

Saved by the Bell: The 2015 Legislative Assembly Rule Changes

BEN WICKSTROM*

Few things are more essential to law-making in Manitoba than the rules of the Manitoba Legislative Assembly. Bills succeed and fail based upon the proper execution of the Assembly's rules. Changes to the Assembly's rules greatly affect the ability of governments to enact legislation and the ability of opposition members to obstruct and slow the passage of bills (or to enact their own). While the lives of Manitobans can be greatly changed by the skillful navigation of the rules, it is hard to imagine more than a hundred people have a working knowledge of these rules. In June 2015, the Assembly enacted a set of rule changes (the first in more than ten years), which significantly altered the tools in the legislator's tool-belt. This paper will examine the rule changes that occurred in June 2015, their origins in previous legislative disputes, and their early consequences.

The June 2015 Rule Changes involved the consideration of 33 separate items, which included the addition and deletion of dozens of provisions. While some of these changes could be described as "legislative housekeeping" involving the elimination of rules that had fallen into disuse or the clarification of ambiguous provisions, others were of much more considerable consequence which would affect how both the government and the opposition carry out their respective roles. The focus of this paper will be on the changes with the most significant impact on the conduct of legislative business, including rules related to matters such as number of sitting days, times of the year at which the house may sit, when the house can be recalled, the creation of categories of "specified government bills" and "designated government bills", challenges to the

* B.A. (Hons), J.D. The author was called to the bar and admitted as a solicitor in Manitoba in May 2018.

rulings of the Speaker, limits on times at which committees will hear public presentations on standing committees, and rules relating to responses on written questions and matters taken under advisement during estimates and concurrence. As well, changes related to the debate and passage of private members business (bills) were also made in this agreement and will be examined.

I. BACKGROUND TO THE CHANGES – THE SUMMER OF 2013

An understanding of the rule changes passed in June 2015 would not be complete without an examination of events leading up to those changes. While the changes represented an accumulation of necessary or desirable reforms over the previous ten years, it would be naïve not to examine the operation of the Legislature during the 2013 Spring session (which became the 2013 Spring and Summer Session) in which a series of controversial bills were introduced and subsequently debated in the legislature.

Two of these bills, Bill 18¹ and Bill 33,² were controversial, but in the normal course of events would have been unlikely to cause the Legislature to sit through the summer and into September. Bill 18 was an anti-bullying bill introduced by the Minister of Education, the most controversial provisions of which allowed for the creation of Gay-Straight Alliance clubs in Manitoba schools. The bill was particularly controversial in the southeast Manitoba in communities where religious social conservatism is a more widely held cultural value. A number of religious leaders in this part of the province viewed the inclusion of provisions related to the creation of clubs to support gay students as a threat to their religious values.³

Bill 33 required the amalgamation of municipalities in rural areas of the province. Many of these communities had experienced depopulation

¹ Bill 18, *The Public Schools Amendment Act (Safe and Inclusive Schools)*, 2nd Sess, 40th Leg, Manitoba, 2013 (assented to 13 September 2013), SM 2013, c 6.

² Bill 33, *The Municipal Modernization Act (Municipal Amalgamations)*, 2nd Sess, 40th Leg, Manitoba 2013 (assented to 13 September 2013), SM 2013, c 10.

³ Joyanne Pursaga, "Steinbach lobbying against anti-bullying Bill 18", *Winnipeg Sun* (7 March 2013), online: <<http://www.winnipegsun.com/2013/03/06/steinbach-lobbying-against-anti-bullying-bill-18>>.

over the previous decades and local governments in these areas represented increasingly small populations. Their declining tax base made local governments less able to perform effective governance. The bill was perceived by rural Progressive Conservative (PC) MLAs and local government leaders as a threat to local control over decision making. In the case of local government leaders it was also seen as a threat to their own personal political futures and leadership roles in the community.⁴

Both pieces of legislation were largely opposed by groups outside of the traditional NDP political base, and while likely to have caused controversy and some legislative turmoil on their own, would have been unlikely to cause the substantial delays experienced in 2013. The chief cause of the legislative tumult in 2013 was the decision by the Selinger government to raise the provincial sale tax in the 2013 Provincial Budget. The increase caught Manitobans by surprise. The media, the opposition, community leaders, and even members of the governing party were caught off guard by Selinger's decision to increase the PST from 7% to 8%.

Bill 20, *The Manitoba Building and Renewal Funding and Fiscal Management Act*, was the legislative vehicle by which the PST increase was introduced into the Manitoba Legislature for debate. Opposition from the PC Official Opposition was immediate. The PC caucus took the rare step of voting against the bill on First Reading and requesting it be a recorded vote.⁵ This unusual action by the PCs set the tone for the weeks that followed. Weeks of "bell-ringing" would be followed by the PCs moving a seldom-used "hoist-motion" in late May that would have delayed debate on the PST for six months.⁶ By late May it had already become clear that the Legislature would not complete its business by the rule-mandated end of session in early June. The government was later required to call the house

⁴ Mary Agnes Welch, "Too small by half", *Winnipeg Free Press* (17 July 2010). Many of these local mayors, reeves and councillors in communities amalgamated faced little opposition in election to their positions, with a significant number being acclaimed.

⁵ Manitoba, Legislative Assembly, *Debates and Proceedings Official Report* (Hansard), 40th Leg, 2nd Sess, Vol 65 No 24 (17 April 2013), 537 (Daryl Reid). The first reading of a bill is usually regarded as a vote to allow debate on the bill and not a judgment on its merits. Many opposition members will vote to allow first reading of a bill but will later vote against it during votes on Second or Third Reading.

