

# Bill 37: Battle Hymn of the Incumbent

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## I. INTRODUCTION

Weighing in at 48 pages and some 6 000 words, Bill 37<sup>1</sup> of the second session of Manitoba's 39<sup>th</sup> Legislature was a massive undertaking. So massive, in fact, that the five-bills-in-one superbill never made its way off the ground during the session.

Bill 37 was introduced 30 April, moved to its committee stage three-and-one-half weeks later, and was on its way to becoming law when it was derailed by (depending on how one looks at it) either an effective opposition attack at committee meetings or a procedural quagmire created by a minority group of MLAs that wasn't willing to play ball. Keeping with the baseball metaphor, Bill 37 had all the drama of a bases loaded, 3-2 pitch in the bottom of the ninth inning, and at least as much substantive clout.

In total, the bill sought to create or amend five different statutes. If passed as originally proposed, it would have created a provincial lobbyist registry system, a new public subsidy for political parties, fixed date elections, given a government-dominated committee the power to screen MLA mailouts, and aggressive new limits on political spending and communications. Quite the mouthful: and one that, in the end, Manitoba's legislative process was unable to swallow in one session alone. After five nights of packed houses at committee meetings, the government and opposition came to an agreement to delay passage

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<sup>1</sup> *The Lobbyists Registration Act and Amendments to the Elections Act, the Elections Finances Act, The Legislative Assembly Act and the Legislative Assembly Management Commission Act*, 2<sup>nd</sup> Sess., 39<sup>th</sup> Leg., Manitoba, 2008 [Bill 37]. Describing the Bill in the House, Progressive Conservative Opposition Leader Hugh McFadyen said that it "contains some 48 pages and, just as a rough estimate, close to 6,000 words of legislation. It is not your average piece of legislation by any stretch of the imagination. It is an important bill not only in terms of its length at 6,000 words, but it's an important bill in terms of its impact on our democratic institutions here in Manitoba." (Manitoba, Legislative Assembly, *Standing Committee on Justice*, Vol. LX No. 2 (26 May 2008) at 28) [*Committee* (26 May 2008)].

of the bill until the fall.<sup>2</sup> Even before that happened, however, the opposition was able to squeeze several key concessions out of the government at the bill's amendment stage.<sup>3</sup>

From a procedural perspective, Bill 37's progression through the legislative process involved positive and negative developments. It would be difficult to characterize the bill's substantive aspects as charitably. In the fifth volume of *Underneath the Golden Boy*,<sup>4</sup> we suggested a number of democratic reforms with an eye to the then-current political situation in Manitoba. Bill 37 has touched on some of these suggestions and left others for another day. With this history in mind, we return to an analysis of democratic reform in Manitoba, with the government's proposed Bill 37 as our focal point.

This paper will analyze Bill 37 from both a procedural and substantive perspective. Within the substantive portion of the analysis, we will look at, in particular, reform related to:

- Election and political party financing;
- Set election dates;
- Changes to Manitoba's Legislative Assembly Management Committee ("LAMC"); and
- The creation of a lobbyist registry.

We will also analyze the bill's committee stage amendments and touch on its future. However, before the analysis proceeds further, a few preliminary comments must be made.

As a starting point, we should work from the assumption that reform to promote good governance and democracy is desirable, whereas reform that does the opposite is not. The Supreme Court of Canada agrees. In a series of decisions concerning electoral reform, the court has reiterated the principle that changes to Canadian electoral laws that promote fair elections will pass constitutional scrutiny, even if they otherwise infringe on *Charter*<sup>5</sup> values.

Commenting on the nature of the rights guaranteed in section 3 of the *Charter*,<sup>6</sup> the Supreme Court has said that "...more is intended [in the right to

<sup>2</sup> Manitoba, Legislative Assembly, *Debates and Proceedings*, Vol. LX No. 53B (5 June 2008) at 2736 [*Debates* (5 June 2008)].

<sup>3</sup> See Part IV of this paper: "Amendments".

<sup>4</sup> (2008) Vol. 5 *Underneath the Golden Boy* at 1–47 [*Underneath the Golden Boy* Vol. 5].

<sup>5</sup> *The Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Charter*].

<sup>6</sup> Section 3 of the *Charter* reads as follows: "Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein."

vote] than the bare right to place a ballot in a box."<sup>7</sup> The court amplified this statement by noting that "the free flow of diverse opinions and ideas is of fundamental importance in a free and democratic society."<sup>8</sup> Similarly, in its opinion on Canada's then-new third party election spending limits in *Harper v. Canada*, the court stated that:

[T]he central component of the egalitarian model is equality in the political discourse ... Equality in the political discourse promotes full political debate and is important in maintaining both the integrity of the electoral process and the fairness of election outcomes ... The primary mechanism by which the state promotes equality in the political discourse is through the electoral financing regime.<sup>9</sup>

Two significant points emerge from the court's comments. First, and not controversially, fair elections are good elections. Second, "[F]ull political discourse" leads to fair elections. It is therefore not a stretch to say that laws that restrict political discourse (in a manner that cannot be demonstrably justified in a free and democratic society) strike against democracy and good governance. This theme is a central thread that runs through our criticism of Bill 37's substantive aspects, and we will return to it frequently.

Bill 37, and other recent electoral reform from the governing Manitoba NDP, have restricted political discourse in a number of ways: by capping spending limits in *non-election* years (without doing the same for third-party spending); by restricting the ability of parties to finance themselves; and, even more alarmingly, by seeking to censor the contents of political expression.

The role of an opposition party is to provide an effective opposition, which, in turn, produces a better government product. As a result, reform that seeks to limit opposition parties from performing their *raison d'être* (opposing the government) is not part of a healthy democracy.<sup>10</sup> This is the most troubling aspect of Bill 37.

