The Consumer Protection Amendment Act (Prepaid Purchase Cards)

C I N D Y   N A D L E R

I. BACKGROUND

The popularity of gift cards in recent years has soared. According to Statistics Canada, currently 82% of large retailers offer gift cards, whereas only 53% of large retailers did in 2003.[1] Similarly, the American gift card market grew to $45 billion U.S. in 2003 from $1 billion in 1995, and in 2007 projections suggest that the gift card market will reach $70 billion U.S.[2] Gift cards also comprise a significant portion of retailer revenues. For example, Starbucks has reported that 11% of its North American revenues consist of gift card purchases.[3]

Consumers like gift cards because they are convenient and are often the perfect gift for the friend or relative who has everything. Retailers like them because they can attract a new customer base, and consumers usually spend more than the value of their gift card once in the store.[4] They are also difficult to counterfeit, can often be reloaded, and retailers can analyze spending patterns and behaviours through their use.[5] Another significant advantage for retailers is that a certain proportion of gift cards are never redeemed by the consumer, and even if they are eventually cashed in, the retailer still has the advantage of investing that outstanding amount until the card is redeemed.[6] Sometimes these

---

1 Bahta et al, "Gift Cards: The Gift of Choice", (December 2006), online: Statistics Canada <http://www.statcan.ca/english/research/11-621-MIE/11-621-MIE2006051.htm> [*Bahta*].

2 Maryanna Lewyckyj, "Legislation will rein in retailers who cash in on early expiry dates", *The Toronto Sun* (26 Sept 2006), also see Ontario Ministry of Government Services, News Release (29 May 2007), online at <www.gov.on.ca/mgs/en/News/Print/133713.html>

3 "Gift Card Expiry Dates may be Banned Here" *The Winnipeg Free Press* (26 September 2006)

4 *Bahta, supra* note 1.

5 Monica Weise, "Analysis in Brief: Gift Cards: A Win-Way Way to Give" (Ottawa: Statistics Canada: 2005), online: Statistics Canada, online at <http://www.statcan.ca/english/research/11-621-MIE/11-621-MIE2005029.pdf>

6 *Ibid.*

unused amounts are significant. For example, in 2006, Best Buy reported that they had a $43 million dollar surplus from unused gift cards alone.[7]

Some of the larger retailers anticipated government intervention and discontinued automatic expiry dates before the government made it incumbent on them to do so. For example, Starbucks, Pier 1, and Future Shop have recently set aside expiry dates in relation to their gift card policies.[8] However, there are many retailers who have not, and recently several provincial governments have stepped in and introduced legislation that deals with retail gift card expiry dates, dormancy, or inactivity fees, as well as consumer disclosure requirements.[9]

This has had a variety of effects and implications on different groups, including not only retailers, but also consumers, in ways that were likely unanticipated by the Legislature. Manitoba's version of the legislation which takes its form in amendments to *The Consumer Protection Act* came into force on 1 November 2007.[10]

The bill that amended *The Consumer Protection Act*, *The Consumer Protection Amendment Act (Prepaid Purchase Cards),* is actually quite vague, as the bulk of the effects of the legislation are determined by the regulations. The bill itself defines prepaid purchase card as:

> "[P]repaid purchase card" means, *subject to the regulations*, an electronic card, written certificate or other voucher or device with a monetary value, that is issued or sold in exchange for the future purchase or delivery of goods or services, and includes a gift card and gift certificate. [Emphasis added].[11]

The Regulations were registered on 31 July 2007.[12] Essentially, they prohibit fees on gift cards with the exception of three circumstances: (i) fees may be charged for the replacement of lost or stolen gift cards, (ii) fees may be charged if the card was a given to the recipient for free, and (iii) a maximum monthly fee of $2.50 may be charged on multi-store gift cards (i.e., a gift card issued by a mall)

---

7 "Gift Card Expiry Dates Will Die" *The Toronto Sun* (1 October 2007).

8 "Manitoba wants gift cards that stand the test of time" *CBC News*, (26 September 2006), online: <http://www.cbc.ca/news/story/2006/09/26/mba-giftcards.html>

9 Manitoba, Ontario, British Columbia, and Nova Scotia have all introduced legislation regulating gift cards. They will be discussed in greater detail later in this paper.

