



STANDING COMMITTEE ON HUMAN SERVICES

Hansard Verbatim Report

No. 16 – November 9, 2016



Legislative Assembly of Saskatchewan

Twenty-Eighth Legislature

STANDING COMMITTEE ON HUMAN SERVICES

Mr. Dan D'Autremont, Chair
Cannington

Ms. Nicole Rancourt, Deputy Chair
Prince Albert Northcote

Mr. David Buckingham
Saskatoon Westview

Ms. Danielle Chartier
Saskatoon Riversdale

Mr. Mark Docherty
Regina Coronation Park

Mr. Muhammad Fiaz
Regina Pasqua

Mr. Roger Parent
Saskatoon Meewasin

Hon. Nadine Wilson
Saskatchewan Rivers

[The committee met at 08:00.]

The Chair: — Good morning, everyone, and welcome to the Human Services Committee. I was just elected Chair at the last meeting, so this is the first real meeting I'm chairing for the Human Services Committee.

With us today, we have Ms. Nadine Wilson, MLA [Member of the Legislative Assembly]; Mr. David Buckingham, MLA; Mr. Mark Docherty, MLA; and substituting in for Roger Parent is Greg Lawrence, MLA. On the opposition side, we have MLA Nicole Rancourt and MLA Danielle Chartier. So welcome everyone today.

The first order of business is that we're looking at the report on organ and tissue donations. And as part of our due diligence, I have asked our Parliamentary Counsel and Law Clerk to attend this morning to give us a brief presentation on the legalities and constitutionality of opt-in or opt-out.

And so I was wondering if we could have a motion under rule 132(6), which states that "The attendance of any witness invited is subject to the final authority of the committee." So I would ask a member to move that we accept Mr. Ken Ring as a witness. Ms. Wilson.

Hon. Ms. Wilson: — Thank you. Good morning. I move:

That the Standing Committee on Human Services now invite the Law Clerk and Parliamentary Counsel, Ken Ring, to make a presentation and answer questions on the constitutional of opt-in and opt-out registries.

I so move.

The Chair: — Ms. Wilson has moved:

That the Standing Committee on Human Services now invite the Law Clerk and Parliamentary Counsel, Ken Ring, to make a presentation and answer questions on the constitutionality of opt-in or opt-out registries.

All in favour?

Some Hon. Members: — Agreed.

The Chair: — Carried. I would now invite Mr. Ken Ring to come forward and do a presentation to the committee.

Mr. Ring: — Good morning, committee members. I would like to start by thanking you for asking me to attend the committee meeting this morning. I would also indicate that I will be addressing legal issues only, so do not take my remarks as in any way indicating a preference for policy decisions that the committee may make. So there'll be no policy input on my part.

I'd also like to indicate that I am appearing as a witness on very short notice. And I am available to the committee at any time following today to provide more considered opinion with respect to the issues that you've asked me to provide an opinion on, as well as answer any questions or follow up on the questions that are answered today. So with those remarks for

the record, I would like to say that I will give you my observations and thoughts on the law as well as the court system.

The democratic process and our structure of government is essentially that assemblies make the law. Elected officials make the law; they pass legislation. The courts interpret that legislation. And Peter Hogg has indicated that this is a dialogue between the two branches of government in order to arrive at legislation that fits constitutional rigour, as well as what the population is understanding.

And that dialogue is a very public dialogue. It is also very structured, so it's not always . . . You can always be definitive with respect to issues that may be raised by the courts or by a litigant who may decide to challenge legislation. So it is incumbent upon the citizenry, if it so chooses, to challenge legislation in order for the courts to be engaged. One other quote that I have heard from other legislators is the role of elected officials is to legislate, and that they ought to perform that role if they so choose.

With respect to generally the issues at hand, as committee members would be aware, there has been significant discussions in the courts with respect to a person's personal health issues and health wishes. That started with the living wills that have been adopted that allow someone to provide a written document as to what their wishes are once they are no longer competent or able to provide to a medical professional what they would like, what type of services — medical intervention — they would like to have. And there it removed it much from family members and allowed the individual the option or the opportunity to set out in writing what their thoughts were, what their wishes were, how they felt what should happen to them medically.

And as well, very recently, there has been a number of court judgments and a Supreme Court judgment with respect to assisted suicide. And that I think is very significant and ought to be considered with respect to the issue at hand. It is somewhat of a different issue, but it does provide an interesting perspective as to how the courts will interpret legislation with respect to, and I will call it that type of medical intervention.

Now having said that, the next item I would like to deal with would be, I believe, some of the issue here will hinge on what the definition of death is. Now that may sound odd to members of the committee. But I believe it's really a question of when the person is not necessarily no longer competent to make a decision, but once death occurs, there is no possibility of them to receive care or medical intervention that will allow them to decide on a type of medical intervention they would like in the case of death.

