

Bill 219: An Insurmountable Goal
By: Courtney Pope

Bill 219, *The Personal Information Protection and Identity Theft Prevention Act*¹, was introduced in the Manitoba Legislative Assembly on November 27, 2008, by opposition member Mavis Taillieu.² This was not the first time the bill had been brought before the Legislative Assembly for consideration though. Variants of Bill 219 had been introduced by Mrs. Taillieu five times earlier and had been met by the same response by the government each time: disregard and indifference. Unfortunately, Bill 219 suffered the same fate as its predecessors, dying on the Order Table after Second Reading.

Bill 219, a private member bill, seeks to address the privacy concerns of Manitobans by implementing procedures that apply to the collection, use, and disclosure of personal information held by organizations. It also has provisions dealing with the protection of personal information of provincial employees. The bill would displace the application of *The Personal Information Protection and Electronic Documents Act* (“PIPEDA”)³, which is federal legislation governing the collection, use, and disclosure of personal information held by organizations engaging in commercial activities. The bill extends privacy rights beyond those offered by PIPEDA, and would establish Manitoba as a proactive province with regards to addressing the problems of identity theft and inadequate privacy safeguards.

This paper will argue that Bill 219 is necessary in order to effectively protect the privacy rights of all Manitobans, and that the reluctance of the government to give adequate attention to the bill is a failure on their part to put forward the best interests of Manitobans. The first part of this paper will outline the main features of the bill and will discuss how private member bills are

¹ Bill 219, *The Personal Information Protection and Identity Theft Prevention Act*, 3rd Session, 39th Leg., Manitoba 2008 [Bill 219 or bill].

² Mrs. Taillieu is the MLA for Morris and a member of the Progressive Conservatives.

³ S.C. 2005, c.5 [PIPEDA].

typically treated. Part two will examine the role of PIPEDA and the concept of substantially similar legislation. Part three will analyze the main arguments advanced for and against the bill, as expressed in *Hansard* and in the context of the bill's legislative history. Theories regarding the major impediments to its passing will also be advanced. Fundamentally, the question to be asked throughout the analysis is: why is this bill being ignored by the government and will persistence finally pay off?

Part I: OVERVIEW OF BILL 219

(A) Legislative History of the Bill

Bill 219 was introduced for First Reading in November of 2008. As noted earlier, Mrs. Taillieu has brought this bill forward six times as an opposition member in an effort to address what she sees as a substantial gap in privacy protections for Manitobans.⁴ The following table outlines the previous versions of Bill 219:

Bill No.	Bill Name	Legislative Session	Stage the Bill Got To
200	<i>The Personal Information Protection Act</i>	3 rd Session, 38 th Legislature	Died after Second Reading
207	<i>The Personal Information Protection and Identity Theft Prevention Act</i>	4 th Session, 38 th Legislature	Died after Second Reading
200	<i>The Personal Information Protection and Identity Theft Prevention Act</i>	5 th Session, 38 th Legislature	Died after First Reading
206	<i>The Personal Information Protection and Identity Theft Prevention Act</i>	1 st Session, 39 th Legislature	Died after Second Reading
216	<i>The Personal Information Protection and Identity Theft Prevention Act</i>	2 nd Session, 39 th Legislature	Died after Second Reading

As is evident, none of the earlier versions of Bill 219 made it passed Second Reading or to Committee. Therefore, there has been no public input on the provisions or merits of the proposed legislation. It is also important to note that all versions were similar and did not differ in content. The only exception is that a duty to notify clause, which will be explained later in the

⁴ Manitoba, Legislative Assembly, *Debates and Proceedings*, Vol. LXI No. 6 (27 November 2008) at 159 (Mavis Taillieu).

paper, was added in Bill 207.

(B) Main Features of Bill 219

This Bill governs the collection, use and disclosure of personal information by organizations in the private sector. It also establishes a duty for those organizations to notify individuals who may be affected when the personal information the organization has collected is lost, stolen or compromised.⁵

The explanatory note perfectly describes the main purpose of the bill. In an era where privacy dominates the concerns of individuals and identity theft is common, Bill 219 seeks to increase protections for personal information held by organizations. The competing interests of protecting personal information and business efficiency are balanced by the proposed legislation. This bill is modelled closely after private sector privacy legislation in Alberta, which has been in effect since 2004.⁶ It was also drafted by Mr. Brian Bowman, a leading privacy lawyer practicing at Pitblado LLP in Winnipeg.⁷ As a result, it can be argued that the provisions in Bill 219 have been tested and are well-researched.

Section 1 is the definition section. Notably, broad meanings were given to the terms ‘organization’, ‘personal employee information’, and ‘personal information’. According to the bill, an organization includes the following: a corporation, an unincorporated association, a union, a partnership, and an individual acting in a “commercial capacity”⁸ but it expressly excludes an individual who is acting in a personal capacity. The definition of ‘personal information’ is unlimited as it encompasses any information about an identifiable individual. Personal employee information includes the personal information obtained by an organization about an individual who “is an employee or potential employee” for the purposes of “establishing, managing, or terminating an employment relationship or a volunteer

⁵ *Supra* note 1 at “Explanatory Note”.

⁶ *Personal Information Protection Act*, S.A. 2003, c. P-6.5 [PIPA].

⁷ Interview of Brian Bowman by Courtney Pope (6 November 2009) [Bowman].