10 Bill 4, *The Consumer Protection Amendment Act (Prepaid Purchase Cards),* 5th Sess., 38th Leg., Manitoba, 2006 (assented to 7 December 2006, S.M. 2006, c. 27) [*Bill 4*].

11 *Ibid.*

12 Man. Reg. 98/2007.

if the card has not been used for 12 months.[13] If the retailer charges a fee in contravention of the Regulations, the consumer is entitled to a full refund.[14]

The Regulations also require the disclosure of certain information. The retailer must provide the consumer with information pertaining to all the restrictions, limitations, and conditions that the supplier has imposed on the use of the card as well as how information may be obtained about the card (*i.e.*, the card's balance).[15]

The Regulations also address expiry dates. The Regulations eliminate expiry dates in all but two situations: (i) where the card is issued for a specific good or service (*i.e.*, a "Spa day"), and (ii) when the holder of the card has not paid for it (*i.e.*, a promotional or chartable gift card).[16] The Retail Council of Canada had advocated for the "specific good exception" as the value of these types of services (for example a Spa treatment) versus a straight cash value tends to vary over time.[17]

The Regulations do not specifically discuss prepaid wireless phone cards, but a representative from Manitoba Consumer and Corporate Affairs advised that they are federally regulated and so the provincial government has no jurisdiction to regulate them.[18]

An interesting feature of the Regulations is that a requirement is placed on the Minister of Finance to review the legislation's effectiveness and consult with affected stakeholders within 18 months of it coming into force.[19] The Director of Consumer and Corporate Affairs Branch advised that this section was added as this is a new area of regulation for the Government (or any government in Canada for that matter)[20] and its effects and implications are largely unknown.

---

13 *Ibid, s.* 2(1).

14 *Ibid*, s. 2(2).

15 *Ibid,* s. 3(1).

16 *Ibid,* s. 4(1).

17 Lanny McInnes, "Retail Council of Canada's Response to the Discussion Paper on Prepaid Purchase Cards" Retail Council of Canada (16 April 2007), available online: Retail Council of Canada, <http://www.retailcouncil.org/advocacy/financial/submissions/submission_prepaidcards_160407.pdf> [*Retail Council of Canada Submission*].

18 Interview of Consumer Services Officer at Manitoba Consumer and Corporate Affairs (31 October 2007).

19 Man. Reg. 98/2007, s. 7.

20 Ontario was the first province to introduce gift card legislation, but their legislation came into force on 1 October 2007, only a month before the Manitoba legislation.

This section of the Regulation was designed to ensure that the government will accommodate and address unforeseen negative consequences if they occur.[21]

The first portion of this paper will discuss Bill 4's progression through the legislative process. Next, this paper will address the other Canadian provinces that have introduced or implemented similar legislation. Finally, the paper considers the effects of this legislation on various stakeholders within Manitoba.

II. Introduction Of Bill 4: *The Consumer Protection Amendment Act* (Prepaid Purchase Cards)

The Honourable Gregory Selinger, Minister of Finance, introduced Bill 4 of the 5th Session, 38th Legislature, *The Consumer Protection Amendment Act (Prepaid Purchase Cards)* on 21 November 2006.[22] Mr. Selinger described the bill at first reading as amending *The Consumer Protection Act* "to prohibit expiry dates on most gift cards and other prepaid purchase cards and to require the disclosure of certain information to consumers."[23]

A. Second Reading

On 27 November 2006, Mr. Selinger motioned that Bill 4 be read a second time and referred to a Committee. He pointed out that the convenience and practicality of prepaid gift cards had caused the popularity of prepaid gift cards to substantially increase in recent years. He observed that consumers were spending more on gift cards and retailers were making them more accessible. Mr. Selinger went on to note that the considerable growth in the retail gift card market had prompted retailers to impose a number of terms and conditions associated with the use of gift cards. The condition that most concerned Mr. Selinger was the expiry dates on the cards which required unsuspecting consumers to use up the value of the gift card by a certain date. He stated that many consumers believed the gift cards "were as good as cash" (in that they would never expire) and he described the consumer's subsequent predicament of being in possession of a valueless gift card, as "frustrating and unfair".[24]

---

21 Interview of the Director of Consumer and Corporate Affairs Branch (31 October 2007).

22 *Bill 4*, *supra* note 10.