⁶ Larry Kusch, "Tory MLAs try to 'hoist' PST hike into limbo", *Winnipeg Free Press* (23 May 2013), online: <<http://www.winnipegfreepress.com/local/tory-mlas-try-to-hoist-pst-hike-into-limbo-208618761.html>>.

back immediately after it rose and continue the legislative session into the summer with no known end in sight. The months of July and August saw Bills 20, 33, and 18 sent to committee for hearings. Hundreds of Manitobans signed up to present to MLAs at committee hearings considering the bills.⁷ July also saw finger pointing between the NDP and PCs related to the passage of an Interim Supply Bill⁸ that would allow the continued operation of government departments that would otherwise run out of spending authority on July 31.⁹ The need to pass an Interim Supply Bill in July was another unusual incident complicating the house's operation during a time of heightened political volatility.

The crisis finally reached a resolution toward the end of August with the Legislative session ending in mid-September. The negotiations to end the session ended with an agreement that saw a number of the most controversial bills held over until the Legislature resumed in November, allowing passage of a number of other less controversial bills to occur as the Spring/Summer wound down. The negotiations also resulted in a thirteen page Sessional Order that would govern the sitting of the Legislature when session resumed in 2014, including agreement on when sitting would commence and provided that all bills introduced before May 1, 2014 would be guaranteed passage by early June 2014. The delays and extended bell-ringing experienced by members of the legislature proved an

⁷ Tom Brodbeck, "Last chance to call PST protest line and speak against Bill 20", *Winnipeg Sun* (2 July 2013), online: <<http://www.winnipegsun.com/2013/07/02/last-chance-to-call-pst-protest-line-and-speak-against-bill-20>>; Larry Kusch, "End is nigh at Manitoba legislature", *Brandon Sun*, (30 August 2013), online: <<http://www.brandonsun.com/breaking-news/end-is-nigh-at-manitoba-legislature-221757081.html?viewAllComments=y>>.

⁸ Passage of what is referred to as Interim Supply is required when a government lacks spending authority while the house is in session. When a government has not passed a budget for a given fiscal year it must seek authority to do so on an interim basis. If the Legislature is not sitting the Cabinet can approve what is referred to as a Special Warrant that authorizes continued spending for a set period of time. When the Legislature is sitting Cabinet is not allowed to authorize spending in that fashion and passage of an Interim Supply Bill is required.

⁹ Joyanne Pursaga, "NDP claim stall tactics will run province over fiscal cliff", *Edmonton Sun* (16 July 2013), online: <<http://www.edmontonsun.com/2013/07/16/ndp-claim-stall-tactics-will-run-province-over-fiscal-cliff?token=22505bfd3b8f10e4d8e12f446e46ad54>>.

important impetus for legislators to re-examine the rules and laid bare some of the legislature's procedural shortcomings.

II. I WON'T BE HOME FOR CHRISTMAS: PRELUDE TO CHANGES

The matter of rule changes had been percolating on the backburner for some time before the government and opposition came to an agreement. While the prolonged legislative session of 2013 exposed flaws in the legislature's rules, it was not until June 2015 that serious negotiation began. This negotiation was precipitated by a very specific interaction in the legislature in early 2015.

In early June 2015 the governing NDP was interested in having the House sit longer than scheduled so that debate on the 2015 budget could be completed. The government's plan to achieve this was by sitting an extra few days or a few hours longer in an effort to complete the work. During private member's business on Thursday, June 4, 2015 government house leader David Chomiak attempted to have the house agree to sit until 6PM that day and for the house to sit on the next day, Friday, June 5. A change to the calendar such as this required the unanimous consent of the House and the opposition did not provide this consent. Immediately following this decision, opposition house leader Kelvin Goertzen posed his own question, asking that the legislature sit from July to December 2015.

To the surprise of many, the House agreed. Even the speaker seemed surprised announcing the House "seems to be agreed."¹⁰ In interviews following this decision Government House Leader David Chomiak described Goertzen's request as tactical maneuvering, saying "I know it's a negotiating ploy that they're doing," adding further that "we want to pass our budget and I said a long time ago we're prepared to sit as long as it takes to get our budget passed."¹¹

With the House set to sit straight through Christmas, the government and the opposition had no option but to negotiate a more intentional end

¹⁰ *Ibid.*

¹¹ Steve Lambert, "Manitoba government, Opposition seem to be in a game of chicken over session end", *The Canadian Press* (4 June 2015), online: <<http://www.660news.com/2015/06/04/manitoba-government-opposition-seem-to-be-in-a-game-of-chicken-over-session-end/>>.

to the session. With this imperative came the opportunity to have more global negotiations about House rules. In an attempt to show that the government was not sincere in its stated willingness to sit until the debate on the budget was completed, the opposition created a small scale emergency that would be resolved as part of a package of rule changes.

III. THE LEGISLATIVE CALENDAR

Prior to the June 2015 Rule Changes the times at which the Legislative Assembly sat was almost entirely at the discretion of the government of the day, with a framework of rules governing when the House could sit. The rules also provided a mechanism by which a government could recall the house outside the times at which the house was required to rise. The previous rules read as follows:

Sessional Calendar

2(1) During a Legislature, the House may meet at any time:

- (a) from the first Monday in February to Thursday of the second full week in June, except during the week designated under The Public Schools Act as a spring break or vacation; and
- (b) from the first Monday after Labour Day to Thursday of the first full week of December.

Within these periods, the House is to begin to meet on a day fixed by the Speaker at the government's request and, unless adjourned earlier by order of the House, is to be adjourned by the Speaker, without a motion for adjournment, on the applicable Thursday. The House then stands adjourned to the call of the Speaker.

Recall of House

2(2) If the government advises the Speaker that the public interest requires the House to meet at any other time because of an emergency or extraordinary circumstances, the Speaker must advise the Members that the House is to meet at the time specified by the government. The House must begin to meet at the specified time.¹²

These rules essentially left recall of the Legislature up to the Premier allowing governments to recall the legislature, to at least some degree, on a

¹² Manitoba, Legislative Assembly, *Rules, Order and Forms of Proceedings of the Legislative Assembly of Manitoba* (7 December 2005) at 2 (George Hickes).

politically expedient basis. The rule resulted in the House often being recalled at the time of the introduction of the budget, resulting in the spring session of the house commencing in late March or early April, and sometimes later.

