

Bill 203: The Legal Profession Amendment Act (Queen's Counsel Appointments)

Y A S S I R A L N A J I *

I. INTRODUCTION

Bill 203 titled *The Legal Profession Amendment Act (Queen's Counsel Appointments)*¹ was introduced in the first session of the 41st legislature. The bill was sponsored privately by the Honorable Steven Fletcher (PC) of the Assiniboia constituency. The bill purported to reinstate the historic tradition of appointing lawyers as Queen's Counsel or King's Counsel depending on the reigning regent. During the reign of a queen, the title is abbreviated "Q.C." in English, or "c.r." in French ("conseiller de la reine"). During the reign of a king, the title is "K.C." in English, and again "c.r." in French ("conseiller du roi").

II. HISTORY

The practice of appointing lawyers as Queen's Counsel (Q.C.) or King's Counsel (K.C.) dates back to the year 1603, when the King of England appointed Sir Francis Bacon as the first K.C. for his exemplary service and "His Majesty's Counsel learned in the law."² An individual

* J.D. The author of this article is articling at MLT Aikins LLP in Winnipeg, Manitoba.

¹ Bill 203, *The Legal Profession Amendment Act (Queen's Counsel Appointments)*, 1st Sess, 41st Leg, Manitoba, 2016.

² "BBC - History - Francis Bacon", Bbc.co.uk. (2017), online: <http://www.bbc.co.uk/history/historic_figures/bacon_francis.shtml> [Accessed 12 Apr. 2017]. Bacon was originally granted the Queen's Counsel Extraordinary letters patent by Queen Elizabeth I in 1597. See William Searle Holdsworth, *History of English Law* vol 6 (London: Methuen, 1938) at 473-4.

bestowed with the designation could wear silk robes (often called “taking the silk”) and was given priority over other lawyers when speaking to matters in court. As England began expanding its colonial rule, the practice permeated its various territories. Practitioners who represented the regent’s interests in various jurisdictions often received the designation.

In Canada, only the federal government had the authority to grant the designation on behalf of the Crown until 1897. This point was decided in the case of *Attorney General for the Dominion of Canada v Attorney General for the Province of Ontario*.³ In that case, the province of Ontario argued that the Crown was as much a part of the provinces as it was a part of the federal government. The Judicial Committee of the Privy Council agreed with the province of Ontario and recognized their power to bestow the designation to the provinces.⁴

In Manitoba, the practice began in 1909, and a new batch of lawyers was appointed on New Year’s Day each year by the Attorney General of the province. The practice halted briefly in 1973 when the NDP Attorney General, Alvin Mackling, made no appointments that year. He stated that the practice “had become meaningless because of the method by which they were made.”⁵ This marked the beginning of an on-again off-again approach to the designations depending on the governing party of the province.

On January 9, 2001, the NDP government stated in a news release that the Q.C. designation would be halted indefinitely due to the partisanship of the practice. It was to be replaced by a Senior Counsel or S.C. designation that would be decided by a group of Chief Justices and the Law Society of Manitoba. This was to be based on merit and would remove the arbitrariness of the selection process. No further steps were taken to implement this new approach and the *Law Society Act* was amended to repeal the statutory authority to give the designation.⁶

³ [1897] UKPC 49, [1898] AC 247.

⁴ *Ibid.*

⁵ Gordon Goldsborough, “Manitoba Queen’s Counsels / King’s Counsels”, 2017, online: <<http://www.mhs.mb.ca/docs/people/counsel.shtml>>.

⁶ *Ibid.*

Similarly, in 1993 the Liberal government lead by Jean Chrétien, ceased to grant the appointment. Then in December of 2013, the Harper government resumed the practice by appointing seven lawyers as Queen's Counsel.⁷ It appears to have been a trend for Liberal or New Democrat governments to halt the designation until a Conservative government regains control and reinstates the policy.