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<sup>7</sup> *Figueroa v. Canada*, 2003 SCC 37 at para.19 [*Figueroa*], quoting *Dixon v. British Columbia (Attorney General)*, [1989] 4 W.W.R. 393 at 403.

<sup>8</sup> *Figueroa*, *ibid.* at para. 28.

<sup>9</sup> *Harper v. Canada*, 2004 SCC 33 at paras. 101 & 102 [*Harper*].

<sup>10</sup> As Manitoba Green Party leader, Andrew Basham noted at committee hearings, the process of fundraising takes away from what political parties should be focusing their attention on, "we hold fundraisers all the time and that takes away from the time we could be working on legislation, on developing real sustainable policies for Manitoba, which is what we want to do. We don't want to be out asking people for money all the time. We're actually holding a fundraiser tonight, and I'm going there right after this is done, just to give you an example." (Manitoba, Legislative Assembly, *Standing Committee on Justice*, Vol. LX No. 5 (29 May 2008) at 279 [*Committee* (29 May 2008)]

## II. PROCEDURAL

A total of 69 presenters came forward to speak to Bill 37 during four nights of committee hearings. Notwithstanding any other complaints that may be made about the bill's procedural aspects, the sheer number of people who engaged in the democratic process must be seen as a success.

Many bills (including some important ones) glide through the legislative process with little or no public comment. Public apathy is one of the worst enemies of democracy, yet oftentimes the number of committee members vastly outnumbered those members of the public who do appear to speak about proposed bills: not so with Bill 37.

It may be argued that many of those presenters were little more than partisan supporters, called to committee by party workers via telephone and e-mail. No doubt there is some truth to that comment, but the value of what went onto the public record during those four May nights greatly outweighs the costs associated with the extra time those speakers used. To its credit, the NDP could have invoked closure to speed the bill's progress through the legislative process. To do so would have circumvented the democratic process, however, and the NDP instead chose to take its lumps through many days of debate in both the House and at committee meetings.

In all, it was a strong response to a bill that blew onto the political scene with great fanfare and little advance notice at the end of April. Allegations of procedural impropriety began only one day after the bill was introduced to the House.<sup>11</sup>

More substantially, opposition members described the bill as a "Trojan Horse"<sup>12</sup> because, while it introduced publicly-popular fixed date elections, it also contained several other less-appealing aspects within its 48 pages. Despite the volume of the bill and its apparent importance, no broad public consultation was performed prior to its introduction, nor was it discussed at Election Manitoba's advisory committee. Rather, the bill's appearance was somewhat of a surprise to observers of Manitoba's political scene. As a newspaper editorial noted at the time,

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<sup>11</sup> Progressive Conservative ("PC") MLA Gerald Hawranik claimed the NDP deliberately introduced the bill late the previous day and only after press releases describing certain aspects of the bills, but not the bills themselves, had been given to the media: Manitoba, Legislative Assembly, *Debates and Proceedings*, Vol. LX No. 34B (1 May 2008) at 1489 [*Debates* (1 May 2008)].

<sup>12</sup> *Ibid.* at 1500 (Kelvin Goertzen).

Instead of respectful, non-partisan consultation, Mr. Doer sprung his reforms, fashioned from full cloth, out of the blue. As mentioned, he deflected attention from the anti-democratic guts of the act by presenting it as an act to fix the dates of future elections, which was rich given that Mr. Doer has in the past strongly opposed the measure, especially before the election last year when he used every trick in the book to gain advantage, including massive government and third party pre-election advertising blitzes.<sup>13</sup>

Even with a broad public consultation process in place, it may have been advisable for the government to consider breaking the bill down into several smaller, more digestible pieces. Speaking at the second night of committee meetings, one member of the public said he couldn't help but feel rushed by the bill:

From introduction on April 30, as been mentioned repeatedly, to the committee stage in just three and a half weeks where the public gets an opportunity to comment on the bill, leads us to believe that the government is not looking for the public to be properly informed and educated on the issue before it becomes law.<sup>14</sup>

Credit must also go to those 69 members of the public who sat through the long and disorganized committee process. The nature of committee hearings is such that members of the public who have signed up to speak know only that they will, eventually, be speaking at committee. They do not know at what time they will speak, or even on what day they will speak, and, if they are not present when their name is called through two rotations of the list, they are dropped off the speaking list altogether. It is asking a lot of private individuals who have their own obligations and commitments to attend four nights in a row of committee meetings so that they may make a 10-minute oral presentation.

The Bill 37 committee meetings included several would-be speakers who were not in attendance when their names were called to speak. These speakers represented lost opportunities to generate the kind of public discourse the Supreme Court has hailed as being central to democracy. As Business Council of Manitoba President, Jim Carr, noted at the committee hearings:

Let me also say, and I hope you don't think that this is gratuitous, but the operation of legislative committees can be improved, too. Looking at what happened today and yesterday is a good case in point.

There are many Manitobans wanting to argue the essence of a set of democratic bills, who were not given a chance to speak and who were denied dinners with their families two nights in a row; before it's over, maybe three or four. I think that, probably, in a spirit of improving the way in which the Legislature does business, this committee and others can do a better job.<sup>15</sup>

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<sup>13</sup> "Fixed Elections," Editorial, *Winnipeg Free Press* (24 May 2008).

<sup>14</sup> Manitoba, Legislative Assembly, *Standing Committee on Justice*, Vol. LX No. 3 (27 May 2008) at 159 (Chuck Davidson) [*Committee* (27 May 2008)].

<sup>15</sup> *Ibid.* at 141 (Jim Carr).

Mr. Carr's comments are on the mark, and future Manitoba governments would do well to heed them.