The new rules established a time for recall of legislature in the spring and other times at which the Assembly may meet:

Sitting periods

2(1) The House may meet at any time during the following sitting periods, except during the Spring Sittings when the House must begin to meet on the first Wednesday in March:

November Sittings

From Tuesday following the Remembrance Day week as described in sub-rule (2)(a) to the first Thursday in December.

Spring Sittings

From the first Wednesday in March to the first sitting day in June.

Fall Sittings

From the first Wednesday in October to Thursday of the week prior to the Remembrance Day Week.¹³

The rules also provided for previously non-existent “Constituency Weeks” that provided for a number of weeklong breaks in the calendar. The recall provisions were also changed:

Recall of the House

2(3) If the Government advises the Speaker that the public interest requires the House to meet at any time because of an emergency or extraordinary circumstances, a reason for the recall must be provided. The Speaker must advise the Members that the House is to meet at the time specified by the Government and of the reason for the recall.¹⁴

The new recall rule requires that if the government believes there are “emergency or extraordinary circumstances” requiring the legislature to sit outside of the normal legislative calendar, the government must provide a reason for this recall. This was not required by the previous rules. Related rules also limit the length of a recalled sitting to three weeks before a break

¹³ Manitoba, Legislative Assembly, *Rules, Order and Forms of Proceedings of the Legislative Assembly of Manitoba* (20 October 2015) at 2 (Daryl Reid) [Manitoba].

¹⁴ *Ibid.*

of one week is required after which the house can be recalled again.¹⁵ This reduces the harrowing nature of legislative marathons that have occurred in the past when contentious government legislation was introduced that was strongly opposed by the official opposition. The threat that the Legislature would be required to “sit into the summer” has long been used by legislators on both sides in a legislative “game of chicken” when controversial bills come before the house.

As bills die on the order paper when a new Throne Speech is introduced (generally this occurs in November in Manitoba), the surest way to ensure passage of a government’s legislative agenda is to threaten the opposition that the government will recall the legislature after its mandated June adjournment and to continue to debate bills until they have been voted on and passed. If an opposition party decides that for a combination of principled and political reasons that sitting into the summer is worthwhile the government’s threat loses its force and the government and opposition spend the summer months facing protracted debates and the use of procedural delay tactics. Prior to the June 2015 Rule Changes, the opposition had extensive tools available to delay legislative business. Rules allowing governments to curtail debate are complex and were subject to the same delay tactics as the rest of house procedure.¹⁶ The controversy over the implementation of the PST in 2013 is the most recent example of the use of summer sittings as a legislative tactic. While the government was determined to implement the sales tax increase and thus willing to sit into the summer, the opposition was equally willing to cause delay and sit through the summer in the belief that it had public favour on its side. The result was a stalemate that was not resolved until September 2013, at which time the sessional order referred to above was reached. It required, among other things, an early start to the spring legislative session and votes on some opposition bills.¹⁷

The new rules related to recall of the legislature make future stalemates similar to that of 2013 less onerous, as they provide for breaks in any summer sittings. Rule changes that will be discussed later in this

¹⁵ *Ibid* at 4 (s 2(4)-(5)).

¹⁶ Karine Levasseur, “Continued Instability in Manitoba: Deficits, Taxes, Elections, and Resetting Government” (2014) 37:2 *Man LJ* 209.

¹⁷ Manitoba, Legislative Assembly, *Sessional Order*, 40th Leg, 2nd Sess (11 September 2013).

paper also reduce the likelihood of summer sittings, so while the “pain” of a summer sitting has been reduced, the odds of the introduction of controversial legislation causing such an extended sitting are made lower by the rules as well, because governments have tools to ensure passage of these bills.

IV. DESIGNATED AND SPECIFIED BILLS

The new rules also created a category of “specified” government bills:

Specified Government Bills

2(8) In order for a Government Bill to be specified, the following actions must take place

- (a) First Reading must be moved no later than the twentieth sitting day after presentation of the Throne Speech;
- (b) Second Reading must be moved no later than the fourteenth sitting day after the First Reading Completion Day for Specified Bills; and
- (c) the Bill has not been included on the list of Designated Bills tabled by the Official Opposition in accordance with sub-rule (9).¹⁸

The creation of a category of “specified” government bills allows the government to ensure the passage of parts of their legislative agenda without the need for protracted negotiation with the opposition. Prior to the change no rule required that any category of bills needed to be voted on before the legislature rose. As long as the government meets certain criteria specified in the rules, including introducing a bill no later than the twentieth sitting day after the Throne Speech, it is guaranteed to be put to a vote and presumably receive the votes needed to pass. In the past a variety of procedural tactics have been used to delay debate and voting on bills virtually indefinitely. The new rules mandate decisions on the “specified” bills by interrupting the business of the Legislature so that votes are taken on specified bills. The idea in part being that if a bill was introduced early enough in the Legislative session then the Legislature should have ample time to debate and consider the bill. The rule means that any bill introduced after the twentieth sitting day after the Throne

¹⁸ Manitoba, Legislative Assembly, *Rules, Order and Forms of Proceedings of the Legislative Assembly of Manitoba* (20 October 2015) at 4 (Daryl Reid).

Speech is not guaranteed a vote and can only be passed if it is the will of the house to vote on it (meaning no delay on the part of the opposition or that an agreement to allow passage of non-specified bills has been reached between the government and opposition).