III. LANGUAGE OF BILL 203

Bill 203 as introduced is comprised of only three provisions which bring about the intended change. The bill acts to amend *The Legal Profession Act*⁸ of Manitoba as it exists by introducing the following provisions under Part 7 before section 84 of the Act:

Queen's Counsel

83.1(1) The Lieutenant Governor in Council may, by letters patent under the great seal, appoint such members as he or she considers proper to be, during pleasure, provincial officers under the name "Her Majesty's counsel learned in the law for the Province of Manitoba".

Qualifications

83.1(2) A person is not eligible for appointment unless he or she has been a practising lawyer in Manitoba for at least 10 years.

Restriction on number of appointments

83.1(3) No more than 10 appointments may be made in a year.⁹

The bill appears to be stated in plain language and does not read as being overbroad such that it may be used for other purposes. Upon first reading the bill, some problems may be identified. One is that the bill uses "he or she" rather than simply restating "the Lieutenant Governor in Council" in 83.1(1)¹⁰ or "the person" in 83.1(2).¹¹ Additionally, 83.1(2) is

⁷ *Designation of Queen's Counsel*, (2017), online: <https://web.archive.org/web/20131220194656/http://www.justice.gc.ca/eng/news-nouv/nr-cp/2013/doc_33009.html>.

⁸ CCSM, c L107.

⁹ Bill 203, *supra* note 1.

¹⁰ *Ibid*, s 83.1(1).

¹¹ *Ibid*, s 83.1(2).

entitled “Qualifications,” however, the section only refers to eligibility. It is arguable that an individual can be eligible but not qualified, as the two terms do not mean the same thing.

Another problem that will be explored further in the parliamentary debate sections of this paper is that the only eligibility requirement is ten years of practice in Manitoba. There is no requirement that the person is in good standing with the Law Society, or that they never faced disciplinary action as a result of unethical behavior.

IV. PARALLEL LEGISLATION

Today, three out of the ten provinces in Canada do not grant the Queen’s Counsel designation. Those provinces are Manitoba, Quebec, and Ontario. Alberta does not include in its *Legal Profession Act*¹² any provision capable of granting the Q.C. designation. Instead, it has the *Queen’s Counsel Act*¹³ as stand alone legislation which authorizes the Lieutenant Governor in Council to grant the designation. When compared to the proposed Manitoba legislation, the *Queen’s Counsel Act* differs regarding qualifications and exceptions.

Under “Qualifications” in the Manitoba bill, the person must have practiced in Manitoba for ten years, whereas in the Alberta legislation, the person must have practiced for ten years anywhere in Canada, or the superior courts of the United Kingdom.¹⁴ This qualification requirement is much broader than that in the proposed Manitoba bill. Perhaps this is because until recently, Manitoba did not have a large regional firm. Such is not the case in Alberta where regional and national firms such as Borden Ladner Gervais and the like are commonplace.

The *Queen’s Counsel Act* does not contain a restriction on the number of appointments like that in the proposed Manitoba bill. In 2016, a total of 39 lawyers received the designation in Alberta.¹⁵ Interestingly, in the

¹² RSA 2000, c L-8.

¹³ RSA 2000, c Q-1 [*Queen’s Counsel Act*].

¹⁴ *Ibid*, s 2.

¹⁵ Justice and Solicitor General of Alberta, “*Queen’s Counsel appointments - Alberta Justice*”, (2017), [online: <https://justice.alberta.ca/initiatives/Initiatives%20Library/queenscounsel.aspx>](https://justice.alberta.ca/initiatives/Initiatives%20Library/queenscounsel.aspx).

Alberta legislation under section 3, any person appointed to the office of Minister of Justice and Solicitor General of Alberta who is not already appointed as Q.C., shall be appointed.¹⁶ This seems to align directly with the concerns of critics that the designation is too politicized and that merit is irrelevant.