### III. SUBSTANTIVE

#### A. Election Finances

Given the Supreme Court's comments about the importance of election financing in *Harper*,<sup>16</sup> Bill 37's proposed changes to election financing in Manitoba may represent its broadest impact. Crucial provisions in the original version of Bill 37 included:

- Raising the limit parties can spend on advertising expenses outside the writ period during an election year to \$150 000 from \$50 000.<sup>17</sup> However, the definition of "advertising expenses" would be widely broadened, such that items that did not fall under the term under current legislation (for example, posters and leaflets) would now be included in the amount subject to the \$150 000 limit;<sup>18</sup>
- Raising the limit parties can spend on advertising expenses in a non-election year from \$50 000 to \$75 000;<sup>19</sup>
- Government advertising will be suspended 60 days before polling day for a fixed date election.<sup>20</sup> Currently, government advertising is suspended during the campaign period generally; and
- Parties will receive an annual allowance based on the number of votes they received in the most recent general election. That amount will start at \$1.25 per vote and be indexed to inflation.<sup>21</sup>

The proposed financing changes raise several discrete issues, each of which will be addressed under separate headings below.

#### *1. Annual Allowances - The 'Vote Tax'*

Apparently, \$1.25 buys not only a cup of coffee but also a storm of public dissension. Judging from the comments made by members of the public at Bill 37's committee hearings, the bill's provisions for a new annual allowance for political parties was easily the most unpopular portion of the bill. The allowance

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<sup>16</sup> *Supra* note 9.

<sup>17</sup> Bill 37, *supra* note 1, Sch. C at cl. 11(1). The \$50 000 cap outside the writ period was indexed for inflation.

<sup>18</sup> *Ibid.* at cl. 11(3).

<sup>19</sup> *Ibid.* at cl. 11(1).

<sup>20</sup> *Ibid.* at cl. 12.

<sup>21</sup> *Ibid.* at cl. 15.

was also widely panned in the House and in the media, where it came to be known as the "vote tax":

The \$1.25 vote tax is ... part of Bill 37, which would make sweeping changes to our election laws, including forcing taxpayers to give each political party \$1.25 per vote they received in the last election.<sup>22</sup>

Several MLAs, including Liberal leader Dr. Jon Gerrard, also described the allowance as a pay-to-vote scheme:

Well, the reality is that Bill 37 charges people to vote. It discourages people to vote because knowing that government will fund its operations, its political operations through a tax on voting.<sup>23</sup>

Some would argue this criticism is misplaced. As courts and other commentators have noted, financing is the lifeblood of political parties. Effective political activity costs money, and as a result political parties cannot operate without funding. Meanwhile, legislative limits on how parties raise funds have severely restricted fundraising avenues. Public funding, therefore, is a crucial corollary of the political financing system that is currently in place:

As countries, states and provinces have placed limits on who can donate to parties and how much they give, they have filled the inevitable gap in donations with fair formulas to provide large and small parties the requisite funds needed to wage campaigns. Public funds create the space for small parties to give voters more choices on the ballot, which is ultimately better, not worse, for democracy.<sup>24</sup>

Use of the term "vote tax" ignores the reality that Canadian taxpayers—through the charitable donation tax-credit regime and other public subsidies such as free television advertising time—already heavily subsidize political parties. Your vote may put \$1.25 in a party's coffers, but—as the Official Opposition noted—consider also that many of your tax dollars have already been used to (involuntarily) support the tax credit your neighbour received for donating to his or her party of choice and to provide a 50 percent subsidy for eligible expenses incurred during elections.

Additionally, several "vote tax" systems are already in place in a number of provinces, as well as at the federal level.<sup>25</sup> They have generally received the support of Canadian courts on the basis that they help promote fair elections by increasing the level of political discourse.

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<sup>22</sup> Tom Brodbeck, "You can be Heard" *Winnipeg Sun* (22 May 2008) 5.

<sup>23</sup> Manitoba, Legislative Assembly, *Debates and Proceedings*, Vol. LX No. 45B (May 22 2008) at 2357 (Jon Gerrard) [*Debates* (22 May 2008)].

<sup>24</sup> Curtis Brown, "Shred most of Bill 37" *Winnipeg Free Press* (31 May 2008).

<sup>25</sup> See *Figueroa*, *supra* note 7 at paras. 21 & 22.

Following this argument to its conclusion, some would argue the problem with the annual allowance system proposed by Bill 37 does not relate to the fact it creates a new public funding regime. Instead, the problem relates to *how* that funding system operates. When a voter casts a vote for the party of his or her choice, the funding is then locked in until the next general election. This allows a governing party to reap the benefits of an election win throughout the life of its incumbency, regardless of whether it still holds that voter's support. As one public presenter noted during committee meetings:

What if, in the future, another political party should arise in Manitoba ... that political opportunity is being cut off at the knees by a bill like this because the existing parties will get their votes, their money. They have the rebate from the previous election. They have their \$1.25 per year from the previous election, and if someone comes up with a new point of view, this total control of the system will disallow new, dissenting voices.<sup>26</sup>

Alternative methods should be explored in the place of pegging support to general election results. If a public-subsidy route were viewed as preferable, another option would be a tax return check-off system, such as the Presidential Election Campaign Fund Checkoff<sup>27</sup> that is used in the United States. This method of public financing is attractive because, unlike a subsidy that is tied to votes received, it allows voters to vote for one party while choosing to fund another. Alternatively, voters may choose not to fund any parties, since the program is entirely voluntary. As the Federal Election Commission notes:

In establishing the checkoff program, Congress left the single most important decision to you, the taxpayer. You decide whether you want three dollars of your tax to be used for the Presidential funding program described in this brochure. The choice is yours to voluntarily check yes or no.<sup>28</sup>

A check-off program thus provides for voter autonomy at a time when election-by-election strategic voting appears to be gaining traction with the Canadian public. No similar programs appear to be in place in Canada and the

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<sup>26</sup> *Committee* (26 May 2008), *supra* note 1 at 76 (Christine Waddell).

