

# A Prescription in the Public Interest? Bill 207, *The Medical Amendment Act*

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## I. INTRODUCTION

"**when** there are [private members'] proposals that the government finds in the public interest, I think there is a more recent developing interest to work together and get these proposals moving."<sup>1</sup>

Generally, the passage of Private Members' Bills ("PMB")<sup>1</sup> into law is a rare feat for opposition members and government backbenchers ("private members"). In the Manitoba Legislature, this statement is particularly true—since 1992, while 141 PMBs were formulated, 88 of which were printed and introduced in the House, only four subsequently became law.<sup>3</sup> It should, however, be noted that these figures do not account for PMBs which, after being introduced by private members but not passed, are introduced and subsequently passed in whole or in part through government legislation.

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Interview of Hon. Gord Mackintosh, Attorney General and Government House Leader, by Theresa Danyluk (6 October 2005) in Winnipeg, Manitoba.

A private members' bill is a bill presented to the House by either a government backbencher or an opposition member. There are private members' public bills; dealing with general legislation, and private members' private bills; used most commonly for the incorporation of an organization seeking powers, which cannot be granted under *The Incorporations Act*, or for amendments to existing Private Acts of Incorporation. See Manitoba, Legislative Assembly, "Private Bills, Process for Passage of a Private Bill in the Legislative Assembly of Manitoba" online: The Legislative Assembly of Manitoba <<http://www.gov.mb.ca/legislature/bills/privatebillguidelines.html> >.

Manitoba, Legislative Assembly, *Journals*, Appendices "C" and "D" from 4th Sess., 35th Leg., 1992-93-94 to 4th Sess., 38th Leg., 2004-05. Since 1992, the total number of private members bills introduced in the House was 141; 53 of those were not printed, two were ruled out of order, and four were passed. Of these four, one was passed by a government backbencher, and three were passed by members of opposition parties. See also attached Tables: Table 1 ("History of Introduction and Passage of Private Members' Public Bills in Manitoba, 1992-2005") and Table 2 ("Sponsors, Titles and Passage of Private Members' Public Bills Passed in Manitoba, 1992-2005").

While private members face several obstacles in overseeing the passage of bills they seek to introduce into law, during the Third Session of the 38th Legislature some of these impediments were overcome when Bill 207, *The Medical Amendment Act* ("MAA"), was passed. The bill was introduced by Len Derkach, the Opposition House Leader and Member of the Legislative Assembly ("MLA") representing the Russell constituency.<sup>4</sup>

Although Bill 207 creates a significant change with respect to the prescribing of "non traditional/" "alternative," or "complementary" health therapies, its passage may be just as, if not more, significant in other respects. More specifically, the passage of this PMB—the second passed in as many legislative sessions and only the fourth passed since 1992—may be a sign that the government and opposition are "healing" legislative relations, setting aside political barriers, and aspiring to legislate in the "public interest". Or, on a less optimistic note, its passage could be the result of other factors, including coincidence; the position, character and strategy of the private member who sponsored the bill; amendments introduced by the government that altered the substance of the bill, making it something the government was willing to support; and so on.

This paper will explore these above stated issues with specific reference to the history and passage of Bill 207. First, it will explore Bill 207 and the Act it amends: *The Medical Act* ("MA"). Next, it will look at the origins of the bill and go on to examine the introduction and passage of the bill through the House. This paper will then examine the critiques of Bill 207, with reference to submissions made at the Committee Stage prior to the enactment of the bill, personal interviews conducted subsequent to the bill's passage, and through an examination of the bill itself. Finally, this paper will assess Bill 207 through a broad, critical lens, by considering issues such as why the bill may have arisen and passed as a PMB rather than a government bill, and whether or not the passage of Bill 207 is a sign that the current government is increasingly willing to set aside "politics" in order to legislate in the "public interest".

Before proceeding, I would like to thank all those who agreed to be interviewed regarding this bill, including the Hon. Gord Mackintosh, Dr. Bill Pope, Dr. Jon Gerrard, Mr. Ralph Eichler, and Mr. Rick Mantey. Other important figures in relation to this bill were contacted but did not respond to the invitation to be interviewed.

## II. BILL 207: THE MEDICAL AMENDMENT ACT

I believe that the bill is important because it seeks to strike a balance between the evolution of appropriate new therapies which are not traditionally considered as part of the existing basket, at the same time protecting both practitioners and patients from

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The Russell constituency is in western Manitoba.

people who would advance therapies that are inappropriate, are unproven, and, in some cases, could be significantly dangerous.... I believe that balance has been found in the wording that was agreed to in committee.<sup>5</sup>

Bill 207, *The Medical Amendment Act*,<sup>6</sup> is a concise bill that amends *The Medical Act*.<sup>7</sup> The original bill sponsored by Len Derkach added the following after s. 36 of the MA:

Non traditional therapies

36.1 Despite section 36, Parts VIII to X and the *regulations and by-laws*, a member shall not be found guilty of professional misconduct or of incompetence solely on the basis that the member practises a therapy that is non traditional or departs from the prevailing medical practice *unless there is evidence that proves* that the therapy poses a greater risk to a patient's *health* than the traditional or prevailing practice.<sup>8</sup>

In general, the MA is legislation governing the practice of medicine in Manitoba; an area of provincial jurisdiction by virtue of sections 92(7), (13) and (16) of the *Constitution Act, 1867*.<sup>9</sup> The MA addresses several issues related to medical practitioners, including who is "deemed" to be practicing medicine,<sup>10</sup> and who is excluded by the Act.<sup>11</sup> The MA also deals with the establishment of registers (Part II), the registration and licensing of members and associate members (Part III), medical corporations (Part IV), the general powers of the College of Physicians and Surgeons of Manitoba ("CPSM") (Part V), the Council of the College (Part VI), the Standards Committee and Program Review Committee (Part VII), offences and penalties (Part XIII) and so on.

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Manitoba, Legislative Assembly, *Debates and Proceedings*, Vol. LVINO. 65A (16 June 2005) at 3667 (Hon. Tim Sale, Minister of Health).

Bill 207, *The Medical Amendment Act*, 3d Sess., 38th Leg., Manitoba, 2005 (assented to 15 June 2005), S.M. 2005, c. 45.

*The Medical Act*, C.C.S.M. c. M90.

*Supra* note 6 at s. 2 of the pre-amended bill as initially submitted by Len Derkach. See Manitoba, Legislative Assembly, *The Status of Bills Third Session, Thirty-Eighth Legislature: Bill 207*, online: The Status of Bills <<http://web2.gov.mb.ca/bills/38-3/index.php>> [emphasis added].

*Constitution Act, 1867* (U.K.), 30 & 31 Viet., c. 3, reprinted in R.S.C. 1985, App. II, No.5. Under the Canadian Constitution, health care is considered a matter of provincial jurisdiction. Only the provinces have the constitutional right to make laws regarding health care programs and services within their own region. Federal participation in health care is by virtue of its spending power. Each year, the Government of Canada contributes billions of dollars to provincial health care programs. For more information, see Martha Jackman, "Constitutional Jurisdiction over Health in Canada," online: <<http://www.law.ualberta.ca/centres/hli/pdfs/hlj/v8/jackmanfrm.pdf>>.

<sup>10</sup> *Supra* note 7 at s. 2(1).

<sup>11</sup> *Ibid.* at s. 2(2). Those excluded from the Act include: {acting within the scope of their relevant Acts) podiatrists, chiropractors, midwives, naturopaths, nurses, opticians, optometrists, physiotherapists, and persons registered under *The Psychologists Registration Act*, C.C.S.M. c. P190.