The Alberta *Queen's Counsel Act* allows exceptions to its qualification requirements. The following is stated under section 4 of the Act:

4. Notwithstanding section 2, the following may be appointed pursuant to section 1:
- (a) a Member of the Legislative Assembly or of the Parliament of Canada;
 - (b) a deputy appointed for the Minister of Justice and Solicitor General under section 4 of the Government Organization Act;
 - (b.1) a Deputy Attorney General appointed under section 1(3) of Schedule 9 of the Government Organization Act;
 - (c) a Bencher of The Law Society of Alberta.¹⁷

I do not imagine including a section like this would help the bill succeed in Manitoba's Legislative Assembly. Although, perhaps some opposition members would like the ring of Q.C. added to the end of their names.

Finally, the Alberta legislation includes a "revocation of appointment" under section 10 of the Act. This states that the Lieutenant Governor in Council shall revoke the appointment if the person is disbarred or resigns in the face of Law Society discipline.¹⁸ In the proposed Manitoba bill, there is no mechanism by which the designation can be revoked.

Saskatchewan, like Alberta, has *The Queen's Counsel Act*.¹⁹ The legislation bears many similarities to the one in Alberta but does not contain de facto designation for the Minister of Justice and Solicitor General. Nor does it contain exceptions that enable the designation to be bestowed upon members of a legislative assembly.

Instead of calling the eligibility requirement "Qualifications" the Saskatchewan legislation refers to it as "Limitations on appointments" under section 3.²⁰ I think this is a much more suitable name for the

¹⁶ *Queen's Counsel Act*, *supra* note 13, s 3.

¹⁷ *Ibid*, s 4.

¹⁸ *Ibid*, s 10.

¹⁹ RSS 1979, c Q-2.

²⁰ *Ibid*, s 3.

eligibility requirements as it does not purport to refer to qualifications. Like the Alberta legislation, the Saskatchewan requirement is that a person has practiced for ten years in any Canadian province, or the Northwest Territories, or that the person practiced for ten years in a superior court in the UK.²¹

The Saskatchewan legislation also includes under section 8 a “Revocation of appointment” provision.²² However, the language states that upon disbarment the appointment is automatically revoked, and the letters patent must be returned to the Attorney General. Failing to do so is an offence punishable by summary conviction and a fine of \$50. This differs from the Alberta legislation, which does not state that a person who resigns in the face of Law Society discipline will have their appointment revoked.

V. PARLIAMENTARY QUESTIONS AND DEBATE

The bill was given its 1st reading on June 23rd, 2016 and made it through to a 2nd reading. This took place on October 4th, 2016. The Honorable Steven Fletcher (PC) introduced the bill and shared his inspiration for the idea. The bill was not a campaign promise but rather inspired by the acts of Sidney Green Q.C., who would go on to become the founder of the Manitoba Progressive Party in the late 1970s. Mr. Fletcher shared how at one point Mr. Green assisted him through a difficult time out of the kindness of his heart, and without his assistance, he would likely not be around today.²³ As a result, Mr. Fletcher felt it was important to recognize the contribution of the legal profession to the public. He sought to bring back the appointment to honour those like Mr. Green who deserve recognition as great lawyers.

An overview of the debate shows that the design of the bill is not well thought out. The bill has a lot of holes in it that its opponents brought to the forefront. Mr. Fletcher did little to defend the bill in its current state, and hoped to refer it to a committee for what sounded like an overhaul.

²¹ *Ibid.*

²² *Ibid.*, s 8.

²³ Manitoba, Legislative Assembly, *Debates and Proceedings*, 41st Leg, 1st Sess, Vol LXIX No 38A (4 October 2016) at 1805 (Hon Steven Fletcher).

He often remarked that he was looking for bi-partisan assistance in amending the bill to achieve the agreed upon goal. At one point in answering a question, he stated “See, this is why we have a parliamentary process. I deliberately left the process open so that at committee we can provide direction, amend the bill or, you know, do what is necessary to make sure that they’re-appointments are based on merit.”²⁴

Quite aware of the obstacles he would face in proposing this bill, Mr. Fletcher attempted to pre-empt the rebuff that a bill such as the one proposed was intended to reward political allies. During the reading, he stated “But that’s the kind of guy or gal that I’d like us to recognize. I don’t care about—and none of us should care about their political persuasion. What we should care about is—on a meritorious selection of these ten individuals.”²⁵ Mr. Fletcher also sought to emphasize the long-standing tradition of the appointment.