<sup>27</sup> Federal Election Commission, "Public Funding of Federal Elections", Federal Election Commission online: <<http://www.fec.gov/pages/brochures/pubfund.shtml>>. The United States check-off system has been in place since 1971, when voters were initially given the option of donating \$1 to eligible nominees in the presidential general election on their federal tax returns. The check-off amount was increased to \$3 in 1993, and the question now reads: "Do you want \$3 of your federal tax to go to the Presidential Election Campaign Fund?" See also Federal Election Commission, "The \$3 Tax Checkoff", Federal Election Commission online: <<http://www.fec.gov/pages/brochures/checkoff.shtml>>.

<sup>28</sup> Federal Election Commission, "The \$3 Tax Checkoff", *ibid*.

idea was not given any consideration during Bill 37's passage through the Legislature.<sup>29</sup>

While the logistics of the annual allowance as it was presented may be defended, there was no excuse for the government's decision to index the allowance to inflation. The optics of this decision were particularly poor given the government's ongoing battle with the retired teachers over whether the Teachers' Retirement Allowances Fund ("TRAF") should be indexed to inflation.

The indexing provisions, hidden in the 48 pages of Bill 37, did not go unnoticed by one retired teacher who spoke at committee hearings:

I feel hurt, angry even, that the members of the legislature are calling for a 100% cost of living adjustment for their election expenses and their contributions. Why am I angry? Because the government refuses to offer me this adjustment. And yet, I have paid for this cost of living adjustment, the famous COLA, through my contributions. I do not understand how and where you find the funds for this full adjustment when you tell me, over and over, that there is no money to pay me this COLA towards which I contributed.<sup>30</sup>

The business community also took notice of the indexing provisions. The Director of Provincial Affairs for the Canadian Federation of Independent Business had this to say at the committee hearings:

Concerning the elections finances amendment act, CFIB is astounded that this government, which continues to deny the benefits of automatic indexation of personal income tax brackets and exemptions would extend those very benefits to its political arm, as noted in section 42.1(2).<sup>31</sup>

## ***2. Advertising Limits***

After protracted negotiations with the Opposition, the final version Bill 37 removed the \$50 000 annual advertising expense limit outside election years for political parties. In election years, meanwhile, the limit would be raised from \$50 000 to \$250 000 outside the writ period. At first blush, these seem like progressive changes—a closer look, however, reveals the opposite.

Removing the spending limit in non-election years is a positive move, but viewed broadly, it merely represents recognition of the fragile legal foundation upon which these limits were based on in the first place:

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<sup>29</sup> See, for example, Elections Canada's comparative analysis of Canadian and American electoral finance regimes: Elections Canada, "Chronology of the Federal Campaign Finance System of Third Parties in Canada / Chronology of the US Campaign Finance System", Elections Canada online: <[http://www.elections.ca/med/spe/chronology\\_e.pdf](http://www.elections.ca/med/spe/chronology_e.pdf)> at 8.

<sup>30</sup> *Committee* (26 May 2008), *supra* note 1 at 54 (Norma Lacroix-Gagne, translation).

<sup>31</sup> *Ibid.* at 58 (Shannon Martin).

- First, the Supreme Court of Canada cautiously endorsed Parliament's *third-party* advertising limit regime in *Harper*. However, that regime extends to third-parties, not political parties themselves, and it also does not apply in non-election periods, as this regime purports to.<sup>32</sup>
- Second, party spending limits—such as those installed by the federal government—apply only during elections. Presumably, this is in recognition of the fact that the infringement on political speech created by spending limits can only be justified by the overarching goal of promoting fairness during an election.<sup>33</sup>

As a result, it is unclear whether Manitoba's law—which was introduced by the NDP in 2000<sup>34</sup> to apply to political parties in non-election periods—would have withstood a constitutional challenge.

The election-year spending limit (which applies outside the writ period), meanwhile, was in the final result increased to \$250 000. That appears to be a significant change in favour of free speech, until one considers the effect of the expanded definition of election year advertising contained in the bill:<sup>35</sup>

54.1(6) For the purposes of this section, in the year of a fixed date election, "advertising expenses" also includes money spent or liabilities incurred, and the value of donations in kind accepted, by a registered political party in producing and distributing

(a) posters, leaflets, letters, cards, signs and banners;

(b) any similar printed material, the purpose of which is to support or oppose, directly or indirectly, a registered political party; but does not include

(c) material that is distributed

(i) to individuals who hold memberships in the party, or

(ii) at a conference, convention or meeting held by the party, or a constituency association or candidate of the party; or

(d) a commentary, letter to the editor or similar expression of opinion of a kind normally published without charge in a newspaper, magazine or other periodical publication.

Compare this expanded definition with the current conception of advertising expenses under the *Elections Finances Act*:

"[A]dvertising expenses" means money spent or liabilities incurred, and the value of donations in kind accepted, for advertising

(a) in newspapers, magazines or other periodicals, or on the Internet,

(b) on radio or television, and

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<sup>32</sup> See *Harper*, *supra* note 9 at para. 112, where the majority noted one of the third-party spending limit regime's saving graces was the fact it *did not* apply in non-election years.

<sup>33</sup> *Ibid.* at para. 63.

<sup>34</sup> *Elections Finances Amendment Act*, S.M. 2000, c. 9 at cl. 22.

<sup>35</sup> Bill 37, *supra* note 1, Sch. C at cl. 11(3).