⁸ *Supra* note 1 at section 1.

relationship”.⁹

Section 4(1) states that the Act is applicable to all organizations and the personal information in the organization’s control. However, there are various exemptions for public bodies, or where the personal information is collected, used, or disclosed for personal, artistic, or political campaigning purposes. Personal information governed under *The Freedom of Information and Protection of Privacy Act* and *The Personal Health Information Act* is also exempted. Interestingly, there is also an exemption for personal information about an individual who has been deceased for at least twenty years, or for personal information about an individual that is contained in a record for at least 100 years.¹⁰

Section 4(4) is a grandfathering provision whereby personal information that was collected prior to the enactment of the legislation is deemed to have been collected with consent, and may be used and disclosed for the purposes identified at the time of collection.

Section 4(7) explicitly states that parties cannot contract out of the application of the Act because it is against public policy to do so.

Division 1 of Part 3 declares that an organization must develop policies and practices that are necessary for the organization to fulfill its responsibilities under the Act.¹¹ The organization must also designate one individual who is responsible for ensuring that the organization complies with the Act.¹²

Division 2 of Part 1 covers the issue of consent. Section 7(1) provides that an organization must obtain the consent of the individual before the personal information is collected, used, or disclosed. An individual may limit the extent of their consent by imposing reasonable terms or

⁹ *Ibid.*

¹⁰ *Ibid.* at section 4(3).

¹¹ *Ibid.* at section 6.

¹² *Ibid.* at section 5(3).

conditions¹³, and the consent can be either oral or written form.¹⁴ Implicit consent may be found where the individual willingly provided the personal information to the organization and it was reasonable for them to do so in the circumstances.¹⁵ The organization is restricted to use the personal information only for the purposes that the individual consented to.¹⁶ Individuals are also permitted to withdraw or vary their consent upon reasonable notice¹⁷ but the withdrawal or variation cannot serve to frustrate a legal obligation between the organization and the individual.¹⁸ Section 10 states that if consent was obtained through deception, it is negated.

Division 3 of Part 1 deals with the collection of personal information, starting with the overriding principle that the collection must only be purposes that are reasonable.¹⁹ At the time of collection, the organization must inform the individual of the purposes for which their personal information is being collected and the name of the designated person who is responsible for compliance with the legislation.²⁰ Section 14 lists the instances in which consent of the individual is not required. For example, if the information is being obtained in the best interests of the individual but timely consent cannot be obtained and it is reasonable to assume that the individual would consent²¹, or it is necessary to collect on a debt²², or for an investigation²³, or to determine whether an individual is entitled to a scholarship, consent is not required.²⁴ An organization may also collect personal employee information about an employee without consent if it is for reasonable purposes, the information only relates to the employment or volunteer

¹³ *Ibid.* at section 7(3).

¹⁴ *Ibid.* at section 8(1).

¹⁵ *Ibid.* at section 8(2).

¹⁶ *Ibid.* at section 8(4).

¹⁷ *Ibid.* at section 9(4).

¹⁸ *Ibid.* at section 9(5).

¹⁹ *Ibid.* at section 11(1).

²⁰ *Ibid.* at section 13(1).

²¹ *Ibid.* at section 14(a).

²² *Ibid.* at section 14(i).

²³ *Ibid.* at section 14(d).

²⁴ *Ibid.* at section 14(g).

relationship of the individual, and the employee has been provided with reasonable notice of the collection and its purposes.²⁵

Division 4 specifies what is considered reasonable uses of personal information by an organization.²⁶ The instances where consent is not required for use are specified in section 17 and are the same as those for collection, with the added exceptions of emergency or threat to life, health, or security of an individual or the public.²⁷

Division 5 governs the disclosure of personal information, which must only be for purposes that are reasonable.²⁸ The exceptions to consent for disclosure are listed in section 20, and mirror those for collection and use, but also include provisions for disclosing in accordance with a subpoena or warrant²⁹, in a law enforcement investigation³⁰, or for the purposes of contacting a next of kin.³¹

Division 6 sets out procedures to be followed when collecting, using, and disclosing personal information in business transactions. This section, for example, would apply in situations where prospective buyers of an organization examine client lists to ensure that the company actually does have clients.

Part 4 of the bill manages access, correction, and care of personal information held by an organization. Division 1 deals with the issues of access and correction, stating that where a request for access is made by an individual for their personal information in the control of the organization, the organization must provide the individual with access and declare the purposes

²⁵ *Ibid.* at section 15(2).

²⁶ *Ibid.* at section 16(1).

²⁷ *Ibid.* at section 17(i).

²⁸ *Ibid.* at section 19(1).

²⁹ *Ibid.* at section 20(e).

³⁰ *Ibid.* at section 20(f).

³¹ *Ibid.* at section 20(h).

for which the information is being used and whom it has been disclosed to.³² Exceptions to access are listed in sections 24(2) and 24(3). Individuals can also request that the organization correct inaccurate or incomplete information.³³ However, the organization has discretion to refuse a correction if it has reasonable grounds to do so but must make an annotation that a request for correction was made.³⁴ Issues regarding how to make a request, time limits to responding to requests for access or correction, and how access is to be given are also set out.