When the question period began, Andrew Swan (NDP) of the Minto constituency was the first to voice his opposition. Mr. Swan was himself the Attorney General for five years and had a lot to say about this proposed bill. He began by questioning why this bill was being proposed by Mr. Fletcher when the Law Society of Manitoba had not requested it.²⁶ Jim Maloway (NDP) of Elmwood then aimed. He asked why the designation remained as “Queen’s Counsel”, and asked why Senior Counsel would not be more appropriate.²⁷

Mr. Swan then challenged that the bill grants the authority to make the appointment to the Lieutenant Governor in Council. He stated that this is problematic because it allows the cabinet of the current governing party to have power over the designation. He asked “Is there anything in the bill that actually provides for any input from the public, from lawyers, from judges or anybody else?”²⁸ To this, Mr. Fletcher responded the following:

Actually, that is a good question. I left the bill that simple because I wanted it to go to committee where we can discuss that very issue. Like, in the end, it’ll be the

²⁴ *Ibid* at 1806.

²⁵ *Ibid*.

²⁶ *Ibid* at 1806 (Andrew Swan).

²⁷ *Ibid* at 1806 (Jim Maloway).

²⁸ *Ibid* at 1807 (Andrew Swan).

LG that would make the appointment on the recommendation of Cabinet. But at committee we could discuss ways to ensure that the proper input is made, maybe a non-partisan, multi-committee—a multi-member of committee.²⁹

Mr. Maloway then asked whether there is a mechanism to remove the designation where a lawyer discredits the profession. Mr. Fletcher did not answer the question but stated that of course the lawyer has to be in good standing.³⁰

The political mudslinging began when Wayne Ewasko (PC) from Lac du Bonnet asked Mr. Fletcher to explain the consultation process when the designations ceased in 2001. Mr. Fletcher stated that there was little to no consultation with legal professionals when the designation ceased. Mr. Swan took exception and stated that the practice was discontinued as a result of lawyers being unhappy with all of the politics in the Q.C. practice.

The debate then commenced and Mr. Swan expressed his serious opposition to the reinstatement of the Q.C. appointment practice. He vehemently believes it will be used as a tool by the Progressive Conservatives to recruit allies and reward their friends. Mr. Swan made a number of notable statements reproduced here:

I thought, well, this is interesting. Let's see what the member has to say, let's see if there's some fresh ideas and, unfortunately, there was no fresh ideas. There was a bill with a lot of dust, frankly, contained on it. And the only meaningful provision of the bill provides the lieutenant government—governor in council would be authorized to appoint a certain number of lawyers as Queen's Counsel every year, meaning that it would be a partisan, patronage appointment, which unfortunately was the way that Queen's Counsel came to be viewed, not just by the legal profession, but by the general public.³¹

And;

And we've already seen, of course, a new government which is quite concerned about making sure that every one of their defeated candidates from the last election gets appointed to a board or gets appointed to a commission. You know, I can only imagine that the Queen's Counsel would just become one of another way that this

²⁹ *Ibid* at 1807 (Steven Fletcher).

³⁰ *Ibid.*

³¹ *Ibid* at 1808 (Andrew Swan).

new old government would continue to give out patronage to those who ran for them or who wrote them a big cheque.³²

Mr. Swan ended his speech by saying lawyers do not care about the designation and would rather see other problems in the field addressed before government focuses on an arbitrary title. He suggested that there is no reason to reward lawyers when other professionals such as doctors, nurses, and architects receive no such honour.

Mr. Nic Curry (PC) from the Kildonan constituency was then heard for the first time. He argued that there are other fields where a Queen's award designation exists, like in the military. He said that as a former soldier himself, he recognizes the value of such appointments. Mr. Curry made a notable remark when he stated the following:

Someone once said that a soldier will fight long and hard for a few tattered pieces of ribbon. This was Napoleon in the Napoleonic wars. Now, what he said, essentially, was that he could send his men to fight and die for nothing more than the hope of getting Croix de Guerre.³³

Mr. Curry believes the appointment practice makes lawyers work harder for the interests of their clients and would be motivation to be more honest. He stated that this bill is not intended to resolve all of the problems in the legal field, but rather that it creates motivation to excel at the job.