The assisted suicide and the living wills is dealing with individuals who are still very much alive and have the possibility of changing their mind, changing the consent that they have provided previously, which is always someone's prerogative. Individuals make decisions based on what is happening today or at that point in their life, and they may change their decision as life progresses, other matters come into their lives.

So I believe the definition of death is important because the use of organs or organ donation occurs after the point where the person is no longer able to return and change, I'll say change their mind, but change what their wishes were when they made a decision with respect to their medical care and/or organ donation, if that is a possibility.

With respect to a constitutional aspect in this area, section 7 of the Charter of Rights and Freedoms would certainly be engaged in considering this question if it is litigated in the courts; and that is life, liberty, and security of the person. It doesn't necessarily mention the situation following a person's demise; it's life, liberty, and security of the person. And I think that is something that should be investigated and should be considered. I have not, however, had a chance to look into that to see if there is any judicial pronouncements or an indication by the courts as to how they might deal with that situation.

One case, and I'm not saying that this has a bearing on the decision that the committee may take, but one case is the Borowski case, at the beginning of life. And that was the question of when does life start? Is it after full birth, or is it before full birth? That was a question that the court dealt with, and it was the issue that was put before the court.

With respect to end-of-life assisted dying, the issue in the Carter case was, ought this to be allowed? Is it constitutionally allowed? What type of rules or parameters may be set out in order to decide whether assisted dying is a possibility?

Health care is a provincial responsibility. The Criminal Code with respect to suicide is a federal responsibility. So there can be an overlap. There can be some issues. With respect to organ donation, that may be the same. However, organ donation deals with individuals who are still alive. The issue though is the incapacity of the individual and the decision that they need to make prior to the incapacity or, I will say, incapacity in terms of whether their . . . what their final wishes are.

What has been described as the soft-in, soft-out, or opt-out possibility is something I would like to consider more carefully. But I can offer you some thoughts today with respect to that issue. Requiring individuals to opt out, but they're not necessarily aware that there is an opt-out possibility, may engage issues when the opt-out possibility is something that needs to be signed. And if there's no opt-out, we continue with the situation as it presently occurs. There the individual has been made aware of the fact that they are required to make a decision, and I think that would have a bearing on how the legislation would be interpreted by the courts.

[08:15]

So those are the . . . That's the presentation that I have for you this morning, given the timelines.

But I would also like to say that, at the end of the day, it requires someone to challenge the legislation. And challenging the legislation is fact specific. There are a number of rights and freedoms contained in the Charter that will have a bearing on this issue, certainly with respect to life, liberty, and security of the person while they are still able to decide and alive, also religious beliefs and religious expressions as to whether or not

the person is a practising member of their religion as opposed to being born into the religion. So there's a number of areas that need to be considered as things move forward.

With respect to court challenges, it's always a decision of the litigant as to what issue they are prepared to raise, and the courts then must deal with that question and those issues raised. And that's how the court process works: legislation . . . legislators may legislate; the courts interpret.

So with those remarks, that would be the end of my brief presentation, and I hope it is of value to the committee members. And as I said at the outset, I certainly am prepared to return to the committee to answer specific questions or provide other information to committee members. So thank you very much, Mr. Chair.

The Chair: — Thank you, Mr. Ring. Any questions from any of the members? Ms. Chartier.

Ms. Chartier: — First of all, thank you very much, Mr. Ring. I always appreciate your perspective in any dealings that I've had with you around private members' bills. I'm very appreciative of the work that you bring to the table here.

Around the opt-out provision . . . And you said you want to take some more time to consider that carefully. The short time span that you had to present here obviously poses some challenges. Can you just talk a little bit more about the perspective around, if you're not aware that opt-out is a possibility, where the legal difficulties might be around that? I'm not a lawyer and I would be grateful for a little bit more input around that.

Mr. Ring: — Okay. Thank you, Ms. Chartier. I would indicate that with respect to something that deals with an individual's body and that is very invasive, an individual perhaps ought to know that there is a decision that they must make . . . Or can, not must make — that they can make, in order to decide their wishes. If you're not aware that you have a decision to make, I would suggest an individual would not make that decision because they don't know that's required of them.

Life, liberty, security of the person, each individual has an idea of what that is for them. Legislation, however, is for society. And so there are a number of other considerations that would have a bearing for other citizens, notwithstanding your personal thoughts on that.

The second point on that that I would just like to mention is that if you don't know there is the opt-out, the option, then a decision is being made for you although you do not realize that there is a decision to be made in that regard.