In particular, as referenced in Bill 207, Part VIII of the MA deals with the establishment and makeup of the Complaints Committee,<sup>12</sup> Part IX deals with the Investigation Committee,<sup>13</sup> and Part X deals with the Inquiry Committee Appointment.<sup>14</sup> These provisions come into play where there is a concern about the conduct of a "member,"<sup>15</sup> brought to the attention of the College either by the public or through internal investigations of the member. Section 36 permits the Council of the College, in relation to this bill, to: (i) exercise disciplinary jurisdiction over members; (ii) establish and maintain professional standards of medical practice; (iii) make by-laws for the exercise and carrying out of the powers, rights and duties conferred or imposed upon the Council or the College by the MA and any other Act of the Legislature; and, (iv) make rules respecting the standards of practice and ethics by members and the conduct of the affairs of the college, council and committees.<sup>16</sup>

It is important to note that the original printed bill as submitted by Mr. Derkach and set out above, was amended at the Committee stage by the Honourable ("Hon.") Tim Sale, Minister of Health, seconded by Mr. Derkach. The second clause of Bill 207, as amended and incorporated into the MA, now reads:

Non traditional therapies

36.1 Despite section 36 and Parts VIII to X, a member shall not be found guilty of professional misconduct or of incompetence solely on the basis that the member practises a therapy that is non,traditional or departs from the prevailing medical practice, *unless it can be demonstrated* that the therapy poses a greater risk to a patient's *health or safety* than the traditional or prevailing practice.<sup>17</sup>

While on its face there does not appear to be a significant difference between Mr. Derkach's initial version and the final version as amended by the Hon. Mr. Sale, a closer examination and comparison of both clauses reveals otherwise, and may shed some light on the "backstage politics" of this bill. Whereas Mr. Derkach's draft stated that there must be "*evidence that proves*" that the alternative therapy poses a greater risk to a patient's "*health*" than the conventional practice, Minister Sale's amended version-the adaptation now included in the MA-states that it must be "*demonstrated*" that the alternative therapy poses a greater risk to a patient's "*health or safety*" than the traditional

<sup>12</sup> *Ibid.* at ss. 41(1) to 43(4).

<sup>13</sup> *Ibid.* at ss. 44(1) to 51.4.

<sup>14</sup> *Ibid.* at ss. 52(1) to 59.13.

<sup>15</sup> "Member" is defined as "an individual who is registered on the Manitoba Medical Register," and for the purposes of Part VII to XI, includes an "associate member." See *ibid.* at s. 1.

<sup>16</sup> *Supra* note 7 at ss. 36(1) (a) and (i) and ss. 36(2) (g) and (h) respectively.

<sup>17</sup> Manitoba, Legislative Assembly, *Standing Committee on Social and Economic Development*, Vol. LVI No. 2 (13 June 2005) at 73, online: <<http://www.gov.mb.ca/legislature/hansard/vol38th/hansardpdf/sed2.pdf>>.

or prevailing practice. The likely result of the first distinction-the requirement for "evidence to proven versus the requirement to "demonstrate"-is that it creates a lower evidentiary threshold for showing the alternative therapy poses a greater risk to the patient than the conventional therapy, thus enhancing the scope for removing a physician's licence for administering the alternative treatment

The second amendment also replaced the risk to patients' "health" with the risk to patients' "health or safety", relating to what may be demonstrated when attempting to show that the physician's use of the alternative therapy posed a greater risk than the conventional therapy. The effect of this amendment appears to be significant. First, it provides a wider scope for finding that a patient has been harmed by the alternative therapy. Second, Mr. Derkach's original version may be interpreted to mean that, if the alternative therapy prescribed in the place of a conventional therapy maintained the status quo of the patient's health without posing a greater risk to their health, even though the conventional therapy could have improved the patient's medical status, then it is likely the physician would fall within s. 36.1. escaping professional discipline. In other words, the use of the words "risk to healthn could be interpreted such that maintaining, but not improving, a patient's health, is within the confines of the protection ins. 36.1. By adding the word "safety," however, this inference may be more difficult, though still not impossible, to make, as maintaining the status quo through the use of an alternative treatment, without enhancing the patient's health despite the existence of a conventional therapy that could, is more likely to be interpreted by the courts as impinging on the patient's safety. The addition of "safety" also provides a more holistic approach to determining whether there are any negative impacts of the alternative therapy on a patient's wellbeing.

Third, unlike Mr. Derkach's original version, the amendment proposed by Minister Sale does not contain "regulations and by laws" in the list of provisions from which a physician is protected from discipline by virtue of s. 36.1. In other words, whereas Mr. Derkach's version permitted a physician to escape professional misconduct sanctions despite s. 36, Parts VIII to X, and the regulations and by.laws, Minister Sale's adaptation, now included in the MA, only lists s. 36 and Parts VIII to X. The effect of this amendment is also significant in that, presumably, the Lieutenant-Governor in.Council can pass regulations delineating the process physicians must follow when prescribing alternative therapies, and the CPSM can pass by.laws and statements affecting

the way physicians prescribe "non-traditional" treatments.<sup>18</sup> Some Colleges have already passed bylaws and statements to this effect.<sup>19</sup>

The overall effect of Minister Sale's amendments is that the bill appears to have been effectively watered down, providing committees of the CPSM and the courts with an increased ability to find a physician outside the protective bounds of s. 36.1. This fits with the overall political forces that appear to be at play with respect to this bill. Since the bill was introduced as a PMB as a result of what appears to be political pressure from within the sponsoring member's constituency and from the public, Mr. Derkach would likely have been advocating for a broad clause that would provide maximum protection to physicians prescribing non-traditional treatment. Minister Sale, on the other hand, likely wanted to dampen the potential effects of the bill, evidenced by his government not introducing the bill (despite similar legislation having been introduced in other jurisdictions and despite the government's ample opportunity to have introduced it via government legislation), but also since he had to balance the perspectives of the College and avoid alienating it<sup>20</sup> as well as maintaining the utmost concern for patient safety as the Minister responsible and accountable for health.

In the initial printed form presented by Mr. Derkach, the French version of the bill did not appear to be different from the English version. The only difference was that where the English version read that a physician cannot be penalized for practicing a non-traditional therapy "unless there is *evidence* that proves" that the therapy poses a greater risk to the patient's health than the conventional therapy, the French version simply stated "unless it is *proven*." This distinction did not appear to be material. In the final format of the bill as amended by Minister Sale and incorporated into the MA, there is no distinction between the French and English versions.

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<sup>18</sup> Interview of Dr. Bill Pope, Registrar, College of Physicians and Surgeons of Manitoba, by Theresa Danyluk (3 October 2005) in Winnipeg, Manitoba ["Interview"]; E-mail from Dr. Bill Pope to Theresa Danyluk (16 November 2005) ["E-mail"].

<sup>19</sup> See, for example, the Alberta College of Physicians and Surgeons bylaws, which may shed some light on what the CPSM bylaws will look like. College of Physicians and Surgeons of Alberta, *Bylaws of the College of Physicians and Surgeons of Alberta* (4 January 2005), online: College of Physicians and Surgeons of Alberta <<http://www.cpsa.ab.ca/aboutus/bylaws.asp>>.

<sup>20</sup> Notes from the Frontier Centre for Public Policy, "Patients' Medical Freedom Grows: Consumers have more access to alternative remedies" (14 July 2005), online: The Frontier Centre for Public Policy <[http://www.fcpp.org/main/publication\\_detail.php?PubID=1104](http://www.fcpp.org/main/publication_detail.php?PubID=1104)>. The Frontier Centre states that laws equivalent to Bill 207 tend to be proposed by opposition members since it gives the government of the day cover on controversial issues by reducing the risk of alienating a powerful group.