Ms. Cindy Lamoureux (Lib) from Burrows was next to speak, and gave the Assembly a plethora of background information on the Q.C. appointment. She then stated the following in opposition to the bill:

When I consulted with lawyers, I was told that the current Jubilee award was a sufficient honour and the depoliticized system was working very well. They started—they stated that Queen's Counsel appointments are to serve politicians, not the public, and that this archaic award was to give patronage to government supporters.³⁴

Mr. Ted Marcelino (NDP) from Tyndall Park then shared a story about his time as a lawyer in the Philippines. He expressed his concern

³² *Ibid* at 1809.

³³ *Ibid* at 1810 (Nic Curry).

³⁴ *Ibid* at 1811 (Cindy Lamoureux).

that the appointment is arbitrary. He said that in his experience, some bad lawyers have the distinction and some good ones don't.³⁵

Mr. Greg Nesbitt (PC) from the Riding Mountain constituency was the next to take the floor. Mr. Nesbitt argued that the Manitoba Bar Association is in support of reinstating the Q.C. designation and that the Law Society urged the NDP government not to do away with it in 2001. Mr. Nesbitt then went off on the NDP government's alleged deplorable record when it came to crime statistics.³⁶ The Opposition House Leader, Mr. Maloway called a point of order, and Mr. Nesbitt was reminded to stay on topic. He wrapped up by saying the Progressive Conservatives understand the crucial role the legal profession plays in keeping Manitoba safe, and that he hopes to see their efforts rewarded.

The final person to speak on the bill during the debate was Mr. James Allum (NDP) of the Fort Garry-Riverview constituency. Mr. Allum made a few remarks about Mr. Fletcher's handholding with the Harper government, before finally moving to address the bill. He stated that as Minister of Justice for the Province of Manitoba, he never fielded complaints from lawyers or interested parties about the Q.C. designation. He noted that lawyers are more concerned with access to justice issues and that this should be the focus for now.³⁷ This concluded the debate.

VI. SCHOLARLY COMMENTARY

The appointing of K.C. or Q.C. has been a hotly debated topic in Canada since its inception. Scholars have typically agreed that the designation is antiquated and unnecessary with a few exceptions. Under this heading, I will provide various authors' commentary on the topic and offer my thoughts on the points raised.

1. *Manitoba Law Journal 1884*

In 1884, at which time the Q.C. designation could only be made by the federal government, the Manitoba Law Journal published a scathing critique of the practice. The piece came just after the appointment of four

³⁵ *Ibid* at 1812 (Ted Marcelino).

³⁶ *Ibid* at 1813 (Greg Nesbitt).

³⁷ *Ibid* at 1814 (James Allum).

local lawyers, one of whom was Sir John Aikins who would go on to found what is today the law firm of MLT Aikins in Winnipeg. The author starts the piece by stating “The practice of singling out, from time to time, certain barristers for invidious distinction, should have been abolished together with patents of monopoly – that is centuries ago.”³⁸ The article goes on to advance a number of arguments against the practice, but two very familiar ones arise. The author writes:

Let it be understood that during tory reign the tory lawyers can, on application, obtain their silk, and when the grits succeed to office that their friends shall succeed at the bar, and, all events, we have an intelligible system.³⁹

This first argument mirrors one of the issues raised by the opposition of the bill in the Assembly. It becomes clear that criticism of the Q.C. designation as a political tool has a long history in Winnipeg, dating back to at least 1884. However, one could certainly argue that the award must have been more political in 1884 than it is today. Today, there is an avenue through which the achievements of various attorneys may be known to the government. The sharing of information is as simple as opening a web browser. Unfortunately, the proposed bill in its current form does absolutely nothing to assuage this oft-raised concern.