(c) on billboards, buses or other property normally used for commercial advertising, including direct production expenses; (« dépenses de publicité »)<sup>36</sup>

A simple comparison of the two provisions makes it abundantly clear that last election's \$50 000 would get a party just as much (if not more) bang for its advertising buck than the next election's \$250 000. This ostensible upward shift in the spending limit is in fact no shift at all.

### ***3. The Uneven Playing Field Remains***

When we wrote about eliminating partisan advertising by incumbent governments in the fifth volume of *Underneath the Golden Boy*, we spoke of the imbalance created by the political financing model that was then in place in Manitoba:

[T]he spending limits imposed by provincial and federal legislation work to stifle political speech. Lower expense limits reduce the amount of political speech parties and candidates can produce and disseminate. Less political speech inherently favours incumbents, who can ride voter apathy to another term.<sup>37</sup>

We proposed a number of measures we believed could even up the imbalance in political discourse the Supreme Court has warned against. Bill 37 provided an opportunity for the Manitoba Government to address this imbalance by attempting to level the playing field between challengers and incumbent parties. Unfortunately, the government has used Bill 37 to worsen the problem.

The incumbent government has the advantage of having the province's civil service and communications machine behind it. While the governing party may be subject to expense limits in its role *qua* political party, it remains free from restraint when it dons its "Government of Manitoba" hat and steps onto the soapbox. A newspaper editorial noted the hypocrisy of a bill that would "Limit to \$75,000 a year political party spending while not restricting [the] government's spending of at least \$11 million a year on flattering "government communications" campaigns."<sup>38</sup> It may be that "Manitoba Means Business", as a recent campaign proclaimed, but is it equitable to allow the government to charge these feel-good campaigns to the general public free from the limits it has set for other parties?

Another troubling aspect of the political financing regime created by Bill 37 is the complete absence of third-party spending limits. While the government has continued to tighten the vise on political party fundraising and spending, third parties are free to spend as they please. The NDP government put a third

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<sup>36</sup> C.C.S.M. c. E32 at s. 1.

<sup>37</sup> *Underneath the Golden Boy* Vol. 5, *supra* note 4 at 28.

<sup>38</sup> "Fixed Elections", Editorial, *Winnipeg Free Press* (24 May 2008).

party spending limit regime on the books in 2000, but, chose never to proclaim it,<sup>39</sup> and in the course of their amendments to Bill 37, eventually removed those limits altogether.<sup>40</sup>

One could argue that, if one party does not like the fact another party's traditional support group is out-advertising their traditional support group, the solution lies outside electoral financing regulation.<sup>41</sup> This argument, however, is fundamentally inconsistent with the current government's heavy-handed approach to election financing. If the government chooses to enter the political financing regulation arena it should do so consistently, not with a piecemeal, issue-by-issue, contradictory approach.

While no one has yet challenged the constitutionality of Manitoba's political financing laws, one wonders whether it would meet the standard laid out by the Supreme Court. As the court noted in *Harper*:

The state can equalize participation in the electoral process in two ways; see O.M. Fiss, *The Irony of Free Speech* (1996), at p. 4. First, the State can provide a voice to those who might otherwise not be heard. The Act does so by reimbursing candidates and political parties and by providing broadcast time to political parties. Second, the State can restrict the voices which dominate the political discourse so that others may be heard as well.<sup>42</sup>

In Manitoba, the state is neither providing a voice to those who might otherwise not be heard, nor is it restricting the voices which dominate the political discourse. The \$1.25 spending allowance may be a shot in the arm for smaller political parties, but it will have little effect compared with the substantially larger payout the governing party will receive under the same system. Meanwhile, the electoral financing laws discussed above will allow the voices that already dominate the political discourse to continue to drown other parties out.

The last word on the issue goes to opposition MLA Kelvin Goertzen, who rose in the House to speak to the unfairness created by the government's electoral financing laws:

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<sup>39</sup> *The Elections Finances Amendment Act*, *supra* note 34 at s. 45(2). See also comments made by Mr. McFadyen at committee hearings: "[F]or the record ... those sections have never been proclaimed in Manitoba, even though they were passed; so that's not law presently. There are no third-party limits." (*Committee* (27 May 2008), *supra* note 14 at 138).

<sup>40</sup> It is worthy of note that the only significant third-party advertising that took place prior to and during the 2007 election was paid for by the Manitoba Nurses' Union.

<sup>41</sup> In other words, it was open to the Manitoba business community to respond to the pro-government advertising campaign staged by the Manitoba Nurses' Union leading up to the 2007 Manitoba general election.

<sup>42</sup> *Harper*, *supra* note 9 at para. 62.

[O]n the one hand, you have the government using taxpayers' dollars, spending millions of dollars on feel-good quasi-government ads in the province of Manitoba. On the other side, you have a law that restricts the ability of opposition parties to bring forward their concerns about what's happening in Manitoba. So it certainly creates an uneven playing field. It strikes at the heart of democracy. We believe it impinges upon the Charter of Rights and Freedoms, and it does all of those things to the detriment of each of us.<sup>43</sup>

## B. Set Election Dates

Many Canadian provinces, as well as the federal government, have introduced set election date legislation. We have already canvassed the merits of this legislation in previous editions of *Underneath the Golden Boy*; in summary, these advantages include a measure of legislative certainty and—by removing the government's power to arbitrarily call an election that suits its own interests—improved overall governance.

The introduction of set election date legislation in Manitoba could be described as somewhat of a surprise, given the NDP government's previous ambivalence to the idea. Set election dates did not form a part of the party's platform in the general election that had been held just one year before Bill 37 was introduced.