The category of “specified” bills also created a sub-category of “designated” bills. The rules allow the opposition to “designate” five “specified” bills to be held over to the fall session:

Designation by Opposition parties

2(9) No later than the fourteenth sitting day after the First Reading Completion Day for Specified Bills, the Official Opposition may designate up to five Government Bills for the purpose of further consideration at a later sitting period. If The Budget Implementation and Tax Statutes Amendment Act is identified as a Designated Bill, it counts as two of the five Bills that can be designated. If there is a Second Opposition Party, the division of Designated Bills is four for the Official Opposition and one for the Second Opposition Party. The Interim Appropriation Act may not be designated under this sub-rule.¹⁹

The rule allows the Official Opposition to require consideration of these five bills be delayed until a subsequent sitting, which the rules stipulate will occur at the earliest in October. The rule also provides that if one of the bills chosen is *The Budget Implementation and Tax Statutes Amendment Act* it will count as two bills. Referred to colloquially as *BITSA*, this bill is an annual omnibus bill which provides for implementation of all taxation and other legislative changes required for implementation of the government’s budget. Delay of this bill is arguably very disruptive to the government’s agenda as it could have an impact on the collection of revenues. Accordingly, counting it as two bills is a reflection of the seriousness of choosing to delay it.

The idea of creating a mechanism in the Legislative Assembly rules requiring the passage of certain bills was not new to the Manitoba Legislature and its use was employed after the conclusion of the contentious 2013 Spring/Summer Legislative Session when all parties agreed to a “sessional order” for the next legislative session. It had also been frequently employed previous to the 2013 sessional order. The sessional order agreed to in 2013 required that all bills introduced before May 1, 2014 be passed by the end of the Spring sitting, however, there was

¹⁹ *Ibid.*

no provision in the order for the designation of some bills to be considered at a later sitting.²⁰ These new rules codified what had often, but not always, been practice of the legislature.

V. CHALLENGES TO SPEAKER'S RULINGS

On its face, the elimination of the ability of Members of the Assembly to challenge a speaker's ruling may not appear to be a significant change. The Speaker is the presiding officer of the Assembly and has since 1999 owed their position to their direct election by Members of the Assembly. Speakers are generally elected from the benches of the governing party and, even with open elections where multiple candidates from the governing party have contested the election, they almost as a matter of course enjoy the confidence of the government caucus. When a ruling of the Speaker is challenged, the resulting vote is one that upholds the Speaker's ruling. Over time, however, challenging a speaker's ruling on a point of order has been one of the most widely used tactics for delaying the business of the house.

The addition of this rule to the Assembly's rules would appear to remove a significant weapon from the opposition's arsenal:

Decision

52(3) The Speaker shall decide the Point of Order and the Speaker's decision is not subject to appeal to the House and cannot be debated.²¹

The rule makes the Speaker the final authority on points of order raised by members of the house. Prior to the rule the Assembly was the final authority on determining the validity of points of order. Government caucuses rarely challenged rulings of the Assembly's Speaker, as an adverse vote for a Speaker on a point of order generally indicates that the Assembly has lost confidence in the presiding officer and results in the Speaker's immediate resignation. Only if a government caucus wished to remove the Speaker would such a dramatic vote be contemplated. In the Manitoba Legislature opposition parties routinely challenged the chair on points of order as means of delaying House business. This was achieved by

²⁰ *Supra* note 17.

²¹ *Supra* note 13 at 42.

Official Opposition House Leader standing up and calling a point of order on the conduct of a government member. The Speaker would then rule that there is no point of order (indeed an Opposition House Leader would often deliberately raise a weak point of order to ensure an adverse ruling), and then the Opposition House Leader would stand up and challenge the chair's ruling. The Speaker then asks the Assembly if they wish to uphold the Speaker's ruling, at which point the government caucus upheld the Speaker via a voice vote. The Opposition House Leader then called for a "recorded vote".²² This required that the division bells be rung to call the members in for a vote. Tradition in the Assembly is that no vote takes place until the Caucus Whips have indicated the various caucuses are prepared to vote or one hour of bell ringing has occurred. In these cases the Opposition Whip would refrain from indicating the readiness of the Opposition and the bells would ring for one hour.

The points of order raised by the Opposition House Leader were specifically meant to trigger an adverse ruling and thus an opportunity to challenge the Speaker and force a recorded vote. An opposition party could endlessly delay the house by raising frivolous points of order for the purpose of causing an endless series of challenges to the Speaker. This tactic was widely employed by both the New Democratic Party and the Progressive Conservative Party while they have been in opposition. It was most recently used to great effect during the debate around the increase to the PST in 2013. The practice is deplored by governments and employed widely by opposition parties. The ability to challenge the chair was abolished in the House of Commons in 1965 and by 2006 was prohibited in most Canadian jurisdictions.²³ There are other ways to deal with the Speaker making an incorrect ruling and most assemblies in Canada found that the challenge of the chair was used for purposes unrelated to the point of order it was meant to address.²⁴

The ability of opposition parties to "designate" bills to be held over for further debate allows for much the same effect that endless procedural delays do. The ability to delay a bill to a later sitting allows the opposition

²² A recorded vote is one where all members voting are required to vote from their seat in the Assembly. The names of the members and how they voted are recorded in the record (Hansard) of the Assembly.

²³ Tim Mercer, "Challenging the Chair", (2006) 29:2 Canadian Parliamentary Rev 21.

²⁴ *Ibid* at 22.

to have time to mobilize the public against the bill and to ensure that the government thinks twice about the legislative change it is planning on implementing. The endless calling of recorded votes and the “bell-ringing” that occurs as a means of indicating to members that a vote is about to occur likely strike the public as a considerable waste of time. It is likely that visitors to the Legislature view such tactics, occurring while they are attempting to take in the splendour of the democratic process, as disheartening displays of a kind of childishness on the part of lawmakers. The end of what had come to serve as a procedural delay tactic is a welcome change to the function of the Legislature and likely a relief to staff who toil in the building on an ongoing basis and endure the extended sittings and prolonged bell ringing.