Division 2 states that an organization has the duty to ensure that the personal information in their control is accurate and they must take reasonable steps to protect that information. Section 34(2) is significant because it places an onus on an organization to notify an individual if their personal information has been stolen, lost, or accessed in an unauthorized manner. Manitoba would be the only province with private sector privacy legislation that contains a duty to notify. Section 34(4) also gives an individual a right of action against an organization that has failed to protect their personal information or failed to notify them in the event of a breach.

Part 5 governs the application of the Bill to professional regulatory and non-profit organizations. This will be dealt mainly through regulations to be established by the Lieutenant Governor in Council.³⁵

Part 6 sets out general provisions regarding defences for organizations where their actions have been reasonable³⁶, specifying who can exercise their rights under the legislation³⁷, and provisions for general regulation making powers.³⁸ Section 41 is the offence provision, which establishes that person commits a summary conviction and can be liable to a fine of \$10,000 (or

³² *Ibid.* at section 24(1).

³³ *Ibid.* at section 25(1).

³⁴ *Ibid.* at section 25(3).

³⁵ Please note that the Act applies to non-profit organizations that are engaged in commercial activities, as specified by section 37(3).

³⁶ *Ibid.* at section 38.

³⁷ *Ibid.* at section 41(1).

³⁸ *Ibid.* at section 42.

\$100,000 for offenders other than individuals) if they wilfully collect, use, disclose, gain access to, or alter, falsify, or conceal personal information in contravention of the Act. Section 41(3) states that no offence is committed if a court is satisfied that the individual or organization acted reasonably in the circumstances.

Finally, section 43(1) creates a mandatory review of the Act eighteen months after it has come into force and every three years thereafter. This is to help ensure that the legislation will continue to adapt to ever evolving technology so that the privacy protections do not become outdated.³⁹

(C) How Private Member Bills Are Treated in Manitoba

As noted earlier, Bill 219 is a private member bill. Therefore, its treatment in the Assembly is somewhat different from that of bills introduced by the government. A private member bill must still go through first, second, and third readings, and the committee stage, but it is much more difficult for such bills to navigate through the legislative channels.

A private bill “relates directly to the affairs of an individual or group of individuals”.⁴⁰ The bill must be sponsored by an MLA, who can choose to use either the Legislative Counsel Office or a solicitor to draft the bill. Once the bill is ready, it is introduced to the Assembly and proceeds through the normal process of bill passage.⁴¹ Private bills cannot include provisions which would result in a financial obligation placed on government. If such provisions are needed, they can be introduced by the government through amendments presented at the Committee stage. For example, Bill 219 requires an enforcement and oversight mechanism, such as establishing a privacy commissioner office. Since this imposes a financial burden on the

³⁹ Bowman, *supra* note 7.

⁴⁰ Manitoba Legislative Assembly, *Process for Passage of a Private Bill in the Legislative Assembly of Manitoba* (March 2007) available online: <<http://www.gov.mb.ca/legislature/bills/privatebillguidelines.pdf>> at 1.

⁴¹ *Ibid.*

government, it cannot be included in Bill 219 as presented by Mrs. Taillieu and must instead be included through amendments.

In the 1950s and 1960s, private member bills were effectively used to address policy issues too contentious for governments to handle. In the past twenty years, however, the effectiveness of these bills has decreased considerably “as a serious and viable policy tool”.⁴² The question then becomes, what is the reason why private member bills are no longer politically effective? There are a few possible reasons such as: reluctance on the part of the government to support opposition bills for fear of the opposition gaining political leverage; the decreased media attention that is cast upon individual MLAs; and the fact that the opposition garners most media attention through Question Period.⁴³ What is clear is that there is a trend in Manitoba politics whereby private member bills rarely become law. Even though a piece of legislation may be sound and well-drafted,

An assessment of the passage of PMBs necessarily involves a consideration of several factors, including, but not limited to, the substance of the bill; the political climate of the day and the timing of the bill; the status, position, and influence of the sponsoring member; and, whether any amendments are being considered or have been passed. Therefore, it is impossible to state with any measure of certainty whether or not a PMB, though on its face appearing to be generally reasonable and acceptable legislation, will make it through the ‘halls of power’ and land in Manitoba’s law books.⁴⁴

PART II: THE ROLE OF PIPEDA

(A) Current Manitoba Privacy Legislation

In Manitoba, there are four statutes which govern the privacy rights of individuals. The

⁴² Theresa Vandean Danyluk, “A Prescription in the Public Interest? Bill 207: The Medical Amendment Act” (2008) 5 *Underneath the Golden Boy* at 216.

⁴³ *Ibid.* at 216.

⁴⁴ *Ibid.* at 217.

*Freedom of Information and Personal Privacy Act*⁴⁵ (“FIPPA”) is a provincial act which governs the collection, use, and disclosure of personal information by provincial public bodies. It also provides rules for an individual to access and request a correction of their personal information held by a provincial public body. The *Personal Health Information Act*⁴⁶ (“PHIA”) is a provincial act which applies to the use of personal health information held by health trustees.⁴⁷ It also gives individuals the right to access and request corrections of their personal health information held by such trustees. Bill 219 would not be applicable to those bodies that are governed under FIPPA and PHIA. Thirdly, the *Privacy Act*⁴⁸ creates a civil tort for invasion of privacy. The Act gives numerous examples of invasions of privacy which violate the provisions of the statute, such as unauthorized surveillance and trespassing on an individual’s property.⁴⁹

(B) PIPEDA and ‘Substantially Similar’ Legislation

In addition to the provincial statutes, PIPEDA also applies. Since it was enacted by the Federal Government under the trade and commerce power, it applies only to the collection, use, and disclosure of personal information by private sector organizations carrying out commercial activities.⁵⁰ It also regulates the care and control of personal information by federal works, businesses, and undertakings such as telecommunication companies and railways. In addition, it sets guidelines for the control of personal information collected in consumer transactions. The application and enforcement of PIPEDA is overseen by the Office of the Privacy Commissioner of Canada, who does not have order making power but can make recommendations about what procedures an organization should implement.