Speaking in the House, Premier Gary Doer did not explain his apparent change of mind on the issue, though he did note the legislation was modeled after the federal set election date model.<sup>44</sup> A provision that respects the Royal Prerogative, which is central to constitutionality of the federal model, was included in Bill 37:

Powers of Lieutenant Governor preserved  
49.1(1) Nothing in this section affects the powers of the Lieutenant Governor, including the power to dissolve the Legislature at the Lieutenant Governor's discretion.<sup>45</sup>

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<sup>43</sup> *Debates* (22 May 2008), *supra* note 22 at 2360 (Kelvin Goertzen). A newspaper editorial made a different point on the bill's constitutionality: "The Supreme Court has already found that limits on third-party advertising violate the free speech guarantees of the Charter of Rights and Freedoms except in the writ period. It is difficult to see how it might find that tougher prohibitions on political parties than on third-parties can be countenanced." ("Stop this mug's game", Editorial, *Winnipeg Free Press* (6 June 2008))

<sup>44</sup> *Debates* (1 May 2008), *supra* note 11 at 1505 (Gary Doer).

<sup>45</sup> Bill 37, *supra* note 1, Sch. B at cl. 6. Public presenter Jae Eadie spoke to this issue at Bill 37's committee hearings: "If the situation arises where the government of the day loses the confidence of the House ... that usually necessitates a general election, and that usually necessitates the Lieutenant-Governor making that order. Nobody else can do that except the Lieutenant-Governor ... it is vitally important—if you're going to have a fixed-date election process, it's vitally important that the other process remain intact, and that is that the power of the Lieutenant-Government to dissolve at his discretion is retained in the bill." (Manitoba, Legislative Assembly, *Standing Committee on Justice*, Vol. LX No. 4 (28 May 2008) at 208–9 [Committee (28 May 2008)]).

Such a provision—called an "out clause" by some critics—has been viewed as necessary to ensure set election legislation remains constitutional. This is because the Queen's representative (either the Lieutenant Governor or Governor General) must always retain the power to dissolve or prolong Parliament at any point.<sup>46</sup> Opposition MLAs seized on this "escape clause", claiming the legislation creates "fixed elections if necessary but not necessarily fixed elections."<sup>47</sup> In reality, this clause is nothing more than a tip of the hat to the necessary constitutional provisions the bill had to contain.

On the other hand, Bill 37 did create a potential loophole for the governing party in terms of *when* the set election date legislation takes effect. The bill would amend s. 49.1(2) of the *Elections Act* to require the government to hold a general election on 14 June 2011, "unless a general election has been held between the coming into force of this section and 13 June 2011."<sup>48</sup> The effect of this clause can be viewed two ways. First, it could be seen as simply indicating that if an election must be called before the set date, there is no point to have another election on that set date "just because". Or, the clause could be seen as delaying the implementation of set election date legislation for one election.

In any event, the issue is not a pressing one because the bill preserves the power of the Queen's representative to veto any election call. In the end, the decision rests with the Lieutenant Governor, not the premier, and set election date legislation should be viewed as merely persuasive advice to the government of the day in that regard.

Interestingly, the constitutional "out-clause" may not be required for set election date legislation. Though no court has ruled on this point, we believe that set election dates do not derogate from the power of the Queen's representative to dissolve or prolong a sitting of the House. Instead, the legislation should be viewed as merely reducing the maximum length the House can sit from its current five-year length to four years. The maximum shelf life of Parliament has been changed before without the need for a constitutional amendment, and we suggest the same could apply to this legislation. We made this argument in a previous edition of *Underneath the Golden Boy* as follows:

[T]he law could only be unconstitutional if it forces the Queen's representative to call an election in a manner that offends the Royal Prerogative, as opposed to prohibiting the Queen's representative from dissolving the House. The only time a Lieutenant Governor

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<sup>46</sup> Section 41(a) of the *Charter* requires unanimous consent from the Senate, House of Commons and each province's Legislative Assembly for any laws that infringe on the office of the Queen's representative. Set election date legislation that failed to preserve the Queen's representative's power to prolong or dissolve the House would thus require such an amendment.

<sup>47</sup> *Debates* (22 May 2008), *supra* note 22 at 2359 (Kelvin Goertzen).

<sup>48</sup> Bill 37, *supra* note 1, Sch. B at cl. 6.

or Governor General would be "forced" to call an election is at the date prescribed by legislation. This date is nothing more than the ceiling for that particular Parliament's life—the only difference between this law and the unfixed election status quo is that the ceiling has been lowered from five years to four years. A mandated election at the end of four years infringes on the office of the Lieutenant Governor or Governor General no more than the current five-year requirement does.<sup>49</sup>

Several presenters at committee hearings recommended the bill should contain a provision that would allow the Chief Electoral Officer to recommend alternate polling days in the event the election falls on a day of religious or cultural significance.<sup>50</sup> This should be added to the bill.

### C. Legislative Assembly Management Commission Changes

The Supreme Court of Canada's view on freedom expression was expressed in the seminal case of *R. v. Keegstra* as follows:

Freedom of expression is a crucial aspect of the democratic commitment, not merely because it permits the best policies to be chosen from among a wide array of proffered options, but additionally because it helps to ensure that participation in the political process is open to all persons. Such open participation must involve to a substantial degree the notion that all persons are equally deserving of respect and dignity. The state therefore cannot act to hinder or condemn a political view without to some extent harming the openness of Canadian democracy and its associated tenet of equality for all.<sup>51</sup>

In *Figueroa*, the court singled out the importance political parties play in ensuring the concept of a broad and open "marketplace of ideas" is allowed to flourish:

[P]olitical parties act as a vehicle for the participation of individual citizens in the electoral process; they are the primary mechanism by which individual citizens introduce their own ideas and opinions into the public dialogue that elections spawn. Legislation that contributes to a disparity in the capacity of the various political parties to participate in that dialogue ensures that some persons have a more effective vehicle for their ideas and opinions than others.<sup>52</sup>

We have cited these judicial comments to provide the backdrop against which the Manitoba government attempted to implement bold changes to the way elected representatives communicate with their constituents. Bill 37, as it was initially proposed, would have put the power to censor these communications into the hands of a government-dominated committee. Use of the word "censor" is not to be done lightly—it smacks of melodrama and partisan vitriol—yet, in the face of Bill 37, we are left with little choice.