23 Manitoba, Legislative Assembly, *Debates and Proceedings*, LVIII No. 5 (21 November 2006) [*Debates* (21 November 2006)] at 135 (Greg Selinger).

24 Manitoba, Legislative Assembly, *Debates and Proceedings*, LVIII No. 9 (27 November 2006) [*Debates* (27 November 2006)] at 309-310 (Greg Selinger).

Mr. Selinger went on to describe how the new legislation would remedy this unfortunate situation by not only prohibiting expiry dates on gift cards, but also by allowing the Government to regulate fees associated with gift cards which penalize the consumer for not using the gift card within a certain period of time.[25]

Interestingly, Mr. Selinger also mentioned that his staff was consulting with members of the Ontario Government. Ontario introduced similar legislation on 19 October 2006 which came into force on 1 October 2007.[26] This paper will discuss Ontario's legislation in detail. Mr. Selinger pointed out that his staff had consulted with the Ontario Government to "ensure fairness and consistency in the legislation."[27]

Second reading of Bill 4 continued on 30 November 2006. Mr. Gerald Hawranik, a Progressive Conservative Member from Lac du Bonnet, had some interesting comments to add to the debate. He pointed out that, in the interest of retaining customers, most retail businesses will honour expired gift cards. However, he did acknowledge that some retailers will strictly adhere to the expiry date, which, absent any government intervention, was fully within their rights to do. Mr. Hawranik stated that type of behavior was what Bill 4 was designed to guard against.[28]

Mr. Hawranik went on to say that the amendments to *The Consumer Protection Act* prohibiting expiry dates on gift cards would not be sufficient. He stressed the need for consumer education; specifically that consumers should be told to use up the value of the gift card within a reasonable period of time. Mr. Hawranik mentioned that, potentially, there could be adverse effects on businesses if this education was not required—namely the negative effect on the cash flow and financial statements of small businesses.[29]

Mr. Hawranik pointed out that Bill 4 had the potential to harm those it was intended to protect—the consumers. For example, without expiry dates, Mr. Hawranik noted that consumers (uneducated about the potential pitfalls of gift cards) may be left with valueless gift cards in the event that vendor has moved to another Province, gone bankrupt, or otherwise closed. To support the

---

25 *Ibid.*

26 Bill 152, *Ministry of Government Services Consumer Protection and Service Modernization Act,* 2nd Sess., 38th Leg., Ontario, 2006 (assented to 20 December 2006), S.O. 2006, c. 34.

27 *Supra,* note 24

28 Manitoba, Legislative Assembly, *Debates and Proceedings*, LVIII No. 12B (30 November 2006) [*Debates* (30 November 2006)] at 430 (Gerald Hawranik).

29 *Ibid* at 430-431.

proposition that businesses are leaving Manitoba, Mr. Hawranik cited a 2005 Statistics Canada report which indicated that 9 880 Manitobans left the province that year. He postulated that part of that number consisted of businesspeople who took their capital and growth potential with them. Mr. Hawranik then closed his comments by taking a bit of a stab at the current NDP Government, specifically Mr. Selinger, for often quoting Statistics Canada reports when they reflected favorably on his government, but selectively ignoring them when they did not.[30]

III. COMMITTEE STAGE

On 4 December 2006, consideration of Bill 4 went to the Standing Committee on Social and Economic Development. Two oral presentations were made, one on behalf of Polo Park–Cadillac Fairview and the other on behalf of Rogers Communications. Furthermore, the Retail Council of Canada as well as a private citizen, Edward Bachewich, submitted written submissions in relation to the bill.[31]

A. Polo Park—Cadillac Fairview: Multi-Store Gift Cards ("MSGCs")

The first presenter, Deborah Green, was the General Manager of Polo Park Shopping Centre, which is owned by Cadillac Fairview Corporation Ltd. Cadillac Fairview owns many of Canada's large retail shopping centres, such as the Toronto Eaton Centre, the Bay Centre in Victoria, and the Chinook Centre in Calgary.[32] Ms. Green indicated she was present at the Committee to represent Cadillac Fairview as well as the increasing number of companies who offer "multi-store gift cards" ("MSGCs"). She explained that the MSGC allows consumers to redeem the card at various unaffiliated retailers within a shopping centre. Cadillac Fairview's MSGC is redeemable in any Cadillac Fairview shopping mall across the country.[33] This gives the consumer the option of using

---

30 *Ibid* at 431.