⁴⁵ S.M. 1997, c.50.

⁴⁶ S.M. 1997, c.51.

⁴⁷ *Ibid.* at section 1. A trustee is defined as: “a health professional, health care facility, public body, or health services agency that collects or maintains personal health information”.

⁴⁸ R.S.M. 1987, c. P125.

⁴⁹ *Ibid.* at section 3.

⁵⁰ Minister of Industry, “Organizations in the Province of Alberta Exemption Order” C. Gazette (3 November 2004) P.C. 2004-1163

PIPEDA does not contain a duty to notify provision, nor does it protect the personal information of employees working in provincially-regulated sectors. PIPEDA was enacted with the intention of encouraging other provinces to create and enforce its own privacy legislation and does not apply in provinces that have “substantially similar legislation”.⁵¹ To date, only British Columbia⁵², Alberta⁵³, and Quebec⁵⁴ have privacy legislation that has been deemed substantially similar, thus exempting those provinces from PIPEDA’s reign. Ontario⁵⁵ also has substantially similar legislation regarding personal health information. In provinces where substantially similar legislation exists, PIPEDA only applies to federal works, undertakings, and businesses⁵⁶; federally-regulated employees; and to interprovincial and international transactions involving personal information by organizations engaged in commercial activities.⁵⁷

PIPEDA does not set out the criteria necessary for legislation to be deemed substantially similar. The Privacy Commissioner and the Minister of Industry have both released what they see as essential elements of privacy protections. It is clear from the literature that the Privacy Commissioner has taken a more rigid stance than the Minister of Industry.⁵⁸ In a 2003 address to Parliament, former Privacy Commissioner George Radwanski said that in order to be substantially similar, the provincial legislation must be at least “equal or superior to PIPEDA in

⁵¹ *Supra* note 3, section 26(2)(b).

⁵² *Personal Information Act*, S.B.C. 2003, c.63.

⁵³ *Personal Information Act*, S.A. 2003, c. P-6.5 [PIPA].

⁵⁴ *An act respecting the protection of personal information in the private sector*, R.S.Q. c. P-39.1.

⁵⁵ *Personal Health Information Protection Act*, S.O. 2004, c.3.

⁵⁶ This includes: banks; radio and television stations; inter-provincial trucking; airports and airlines; navigation and shipping by water; telecommunication companies; railways, canals, pipelines, ferries, etc. that cross borders. See: Office of the Privacy Commissioner of Canada, “Questions and Answers Regarding the Application of PIPEDA, Alberta and British Columbia’s Personal Information Protection Acts” (11 May 2004), online: http://www.priv.gc.ca/fs-fi/02_05_d_26_e.cfm.

⁵⁷ Office of the Privacy Commissioner of Canada, “Fact Sheets”, online: http://www.priv.gc.ca/fs-fi/02_05_d_15_e.cfm#contenttop.

⁵⁸ Please note that the Governor in Council makes a determination regarding substantially similar legislation on the recommendation of the Minister of Industry, who must make that recommendation taking into account the views of the Privacy Commissioner and the public.

degree and quality of privacy protection”.⁵⁹ All ten principles of privacy that are enunciated in Schedule 1 of PIPEDA must also be enshrined in the privacy legislation. In addition, the provincial statutes must include the following: (1) consent – personal information can only be collected, used, and disclosed with the consent of the individual; (2) reasonable person test – collection, use, and disclosure is limited to purposes that a reasonable person would consider suitable in the circumstances; (3) access and correction rights; (4) independent oversight body to resolve disputes and make recommendations/orders; and (5) redress mechanisms.⁶⁰

The Department of Industry stated that “the term ‘substantially similar’ affords provinces the flexibility to adapt and tailor their own private sector legislation to the specific needs and conditions of their jurisdiction while meeting the intent of the Act [PIPEDA]”.⁶¹ Substantially similar legislation must: (1) incorporate all ten principles of Schedule 1 (though it is not necessary to enumerate each individually) with an emphasis on consent, access, and correction rights; (2) establish an independent oversight and redress system; and (3) limit the collection, use, and disclosure of personal information to purposes which are reasonable.⁶²

Bill 219 is modelled after Alberta’s legislation, which has been deemed as substantially similar by the Governor in Council. Therefore, it is likely that Bill 219 fulfills the necessary criteria to be labelled as substantially similar. Alberta’s PIPA legislation has been branded as a huge success in terms of implementation and promotion of privacy rights because it is clear what businesses must do to comply with the Act.⁶³

Since Bill 219 was drafted by a privacy expert and is based on a second generation privacy

⁵⁹ Privacy Commissioner of Canada, “Report to Parliament Concerning Substantially Similar Provincial Legislation” (Ottawa: June 2003), online: <http://www.priv.gc.ca/legislation/leg-rp_030611_e.cfm>.