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<sup>49</sup> *Underneath the Golden Boy* Vol. 5, *supra* note 4 at 7.

<sup>50</sup> *Committee* (26 May 2008), *supra* note 1 at 29 (Graham Starmer).

<sup>51</sup> [1990] 3 S.C.R. 697, at 763–64.

<sup>52</sup> *Figueroa*, *supra* note 7 at para. 53.

The bill speaks for itself. Clause 2 of Schedule E of Bill 37 reads as follows:

6.1(1) The commission must, as soon as reasonably practicable after the coming into force of this section, establish criteria or guidelines in order to ensure that the following are not partisan:

- (a) material printed, mailed or distributed electronically by a member, if the cost is
  - (i) paid under section 52.22 of The Legislative Assembly Act, or
  - (ii) paid for with money that is appropriated by the Legislature to enable the member to communicate with his or her constituents;
- (b) material printed, mailed or distributed electronically by the caucus of a recognized political party or a member who does not belong to the caucus of a recognized political party, if the cost is paid for with money that is
  - (i) received under section 52.23 of The Legislative Assembly Act, or
  - (ii) appropriated by the Legislature for use by the caucus or the member;
- (c) advertising in newspapers, magazines or other periodicals, on the Internet, on radio or television, or on billboards, buses or other property normally used for commercial advertising, if the cost of the advertising, including the cost of producing it, is paid for with money appropriated by the Legislature
  - (i) to enable a member to communicate with his or her constituents, or
  - (ii) that is available for use by a caucus of a recognized political party or a member who does not belong to the caucus of a recognized political party.

With this one clause,<sup>53</sup> the government attempted to place control of the content of almost every single meaningful form of political communication in the hands of the Legislative Assembly Management Commission. The original proposal in Bill 37 would have given the commission the responsibility to create "guidelines" as to what is, and what is not, partisan. The final amendments, introduced after negotiations with the Opposition, created a test of "appropriateness" for the content of these mailings and provided an arbitration process in the event that the commission is unable to arrive at criteria by consensus (see below). The untrammelled discretion that the original version of Bill 37 proposed to grant to LAMC is concerning, but perhaps not as concerning as the prospect of a government-dominated group of MLAs deciding what other MLAs may or may not tell the public. Given the above comments from the Supreme Court, there is a legitimate question as to whether this section of the bill would withstand a constitutional challenge. If nothing else, it certainly goes against the spirit of *Charter* expression and political representation rights as the courts have interpreted them.

The timing of the introduction of these provisions is especially poor, considering the Manitoba Government has failed to follow Ontario's lead in establishing legislation that would ban partisan government advertising. The McGuinty government created the *Government Advertising Act*<sup>54</sup> in 2004 to

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<sup>53</sup> Bill 37, *supra* note 1, Sch. D, cl. 2(1) would also attach LAMC-created guidelines to mailing privileges established by the *Legislative Assembly Act*.

<sup>54</sup> S.O. 2004, c. 20 at s. 6(3).

eliminate public funding for advertisements whose primary objective is "to promote the partisan political interests of the governing party". A government could hardly be faulted to failing to adopt another province's legislative regime, but more troubling in this instance is the fact similar legislation was proposed in Manitoba during the same session that saw the introduction of Bill 37.

Bill 234, *The Ending Government Spending on Partisan Advertising Act*<sup>55</sup> was introduced by Tory MLA Myrna Driedger a few weeks after Bill 37 was presented to the House. In an interview with a newspaper reporter, Driedger described the rationale behind the private member's bill as follows:

"There's a difference between facts and figures and deceiving the public," Driedger said. "If you're going to talk about stopping smoking, recruiting foster parents, domestic violence campaigns, West Nile virus, that's fine. But the NDP is attempting to brainwash Manitoban taxpayers into thinking they're doing a better job than they are."<sup>56</sup>

Bill 234 was similar in substance to Ontario's legislation, but it was not supported by the NDP. One wonders if the governing party took a pass on the bill because it wanted to retain the power to decide which communications are "partisan", instead of giving the task to the Auditor General or another independent individual.

A poignant moment occurred at the bill's committee meetings when a public presenter, who otherwise supported Bill 37, was asked who should decide whether political communications are partisan: "I believe a neutral third party would do a great job of deciding whether or not that's appropriate or inappropriate."<sup>57</sup> We agree. With the introduction of Bill 37, however, it appears Manitoba's governing party does not.

The irony of the NDP's position was not lost on the *Winnipeg Free Press* editorial board, which noted that:

The new rules would raise the spectre of a small group of select politicians censoring every letter an MLA or a caucus wishes to send to Manitobans, something none of the government's own propaganda is never subjected to ... Like any party in power, the Doer administration gets to ride above such rules. Its virtues are extolled with every press release issued by the "news media services" branch. Indeed, it was the heft of that robust machinery that Mr. Doer himself used to extol the virtues of Bill 37 as law that will ensure elections are fair and democracy in Manitoba remains strong.<sup>58</sup>

There is not much else that can be said about this aspect of Bill 37 other than it is, plain and simple, bad law.

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<sup>55</sup> 2<sup>nd</sup> Sess., 39<sup>th</sup> Leg., Manitoba, 2008.

