 33 U.B.C.L. Rev. 285.

⁷³ *Supra* note 1.

⁷⁴ *Ibid.* at para. 23.

⁷⁵ Interview of the Honourable Gordon Mackintosh, Attorney General and Justice Minister for Manitoba, by Judy Eagle (15 December 2005) at Manitoba Legislature, Winnipeg, Manitoba.

⁷⁶ *Ibid.*

These responses do not adequately address the true dilemma that hovers—that somewhere between management, governance concerns and dwindling government funding, there exist cracks into which those in our society who have the least resources and the greatest needs inevitably fall. A watchful eye is recommended—as ready action may be required to protect individuals' rights.