VI. LIMITS ON PUBLIC PRESENTATIONS

Manitoba allows for some of the most significant public participation in the legislative process in all of Canada.²⁵ This has been a point of great pride on the part of legislators in Manitoba. The wide-ranging ability of citizens to appear before Legislative committees has meant that when the number of presenters is substantial one way of dealing with the volume is to have the Legislative committee sit late into the evening, occasionally until the early hours of the morning. The June 2015 changes included a significant change to the provision related to public presentations:

Sitting past midnight

92(5) Except with the unanimous consent of the Committee, a Standing or Special Committee must not hear public presentations past midnight. After concluding public presentations, by unanimous consent the Committee may sit past midnight to consider a Bill clause by clause.²⁶

As one member of the committee noted legislators often wear survival of such sittings, often on controversial issues of historical significance, as a badge of honour. In discussing the changes Opposition House Leader Kelvin Goertzen noted:

²⁵ Zachary Kinahan, Stacy Senkbeil & Matthew Carvell, “Wedge Politics in Manitoba: Bill 18-The Public Schools Amendment Act (Safe and Inclusive Schools)” (2014) 37:2 Man LJ 192 at para 33.

²⁶ *Supra* note 13 at 59.

We sometimes, as MLAs, take great pride in the fact that we sit through the night and do things that way, and we tell war stories about that. But I doubt, highly, that the public goes home and talks too grandly about how they were here to three in the morning, making a presentation. So if we're going to do it, let's leave it to MLAs and not to the public.²⁷

The practice of allowing presentations to occur into the early hours of the morning was seen as something of an embarrassment on the part of legislators. MLAs are expected to do the work of the Legislature and should understand that they may need to work extended hours, even past midnight, and this has long been acknowledged as a part of the job. That the public must suffer through the inability of lawmakers to schedule the work of the Legislature efficiently was clearly deemed by MLAs as unfair. It was noted that even allowing presentations until midnight may still be asking too much from the public, but the change at least reduces the ability of the government and opposition to use members of the public as a bargaining chip in their attempts to resolve legislative disputes. This change grew from agreements between government and opposition during the contentious 2013 session and from rules that had limited the likelihood of public presentations after midnight.²⁸

VII. WRITTEN QUESTIONS AND MATTERS TAKEN UNDER ADVISEMENT

Two methods by which the opposition can obtain information from the government are by asking Written Questions of Ministers and by asking Ministers questions during phases of the budget process, which are known as Estimates and Concurrence.

Written Questions are asked by one member of another member largely to seek information about a matter related to a Minister's department. The previous rules did not stipulate that answers needed to be provided within a specific timeframe, merely that they would appear on

²⁷ Manitoba, Legislative Assembly, Standing Committee on Rules of the House, *Debates and Proceedings Official Report (Hansard)*, 40th Leg, 4th Sess, Vol 67 No 1 (26 June 2015) at 22 (Daryl Reid). (Goertzen).

²⁸ Kelvin Goertzen, "Interview with Kelvin Goertzen" (2014) 37:2 Man LJ 17 at 27-28.

the order paper every two weeks until they were answered or at the end of the legislative session. Governments sometimes answered the questions and sometimes they did not. Given their less public nature Written Questions generally did not attract much attention outside of their appearance on the Order Paper every two weeks.

During Estimates and Concurrence, Ministers respond to questions about different aspects of their departments from opposition members. In some cases departmental staff are present with them in the Chamber or Committee Room where the questioning is occurring so that they can assist in providing answers. These processes are generally treated as less partisan than the Oral Question Period that most of the public is familiar with due to the more extensive coverage it receives by the news media. While Ministers attempt to provide information to opposition members immediately, there are occasions where Ministers take the question “under advisement” and endeavor to obtain an answer for the member at a later point.

The new rules provided a requirement for answers to be provided in both cases. In the case of Written Questions the new rules read as follows:

Responses by Members

61(2) A Member replying to a Written Question must do so within 30 days of the Written Question appearing on the Order Paper. If the reply is received when the House is not sitting, the Clerk shall provide the answer in writing to the Member who asked the question, while also notifying all Recognized Party Caucuses and Independent Members that a reply has been received and is available upon request.²⁹

The rules created a requirement that Written Questions be answered within 30 days. While the rules now require an answer to be provided by the member to whom a question is asked one member noted of the new rule that “it doesn’t govern the quality of the answer but at least requires some response.”³⁰ The new rule also expanded the list of members who could be asked a question as the previous rules had only provided for Written Questions to be addressed to Ministers.³¹

²⁹ *Supra* note 13 at 44.

³⁰ *Supra* note 27 at 18 (Goertzen).

³¹ *Ibid* (Yarish).

More significantly, the rule reforms addressed an issue related to matters taken under advisement during Estimates and Concurrence. Ministers are often asked for information about programs or individuals under the purview of the Minister and on many occasions the Minister is unable to provide the information while being questioned and offers to answer the question at a later point. The following is an example of such an exchange:

Mr. McFadyen: I just want to ask, as well, whether an individual by the name of Ben Wickham continues to be employed by the government.

An Honourable Member: Wickstrom.

Mr. McFadyen: Sorry, I—the name is Ben Wickstrom.

Mr. Selinger: Yes, he's employed by the government.

Mr. McFadyen: And what's the position that Mr. Wickstrom occupies?

Mr. Selinger: We'll get that information for the Leader of the Opposition.

Mr. McFadyen: And can the Premier just indicate who would make the decision to hire or promote Mr. Wickstrom? Is that the minister of the department or is there somebody within Executive Council who oversees those appointments?