31 Manitoba, Legislative Assembly, *Debates and Proceedings*, LVIII No. 1 (4 December 2006) [*Debates* (4 December 2006)].

32 Portfolio Map, *Cadillac Fairview,* (2008), online: Cadillac Fairview <http://www.cadillacfairview.com/notesdata/hr/cf_lp4w_lnd_webstation.nsf/page/Portfolio+Map> [*Cadillac Fairview Portfolio*].

33 Manitoba, Legislative Assembly, *Debates and Proceedings*, LVIII No. 1 (4 December 2006) [*Debates* (4 December 2006)] at 7 (Deborah Green).

the card in over 4 000 stores and restaurants nationwide.[34] According to Cadillac Fairview's Manager of Corporate Communications, Mr. Heath Applebaum, who spoke before the Ontario Standing Committee on Social Policy when Ontario was considering similar legislation, Cadillac Fairview has sold more than two million MSGCs since the card's inception in 2004.[35] The Cadillac Fairview version of the card is known as the "shop!" card.[36]

Ms. Green emphasized the differences between single retailer gift cards and MSGCs. The MSGC operates on a much larger scale than the single retailer gift card, as MSGCs are issued by the shopping centre, not the individual retailer and a third party company, StoreFinancial Services of Canada Co., implements and processes the service. According to Ms. Green, Cadillac Fairview does not profit from issuing the MSGC; it is simply a service they offer because there is a demand for it from both their tenants (the shopping centre retailers) as well as consumers. Ms. Green explained that a sponsor bank that uses a global payment system operates the MSGC program. When the gift card is sold, and value is added to it, the funds are deposited with the sponsor bank. When the consumer uses the MSGC, the global system pays the funds to the retailer, similar to a debit or credit card transaction.[37]

Ms. Green pointed out some other notable differences between single retailer gift cards and the MSGC. The MSGC allows the consumer to return goods to the retailer and have that amount credited back to their MSGC account balance. Consumers may also access their MSGC account information 24 hours a day via the internet or a toll free telephone number. Finally, MSGCs are superior to cash as lost, stolen, or damaged MSGCs may be replaced.[38]

With respect to service fees, Ms. Green indicated that the MSGC offered by Cadillac Fairview has an upfront service fee of $1.50 which is tacked onto the price of the gift card at the time of purchase, and generally the range of fees for most MSGCs are between $1.00 and $1.50.[39] These fees are quite transparent as

---

34 Cadillac Fairview, about the "shop!" card, online: <http://www.shops.ca/page.ch2?uid=shopCard>

35 Ontario Government Recognizes Differences Between Mall and Retail Gift Cards, *Cadillac Fairview*, online: Cadillac Fairview <http://www.cadillacfairview.com/NOTESDATA/HR/CF_LP4W_LND_WebStation.nsf/page/2007+Mall+and+Retail+Gift+Cards>

36 *Supra* note 34.

37 *Supra* note 33 at 8.

38 *Ibid.*

39 *Ibid.*

the consumer pays the fee when purchasing the gift card.[40] With respect to maintenance fees, Ms. Green advised that most MSGCs generally do not charge maintenance fees if their value is redeemed within a period of twelve months. With respect to the Cadillac Fairview's MSGC "shop!" card specifically, it has a \$2 maintenance fee which only comes into effect if the card is not used within 15 months of the date of purchase. Cadillac Fairview selected this timeline since most MSGCs are purchased in the fall before the holiday season, and the 15 month period provides the consumer with two holiday seasons during which they can use the card. Ms. Green advised that 95% of the MSGCs sold by her company are redeemed for their full value within that time frame.[41] In this context, the writer spoke with Mr. Applebaum. He advised that Cadillac Fairview's research indicated the majority of those unused cards consisted of cards that were lost or damaged, had negligible sums of money left on them, or were cards that the consumers had decided simply decided not to use. However, there is no expiry date for the Cadillac Fairview "shop!" card, nor has there ever been.[42]