⁶⁰ *Ibid.*

⁶¹ Department of Industry, “PIPEDA: Process for the Determination of Substantially Similar Provincial Legislation by the Governor in Council” C. Gazette 2002.I., online: <<http://gazette.gc.ca/archives/p1/2002/2002-08-03/html/notice-avis-eng.html#i10>>.

⁶² *Ibid.*

⁶³ Bowman, *supra* note 7.

statute, it seeks to remedy the significant deficiencies evident with PIPEDA. First of all, PIPEDA contains no duty to notify individuals if their personal information protection has been breached. Secondly, PIPEDA provides protection only to employees of federal works, undertakings, and businesses but no similar protection is afforded to employees of provincially-regulated organizations. Thirdly, it is not clear how organizations engaged in businesses transactions such as mergers and acquisitions are to handle personal information.⁶⁴

PART III: BILL 219 AND THE LEGISLATIVE PROCESS

(A) First and Second Readings

Mrs. Taillieu introduced Bill 219 for First Reading on November 27, 2008, seconded by the MLA for Minnedosa, Mrs. Leanne Rowat. Mrs. Taillieu stated that identity theft has become a pressing concern that needs to be addressed. The bill addresses this issue by setting out protections for personal information, as well as a duty to notify in cases of a breach. The House adopted the motion.⁶⁵

On May 14, 2009, the bill was read for a second time. Mrs. Taillieu, as the MLA sponsoring the bill, spoke first. She stated that the bill was drafted specifically to address one of the criticisms advanced by government members that private member bills are not “substantial” enough.⁶⁶ She argued that the government’s main argument that the bill is not substantially similar to PIPEDA due to the lack of enforcement and redress provisions is because private member bills cannot impose budgetary obligations on government. She stated that the opposition would support an amendment made by government putting such provisions into place. Therefore,

⁶⁴ Bryan Schwartz & Darla Rettie, “Bridging the Privacy Gap: the Case for Enacting Substantially Similar Privacy Legislation” (Paper presented to the 2004 Isaac Pitblado Lectures, 19 November 2004) *Privacy – Another Snail in the Ginger Beer*, (Winnipeg: Law Society of Manitoba, 2004) at 2 and 3.

⁶⁵ *Supra* note 4 at 159.

⁶⁶ Manitoba, Legislative Assembly, *Debates and Proceedings*, Vol. LXI No.42A (14 May 2009) at 2059 (Mavis Taillieu).

the argument about dual regulation does not hold water. She concluded with the statistic that identity theft is a concern among 73% of Canadians and resulted in the loss of \$6 million last year. Action needs to be taken now.⁶⁷

The Honourable Peter Bjornson, Minister of Education, Citizenship, and Youth, was the next to speak to the bill. He stated that he had been a victim of identity theft and understood what it felt like to have his privacy violated.⁶⁸ However, instead of supporting the measures in the bill, he argued that Manitoba has taken adequate steps to address the problem. For example, a government website that includes an identity theft prevention kit and contact information for various institutions was established in 2006, and the government has also developed an Identity Kit for Businesses, which helps businesses implement appropriate measures to protect personal information. In addition, the *Consumer Protection Act* has been amended to limit an individual's liability to \$50 when their stolen credit cards have been used to make fraudulent purchases and the *Personal Investigations Amendment Act* allows an individual to put a security alert on their credit cards. In his view, steps have already been taken at the provincial and federal level to adequately address the issue.⁶⁹

In response, Mrs. Leanne Rowat stated the government has missed a vital opportunity to take a proactive stance on this issue. She said that media and public response to the bill (and its earlier versions) has been positive, the substance of the bill has been researched thoroughly, and it is supported by privacy experts and the Manitoba Federation of Labour.⁷⁰

The Honourable Ron Lemieux, the Minister of Infrastructure and Transportation, argued that the bill lacks one crucial element: enforcement and redress provisions. Without such an

⁶⁷ *Ibid.* at 2060.

⁶⁸ *Ibid.* (Peter Bjornson).

⁶⁹ *Ibid.* at 2061.

⁷⁰ *Ibid.* at 2064 (Leanne Rowat).

inclusion, the legislation is not substantially similar to PIPEDA, leading to dual regulation.⁷¹ He stated that the Minister of Finance (Greg Selinger) has lobbied the Federal Government to include a duty to notify in PIPEDA and he reiterated the same measures that the government has taken as Mr. Bjornson did.⁷² He appeared to place the burden on individuals to protect their personal information.⁷³

Mr. Cliff Graydon, MLA for Emerson, expressed disbelief that the government has ignored this issue for the past four years and that minor problems with the bill have been used as a justification for defeating it. However, he then engaged in a lengthy debate about enhanced identification cards, which was off-topic and did not speak to the merits of Bill 219.⁷⁴

The Honourable Nancy Allen, Minister of Labour and Immigration, raised two problems with the bill before time for the debate ran out. First, she argued that if the bill was passed, the private sector would be regulated by two pieces of privacy legislation. Secondly, she said there has not been adequate consultation with stakeholders.⁷⁵

Time elapsed without the bill being referred to Committee. As a result, Bill 219 died on the Order Table, just as its predecessors had. Mrs. Taillieu's efforts once again were ignored by a government unwilling to address the true merits of the bill.