### III. PRACTICAL CONSEQUENCES OF BILL 207

What this bill talks about is allowing people some additional alternative choices.<sup>21</sup>

Bill 207 decriminalizes the most fundamental principle of medicine, first expressed by Hippocrates, the father of medicine, 2,500 years ago. That principle requires that the physician explore new ways to treat illness effectively and that this exploration can only take place within the context of the doctor, patient relationship in which no third party may interfere.<sup>22</sup>

Practically speaking, Bill 207 provides physicians with more flexibility to practice "non-traditional" or "alternative" health care therapies<sup>23</sup> that differ from prevailing medical therapies,<sup>24</sup> while eliminating the potential for professional discipline from the CPSM, unless the non-traditional or alternative therapy puts the patient's health or safety at a greater risk than the conventional treatment. Prior to the passage of the MAA, if doctors prescribed an alternative form of medicine or therapy, they could be subject to disciplinary proceedings by the CPSM, which could result in the suspension or withdrawal

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<sup>21</sup> Manitoba, Legislative Assembly. *Debates and Proceedings*. Vol. LVI No. 30A (14 April 2005) at 1338 (Glen Cummings).

<sup>22</sup> Helke Ferrie. Research Co-ordinator, The Glasnost Group and Cos Publishing, cited in *supra* note 20.

<sup>23</sup> Interview of Dr. Jon Gerrard, Leader of the Liberal Party and MLA for River Heights, by Theresa Danyluk (5 October 2005) in Winnipeg, Manitoba. Dr. Gerrard explained the process for determining when a therapy is considered "alternative." In general, it involves an examination of one or more of the following: whether the therapy has passed the formal drug-approval process, whether the therapy is approved in legislation and regulations, whether the use of the therapy complies with applicable standards, whether the medicine is on the pharmaceutical list, and/or whether medical literature and texts, written and vetted by experts, hold the therapy out as being generally accepted, subject, of course, to new research. According to Dr. Gerrard, the Canadian Medical Association (and respective provincial branches) also produces clinical guidelines on the use of certain therapies, which may be instructive in this regard.

In *supra* note 17 (Linda West), Linda West describes an alternative medicine as having "a messy definition" and states that "[i]t and what is an alternative medicine today may not be tomorrow. Acupuncture would be a good example where some would argue that it is an alternative medicine and some would argue it is not." The *Bylaws of the College of Physicians and Surgeons of Alberta* defines "complementary health therapy" as "any form of treatment provided by a medical practitioner which has not been proven by orthodox scientific methodology and/or accepted by statutory medical or health authorities as effective for the prevention, treatment, or cure of any human disease, ailment, physical or mental condition, deformity, defect or injury ... and may include (1) diet/nutrition/lifestyle changes, (b) mind/body control, (c) traditional and ethnomedicine, (d) structural and energetic therapies, (e) pharmacological and biological treatments and (f) bioelectromagnetic applications." See *supra* note 19.

of their licence to practice medicine. There are numerous examples of this occurring in several provinces throughout Canada.<sup>25</sup>

The broader effect of Bill 207 is that it appears to shift more control of health services from regulatory health bodies, doctors, and other health providers to patients, who are ultimately provided with a greater range of health therapies to choose from (including the potential to choose combinations of conventional and alternative treatments). The bill also arguably decreases the power of professional health associations to regulate their members' behaviour. Helke Ferrie, one of the presenters at the Standing Committee on Social and Economic Development ("SCSED") that considered Bill 207, argues that the Manitoba Medical Association's quasi-judicial power to regulate alternative therapies might have been appropriate in the past, but given the significant amount of information now available at the public's fingertips, individuals do not need as much protection from overarching regulatory bodies. Further, she claims that many "chronically outdated clinical guidelines, have more to do with agreements with food, drug and insurance companies than with science."<sup>26</sup>

These clinical guidelines meant that, prior to Bill 207, physicians could only prescribe approved treatments, which often are cost-prohibitive. Many of the MLAs who spoke to this bill in the House, including the sponsoring member, Mr. Derkach, as well as presenters at the SCSED hearings, claimed that Bill 207 could amount to significant savings in an already stretched provincial health budget.<sup>17</sup> For example, SCSED presenter Harry Morstead, representing Citizens for Choice in Health Care ("CCHC"), stated that stemming ever-increasing health care costs necessarily involves keeping patients out of hospitals, prescribing fewer conventional drugs, and reducing the use of high-cost technology to diagnose and treat illnesses.<sup>28</sup> Presenter Shoshana Scott, member of the Manitoba Society of Homeopathic Physicians and a homeopathic doctor, claimed in committee that homeopathic services affect the sale of pharmaceutical drugs and alleviate some financial pressures on Manitoba's health care system.<sup>29</sup> Nathan Zassman presented to the SCSED that the cost to

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<sup>25</sup> See *supra* note 17 at 71-72 (Helke Ferrie), where Helke Ferrie presented at the Standing Committee hearings the detailed story of a medical doctor who went to China to learn traditional Chinese medicine including acupuncture. When he returned, he wrote a report to the Canadian Medical Association on the superiority of treating pain with acupuncture, and, despite his expertise on the treatment, was subsequently disciplined. Sadly, he committed suicide. According to this presenter several doctors committed suicide while they were under investigation by their respective Colleges of Physicians and Surgeons.

<sup>26</sup> Helke Ferrie, cited in *supra* note 20.

<sup>27</sup> *Supra* note 21 at 1339 (Glen Cummings), where Glen Cummings dismisses the argument that Bill 207 could increase health care costs, and states that, instead, alternative medicine can be cost-effective.

<sup>28</sup> *Supra* note 17 at 57 (Harry Morstead).

<sup>29</sup> *Ibid.* at 60 (Shoshana Scott).



treat someone with bipolar depression or schizophrenia typically exceeds \$400 per month in drug expenses, but some doctors have had equal or better success with \$20 in vitamins.<sup>30</sup> In a written submission, one presenter wrote, "New drugs and procedures have increased our health care costs dramatically . . . . Alternative and complementary therapies would cut these costs dramatically!"<sup>31</sup>

#### IV. THE ORIGIN, INTRODUCTION AND PASSAGE OF BILL 207

I am extremely pleased that we were able to get to this position on this bill now, Mr. Speaker, because there are many Manitobans who are today looking at alternative ways to get medical treatment and to be able to use, perhaps, natural forms of medication to cure their ills.<sup>32</sup>

The impetus for Bill 207 appears to have come from several sources. First, it appears that several Manitobans lobbied for it over a number of years.<sup>33</sup> Second, constituents living in the sponsoring member's constituency lobbied for the passage of a bill that would facilitate the prescription of chelation therapy.<sup>34</sup> During the second reading of the bill, Mr. Derkach stated:

I did not introduce [Bill 207] because it was something that I had thought about or thought of. It was introduced because I had a large number of people who had come to

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<sup>30</sup> *Ibid.* at 64 (Nathan Zassman).

<sup>31</sup> *Ibid.* at 75 (A. Florence Matthews).

<sup>32</sup> *Supra* note 21 at 1334 (Len Derkach).

<sup>33</sup> *Ibid.* at 1337 (Doug Martindale), where Doug Martindale states: "This is an amendment that I have some familiarity with because I have been lobbied, as other MLAs have been lobbied in the past, about this." See also *ibid.* at 1339 (Glen Cummings), where Glen Cummings states: "I have been approached by constituents, not lobbying for support, but simply remarking on how their health has been improved by support and by treatment and by advice that they have received from alternative care practitioners ... [that] this practice had a positive impact on [their] li[ves], on [their] health." See also *supra* note 20, where the Frontier Centre for Public Policy states that legislators appreciate that "... the numbers of their constituents who seek natural remedies are growing and [becoming] more vocal."