Ms. Green also addressed the issue of consumer disclosure. Cadillac Fairview's policy is to advise the purchaser of the costs associated with their MSGC at the time the card is purchased. Cadillac Fairview also posts signs informing consumers of the MSGCs fees at the location where the cards are purchased,[43] and according to Mr. Applebaum, this process of advising the consumer is not done in complicated legalese language.[44] The fees are also written on the MSGC receipt as well as on the MSGC packaging. Furthermore, the existence of the \$2 maintenance fee which comes into effect after fifteen months is written on the back of the gift card itself. Ms. Green attributed the fact that the majority of consumers use their MSGCs within a fifteen month period to Cadillac Fairview's extensive consumer disclosure policies.[45]

As mentioned above, the "shop!" card was not designed to generate a profit for Cadillac Fairview. Rather, it operates more like a bank card. Mr. Applebaum advised that the sponsor bank holds the money received from "shop!" card purchases in trust until the gift card is redeemed, and the \$2 maintenance fee which comes into effect after fifteen months represents the amount charged to

---

40 Interview of Heath Applebaum (29 October 2007).

41 *Supra* note 33 at 8.

42 *Supra* note 40.

43 *Supra* note 33 at 9.

44 *Supra* note 40.

45 *Supra* note 33 at 9.

Cadillac Fairview by the bank for keeping the money in the account, similar to a personal bank account fee.[46]

It should be kept in mind that Cadillac Fairview does offer a number of services associated with the card, such as the replacement of lost, stolen, or damaged cards, as well as telephone or internet account accessibility. The card also comes in gift packaging and customers also have the option of returning merchandise and having their "shop!" card account credited. The only money directly coming into Cadillac Fairview from this program is the $1.50 service charge levied on each card sold. In fact, according to Mr. Applebaum, without that $1.50 service fee, the MSGC service wouldn't be feasible.[47] Mr. Applebaum has indicated the whole system was designed to be more like a customer loyalty card: Cadillac Fairview doesn't directly profit from the sale of the card, but does so indirectly through their tenants' increased profitability.[48]

Ms. Green concluded by stressing the difference between the single retailer gift card and the MSGC. She stated that as the two products were significantly different, they should be regulated in different ways. She ended her presentation by stating that Cadillac Fairview received only one fee-based inquiry per 10 000 MSGCs issued and that her company wanted to collaborate with the Manitoba Government to ensure that Cadillac Fairview could continue to offer the MSGC within Manitoba.[49]

Although Ms. Green did not have sufficient time to address the portion of her submission which was directed towards gift card regulation in the United States, the Committee agreed that this portion of her submission would be written into *Hansard.* Essentially this portion of Ms. Green's submission exemplified how the United States legislation has acknowledged the differences between MSGCs and single retailer gift cards. For example, according to Ms. Green, since 2000, 24 states have enacted legislation that deal with gift card fees and expiry dates. Ms. Green proceeded to break down the different states into categories based on how they regulated gift cards. Some of them allowed expiry dates and fees given that certain requirements were met (such as consumer disclosure), some of them specifically prohibited expiry dates for single retailer gift cards, but most of them specifically exempted MSGCs from any sort of government regulation. In fact, Ms. Green said there were only two states out of

---

46 *Supra* note 40.

47 Paul Turenne "Polo Park takes gift cards out of tills" *The Winnipeg Sun (*27 October 2007), online: The Winnipeg Sun <http://www.winnipegsun.com/News/Manitoba/2007/10/27/4609278-sun.html> [*Turenne*].

48 *Supra* note 40.