In 1884, when only the federal government could appoint a Q.C., it was simply not possible to appoint attorneys not personally known to them. Does this mean that they only appointed lawyers who shared their ideologies? Most likely, yes. But as Professor Bryan Schwartz once stated in a classroom lecture “Show me an award and I’ll show you a politicized one.”⁴⁰ Perhaps the author of this piece is warranted in his attack on the practice, and the system should not have been as “pay to play” as it was in 1884. However, it is difficult to imagine any party celebrating the achievements of their sworn adversary. This becomes especially difficult considering how frequently lawyers go on to enter the political fray.

The author of the Manitoba Law Journal piece next takes aim at the idea that the appointment is based on merit. The author states:

³⁸ "Queen's Counsel", Man LJ 1:12 (1884) at 177.

³⁹ *Ibid* at 178.

⁴⁰ Bryan Schwartz, Legislative Process (Robson Hall, Faculty of Law, University of Manitoba, 2018).

If the matter were as easy of decision as a horse-race, by all means let there be an annual contest, and let the best man get his reward. But, in so doubtful a matter as legal ability, who can decide? What is the criterion? Is it success? That comes sometimes without learning. Is it learning? That may exist without success. Is it both learning and success? Then what degree of each?⁴¹

This would appear to be another familiar argument, one which may perhaps help us better understand what Mr. Ted Marcelino was going on about during the legislative debate of this bill. If this obstacle is addressed effectively, it will solve a number of challenges that exist within the appointment process. After all, if you can convince opponents of the bill that the process is truly based on merit, who could challenge it based on partisanship? Unfortunately, the answer is not so simple. By what metric is merit best measured when it comes to the legal profession?

Bill 203 as presented by Mr. Steven Fletcher fails to answer this question. One is considered officially “qualified” for the appointment if they have practiced for ten years in Manitoba. It seems to me that the use of a particular metric for assessing Q.C. candidates is less important than the transparency and uniformity of that process. Q.C. legislation in other provinces does not provide the metric(s) for measuring merit when vetting prospective Q.C. candidates, and it is fair to ask “why not?” Such an omission invites the perception that adhocery permeates the decision-making process. The public, as well as the local Law Society, know what they value most in practicing lawyers. So why not include such metrics in the legislation? For example, under the “qualification” section of the bill, one could simply add “In order to be qualified, the lawyer must have; a) taken (x number) or more cases on a pro bono basis in the previous calendar year.” That would add a transparent and uniform metric that the general public would likely support. Again, it seems to me that what is most important is not what metric is used to measure merit, but rather that a uniform and transparent metric is used across the board when assessing Q.C. candidates.

Were the 1884 Q.C. appointments based on merit? The four selected from Manitoba were S. C. Biggs, H. M. Howell, J. A. M. Aikins, and John S. Ewart. Mr. Biggs would go on to found *The Winnipeg Daily Sun*.⁴² Mr.

⁴¹ *Ibid* at 178.

⁴² Gordon Goldsborough, “Memorable Manitobans: Samuel Clarke Biggs (1851-1911)” (2017), online: <http://www.mhs.mb.ca/docs/people/biggs_sc.shtml>.

Howell would be appointed Chief Justice of the Manitoba Court of Appeal in 1906.⁴³ Sir John Aikins would go on to found what is today the law firm of MLT Aikins LLP, draft the Manitoba Liquor Bill in 1900 as counsel for the province, and act as counsel for the Canadian Pacific Railway.⁴⁴ Finally, Mr. Ewart would become a trailblazing Canadian sovereigntist, insisting on independence from Great Britain. He also served as the founding President of the Canadian Club of Winnipeg and wrote *The Kingdom Papers*, *The Roots and Causes of the Wars*, and *The Independence Papers*.⁴⁵ Notwithstanding the accomplishments of these individuals, without insight into the decision-making process one cannot say whether or not they deserved the Q.C. designation more than their colleagues.