<sup>34</sup> Interview, *supra* note 18. Chelation therapy is a series of intravenous infusions containing disodium, EDTA, and other substances, used to treat arteriosclerotic heart disease. While patients feel it is a valid alternative to established medical interventions such as coronary bypass surgery, many reputable health organizations, such as the American Heart Association, the United States Food and Drug Administration (FDA), the National Institutes of Health, and the American College of Cardiology, believe that to date, there have been no adequate, controlled, published, scientific studies using currently approved scientific methodology to support chelation therapy for the treatment of cardiovascular disease. Further, the FDA has not approved chelation therapy to treat coronary artery disease. Chelation therapy is, however, a recognized treatment for heavy metal poisoning, such as lead or mercury poisoning. For more information, see the American Heart Association, "Chelation Therapy" (2005), online: American Heart Association <<http://www.americanheart.org/presenter.jhtml?identifier=4493>>.

me, asking why it was that in Manitoba a doctor cannot prescribe an alternative form of medicine....

...I hear from many, many people, and I can tell you I have had dozens and dozens of phone calls, dozens and dozens of letters and memos, suggesting that we are on the right track when we are asking that we amend *The Medical Act* to allow for alternative forms of treatment.<sup>35</sup>

Further, alternative therapies and medications are becoming increasingly commonplace<sup>6</sup> due to, among other things, the increasing availability of information on non-conventional treatment, the public's escalating occupation with its wellbeing and its desire to take more control of its health, the rising cost of conventional health care, and the disadvantages of using traditional therapies, including their non-effectiveness and detrimental side effects.<sup>37</sup> Finally, other jurisdictions, including Alberta, British Columbia ("BC"), Ontario, and Nova Scotia have already passed similar legislation.<sup>38</sup>

Alberta's Bill 209, the equivalent of Manitoba's Bill 207, passed as a PMB in April 1996 and amended the *Medical Profession Act*.<sup>39</sup> According to Harry Morstead, representing the CCHC at the Committee hearings, legislators felt that it was of "paramount importance that licensed physicians be allowed to treat their patients as dictated by their conscience when confronted with chronic illness."<sup>40</sup> In Alberta, the amendment appears to have worked well, and according to Morstead, there has only been one case since the passage of Bill 209 where a doctor has been reprimanded for using alternative therapies.<sup>41</sup> The BC equivalent of Manitoba's Bill 207, Bill M202, passed as a PMB in April 2001 despite significant opposition to the bill by the College of Physicians and Surgeons of British Columbia.<sup>42</sup> Bill M202 amended the *Medical Practitioners*

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<sup>35</sup> *Supra* note 21 at 1334 and 1336 (Len Derkach).

<sup>36</sup> *Ibid.* at 1335. In particular, Mr. Derkach states "[W]e have moved a great distance in how we look at natural medications, natural herbs, and natural forms of treatment for certain things, and if you walk into a pharmacy today, you will see a whole section in that pharmacy devoted to natural forms... whether they are vitamins, or treatments..."

<sup>37</sup> *Ibid.* See also *supra* note 17 at 75 (A. Florence Matthews).

<sup>38</sup> Both government bills and private members' bills often arise out of comparable legislation passed in other provinces.

<sup>39</sup> *Medical Profession Act*, R.S.A. 2000 c. M-11, s. 44(3). The section reads: "A registered practitioner shall not be found guilty of unbecoming conduct or be found to be incapable or unfit to practise medicine or osteopathy solely on the basis that the registered practitioner employs a therapy that is non-traditional or departs from the prevailing medical practices, unless it can be demonstrated that the therapy has a safety risk for that patient unreasonably greater than the prevailing treatment."

<sup>40</sup> *Supra* note 17 at 57 (Harry Morstead).

<sup>41</sup> *Ibid.*

For more information on the College of Physicians and Surgeons of British Columbia's opposition to Bill M202, see College of Physicians and Surgeons of British Columbia,

Act.<sup>43</sup> Much of the bill was subsequently repealed by the newly elected Liberal government, who introduced new wording.<sup>44</sup>

In Ontario, the equivalent of Bill 207, Bill 2 or the "Kwinter bill," also passed as a PMB, amending the *Medicine Act*.<sup>45</sup> Monte Kwinter, a Liberal Member of Provincial Parliament ("MPP"), introduced and oversaw the passage of the bill during the time when the Conservatives formed government. Mr. Kwinter sponsored the bill after participating in a radio interview where he discovered that the interviewer, Dr. Jerry Green, was a former doctor who had lost his licence in a disciplinary hearing by the College of Physicians and Surgeons of Ontario ("CPSO"), as a result of his use of broad nutritional advice in addition to standard medicine for cancer patients.<sup>46</sup> The government then commissioned a study of the CPSO, finding that the CPSO was out of touch with science, medicine, and patients. Consequently, the bill was brought to the forefront and passed. The Kwinter bill has been effective in exonerating more than 30 doctors who went to court for prescribing alternative therapies. As a result, the CPSO has altered its practices of conducting tribunals and issuing guidelines.<sup>47</sup>

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"Release to Media: Bill M202-Amendment to the Medical Practitioners Act' (6 April 2001), online: College of Physicians and Surgeons of British Columbia < [https://www.cpsbc.ca/cps/general\\_info/communications/press\\_releases/2004/04/19\\_04042\\_61145-390](https://www.cpsbc.ca/cps/general_info/communications/press_releases/2004/04/19_04042_61145-390)>.

<sup>43</sup> *Medical Practitioners Act*, R.S.B.C. 1996, c. 285.

The bill that repealed Bill M202 was the *Miscellaneous Statutes Amendment Act, 2001*, S.B.C. 2001, c. 32 (Bill 111). The alternative health therapy provision is found in *ibid.* at s. 80(2), which states: ((The council or a committee of the council must not act under section 51(4) or (5)(b), 53(7), 59(1) or 60(3) or (8) respecting a member solely on the basis that the member practises a therapy that departs from prevailing medical practice unless it can be demonstrated that the therapy poses a greater risk to patient health or safety than does prevailing medical practice."

<sup>45</sup> *Medicine Act*, S.O. 1991 c. 30, s. 5.1, which states: "A member shall not be found guilty of professional misconduct or of incompetence under section 51 or 52 of the Health Professions Procedural Code solely on the basis that the member practises a therapy that is non-traditional or that departs from the prevailing medical practice unless there is evidence that proves that the therapy poses a greater risk to a patient's health than the traditional or prevailing practice."

<sup>46</sup> See *supra* note 17 at 68 (Helke Ferrie), Helke Ferrie submitted that Dr. Green advised his patient to drink carrot juice and take very high doses of beta carotene. Research at Harvard Medical School had shown that cancer can, in many cases, be reversed through beta carotene when given in high doses. According to Ferrie, there have also been Lasker Prizes and one Nobel Prize awarded in the discovery of how beta carotene works in cancer reversal.