49 *Supra* note 33 at 9.

the 24 which have implemented legislation that have prohibited expiry dates and fees with respect to MSGCs. She advised that the validity of the legislation was being challenged in both states.[50]

After her presentation was complete, Ms. Green was asked by Progressive Conservative Member Mr. Hawranik whether she had been consulted by the government on the effect the legislation would have on the company she represented and its interests. She advised Mr. Hawranik that she personally was not consulted by Mr. Selinger, and that she was simply asked to make a presentation to the Committee to represent Cadillac Fairview. In a recent article from the *Toronto Sun*, a spokesperson for Mr. Selinger advised that:

> We believe that we provided stakeholders with plenty of lead time. We engaged in a public consultation process on the regulation in March of this year [2007] and we consulted with specific stakeholders during the drafting process. [51]

In response to this comment, Mr. Applebaum stated that Cadillac Fairview is part of a coalition of companies with similar interests that was formed to educate the Government about the differences between the multi-store gift card and the single retailer gift card (the *Multi-store Gift Card Coalition).*[52] He advised that there has been a great deal of communication back and forth, but that perhaps the Manitoba Government did not fully appreciate or accept that Cadillac Fairview simply could not possibly continue to offer this program, as it was, without charging a service fee.[53] Currently, the Regulations only permit maintenance fees for MSGC accounts which have been dormant for a year, but prohibit all other fees to be charged.[54] Since Cadillac Fairview cannot levy the $1.50 service charge which is paid upon purchasing the card, they will not be offering their MSGC this holiday season. This will be discussed further below.

B. Rogers Communications - Prepaid Wireless Cards

The next presenter, Ms. Laura Kwiatkowski, was the General Manager for Rogers Communications, Midwest. The primary issue that concerned Rogers in relation to Bill 4 was the potential ramifications the proposed legislation could have on prepaid wireless phone cards. Rogers wanted to draw the attention of the Committee to the significant differences between traditional retail gift cards and the prepaid wireless phone cards their organization offered, given that the

---

50 *Supra* note 33 at 9-10.

51 *Turenne, supra* note 47.

52 *Supra* note 40. See also Multi-store Gift Cards Coalition, online: <http://multistoregiftcards.com/Index.html>

53 Interview with Heath Applebaum (29 October 2007).

54 Man. Reg. 98/2007, s. 2(1)(3).

definition of a "prepaid card" was rather wide.[55] As mentioned above, Bill 4 defined prepaid purchase card as:

> "[P]repaid purchase card" means, subject to the regulations, an electronic card, written certificate or other voucher or device with a monetary value, that is issued or sold in exchange for the future purchase or delivery of goods or services, and includes a gift card and gift certificate.56

Ms. Kwiatkowski conveyed Rogers' position clearly; essentially, Rogers they did not want the legislation's definition of "prepaid purchase card" to encompass their prepaid wireless phone cards. She went on to point out the many differences between Rogers' prepaid card and the traditional gift card.[57]

The first important difference is that Rogers' prepaid wireless phone cards are often purchased by the ultimate consumer, not as a gift. As a result, the consumer is generally aware of the card's terms and conditions and often uses the card soon after purchasing it: so the cards serve very different purposes.[58]

Another noteworthy difference is that the traditional gift card is very similar to using cash, whereas the prepaid wireless card is more like a billing system for wireless airtime access.[59]

Third, Rogers submitted that traditional retail gift cards can usually be used to redeem a number of different items within a store (or a shopping centre, as pointed out by Cadillac Fairview's presentation with respect to MSGCs), whereas the consumer of a prepaid wireless phone card can only redeem the card for one thing—wireless airtime minutes during a specified time period.[60]

A significant difference between the two types of cards is that networks which offer wireless services have a certain network capacity. In order to manage that capacity, the service provider needs to know what range of usage is available to prepaid customers. A traditional retailer, on the other hand, does not need to purchase more stock simply because they have sold more gift cards.[61]

With respect to expiry, traditionally the cards are sold for one-month periods. If the consumer does not use up the full value of the airtime within that month, they can transfer those minutes over to the next month so long as they

---

55 Manitoba, Legislative Assembly, *Debates and Proceedings*, LVIII No. 1 (4 December 2006) [*Debates* (4 December 2006)] at 11 (Laura Kwiatkowski).

56 *Bill 4*, *supra* note 10.

57 *Supra* note 55 at 11 -12.