2. *Slaw Article 2016*

In a rather brief 2016 article, author Adam Dodek advocates for the continued practice of appointing Q.C. at least at the federal level. Mr. Dodek writes:

[Y]ou won't find [government lawyers'] names listed in any directories of top lawyers in their field. Neither will you find a single government lawyer listed among Lexpert's Rising Stars. Government lawyers are the Rodney Dangerfield of the legal profession: they get no respect. However, as I have written elsewhere, government lawyers are important and underappreciated members of the legal profession and of our justice system.⁴⁶

He goes on to say:

Ultimately, awarding federal QCs to deserving federal government lawyers is in the interests of the public service, the Department of Justice, the legal profession and of the government of the day.⁴⁷

⁴³ Gordon Goldsborough, "Memorable Manitobans: Hector Mansfield Howell (1842-1918)" (2017), online: <http://www.mhs.mb.ca/docs/people/howell_hm.shtml>.

⁴⁴ Gordon Goldsborough, "Memorable Manitobans: James Albert Manning Aikins (1851-1929)" (2017), online: <http://www.mhs.mb.ca/docs/people/aikins_jam.shtml>.

⁴⁵ Gordon Goldsborough, "Memorable Manitobans: John Skirving Ewart (1852-1933)" (2017), online: <http://www.mhs.mb.ca/docs/people/ewart_js.shtml>.

⁴⁶ Adam Dodek, "In Praise of the Queen's Counsel" (February, 2016), *Slaw* (blog), online: <<http://www.slaw.ca/2016/02/08/in-praise-of-the-queens-counsel/>>.

⁴⁷ *Ibid.*

I include this article solely because Mr. Dodek raises an interesting point that is not often considered. That is, does the Q.C. designation serve as a sort of leveling of the playing field for government lawyers get little recognition otherwise? When considering this point against the proposed bill, it does little in the way of helping alleviate concerns. Mr. Fletcher does not suggest that the appointment should favour public lawyers. Even if this was the case, what would happen should a Q.C. appointed Crown subsequently decide to pursue a private law career? Although Mr. Dodek is one of few outspoken proponents of the practice, he does not address the numerous valid issues raised by opponents.

VII. BILL ANALYSIS & PERSONAL THOUGHT

It is clear at first glance that Bill 203 is skeletal. This is especially true upon review of parallel legislation. Had the bill been drafted more thoroughly, and addressed the various concerns that would invariably arise, it would likely have been met with less resistance. I will analyze the three provisions of the bill with the view of addressing the various concerns that arose during the debate.

The first major concern voiced by the opposition is that the PC government will use the appointment of Q.C. to reward its political affiliates and slight those who do not “play ball”.

Mr. Swan stated with respect to section 83.1(1) in the bill:

When I look at the bill, it provides that Lieutenant Governor-in-Council will make the appointments, meaning Lieutenant Governor as recommended by Cabinet. This is identical to the way it used to be, that it would simply be Cabinet on the recommendation of the Attorney General making the recommendation. Is there anything in the bill that actually provides for any input from the public, from lawyers, from judges or anybody else?⁴⁸

Although this concern may be well founded, it is important to note that this section is virtually identical to what can be found in Alberta’s *Queen’s Counsel Act*, and Saskatchewan’s *The Queen’s Counsel Act*. Although both of those provinces consult with the Law Society and various stakeholders in the legal profession when making Q.C. appointments, nothing in the legislation mandates they do so.

⁴⁸ *Debates and Proceedings*, *supra* note 23 at 1806 (Andrew Swan).

On numerous occasions Mr. Fletcher assured opponents that this bill is not intended to enable the government of the day to appoint at its leisure. He stated:

The only—the other thing, I think it's important that there would be—on any kind of committee, that there would be members from each recognized political party, and that nominations could come from an ad hoc legislative committee or the legal profession or from the community itself.⁴⁹

If that is the case, why not include that in the bill? Notwithstanding deviation from neighboring provincial legislation, perhaps it would have been prudent to include under section 83.1(1) a duty to consult with the Law Society. That certainly would have quelled the concerns of numerous opponents. It would also reduce the need to include a “good standing” requirement, as the Law Society is unlikely to recommend a lawyer with a history of disciplinary issues for Q.C. designation.