<sup>47</sup> See *ibid.* at 72 (Helke Ferrie). The result in Ontario has been, according to Helke Ferrie, that the Canadian Medical Association and the Ontario Medical Association (OMA) have now felt "freer to also proceed with teaching courses, and as a result, more doctors are involved." Ms. Ferrie also described a section of the OMA dedicated to alternative

Bill207 was introduced by Mr. Len Derkach, MLA for Russell, as a PMB on 4 December 2003. In presenting the bill to the House, Mr. Derkach stated: "This bill brings Manitoba in line with several other jurisdictions across this land where medical practitioners will no longer have to fear reprisal for prescribing alternative forms of medicine to patients."<sup>48</sup>

The MAA sat on the "backburner" for the subsequent two legislative sessions, but was resuscitated on 14 April 2005, when it was read for a second time by Mr. Derkach. A broad array of MLAs spoke to the bill this time, including two Progressive Conservative ("PC") opposition members, two Liberal MLAs, and one government backbencher. The two PC MLAs commented on the benefits of Bill 207, and called for its timely passage. While the Liberal members expressed their support for moving the bill to committee, Dr. Jon Gerrard, MLA for River Heights, and also a physician, impressed some cautionary notes upon the House. He urged the House to bear in mind the importance of using public health money only for clearly effective treatments, and he underscored the need for ongoing and increased funding for health research if the use of alternative therapies is sanctioned and supported by the government.<sup>49</sup>

Not having yet considered Bill 207 in caucus at this point, *the* government member, Mr. Doug Martindale, MLA for Burrows, took a cautious approach. He expressed concerns that, if the bill is passed and a number of non-traditional therapies are thus made legal, the public will potentially lobby the government to approve these therapies as medical expenses, despite the possibility that some may not be medically or scientifically proven. Mr. Martindale suggested that perhaps legislators should alternatively be looking at whether or not something is effective, rather than making an amendment which is applicable to any kind of alternative therapy that a doctor might say is okay."<sup>50</sup>

On 5 and 12 May 2005, Bill207 was once again considered during the weekly two hours dedicated in the House to Private Members' Business.<sup>51</sup> Ralph Eichler, the Progressive Conservative MLA for Lakeside, informed the House of

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treatments, which used to have 30 doctors whose identities were protected, but now has are about 400 members whose identities are no longer protected.

<sup>48</sup> Manitoba, Legislative Assembly, *Debates and Proceedings*, Vol. LV No. IIB (4 December 2003) at 408 (Len Derkach).

<sup>49</sup> *Supra* note 21 at 1341 (Dr. Jon Gerrard).

<sup>50</sup> *Ibid.* at 1338 (Doug Martindale).

<sup>51</sup> Since Bill 207 passed, there have been new rule changes such that Private Members' Business is now considered on Tuesdays and Thursdays, from 10am to 12pm. It is called on Tuesdays by the Government House Leader and on Thursdays by the Opposition House Leader.

several personal accounts of success with alternative therapy usage.<sup>52</sup> Subsequent to the bill's passage, Mr. Eichler expressed his utmost support for the bill by asserting that, "[E]very person should have access to the best medical products available.,<sup>53</sup>

Towards the end of the Third Session of the 38<sup>th</sup> Legislature, on 9 June 2005, the Minister of Health, the Hon. Tim Sale, rose to speak to the bill.<sup>54</sup> By completing the second reading stage and agreeing to move the bill on to committee, it was clear by this point that the government caucus had met to discuss the bill and the government was prepared to support it, subject to passing certain amendments in committee. Minister Sale described the bill as:

[A]n important bill that... seeks to find an appropriate balance between allowing new procedures to develop in our medical care system while protecting both the safety of patients and the ability of the College of Physicians and Surgeons to reasonably discipline and hold to account physicians for standards of practice.<sup>55</sup>

When the SCSED considered the bill on 13 June 2005, Minister Sale, seconded by Mr. Derkach, introduced amendments to Bill 207. According to the Hon. Mr. Sale, the amendments were necessary to achieve the right balance between (1) permitting the CPSM to function as a self-regulating body and (2) maintaining patient safety, with the need to (A) introduce new ideas and procedures and to (B) recognize that: "[T]here are many paths to health and many sources of wisdom about health."<sup>56</sup>

The bill was read for a third and final time on 16 June 2005, when, in a showing of bipartisan support, one member from each of the political parties represented in the House rose to express their support for Bill 207. Further, they each commended each other for supporting and overseeing the passage of Bill 207.<sup>57</sup> In his closing comments, Dr. Gerrard, while supportive of the bill, cautioned that patients must continue to be fully informed of the benefits, risks and status

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<sup>52</sup> Manitoba) Legislative Assembly, *Debates and Proceedings*, Vol. LVI No. 42A (5 May 2005) at 2399 (Ralph Eichler); Manitoba, Legislative Assembly, *Debates and Proceedings*, Vol. LVI No. 46A (12 May 2005) at 2625 (Ralph Eichler).

<sup>53</sup> Interview of Ralph Eichler, MLA for Lakeside, by Theresa Danyluk (6 October 2005) in Winnipeg, Manitoba.

<sup>54</sup> Manitoba, Legislative Assembly, *Debates and Proceedings*, Vol. LVI No. 61A (9 June 2005) at 3445 (Hon. Tim Sale).

<sup>55</sup> *Ibid.*

<sup>56</sup> *Supra* note 17 at 73 (Hon. Tim Sale).

<sup>57</sup> *Supra* note 5 at 3667-3670 (Han. Tim Sale, Dr. Jon Gerrard, and Len Derkach). The Hon. Tim Sale expressed his gratitude to Len Derkach, MLA for Russell, for bringing Bill 207 forward. Dr. Jon Gerrard, the Leader of the Liberal Party and MLA for River Heights, commended both the Member for Russell for bringing Bill 207 forward, as well as the Minister of Health for making sure that there were useful consultations respecting the bill which resulted in minor amendments. Len Derkach expressed a "vote of gratitude to the Leader of the Liberal Party as well as to the government for supporting this legislation."

of any experimental treatment, and that there must be a system developed to report and document adverse effects of new treatments. In closing, Dr. Gerrard stated:

[L]et us proceed with this legislation which now matches other western provinces, but let us make sure that patients are well informed about what they are being recommended. Let us make sure that we are doing the appropriate follow-up so that if there are problems...we identify these early and move to make sure people are aware of them and look at ways that they can be corrected. With that we will support this legislation.<sup>58</sup>

While acknowledging that the amendment introduced by Minister Sale and passed at committee had the effect of weakening the bill in its original form,<sup>59</sup> Mr. Derkach acknowledged that, nonetheless, the premise of the bill was maintained.<sup>60</sup> He also clarified that, in passing this bill, his intention was not to expand health insurance to cover alternative therapies; rather, his primary and only goal was to "avoid doctors [from being] penalized by the College of Physicians and Surgeons [of Manitoba] simply by prescribing alternative forms of therapy and medicine."<sup>61</sup>

Bill 207 came into force on 16 June 2005, the date it received Royal Assent. The bill, undoubtedly subjected to much backroom debate and considerable persistence on the part of the sponsoring member, quietly slipped into Manitoba's law books, etching itself onto Manitoba's history. Unfortunately, and perhaps somewhat surprisingly, in-depth research on Bill 207 failed to uncover any media attention on the issue. Some theories on why Bill 207 may have garnered so little media attention include: the bill appeared as a minor amendment or one creating an incremental change to existing legislation; the bill lost the media spotlight to other, more significant, and more controversial bills that were passed during the same session; the content of the bill—alternative health therapies—was not widely publicly appealing; and, since similar legislation had passed in other provinces, the public perceived its passage as occurring in due course.

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<sup>58</sup> *Ibid.* at 3669 (Dr. Jon Gerrard). Dr. Gerrard echoed the importance of informed decision-making on the part of the patient in an interview on 5 October 2005 in Winnipeg. He also discussed the importance of the physician informing, rather than telling, the patient regarding different treatment options and alternatives.

<sup>59</sup> See *supra* note 5 at 3670 (Len Derkach), where Mr. Derkach states: "It certainly is not where I would have liked to have ended because it still gives considerable amount of control to the College of Physicians and Surgeons [of Manitoba] to prescribe through regulation the types of therapies that they would consider to be appropriate."