58 *Ibid.*

59 *Ibid.*

60 *Ibid.*

61 *Ibid.*

have activated a new card, keeping their status active. Rogers advised that they take steps to inform customers when their prepaid card is close to expiring so that customers do not lose those minutes.[62]

Furthermore, Rogers argued that with a single-retailer gift card the consumer does not receive anything until they actually redeem the card, whereas Rogers and its competitors offer a program that allows a consumer access to their network 24 hours a day, seven days a week. Rogers also offers the customer ongoing 9-1-1 access even if the customer does not have any minutes left on the prepaid wireless card.[63]

The final difference Ms. Kwiatkowski mentioned is that, even when the consumer of a prepaid wireless card is not using their wireless device, costs are still accumulating for the network service providers as the device is still "communicating with the network". There is also a cost to maintaining the 9-1-1 service as well as IT costs. According to Ms. Kwiatkowski, Rogers does not recoup these outlays until the card expires or the minutes are consumed. This is not the case with respect to a single retailer gift card.[64]

With respect to other jurisdictions, Ms. Kwiatkowski advised that twenty-seven American States have enacted gift card/prepaid card legislation. Not one of those states has enacted legislation that eliminates expiry dates for wireless prepaid phone cards. In fact, 21 of the states clearly exempt these types of cards from the legislation and the remaining six simply require certain disclosures to be made with respect to expiry dates.[65]

Ms. Kwiatkowski closed by asking the government to specifically exempt wireless prepaid cards from the definition of prepaid cards in Bill 4, or alternatively, to ensure that the Regulations acknowledge the difference between the traditional single retailer gift card and the prepaid wireless card. [66]

She further advised that her company made a similar request to the Ontario Government with respect to their gift card legislation, and that they were still considering her company's position at that time. Eventually Ontario concluded that they did not have jurisdiction to legislate these types of cards as communications were the subject of federal jurisdiction.[67] According to an

---

62 *Ibid.*

63 *Ibid.*

64 *Ibid.*

65 *Ibid* at 12.

66 *Ibid.*

67 Ontario Ministry of Government Services, News Release (29 May 2007), online: <www.gov.on.ca/mgs/en/News/Print/133713.html> [*Ontario Government News Release*].

article released shortly after the Standing Committee session, Mr. Selinger advised that the government would "take a careful look" at how wireless service providers' systems work, but his ultimate objective was the protection of the consumer.[68] Ultimately, however (as mentioned above) the Manitoba Government did not regulate prepaid wireless cards, as they agreed with Ontario that they were within the ambit of federal jurisdiction.[69]

C. Retail Council of Canada (RCC) – Written Submissions

The Retail Council of Canada is a not-for-profit organization that represents the interests of Canadian retailers. One of its functions is to advocate on behalf of retailers and present their views to the federal and provincial governments regarding a variety of matters such as taxation issues, environmental protection issues, human resources training, employment and labour relations, and market practices.[70] Lanny McInness, the Director of Government Relations and Member Services for Manitoba and Saskatchewan, submitted detailed written submissions to the Standing Committee with respect to Bill 4.[71]

The Retail Council of Canada submitted that the retail market plays a significant role in Manitoba's economy. It employs over 69 000 people in the province—making it Manitoba's third largest employer.[72]

According to Mr. McInnes, Manitoba retailers were not made aware of the new gift card legislation until the Government's Speech from the Throne made on 15 November 2006. He indicated this was a sharp contrast to the Ontario Government, who worked with retailers before and throughout the legislative process. This concerned retailers, as this news came shortly before their busiest season. Mr. McInnes advised that the Manitoba Government could have avoided this slight upheaval if Mr. Selinger had simply advised Manitoba retailers that they planned to implement this legislation.[73]

---

68 Mia Rabson, "Rogers seeks exclusion from ban on gift-card expiry dates" *The Winnipeg Free Press,* (5 December 2006).

69 *Supra* note 18.

70 Retail Council of Canada, online: <www.retailcouncil.org/aboutus/services.asp>

71 Manitoba, Legislative Assembly, *Debates and Proceedings*, LVIII No. 1 (4 December 2006) [*Debates* (4 December 2006)] at 28-31 (Lanny MacInnes).

72 *Ibid* at 28.

73 *Ibid* at 28-29.