Mr. Selinger: We'll verify his position and who was in charge of hiring him.³²

At no subsequent point did the Premier provide an answer to the Leader of the Opposition related to this question during the Legislature's proceedings. Any answer received by the Leader of the Opposition would have occurred outside of the House and the record of that answer would have been the responsibility of the member receiving that answer to maintain. If Mr. McFadyen's office lost any answer after having received it, then no record would exist.

A new rule about matters taken under advisement changes the outcome in such a situation. The new rule requires:

Matters under advisement

77(17) During the consideration of departmental estimates and the debate on the concurrence motion in the Committee of Supply, when a Minister takes a question under advisement he or she must, within 45 days of the question being asked, respond to the question in one of the following ways:

- (a) in the Committee of Supply before the conclusion of

³² Manitoba, Legislative Assembly, *Debates and Proceedings Official Report (Hansard)*, 40th Leg, 1st Sess, Vol 64 No 29 (7 May 2012) at 833 (Daryl Reid).

- that department's estimates:
- (i) by providing the answer verbally, or
 - (ii) by tabling the answer;
- (b) in the Committee of Supply during the debate on the concurrence motion:
- (i) by providing the answer verbally, or
 - (ii) by tabling the answer;
- (c) in writing:
- (i) by tabling an answer in the House, or
 - (ii) if the House is not in session, by following established intersessional tabling provisions in accordance with sub-rule 25(3).³³

The new rule not only requires an answer after 45 days of the question being asked, but also allows for a record to be created as any document tabled is available for inspection by members of the public through the Clerk of the Legislative Assembly's office. Previously, the only way a record of an answer to a question in Estimates was recorded for the public's review was if an answer was later provided in the House.

VIII. PRIVATE MEMBER'S BUSINESS

The June 2015 Rule Changes also provided some enhancements to the rights of what are referred to as Private Members, MLAs who are not Cabinet Ministers. Time is routinely set aside in legislative assemblies for consideration of bills and (non-binding) resolutions. Most of these initiatives fade into obscurity for a variety of political and procedural reasons. If a bill introduced by an opposition member is a good enough idea to be passed by the house, a government may not want to allow the opposition to have the opportunity for such a legislative victory. As well, many private members' bills have not gone through any kind of departmental vetting process, and while they may make theoretically beneficial changes, most government bills go through a thorough examination by civil servants to ensure the consequences of the new law are known in advance. Private members' bills are also less likely to be debated because the government is able to use the vast majority of the legislature's sitting time to debate government business.

³³ *Supra* note 13 at 53.

Two changes to the Assembly's rules offered the prospect of a more fulsome debate of the private members' business before the assembly and modestly increased the likelihood of more backbench legislation being passed. The first was the institution of a Private Members' Bills Question Period:

Private Members' Bills Question Period

23(8) Following the Sponsor's opening speech on the Second Reading of a Private Members' Bill, a ten minute question period on the Bill may occur.

During this question period

- (a) questions may be addressed to the Sponsor by any Member, with the first question being asked by a Member from another party, followed by a rotation between parties;
- (b) each Independent Member may ask one question; and
- (c) no question or answer shall exceed 45 seconds.³⁴

The rule affords members from all parties of the house the opportunity to ask the member introducing the bill under consideration about the bills purpose and rationale. The then Dean of the House, Steve Ashton, MLA for Thompson, noted that the practice of asking ministers questions about their bills had previously been a practice that had fallen into disuse, to his chagrin, and noted that questions "provide in a lot of cases some greater clarity of the intention of the bill" and believed the ability of members to ask questions about private members bills was "very positive."³⁵

The second change related to private members' bills was a rule change that allowed for the calling of such bills to a second reading vote:

Selected Bills

24(1) Each recognized party may select up to three Private Members' Bills per session to proceed to a Second Reading vote.

Bills to proceed to a Second Reading vote

24(2) Each Independent Member may select one Private Members' Bill per session to proceed to a Second Reading vote, and despite Rule 69(1), an Independent Member will not require a seconder to move each Reading motion for their selected Private Members' Bill.

³⁴ *Ibid* at 23.

³⁵ *Supra* note 27 (Ashton).

While nothing in the previous rules made a second reading vote on a private member's bill impossible, such a vote was unlikely if the government chose not to allow a bill to come to a vote. Government and opposition take turns speaking to private members' bills for an hour twice a week, the vast majority of which are opposition bills. If the government does not wish to have a second reading vote on an opposition bill a government will "talk it out", which means that they will ensure that when time expires on the day's time for debate on the bill that a member of their caucus has their speech interrupted so that the bill cannot be voted on and must be called for debate again by the opposition.

As long as the government has a sufficient number of members able to speak to the bill, this practice will fill the time allowed for debate on a particular bill during a given legislative session. Debate on the bill's second reading will not conclude and no vote will occur. The second reading vote is significant because a bill that passes second reading is generally considered to have been approved-in-principle by the legislature and is only subject to committee hearings and amendments after this point, as well as a final third reading vote (the first reading vote is viewed as allowing the matter to be debated by the assembly and while parties may choose to vote against the bill at first reading such a vote is rare). A favourable vote at the third and final reading is generally believed to be a forgone conclusion if a bill has passed second reading. The second reading vote is therefore an opportunity for members to put their position on the matter on the record.

A government may choose not to allow a vote on an opposition bill because it would prefer not to take a position on the changes the bill introduces. This may be done because the changes in the bill are not supported by the government or because the government may wish to craft their own bill that may include some of these changes at a later date and the government wishes not to indicate their position on the matter under consideration at that time.

The change to the rules allowing each recognized party to select up to three bills for a second reading vote creates the possibility that private members' bills will be afforded a vote on their merits, which slightly increases the likelihood of the bill being passed into law (although there is still no guarantee that private members' bills will be passed). Significantly, the new rules also provide that each Independent Member (MLAs who do not belong to a caucus of four members as required for Official Party

Status) is able to select a bill for the same treatment. In the past, Independent Members who were the only members of their party elected to the legislature had little chance of their bills even being debated as they often had difficulty in securing a seconder for their bill to be considered by the Legislature. The new rules allow for members in such a situation to have their bill considered even without the support of another member.