<sup>56</sup> Paul Turenne, "Tories want line drawn" *Winnipeg Sun* (16 May 2008) at 12.

<sup>57</sup> *Committee* (29 May 2008), *supra* note 10 at 265 (Mitch Tripple).

<sup>58</sup> "Partisan censorship", Editorial, *Winnipeg Free Press* (14 May 2008).

## D. Lobbyist Registration

The inclusion of a lobbyist registration regime in Bill 37 would bring Manitoba in line with the federal government and other provinces that already have such a registry. These provisions are therefore a welcome addition to Bill 37, save for some minor tweaking.

First, the language related to the application of the registration to communications between government officials and unions could be tightened up. The relevant section of the bill reads as follows:

Act does not apply to certain submissions

3(2) This Act does not apply in respect of an oral or written submission made as follows:

(e) made to a public official by a union relating to

(i) the administration or negotiation of a collective agreement with the government or a government agency, or

(ii) the representation of a member or former member of a bargaining unit who is or was employed by the government or a government agency

As opposition MLAs noted, the wording of this provision gives the government and unions considerable room to manoeuvre away from the legislation's registration requirement:

Unions can talk to the government at any time about the administration of a union agreement, and they don't have to follow the same rules as everybody else. The definition of administration is so open-ended that it could mean anything at any time.<sup>59</sup>

The second provision of the proposed lobbyist registration regime that bears mention is the inclusion of a cabinet-appointed registrar.<sup>60</sup> Given the accountability theme underlying the concept of lobbyist registration, placing the registrar under the control of cabinet is a mistake. The problem inherent in this position was summarized by a committee presenter as follows:

The target of lobbying regulation is to prevent undue influence. Well, who has more influence than the Cabinet? Why would you place the Cabinet in charge of the regulatory process to stop undue influence? That aspect of the bill is flawed.<sup>61</sup>

A final comment on this section of Bill 37 was raised by Winnipeg community activist Nick Ternette, who questioned why the bill wouldn't also apply to lobbying at the municipal level. This is a valid point that could be considered in future deliberations.<sup>62</sup>

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<sup>59</sup> *Committee* (27 May 2008), *supra* note 14 at 2431 (Myrna Driedger).

<sup>60</sup> See Bill 37, *supra* note 1, Sch. A at s. 11.

<sup>61</sup> *Committee* (29 May 2008), *supra* note 10 at 243 (Michael Richards).

<sup>62</sup> *Committee* (27 May 2008), *supra* note 14 at 155 (Nick Ternette).

## IV. AMENDMENTS

Bill 37 underwent several important amendments during the committee stage. As one commentator noted, while the opposition was able to delay the bill's passage until the fall, its biggest victory was likely the concessions it extracted from the government on the bill:

The Tories have already realized a dividend from the hard work. The NDP dropped several objectionable elements from the electoral finance bill, including proposed limits on political advertising and controls on content which is, in some ways, more important than delaying passage. The bill was clumsy and the Tories got the NDP to blink.<sup>63</sup>

Many of these amendments indicate the NDP was responsive to the feedback it received during the committee stage. In that sense, all of the public, opposition, and government deserve credit for these improvements (the opposition and the public for suggesting the changes, the government for listening to and adopting them).

### A. Election Financing

Two important amendments were made in this area. First, spending limits on political advertisements in non-election years will be removed.<sup>64</sup> Given the earlier discussion, this is undoubtedly a win for democracy. Second, the political allowance (itself a positive development) will no longer be indexed to inflation.<sup>65</sup> This is also a positive development.

### B. Legislative Assembly Management Commission

In the face of strong public, media, and opposition criticism, the NDP moved to tone down the most draconian of its proposed changes in this area.

LAMC will no longer be charged with the responsibility of creating "partisan guidelines" for most forms of MLA communication. Instead, the bill has been amended to substitute "appropriate" in place of partisan, and it appears MLA mail-outs will no longer be subject to these guidelines.<sup>66</sup> Additionally, the LAMC will invite parties who do not have representation on the committee to join discussion toward the creation of the guidelines.<sup>67</sup> While this will still allow the

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<sup>63</sup> Dan Lett, "Premier offered easy targets" *Winnipeg Free Press* (16 June 2008).

<sup>64</sup> Bill 37, *supra* note 1, Sch. C, cl. 11(1) as amended.

<sup>65</sup> *Ibid.* at cl. 15 as amended.

<sup>66</sup> *Ibid.*, Sch. E, cl. 2 as amended.

<sup>67</sup> *Ibid.*

government to have a majority voice at LAMC, it is a step in the right direction nevertheless.

### C. Lobbyist Registration

Taking the lead of recent changes to the federal lobbyist registry, the provincial government will put control of Manitoba's registry in the hands of an independent officer of the Assembly. This is also a positive development that was responsive to feedback generated during the committee process.

## V. BILL 37: GOING FORWARD

Debate on Bill 37 will resume when the Legislature sits in the fall, as per a sessional order passed 5 June 2008.<sup>68</sup> Report stage will end 30 September, and the bill will be given third reading and Royal Assent no later than 9 October.<sup>69</sup>

There is much work to do between when the House resumes sitting and these dates. The government has been responsive to some of the criticism the bill has received to date, but several negative aspects remain. In particular, close attention should be given to its political financing provisions as described above.

Bill 37 was born as a comprehensive democratic reform package earlier this year. The legislative process to date has been a success in that it has highlighted many of the bill's shortcomings, and led to many improvements. It remains to be seen how many more improvements will be put to paper, but the legislative process has helped instil a bit of democracy and accountability into a bill that, in theory, was supposed to be about both but, in reality, had little of either.

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<sup>68</sup> Debates (5 June 2008), *supra* note 2 at 2736.

<sup>69</sup> *Ibid.*