Opponents of the bill want an answer to the question “if this is such a good idea, why did we end the practice?” I think this is an important question as re-introducing the practice in the same form is sure to lead to the same potential for abuse as existed in the past. If the designation is truly meant for the sole purpose of recognizing great lawyers, then the bill should provide the necessary safeguards that keep politics out of the decision-making process.

Another concern with the bill is that unlike neighboring provincial legislation, it does not include a mechanism to remove the Q.C. appointment after it has been granted. This appears to be a clear oversight on the part of the drafters. More importantly, the failure to include this mechanism could threaten public perception of the designation in its entirety. Take for instance a lawyer who is designated and subsequently appears in a press article having been found guilty of misappropriating a large sum of money. It would likely shake public confidence in the Q.C. designation. That is just one of many possible scenarios where a mechanism for the removal of the designation is imperative.

The next concern with the bill is section 83.1(2), which requires that a person has been practicing in Manitoba for ten years. Despite not having been objected to during the 2nd reading, I think this section should mirror that of the Alberta and Saskatchewan statutes. A lawyer who practiced for

⁴⁹ *Ibid* at 1807 (Steven Fletcher).

20 years in Ontario, and then relocates to Manitoba, should not be overlooked simply because they did not practice locally. Manitoba should work to attract talented legal professionals from across the country, not discourage them. This means increasing mobility incentives rather than limiting them. Additionally, this requirement excludes the possibility of legal academics being granted the designation. If the goal is to recognize those “learned in the law for the Province of Manitoba”, perhaps law professors should be included in the conversation.

The next big question is “do lawyers care?” I think the answer to that question is yes. A number of members stated that through their interaction with the community, they see no indication that this is a concern for lawyers. I agree that there are indeed much larger problems in the legal landscape in Manitoba that require attention. However, just because a matter is not a priority does not mean it is unworthy of consideration. The designation of Q.C. would not hinder or derail other efforts to address issues in the profession such as access to justice. Additionally, most opponents during the debate cited Legal Aid funding shortages as a reason why this bill is a bad idea. That was rather puzzling as issues relating to Legal Aid funding are largely under the purview of the federal government.

The final issue opponents had during the 2nd reading was that it is inappropriate to allow one profession to receive regal recognition while other professions have no such practices in place. I think this argument is not without merit. However, it is important to note that the legal profession is one deeply entrenched in tradition. Take for instance the practice of being called to the bar. One dons robes in an auditorium, takes a solemn oath (invoking the Queen constantly), and signs their name to a scroll. What modern profession even comes close to this level of commemoration? If the argument is that archaic practices need to be dispensed with, the Q.C. designation is merely the tip of the iceberg. In addition, this bill does not prevent other professions from vying for whatever award they find appropriate.

VIII. CONCLUSION

The K.C. or Q.C. designation has had a long and turbulent history around the globe, and particularly in Canada. Proponents say it is a fitting reward and great honour befitting the best of lawyers while opponents

spotlight its misuse in the past as a political tool, and therefore are in no hurry to see its return. A glance at neighboring provincial legislation and historic complications should have made it abundantly clear to the drafters of this bill that it is desperately incomplete.

A Q.C. appointment is certainly prestigious, and the lawyers in Manitoba that have it affix it proudly to their names. In an increasingly interconnected country where seven other provinces appoint Queen's Counsel lawyers, it is in the best interest of Manitoba lawyers to be allowed to achieve the status.

As a future lawyer (hopefully), I am aware of the inherent bias in my opinion with respect to this bill. As in many other professions, prestige is highly coveted in law. Perhaps the Q.C. designation truly is a way to motivate young lawyers to work harder, more honestly, and in the best interests of their clients. Or perhaps the appointment, like the opposition states, is simply a no-cost bargaining chip governments use to reward their friends. The practice is definitely not without its flaws, but it is not beyond repair either.