A. Origins of the June 2015 Rule Changes and Debate

The specific changes to the Legislative Assembly's rules find their origins in off the record discussions between MLAs. The role of the Government House Leader and the Opposition House Leader and their respective staffs is significant. The observations and advice of the Assembly's permanent non-partisan staff, the Clerk's Office, is also a substantial source of recommendations of new rules. These rule changes were enacted with the unanimous support of the Legislature.³⁶ Such consensus was built largely behind the scenes and cannot be observed by reading Hansard.³⁷ A committee of MLAs did meet to discuss the rules and to consider them on a clause-by-clause basis before the changes were subsequently ratified by the House.

The Standing Committee on Rules of the House met on June 26, 2015 to discuss the rule changes and place on the record the rationale for the changes. The government House Leader and MLA for Kildonan, David Chomiak, opened the discussion on the changes by observing that the rules of the house are tools by which Manitobans resolved their disputes noting:

And I often have youth groups in my office, and I often raise the issue of the fact that we shout and yell at each other, but I always say that we fight with words and we have this amazing ability to discuss issues and function despite very strong objections to some of the rules and some of the issues, but we get through it and we don't—and then we walk out of the Chamber and we're friends.³⁸

³⁶ Manitoba, Legislative Assembly, *Debates and Proceedings Official Report* (Hansard), 40th Leg, 4th Sess, Vol 67 No 54 (29 June 2015) at 2245 (Daryl Reid) (Howard).

³⁷ Hansard is the name of the official written record of proceedings in Canadian legislatures and of Parliament. The name is a reference to Thomas Curson Hansard, a British printer who became the first official printer for the British Parliament.

³⁸ *Supra* note 27 at 2 (Chomiak).

The opposition house leader, Steinbach MLA Kelvin Goertzen, argued that the core of the new rules was the balancing of two mandates:

The mandate of government that's given by the electorate to govern but also the mandate of opposition, which is also given by the electorate, to be able to oppose vigorously things that the opposition feels it needs to oppose on behalf of the public.³⁹

Rule changes like the creation of a category of “specified” bills were noted to have found their origins in sessional orders that had been agreed to by governments and oppositions over the previous years.⁴⁰ Steve Ashton noted that rule changes ending the Challenging of a Speaker’s Ruling on a point of order was overdue in Manitoba as the use of it in the Legislature was “out of step with virtually every other Legislature, certainly, in the country and, I think elsewhere”, and arguing that the majority of such appeals were “basically tactical”.⁴¹ As discussed above, changes related to public presentations were rooted in an attempt to relieve the public of the need to remain at the legislature until the early morning in the hopes that they will be called to deliver their presentation to the committee.

The amount of time that had elapsed between the last set of rule changes and the changes enacted in June 2015 was nearly 10 years. Prior to that the rules were often updated on a yearly basis and sometimes more frequently. The sessional order agreed to by the government and opposition after the PST debate of 2013 also appears to have set the stage for the changes as some of the long-standing dysfunctions of the Manitoba Legislature were made obvious during that dispute.

When the changes made their way into the full House for debate there was minimal discussion beyond a few general comments and words of thanks by the Government House Leader, Opposition House Leader, Steve Ashton, and Jon Gerrard. A former Government House Leader, Jennifer Howard, the MLA for Fort Rouge, did speak to the changes and while she thanked the committee for the work in putting together the rule changes, she raised concerns that the predictability and certainty offered by the changes in respect of the creation of a category of “specified” bills

³⁹ *Ibid* (Goertzen).

⁴⁰ *Ibid* at 5 (Chaychuk).

⁴¹ *Ibid* at 10 (Ashton).

could hamper the culture of negotiation and collegiality that had been a requirement under the old rules. She hoped for the following:

I think it's important that [future MLAs] are open to the possibility that if the rules don't work as we hoped, if the opposition finds that its ability to oppose is hampered, if the government finds that its ability to govern is too restricted, then there will be an opportunity to take another look at these rules.⁴²

Goertzen was a bit puzzled by Howard's comments, noting the following:

The general principle of holding over and having the opposition being able to hold over bills for six months or more under these rules actually came from discussions that me and the member for Fort Rouge had over the PST debate.⁴³

Howard's comments, along with similar comments by Southdale MLA Erin Selby, suggest that there was some discomfort with the rule changes within the NDP caucus, and while a formal break with the all-party consensus did not occur, both wanted to register some caution about the changes. Howard and Selby were the only MLAs to speak to the changes beyond the Government House Leader and Opposition House Leader in the Legislative Chamber. The rule changes came after the en masse resignation of Howard, Selby, Theresa Oswald, Stan Struthers, and Andrew Swan from the Selinger Cabinet and after the conclusion of the divisive leadership race. Selby's opaque comments about rules being critical to democracy and "hop[ing] they've maintained that balance for Manitobans" in the changes the House was approving become all the more curious when one considers the member for Southdale resigned weeks later to contest the 2015 Federal Election.⁴⁴

IX. PUBLIC SCRUTINY OF THE JUNE 2015 RULE CHANGES

Changing the rules of a legislative assembly rarely receives much coverage. Save for threats to use the "nuclear option"⁴⁵ in the United

⁴² Manitoba, Legislative Assembly, *Debates and Proceedings Official Report (Hansard)*, 40th Leg, 4th Sess, Vol 67 No 54 (29 June 2015) at 2235-2236 (Daryl Reid) (Howard).

⁴³ *Ibid* at 2237 (Goertzen).

⁴⁴ *Ibid* at 2240 (Selby).