<sup>60</sup> *Ibid.* at 3669 (Len Derkach).

<sup>61</sup> *Ibid.* at 3670 (Len Derkach).

## V. CRITIQUES OF BILL 207

Finding efficacious treatments to deal with these chronic diseases seems, from the point of view of those suffering these afflictions, to be advancing at a glacial speed. It appears to us that it is high time to permit physicians to think outside the pharmaceutical patent medicine box.<sup>62</sup>

A minimal number of presenters, eight in total,<sup>63</sup> were present on 13 June 2005 when the SCSED considered Bill 207.<sup>64</sup> Additionally, two written submissions were presented. While all of the presenters spoke in favour of the bill, some raised specific concerns with respect to the potential consequences of the bill, and others focused their comments on broader critiques of the health care system in Manitoba and elsewhere.

Some presenters expressed support for Bill207 based on its expansion of choice within the health care system. For example, Harry Morstead, representing CCHC, an interest group that advocates for more freedom of choice in medical treatment for patients, stated the importance of releasing "front-line health care providers ... from the rigid control imposed on them by their colleges,"<sup>65</sup> and informed the committee of his belief that Bill 207 would provide physicians with a significant and much-needed measure of freedom to prescribe treatments in accordance with the best interests of the patient. Further, Mr. Morstead explained that, currently, research on alternative health therapies is limited since government has turned research over to industry, which has no incentive to research non-traditional therapies since they are non-patentable, and government has not provided the funding to pursue this research. According to Mr. Morstead, loosening controls on licensed physicians, thus allowing them to prescribe non-traditional treatments, may spur government funding for research into non-patentable remedies. Well-known nursing academic and health advocate Linda West described the importance of choice in medical care in the context of two situations where she attempted to find a physician who prescribed both conventional and alternative treatments for two patients with

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<sup>62</sup> *Supra* note 17 at 57 (Harry Morstead, Citizens for Choice in Health Care).

<sup>63</sup> The number of presenters for bills ranges from zero, for approximately one-third of the bills in any given session, to over 200, which occurred for Bill 67, introduced in 1996, regarding the privatization of Manitoba Telephone Services. According to the estimates of the Committees Clerk, Rick Yarish, if there are 60 bills that go to committee in a session, approximately 20 will have fewer than five presenters, 10 will have between five and 10 presenters, five will have between 10 and 20 presenters, and five will have between 20 and 50 presenters.

<sup>64</sup> The Members of the Standing Committee on Social and Economic Development present included: Hon. Mr. Sale, Mr. Aglugub, Ivk. Brick, Mr. Derkach, Mr. Dewar, Mr. Eichler, Mr. Jennissen, Ms. Korzeniewski, Mr. Martindale, Mr. Penner, and Mrs. Stefanson. Mr. Lamoureux was also present.

<sup>65</sup> *Supra* note 17 at 57 (Harry Morstead).

specific disease modalities requiring conventional and alternative care. After calling the CPSM to no avail, Ms West concluded that one must go "underground" in order to find a doctor who could assist patients in these types of situations.<sup>66</sup>

Several people who presented to the SCSED represented the perspectives of those who subscribe to and support naturopathic or holistic medicine. Presenters representing the Manitoba Society of Homeopathic Physicians expressed concerns with regular MDs prescribing alternative therapies, and they stated that their only interest is that doctors are properly trained to use alternative medicines. It is interesting that the homeopathic community did not take a specific, strong stand against Bill 207 since it could be seen as encroaching on their field.<sup>67</sup> However, it must be recognized that this bill gives their profession recognition and credibility, and acknowledges the importance of choice in health care, something that this community likely supports.

Many of the presenters spoke to the pre Bill 207 situation, where, without the protection of Bill 207, many physicians allegedly avoided prescribing alternative therapies and medications, even though they believed that these would have been more effective than conventional practices, out of fear of reprisals from their respective provincial Colleges of Physicians and Surgeons.<sup>68</sup> Further, one presenter, in his support of the bill, devoted the significant portion of his presentation to discussing the safety of alternative medicine over pharmaceutical drugs.<sup>69</sup>

Despite their concerns related to Bill 207 as it relates to patient safety, the CPSM did not officially take a position on the bill.<sup>70</sup> Dr. Bill Pope, the Registrar for the College, stated that the College was not overly concerned with Bill 207 since similar legislation had already been passed in other jurisdictions, in addition to the fact that, generally, fewer physicians prescribe alternative therapies in Manitoba than in other provinces such as BC. However, Dr. Pope

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<sup>66</sup> *Ibid.* at 61 (Linda West).

<sup>67</sup> In this regard, Shoshana Scott, who is a part of the Manitoba Society of Homeopathic Physicians, stated in committee that she was there "on behalf of the Manitoba Society of Homeopathic Physicians because we are very excited to collaborate with this committee and with the members who are willing to work with the medical system to be part of the process, planning and strategizing how to integrate alternative medicine in our system of health care." See *supra* note 17 at 59 (Shoshana Scott).

<sup>68</sup> *Ibid.* at 63 (Nathan Zassman). Mr. Zassman states: "I know there are many doctors in Winnipeg that would be interested in blending nutritional and orthomolecular therapies into their practice, but many of these doctors remember past doctors who have lost their licence and had to leave this province to practise elsewhere, so their fear prevents them from approaching their craft in a holistic, natural way."

<sup>69</sup> *Ibid.* at 6.3-64 (Nathan Zassman).

<sup>70</sup> IntelView, *supra* note 18. As Dr. Pope states, "The College did not specifically take a position on this bill-while we were not wildly for it, we decided we would not oppose it."



stresses that the College has two primary concerns in light of the passage of Bill 207: (1) that patients may choose to forego more helpful conventional therapy by choosing to proceed with the alternative one, and (2) that vulnerable patients may be convinced to spend significant amounts of money on alternative therapies that are not effective. The College has other concerns with Bill 207, such as the risk of overwhelming already, taxed physicians with additional prescription alternatives.<sup>71</sup> The CPSM is on the verge of enacting by.. laws, similar to those enacted in other jurisdictions such as Alberta, that would etch out a comprehensive process that doctors must follow when prescribing alternative therapies, in light of the changes presented by s. 36.1.<sup>72</sup>

It is interesting to note that no presenters and no MLAs took a firm stand against Bill 207. The bill could be heavily critiqued on the basis that the wording of the bill may be interpreted such that if a physician prescribes a harmless yet ineffective alternative therapy in the place of an effective conventional therapy, although the alternative therapy does not pose any immediate risk to the patient, the patient could be made worse off since the conventional therapy would have improved the patient's situation. However, there appear to be safeguards that could prevent this outcome. First, it is open to disciplinary committees, as well as the courts, to interpret the words "risk" and upatient's health and safety,. to encompass the situation described above. Also, as Dr. Pope points out, doctors' conduct which "preys on a vulnerable patient may also be detrimental to the patient's health and safety,"<sup>73</sup> thus falling outside the protective bounds of s. 36.1 of the MA. Further, in spite of Bill 207, doctors continue to have common law tort duties, such as a general duty of care owed to patients and the duty of informed consent (which includes fully informing patients of the advantages and disadvantages of various treatments options).<sup>74</sup> While Bill 207 now allows doctors to include alternative or non. traditional treatments in the array of prescription possibilities they propose to their patients, administrative tribunals and courts will continue to assess doctors' behaviour in these circumstances against an objective standard,

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<sup>71</sup> When asked by Jack Penner, MLA for Emerson, what the College of Physicians and Surgeons of Manitoba (CPSM) might fear by allowing alternative treatments to be prescribed in Manitoba, Nathan Zassman stated that it could be related to the CPSM losing some regulatory control over doctors. See *supra* note 17 at 64.