Now with respect to legislation generally, there is, as opposed to simply passing legislation — that's the law; off we go — there also is a way of letting the citizenry know, here are the rules that your elected representatives have established. That comes through watching debates in the Assembly. But I will say to members on the record, not everyone in the province watches everything that goes on. I notice some surprise on the part of members. That does not surprise me at all. People believe in the democratic process. They often watch it, but they do not watch it with the care that . . . You don't often know when critical

decisions are being made. I hope that addresses your question, Ms. Chartier.

Ms. Chartier: — It does. I just want to follow up a little bit more about that. So if you're not aware that opt-out is a possibility, and obviously not everybody is glued to their TV sets watching legislative proceedings, would that open . . . What I think I'm hearing you saying is, and I know that you started that particular comment or that piece of explanation that you want to consider this more carefully, but does that open you up to court challenges then around life, liberty, and security of the person and religious beliefs and religious expression then?

Mr. Ring: — I would say in general terms, whether you know there is a decision to be made or you don't know there is a decision to be made, I believe, in terms of the legislation, there's always a possibility that we'll be challenged in terms of, why am I being required to make this decision? Or my particular creed, religious belief, personal thoughts indicate that I ought not be able to make this decision. And there are certainly examples in the health care sector that that occurs in with respect to religious beliefs.

Ms. Chartier: — Thank you for that.

The Chair: — Okay. Thank you, Ms. Chartier. Anyone . . . Mr. Buckingham.

Mr. Buckingham: — Thank you for your presentation, Mr. Ring. I just had one question here. So if one person was to challenge this, would that affect everybody that is in the registry? Or not maybe a registry — an organ donor program.

Mr. Ring: — It would depend on the court decision. And generally with respect to legislation, the courts will and have struck down the entire Act if they feel it is over broad or it does not meet the rigours of the Charter of Rights and Freedoms as have been set out by the common law and other court decisions. They also on occasion will strike out only certain provisions, if those particular provisions offend the Charter of Rights and Freedoms or the constitution. And in that regard, the entire piece of legislation is not struck out but only that area that offends the law either constitutionally or under the Charter of Rights and Freedoms.

In either case, the dialogue between the courts and assemblies would then be engaged should legislators decide to revisit the decision that was made in light of the court decision that has been rendered. That has also occurred on occasion.

The Chair: — Thank you, Mr. Buckingham. I have a question or two. Regarding the Charter, sections 2 and 7, what have been the recent cases that you might be aware of that would affect an individual or a group of individuals in a program such as organ donations in regards to either opt-in or opt-out?

Mr. Ring: — In certain situations, after the court has come to a decision that one of the provisions may have been offended, if it is defensible for society for a number of reasons under section 2, then they will take that into consideration. Whether or not that occurs with respect to all of the rights contained in the Charter of Rights and Freedoms is a further issue. Those would be one of the issues that I certainly would request further time

to consider before providing an opinion to the committee.

The Chair: — Okay. Thank you. In regards to I think it's section 15 which is the opt-out clause, I know that certain clauses are not subject to the opting out of the Charter. Are sections 2 and 7 included in that group that a jurisdiction could not opt out of?

Mr. Ring: — That would be one of the issues that I would request further time to consider.

The Chair: — Any other questions? If not, thank you, Mr. Ring. And if you could look into those questions. And depending on what decisions and discussion come out of today, we may be inviting you back.

Mr. Ring: — Thank you very much, Mr. Chair. As you know, with respect to advice that I have provided to members in the past, the amount of time that a lawyer has to consider a question will certainly result in an opinion that is more considered and certainly perhaps more instructive or helpful for that individual or for members. Thank you.

The Chair: — Okay. Thank you very much. Our next meeting for this committee is a week from today, so that would be the next chance we have to meet with you. But understanding more times lawyers take, it generally means it costs more money. But in this case, you're already being paid. Thank you.

Mr. Ring: — Thank you as well for that comment. You are correct.

The Chair: — Okay. Thank you. The committee was planning on going in camera for our further deliberations, so I wonder if we could have a motion by a member to move in camera at this time. Ms. Wilson?

Hon. Ms. Wilson: — Thank you. I move:

That the committee do now meet in camera [Mr. Chair].

The Chair: — Ms. Wilson has moved:

That the committee do now meet in camera.

Any questions? All in favour? Carried. The Human Services Committee now moves in camera. Thank you.

[The committee continued in camera from 08:28 until 09:03.]

The Chair: — Okay, this committee will reconvene at 9:03. So we're back in session again. Would somebody move that the committee do now adjourn? Mr. Buckingham has moved that the committee do now adjourn. Is it the pleasure of the committee to adjourn?

Some Hon. Members: — Agreed.

The Chair: — Carried. This committee now stands adjourned at 9:04.

[The committee adjourned at 09:04.]