(B) Critical Analysis of the Arguments for and Against Bill 219

After a careful analysis of the *Hansard* for Bill 219 and its five previous versions, it is clear that the government is uncomfortable with this bill and has used shaky and false reasons for rejecting it.

⁷¹ *Ibid* (Ron Lemieux).

⁷² *Ibid.* at 2065.

⁷³ *Ibid.* at 2066.

⁷⁴ *Ibid.* at 2067 (Cliff Graydon).

⁷⁵ *Ibid.* at 2068 (Nancy Allen).

(i) *Arguments for Bill 219*

The main argument in favour of Bill 219 is that it addresses the gaps in protection created by PIPEDA. Currently, employees of federal works, undertakings, and businesses are protected under PIPEDA. Employees working in provincially regulated sectors are not afforded the same protections, even though the risks are the same. As Mrs. Taillieu pointed out in May of 2005, this distinction creates two categories of employees in Manitoba: “those who do not have protection against the misuse of their personal information and those who do”.⁷⁶ Considering that the majority of employees in Manitoba work in provincially-regulated industries and that employers collect vast amounts of personal information about their employees, such as addresses, insurance policies, social insurance numbers, banking information, etc., it does not make sense to have such a distinction.

Bill 219 also outlines measures that organizations should take in business transactions, such as mergers and sales. One of the main complaints with PIPEDA is that it is unclear how personal information should be handled in such situations. This uncertainty makes it difficult for businesses to comply and is used as a way to weasel out of privacy obligations.⁷⁷ Bill 219 clarifies the procedures to be taken, which allows for more efficiency in such transactions.⁷⁸ As Mr. Bowman argued, making it easier for organizations to understand and implement their obligations will result in lower compliance costs for organizations, thus increasing the incentive to comply.⁷⁹

Secondly, Bill 219 gives Manitobans an avenue for addressing privacy complaints. Even though *The Privacy Act* creates a civil tort for invasion of privacy, pursuing such an alternative

⁷⁶ Manitoba, Legislative Assembly, *Debates and Proceedings*, Vol. LVI No. 53A (26 May 2005) at 2987 (Mavis Taillieu).

⁷⁷ Schwartz, *supra* note 64 at 3.

⁷⁸ *Ibid.* at 4.

⁷⁹ Bowman, *supra* note 7.

through the civil justice system is extremely expensive and time consuming and this acts a disincentive to many.⁸⁰ The same factors influence an individual's decision to lodge a complaint to the Federal Privacy Commissioner. It should also be noted that the Federal Privacy Commissioner does not have order making power. Instead, she can only make non-binding recommendations to organizations. In Alberta though, the provincial Privacy Commissioner has order making powers to compel an organization to change its practices. Therefore, a provincial oversight mechanism would have more enforcement teeth than PIPEDA can offer.

Thirdly, Bill 219 includes a duty to notify. No other provincial or federal privacy statute includes such a duty. Manitoba would be seen as a proactive leader in the fight against identity theft by implementing a duty on organizations to notify individuals if their personal information has been lost, stolen, or accessed in an unauthorized manner.⁸¹ It is also significant to note that the bill attempts to address what has become known as “notification fatigue” in the United States.⁸² Therefore, section 34(3)(b) states that an organization does not have a duty of notification where it satisfied that it is not “reasonably possible” for the personal information to have been used in an unlawful manner. Such a provision is in keeping with the reasonable person test that is a cornerstone of the legislation. Even though this injects some subjectivity into the duty to notify, if there is a breach and the organization chooses not to notify but harm is suffered, the organization will be held liable. The Standing Committee on Access to Information, Privacy & Ethics has recommended to Parliament that PIPEDA be amended to include a duty to notify.⁸³ Such an amendment is likely to be implemented and would increase PIPEDA's effectiveness, but it would not eliminate the need for provincial protection as the Honourable Ron Lemieux has

⁸⁰ *Supra* note 76 at 2992 (Jack Reimer).

⁸¹ Bowman, *supra* note 7.

⁸² *Ibid.*

⁸³ Canada, Standing Committee on Access to Information, Privacy & Ethics, *Statutory Review of the Personal Information Protection and Electronic Documents Act*, vol. 4 (Ottawa: 2007). See recommendations 23-25.

suggested.⁸⁴ The same problems with PIPEDA's uneven application and ambiguity still exist.

The fourth main argument in favour of Bill 219 is that it is modelled after PIPA, which has been highly successful and deemed as more successful than PIPEDA because of its clarity.⁸⁵ PIPA is a second generation privacy statute. It has had the opportunity to study PIPEDA and modify its areas of weakness. Since Bill 219 closely resembles PIPA, it can be expected that Manitoba will experience the same level of success that Alberta has.

Fifthly, the privacy obligations of organizations would not change dramatically. PIPEDA has already created privacy obligations for most private sector organizations in Manitoba in respect of customer information. Such privacy rights would simply be extended to employees of those organizations.

(ii) Arguments Against Bill 219

The main crux of the government's opposition to Bill 219 is that it will result in dual regulation. Since the bill contains no enforcement oversight and redress mechanisms, it is argued that the legislation is not substantially similar to PIPEDA. As a result, organizations would be faced with the complex task of complying with two sets of privacy laws. This argument fails to take into account the nature of Bill 219, however. As it is a private member bill, it cannot impose budgetary obligations on the government. In order to overcome this problem, Mrs. Taillieu has said that they will support amendments suggested by the government to put such provisions in place.⁸⁶ Using this argument as a main justification for opposing the bill is weak and demonstrates how little the government actually supports this initiative because the problem could be easily remedied. It also fails to address the fact that Bill 219 is modelled closely after

⁸⁴ See note 71.