<sup>72</sup> Interview, *supra* note 18. Similarly, the Hon. Tim Sale stated at *supra* note 5 at 3667 that "now there will be... the evolution of guidelines and procedures to ensure that the intent of the btl which is to allow new practices to emerge and to be appropriately tested without the practitioner being in jeopardy by virtue of simply using a new procedure which is not harmful and maybe of more benefit than traditional procedures. I think we will see an evolution of the kind of appropriate guidelines that patients need for their safety."

<sup>73</sup> E-mail, *supra* note 18.

<sup>74</sup> *Ibid.* For tort duties imposed on doctors, see for example, *Reibl v. Hughes*, [1980] 2 S.C.R. 880, 114 D.L.R. (3d) 1.

considering whether their actions and explanations to the patient were reasonable in light of what a reasonable person in the patient's situation would want to know and would understand. Finally, Dr. Pope points out a final safeguard: yet-to-be-drafted CPSM guidelines, which will set out a comprehensive procedure doctors must follow in order to prescribe alternative treatments and to minimize any potential dangers to patient safety.<sup>75</sup>

## VI. THE BROADER POLITICAL CONSEQUENCES OF BILL 207

We feel that this bill is a good initiative that has been brought forward to the Legislature in an apolitical fashion.<sup>76</sup>

We are the vehicles of these people, Mr. Speaker. We are the ones who are supposed to bring the message from out there into this Chamber and to affect change. In that regard, I think we have allowed this to happen.<sup>77</sup>

Does the passage of Bill 207, a private members' bill supported by all elected members in the Manitoba Legislature, represent a "new trend" in Manitoba politics, such that provincial legislators appear increasingly willing to put aside political ideology in order to legislate in the public's interest?<sup>78</sup> Or, was the passage of Bill 207 related to other factors, such as the position and influence of the opposition member who sponsored it, the subject matter of the bill, or government-sponsored amendments that made the bill more palatable to the government, and so on?

It makes sense to begin from a starting point of why Bill 207 arose as a PMB. It is interesting to speculate why the government did not introduce this bill (similar to other provinces in which this sort of legislation has also arisen as a PMB). Perhaps the Manitoba government was concerned that permitting doctors to prescribe alternative therapies would provide patients with a choice of treatment, would introduce notions of "two-tier" medicine, and would open up the debate on choice in health care. It is fairly safe to say that Manitoba's current government appears adamantly opposed to privatized health care per se, although there appears to be a mix of public and private health service delivery in this province as in many others. Glen Cummings, opposition MLA for Ste. Rose, alluded to this in his comments during the second reading of Bill 207, when he packed a "political punch" by stating that "[w]e do have a mix of [a] public private system, and alternative medicine [as encompassed by Bill 207]

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<sup>75</sup> *Ibid.*

<sup>76</sup> *Supra* note 21 at 1336-37 (Kevin Lamoureux).

<sup>77</sup> *Supra* note 5 at 3670 (Len Oerkach).

<sup>78</sup> The two Liberal MLAs also supported Bill 207. See *supra* note 21 at 1336-37 (Kevin Lamoureux), *supra* note 54 at 3446 (Kevin Lamoureux), *supra* note 5 at 3667-3669 (Or. Jon Gerrard), and *supra* note 17 at 73 (Kevin Lamoureux).

would be an extension of that."<sup>79</sup> Rick Mantey, the former Secretary to the Legislative and Regulatory Review Committee of Cabinet and Special Advisor to the government House Leader, also states that this kind of "progressive" legislation does not appear to be typical of the cautious government currently in place.&) Further, whereas the "freedom of the opposition" allows opposition members to introduce bill containing (radical) policy ideas, governments generally avoid departing too drastically from the current regime in place.<sup>81</sup>

MLA Doug Martindale's comments during the second reading of Bill 207 also shed some light on why the government may not have taken the lead in passing this bill. Mr. Martindale warned that, in other provinces where equivalents to Bill 207 have been passed, individuals have subsequently successfully lobbied the government to have several alternative therapies approved as medical expenses.<sup>82</sup> He expressed concerns that the Province could be persuaded or forced into footing the bill for an increasing number treatments, medications and therapies, some of which may not be scientifically proven to be effective. In this regard, Mr. Martindale suggested a possible alternative to Bill 207:

Maybe we need to look selectively at whether or not something is effective, rather than making an amendment which is applicable to any kind of alternative therapy that a doctor might say is okay.<sup>83</sup>

There are other possibilities why the government did not introduce Bill 207. For example, the government may have been concerned with offending the medical profession generally and the CPSM in particular, and may have feared that the passage of this type of legislation could lead to increased public pressure to cover as medical expenses services provided by alternative health care providers, such as chiropractors, acupuncturists and homeopaths. Finally, the government may have desired the ability to maintain the argument that the opposition was responsible for the introduction and ultimate passage of Bill 207, in the event that there are unfavourable public or political consequences related to the bill.<sup>84</sup>

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<sup>79</sup> *Supra* note 21 at 1339 (Glen Cummings).

<sup>80</sup> Interview of Rick Mantey by Theresa Danyluk (29 September 2005) in Winnipeg, Manitoba.

<sup>81</sup> *Supra* note 23.

<sup>82</sup> *Supra* note 21 at 1337-38 (Doug Martindale). For example, this occurred with respect to chelation therapy in Alberta, where Mr. Martindale stated it is now approved as a medical expense.

<sup>83</sup> *Ibid.* at 1338 (Doug Martindale).

<sup>84</sup> This argument likely would not be given much weight by interested individuals, however, since the government voted in favour of Bill 207.

The passage of a private members' bill is indeed a rarity in present-day provincial politics.<sup>85</sup> Whereas in the 1950s and 60s PMBs were frequently used to advance policy issues and introduce amendments to legislation, PMBs in recent history appear to have significantly declined as a serious and viable policy tool.<sup>86</sup> Rick Mantey hypothesizes that this is generally due to the fact that individual MLAs no longer receive as much media and public attention as they once did, the public is in general disinterested in politics, and the opposition typically receives more media and public attention from other procedural avenues such as Question Period and the Estimates process.<sup>87</sup> Further, the decline in the use of PMBs may be specific to the makeup and character of the Legislature. For example, depending on the political forces of the day and the political make-up of the Legislature, MLAs may prefer to spend as much time as they can in their constituencies rather than preparing bills at the Legislature.

Mr. Mantey suggests the relative decline in the use of PMBs on the part of Manitoba MLAs to drive important legal and policy issues to the fore is unfortunate for Manitobans. It is not a significant expense to draft bills and qualified legal staff exist to assist MLAs in this regard. Further, if an opposition party is reactionary, that characteristic could carry through when it becomes government. However, opposition parties must also remain cautious when pushing forward with PMBs, as the public in general could expect them to pass similar legislation if and when they form government.

As Bill 207 proceeded through the House, members appeared generally sceptical that it was going to be passed. For example, Doug Martindale, a government backbencher, stated during the bill's second reading that:

Certainly, it would be very unusual for a private members' bill to pass.... [O]pposition members' bills almost never pass, almost never make it to the committee stage.... I can assure you that they do not get passed very often.... So just a little reminder there about what the history and tradition of private members' bills are.<sup>88</sup>

Similarly, at committee, Mr. Derkach stated: "It is not often that a member of the opposition can have a bill come to this stage in the Legislature."<sup>89</sup>

For these reasons, many see the passage of Bill 207 as a significant feat. Following its passage, the Frontier Centre for Public Policy stated that its "bipartisan passage demonstrates that our politicians can share noble moments

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<sup>85</sup> See attached Tables: Table 1 ("History of Introduction and Passage of Private Members' Public Bills in Manitoba, 1992-2005") and Table 2 ("Sponsors, Titles and Passage of Private Members' Public Bills Passed in Manitoba, 1992-2005").