⁴⁵ The "nuclear option" is a reference to the ability of the majority in the US Senate to end the use of the filibuster by voting for a rule change. It most frequently arises in

States Senate, rule changes often do not have much impact on the day to day lives of individuals and therefore do not face much media scrutiny. There were no public committee hearings for the changes and the reporting on the changes that did occur happened after the changes were agreed to, but before they were enacted. The story entitled “Parties agree to sit longer in legislature” discussed how the new rules would mean that the legislature would sit at least 90 days, but the story discussed few other details of the agreement.⁴⁶ A blog post by long-time Legislature reporter Bruce Owen lauded the collegiality of the deal, making the following remark after describing the proceedings of the assembly: “Some of what passes as debate in the house makes you want to slam your head in the wall just to remind yourself that it's really happening, and that you're actually alive and not trapped in some Kafkaesque purgatory.”⁴⁷

While some of the rules went into effect in the following sitting of the House in October 2015, a number of the provisions took effect after the April 2016 general election and have only been operative for a year and a half. As the effects of the rules become more evident as legislators use the procedures to advance and oppose legislation, it is possible that more public scrutiny will be faced by the rules.

X. EVALUATION OF THE RULES

The most powerful of the new rules have been in effect for the shortest period of time. It is too early to tell how effectively they have worked. A number of the rules have barely had the opportunity to be fully engaged by the opposition.

The new rules related to members asking Ministers and private members questions regarding bills appears to be widely used as both Ministers and private members have been subject to fulsome question periods related to various bills.⁴⁸ Many of the questions offered by

discussion of US Supreme Court nominations.

⁴⁶ Larry Kusch & Bruce Owen, “Parties agree to sit longer in legislature”, *Winnipeg Free Press* (11 June 2015), online: <<http://www.winnipegfreepress.com/local/MLAs-to-sit-longer-in-legislature-307039311.html>>.

⁴⁷ Bruce Owen, “When they play nice it works”, *Winnipeg Free Press* (12 June 2015), online: <<http://www.winnipegfreepress.com/opinion/blogs/under-the-dome/307139512.html>>.

⁴⁸ Manitoba, Legislative Assembly, [*Debates and Proceedings Official Report*] (Hansard), 41st

members, both from the member's own party and from members of other parties, appear to be genuinely posed and were real attempts to elicit more information about the bill's purpose. The rules have also resulted in members being questioned about the rationale for a bill and have on occasion exposed how little consultation has occurred with respect to some bills before the house.⁴⁹ The question periods for bills also allow for political grandstanding and cannot be said to be entirely used for the noble purpose they were ostensibly enacted for.

The rules that allow for designation of up to five "specified" bills have only recently been engaged. The new government's first spring session was too brief for them to take effect and all legislation introduced in Spring 2016 waited until Fall 2016 for passage. In the 2017 Spring Session the Official Opposition used the designation provisions in the rules for the first time, designating five bills. The bills include legislation related to tuition fee increases, regulation of the taxicab marketplace and devolution of regulatory responsibility to Winnipeg, freshwater fish marketing, changes to environmental regulation, and voter identification requirements. Although the opposition raised some public concern related to these bills the government caucus voted to enact them when they did finally come up for a vote. Despite Kelvin Goertzen's concerns that the rules could be used to routinely delay the budget bill,⁵⁰ the opposition used all of its "designations" before the budget was introduced and the 2017 Budget received timely passage.

More generally, the rule changes appear to offer an important modernization of the Legislature's proceedings. As noted above, a number of the rule changes are in keeping with best practices found in other legislature in Canada and Manitoba's retention of those rules was an anachronism. The spectacle of extended episodes of bell-ringing was an absurdity. Bell-ringing was used to delay passage of bills for which opposition parties argued the public was being given inadequate time to provide feedback on. Bringing the assembly's proceedings to a halt to demand more fulsome consideration of a bill seems paradoxical. The rules

Leg, 1st Sess, Vol 69 No 41A (11 October 2016), 1953 (Myrna Dridger).

⁴⁹ Manitoba, Legislative Assembly, *Debates and Proceedings Official Report* (Hansard), 41st Leg, 1st Sess, Vol 69 No 38A (4 October 2016), 1807 (Myrna Dridger).

⁵⁰ *Supra* note 42 at 2237-2238 (Goertzen).

allowing select bills to be delayed for more consideration more effectively serves the same purpose.

The new rules are also a reflection of something that, while not unique to Manitoba, is a feature of somewhat peculiar circumstances. Since the collapse of Manitoba Liberal fortunes in the mid-1990s, the Manitoba Liberals have been unable to achieve official party status. Throughout this time, as Liberal electoral success has ebbed and flowed, Jon Gerrard has been a constant presence in the Legislature and at times been the only Liberal in the Legislature. The number of times that “Independent Member” appears in the new rules, including the ones discussed in this paper, is an expression of the reality that Manitoba does not quite have a third party, but does have a collection of legislators who are deserving of some rights within the Assembly, even if these rights fall short of those accorded to parties that achieve official party status.

The warnings of Jennifer Howard are worth consideration. The new rules do provide governments the ability to pass even controversial or unpopular legislation if it meets certain deadlines in the Legislative Calendar. This was incredibly difficult under previous rules. Howard may be right that something was given away from the opposition’s ability to oppose in these negotiations, however, it is worth noting that the highly controversial sale of the Manitoba Telephone Services was completed when a government negotiated a similar timetable offered by the new rules. The French Language Crisis, another controversial moment in Manitoba’s legislative history, provides an example of what a determined opposition can do with significant public support. The public backlash became so profound in that case that the effort was withdrawn. Both disputes are a reminder that what might be described as “macro-political” forces are as important, if not more important, than the debates occurring in the Legislature in determining what a government is willing to attempt to legislate. As former Government House Leader David Chomiak observed about the rules of the Legislature, they are there to ensure that Manitobans fight with words and not weapons.