⁸⁵ Bowman, *supra* note 7.

⁸⁶ See note 67. Also see: Manitoba, Legislative Assembly, *Debates and Proceedings*, Vol. LIX No. 15A (4 October 2007) at 801 (Mavis Taillieu).

PIPA, which has been deemed as “substantially similar” legislation. Therefore, if the necessary amendments were made, there is no reason to believe that legislation would result in dual regulation.

Another argument the government has used to support its opposition of Bill 219 is that the problem of identity theft can be remedied through public education and awareness efforts.⁸⁷ During the debate about Bill 207⁸⁸, the Honourable Greg Selinger stated that the focus of the government should not be on legislating in this area but rather informing the public about how to protect themselves. “If people have greater awareness of this issue, they can take many measures that do not require legislation that will prevent them from being victims of this type of criminal activity”.⁸⁹ By placing the onus on individuals to protect themselves, Mr. Selinger has missed the main objective of the legislation. The premise of the bill is not about what individuals can do to protect the personal information which is in their control, but rather it is focused on the protection of personal information in the hands of third parties, such as an employer.

The government has argued that this bill is unnecessary because it has been addressed through other efforts. In the debates regarding the bill, the government routinely cited the same examples of proactive measures it has taken to address the issue of identity theft. For example, the *Personal Investigations Amendment Act* was amended so individuals are now able to put a security alert on credit cards if they suspect they have been the victim of identity theft.⁹⁰ However, there is a serious problem with relying heavily on this amendment as a justification for opposing Bill 219. An identity thief can call a credit bureau like Equinox and leave their phone

⁸⁷ Manitoba, Legislative Assembly, *Debates and Proceedings*, Vol. LVII No. 72A (18 May 2006) at 2271 (Greg Selinger).

⁸⁸ Note: Bill 207, *The Personal Information Protection and Identity Theft Prevention Act*, is a predecessor to Bill 219.

⁸⁹ *Supra* note 87.

⁹⁰ *Supra* note 66 at 2065 (Ron Lemieux).

number, so when the credit company calls to alert about suspicious activity, they will call the identity thief instead. Therefore, this does not offer a plausible alternative to Bill 219.⁹¹ In addition, they have also argued that the Identity Theft Prevention Website gives individuals and organizations the information they need to protect against identity theft. In the debate regarding Bill 216, Mr. Rick Borotsik asked the government how many hits the website actually gets.⁹² Mr. David Faurschou pointed out that until the morning of the Second Reading of Bill 216, the website had not been updated in two years.⁹³ Thus, it is evident that the best way to educate the public is not through constructing obscure websites but by legislating in the area.

The government has also argued that privacy issues can be addressed by amending various statutes or instituting new regulations to impose privacy obligations on business sectors. Bryan Schwartz has warned, however, that addressing privacy concerns in this manner “misses the opportunity to create a visible, broadly applicable statute that clarifies for all stakeholders that rights and obligations are to be applied fairly”.⁹⁴ It also presents enforcement problems. He gave the example of amending the *Employment Standards Code* to address the collection, use, and disclosure of provincial employees’ personal information. The problem that arises is that the Manitoba Labour Board does not have the necessary expertise and training to deal with and apply privacy legislation, or to weigh the competing interests of personal privacy with an organization’s need to collect, use, and disclose personal information.⁹⁵

Another argument against Bill 219 was advanced by the Honourable Nancy Allan, who has expressed concern that there has been inadequate consultation with stakeholders and therefore

⁹¹ Bowman, *supra* note 7.

⁹² Manitoba, Legislative Assembly, *Debates and Proceedings*, Vol. LX No. 34A (1 May 2008) at 1457 (Rick Borotsik).

⁹³ *Ibid.* at 1458 (David Faurschou).

⁹⁴ Schwartz, *supra* note 64 at 5.

⁹⁵ *Ibid.*

the bill may not address the various concerns and implications that it will have on employers, unions, small businesses, etc.⁹⁶ This argument is flawed and weak for three main reasons. First, the bill was drafted in consultation with the Manitoba Federation of Labour, which wholly supported the legislation as a means to address the gaps in privacy legislation for employees. Secondly, the Committee stage is meant to provide a forum for the public and organizations alike to speak to the merits of the bill and raises problems or suggestions. The bill would benefit greatly from such public debate but this has not happened because of the government's reluctance to pass it beyond Second Reading. Thirdly, Bill 219 is based upon the five-year old PIPA law in Alberta, which has been declared as tremendously successful and advantageous for businesses in terms of clarity and compliance.

Finally, it has been argued that it is expensive to establish an Information and Privacy Commissioner Office.⁹⁷ While it is true that it would be expensive, the true benefits of the legislation outweigh any budgetary costs. Bill 219 would provide Manitobans with an outlet to complain that is accessible and economically-friendly. If the costs are too great, the Manitoba Ombudsman Office, which is already in existence, could subsume the role of privacy commissioner. This would decrease costs because the organization and personnel are already in place. Alberta chose to have the existing Office of the Information and Privacy Commissioner take over the additional responsibilities created under PIPA in 2004.⁹⁸

(C) Will Privacy Legislation Ever Be Passed in Manitoba?