<sup>86</sup> *Supra* note 80.

<sup>61</sup> *Ibid.*

<sup>88</sup> *Supra* note 21 at 1338-39 (Doug Martindale).

<sup>89</sup> *Supra* note 17 at 71 (Len Derkach).

when public glare does not intrude."<sup>90</sup> Further, the Hon. Gord Mackintosh, the Minister of Justice and Attorney General and government House Leader at the time of the passage of Bill 207, stated that, "When there are proposals that the government finds in the public interest, I think there is a more recent developing interest to work together and get proposals moving."<sup>91</sup> Minister Mackintosh stated that during his experience as an opposition MLA from 1993-99, the government would turn down opposition proposals and opposition PMBs outright. However, during his time in government, he states that, while his caucus will not support PMBs that are "clearly flawed," they will genuinely consider PMBs worthy of serious consideration,<sup>92</sup> and will ultimately support those PMBs they can agree with.<sup>93</sup> According to Minister Mackintosh, Bill 207 had "strong merits" and was thus worthy of government support.

In the end, 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; the level of public support for the bill; the support of the caucus 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. Based on an assessment of the dismal record for the passage of PMBs over the past decade and a half, in addition to the passage of two PMBs in as many years, it is possible that the current administration may be in some way facilitating the passage of PMBs, whether through "passive" means, such as government support of specific pieces of legislation it agrees with, or through deliberate cooperation with the opposition to ensure an increasing amount of legislation introduced by opposition members becomes law. However, in spite of the current House Leader's comments regarding the government's willingness to cooperate with the opposition MLAs to facilitate the passage of PMBs, it is too early to come to an independent conclusion whether this is the beginning of a

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<sup>90</sup> *Supra* note 20.

<sup>91</sup> *Supra* note 1.

<sup>92</sup> For example, Minister Gord Mackintosh, in *ibid.*, stated that Bill 208, *The Child and Family Service Amendment Act (Grandparent Access)*, a private members' bill introduced by Child and Family Services critic and opposition MLA Leanne Rowat that did not pass, has recently been assigned to government MLA Andrew Swan, who will examine it more closely.

<sup>93</sup> *Ibid.* It is important to note that this is largely a political exercise, so there may be private members' bills that the public generally would deem meritorious and that garner a significant level of public support, but the government is not prepared to support them for (undisclosed) political reasons.

new trend of cooperation at the Manitoba Legislature or simply a combination of other factors including coincidence. Only time will tell.

## **VII. CONCLUSION**

The passage of Bill 207 was an exceptional occurrence-it was one of only four private members' bills passed out of 141 PMBs introduced over the past 15 legislative sessions. Although only a small amendment, the bill has significant consequences in terms of providing physicians with a measure of protection from professional discipline in the event that they prescribe alternative treatments outside the scope of conventional therapies, so long as those treatments do not pose a greater risk to a patient's health or safety than conventional therapies. The bill effectively addresses some of the concerns of physicians and members of the public that doctors could be reprimanded by the College of Physicians and Surgeons of Manitoba for using therapies not "conventionally" administered. Bill 207 is also significant for achieving passage through the Legislature as a PMBt and for potentially signalling a new trend in the Legislature whereby government politicians are giving renewed attention and consideration to policy and legislative proposals brought forward by opposition politicians.

# Appendix: Private Members' Public Bills in Manitoba

Table 1: History of Introduction and Passage of Private Members' Public Bills in Manitoba, 1992-2005

Legislative Session	Total Number of Private Members' Public Bills Introduced	Outcome of Private Members' Public Bills Introduced
3 <sup>rd</sup> Sess., 38 <sup>th</sup> 2004-05	11	<ul style="list-style-type: none"> <li>• 1 bill passed (Bill 207)</li> <li>• 1 bill ruled Out of Order</li> </ul>
2 <sup>nd</sup> Sess., 38 <sup>th</sup> Leg., 2003-04	14	<ul style="list-style-type: none"> <li>• 1 bill passed (Bill 202)</li> <li>• 2 bills to be reinstated (Bill 207, <i>The Medical Amendment Act</i> and Bill 212, <i>The Pension Freedom Act</i>)</li> </ul>
1 <sup>st</sup> Sess., 38 <sup>th</sup> Leg., 2003	0	
4 <sup>th</sup> Sess., 37 <sup>th</sup> Leg., 2002-03	9 (3 not printed)	
3 <sup>rd</sup> Sess., 37 <sup>th</sup> Leg., 2001-02	4	<ul style="list-style-type: none"> <li>• 1 bill to be reinstated (Bill 204, <i>The Smoke, Free Places Act</i>)<sup>1</sup></li> </ul>
2 <sup>nd</sup> Sess., 37 <sup>th</sup> Leg., 2000-01	2	
1 <sup>st</sup> Sess., 37 <sup>th</sup> Leg., 1999-00	2	

<sup>1</sup> Bill 204, *The Smoke, Free Places Act*, was subsequently passed via government legislation.

Legislative Session	Total Number of Private Members' Public Bills Introduced	Outcome of Private Members' Public Bills Introduced
5th Sess., 36th Leg., 1999	4 (1 not printed)	
4th Sess., 36th Leg., 1997-98-99	5 (1 not printed)	
3rd Sess., 36th Leg., 1997	8 (3 not printed)	
2nd Sess., 36th Leg., 1995-96	5 (not proceeded with)	
1st Sess., 36th Leg., 1995	12 (5 not printed)	
6th Sess., 35th Leg., 1994-95	22 (10 not printed)	
5th Sess., 35th Leg., 1994	26 (13 not printed)	<ul style="list-style-type: none"> <li>• 1 bill (Bill 206)</li> </ul>
4th Sess., 35th Leg., 1992-93-94	28 (17 not printed)	<ul style="list-style-type: none"> <li>• 1 bill passed (Bill 212)</li> <li>• 1 bill ruled Out of Order</li> </ul>
<b>TOTAL</b>	141 (53 not printed)	<ul style="list-style-type: none"> <li>• 4 bills passed</li> <li>• 2 bills ruled Out of Order</li> </ul>



Table 2: Sponsors, Titles and Passage of Private Members' Public Bills Passed in Manitoba, 1992-2005

Member of the Legislative Assembly ("M.L.A.") and Political Party of Bill's Sponsor	Bill Number and Title	Date of Royal Assent
Mr. Len Derkach M.L.A. for Russell Progressive Conservative-Opposition	Bill 207: <i>The Medical Amendment Act</i>	15 June 2005
Mr. Stuart Murray M.L.A. for Kirkfield Park and Leader of the Official Opposition Progressive Conservative – Opposition	Bill 202: <i>The Nellie McClung Foundation Act</i>	04 December 2003
Mr. Gerry MacAlpine M.L.A. for Sturgeon Creek Progressive Conservative-Government	Bill 206: <i>The Coat of Arms, Emblems and the Manitoba Tartan Amendment Act</i>	05 July 1994
Mr. John S. Plohman M.L.A. for Dauphin NDP Opposition	Bill 212: <i>The Dauphin Memorial Community Centre Board Repeal Act</i>	27 July 1993

Source: Manitoba, Legislative Assembly, *Journals*, Appendices "C" and "D" from 4th Sess., 1st Leg., 1992-93-94 to 38th Sess., 38th Leg., 2004-05.