After examining the *Hansard* materials for Bill 219 and its' predecessors, it is clear that the

⁹⁶ *Supra* note 87 at 2274 (Nancy Allan).

⁹⁷ *Ibid.* at 2275.

⁹⁸ Office of the Information and Privacy Commissioner of Alberta, "About" (2009), online: <<http://www.oipc.ab.ca/pages/About/default.aspx>>. The Office of the Information and Privacy Commissioner was originally created in 1995 to deal with the following statutes: *Freedom of Information and Protection of Privacy Act* and the *Health Information Act*.

government is reluctant to support the merits of the bill, but is unable to come up with a valid justification for doing so. The government refuses to deal with the bill, as it has died on the Order Table six times, and has never been referred to Committee. When the matter first came before the Legislative Assembly in May of 2005 in the form of Bill 200, the government refused to speak to it. Mr. Kevin Lamoureux blasted the government's handling of private member bills and their failure to put their position on the record. He stated that "the worst thing you can do is just adjourn debate and not allow it to be debated and voted upon".⁹⁹ He was suspicious of the government's motives and suggested that the NDP may attempt to take credit for the bill by later reintroducing it.¹⁰⁰ This has not happened though. In fact, the government has been wary to take any proactive steps to tackle the issue of identity theft and protection of personal information. The question then becomes, what is the real political underpinning behind the government's opposition to a bill that is substantively sound and addresses a pressing concern among Manitobans?

Brian Bowman has urged the government to explain why the bill should not proceed and offer options to remedy the situation. He states that this bill is somewhat of an anomaly because the political history of the NDP and PC parties is that the NDP is aligned with workers, and the PC party supports businesses. Here we have a bill that extends rights and protections to employees yet the government is refusing to support it.¹⁰¹ In addition, identity theft and privacy are major concerns of Manitobans. Between January and November of 2008, identity thieves caused more than \$8.8 million worth of losses with stolen personal information.¹⁰² In 2007, more than 10,366 complaints were filed with the Canadian Anti-Fraud Call Centre but these figures do

⁹⁹ *Supra* note 76 at 2989 (Kevin Lamoureux).

¹⁰⁰ *Ibid.* at 2990.

¹⁰¹ Brian Bowman, "NDP should support privacy bill or say why not" *Winnipeg Free Press* (1 March 2006).

¹⁰² Karen Kleiss, "ID theft worth millions: credits ruined, accounts emptied" *Winnipeg Free Press* (21 December 2008).

not represent the total number of victims because many are too ashamed to report or they are unaware that their personal information had been accessed in an unlawful manner.¹⁰³ From such statistics, it is evident that this is a pressing concern for Manitobans.

It could be theorized that the real reason behind the government's opposition to private sector privacy legislation in Manitoba is because they are being lobbied heavily by unions to reject it. Currently, most union activities are not covered by PIPEDA because they are described as non-commercial in nature. This has gone undisputed even though the argument can be made that when a unionized employee pays union dues and receives a service or benefit in return, that is a commercial transaction, and thus PIPEDA applies. However, Alberta's Privacy Commissioner has ruled that PIPA explicitly applies to union activities.¹⁰⁴ Unions in Manitoba may argue that this bill places too much of a burden on them to conform their practices and puts them at financial risk if there is a breach of their union members' personal information. Since unions provide considerable support for the NDP, the government may be reluctant to support a bill that is unfavourable among their strongest supporter. It should be pointed out though that this bill would give workers more rights and protections, a goal which is typical of most NDP and union agendas.

PART IV: CONCLUSION

In conclusion, it is unfortunate that the passionate and unrelenting efforts of Mrs. Taillieu have been so abruptly brushed aside by the NDP government. Bill 219 is a thorough bill which seeks to address and remedy the gaps of PIPEDA and provide a made-in-Manitoba response to privacy matters. The benefits of the bill far outweigh any potential economic costs. It is not

¹⁰³ Criminal Intelligence Service Canada, "Feature Focus: Identity Theft and Identity Fraud in Canada" (19 December 2008), online: <www.cisc.gc.ca/annual_reports/annual_report_2008/feature_focus_2008_e.html>.

¹⁰⁴ See: Alberta Information and Privacy Commissioner, "Report on an Investigation into Reasonable Safeguards and Retention of Personal Information in Custody of a Union" (14 September 2006), online: <<http://www.oipc.ab.ca/downloads/documentloader.ashx?id=2265>>.

logical that employees of federally-regulated sectors have the personal information held by their employers regulated and protected, but employees in the provincial sector do not have the same safeguards. Identity theft is becoming an ever pressing concern as a consequence of the technological advances of the twenty-first century. An individual can take steps to protect themselves but once their personal information is in the hands of others, such as employers, the matter is out of their control. Without proper procedures and redress mechanisms in place, Manitobans are unprotected. The government has been presented with the opportunity to be a proactive leader on this front six separate times. Each time, they have rejected the chance. Unfortunately, it appears that the government will only change its stance after there has been a major privacy breach with consequent losses that could have been prevented by this bill. As Brian Bowman has pointed out, Bill 219 is a “shot in the arm dose for privacy matters here in Manitoba”.¹⁰⁵

¹⁰⁵ Bowman *supra* note 7.