The RCC's main areas of concern were: (i) the definition of 'prepaid cards'; (ii) expiry dates; (iii) service fees; (iv) disclosure; and (v) timing in relation to the legislation's implementation.[74]

(i) With respect to the definition, the RCC pointed out that Ontario's version of the legislation did not include a definition of "prepaid cards", and that having one might improperly include certain types of cards which the Legislature did not intend to include. The Ontario legislation defines "gift card agreements"[75] but requires the consumer to make a "payment in full when entering into the agreement."[76] It also specifically exempts gift cards for charitable purposes.[77] Manitoba's legislation (as it was in December 2006) did not distinguish between promotional gift cards and gift cards which were purchased, so it was unclear whether the legislation would exempt promotional gift cards. Mr. McInnes stated that Manitoba Consumer and Corporate Affairs advised him that the legislation would exclude promotional cards via the Regulations,[78] but it seemed that his organization wanted greater assurances that this was the case. Overall, Mr. McInnes stressed the importance of exempting the promotional cards from the legislation as consumers and charities would be precluded from enjoying their benefits and retailers would lose the opportunity to use these cards as part of a marketing strategy.[79] Fortunately, the Regulations reflected his concerns, and promotional or charitable cards are permitted to have expiry dates.[80] However, the Regulations do seem to suggest that consumer disclosure is still required as the Regulation relating to disclosure refers to gift cards "issued <u>or</u> sold."[81] The Manitoba Regulations also go a step further by allowing retailers to charge fees in relation to free gift cards.[82] The Ontario legislation does not have a similar provision.

(ii) Expiry dates were another area of concern for the RCC. Mr. McInnes corroborated what was earlier said by Ms. Green: the majority of gift cards are redeemed within a short period of time. According to Mr. McInnes, the main reason why retailers insist on expiry dates is because the revenue from

---

74 *Ibid at* 29-30.

75 O. Reg. 17/05 amended by O. Reg. 187/07, s. 23.

76 *Ibid.*

77 *Ibid* s. 25.1(a).

78 *Supra* note 71 at 29.

79 *Ibid.* Also see *Retail Council of Canada Submission, supra* note 17 at 4.

80 Man. Reg. 98/2007, s. 4(1)(b).

81 *Ibid* s. 3(1).

82 *Ibid* s. 2(1)(2).

gift cards must be recorded as a liability on their balance sheet until the value of the card is redeemed. Having a specific expiry date is a method of ensuring those contingent liabilities are eventually removed from the company's balance sheet. Another reason for the expiry dates is that as gift cards become older, it may be more difficult for the retailer who issued the card to ascertain what value remains on the card. Presumably this is because the technology the store has used to issue and redeem gift cards changes over time. Mr. McInnes advised that the RCC appreciates that some consumers have problems with expiry dates, and that the Ontario Government was working with RCC to develop a method of eliminating expiry dates that balances the rights of all parties.[83]

(iii) On the topic of service fees, again, much of what Mr. McInnes said corroborated Ms. Green's submissions. He indicated that, depending on the type of infrastructure surrounding the gift card, the implementation and issuance of a gift card service could be quite costly. The service fees are designed so the retailer can recover some of the expenses associated with the gift card program. Mr. McInnes also mentioned that, where a third party is engaged to open gift card accounts (as in the case of Cadillac Fairview), the cost to the company to keep that gift card account open is sometimes more than the card's remaining value.[84]

(iv) With respect to disclosure, the RCC acknowledged that consumer awareness was an important part of the gift card system, but a lack of physical space on the card sometimes prohibits the dissemination of all pertinent information to the consumer.[85] The RCC recently recommended that the Regulations should not indicate exactly how and where this information should be provided, as that requirement might hinder unique and distinctive card design.[86] Essentially the RCC advised it was working with the Ontario Government to develop the requirements for consumer disclosure, and they hoped that Manitoba would adopt rules similar to Ontario in this regard.[87] Interestingly the Manitoba Regulations do not specify exactly where and how the information should be displayed, but they do require that the information is given "clearly in a way that is likely to bring it to the holder's attention."[88]

---

83 *Supra* note 71 at 29-30.

84 *Ibid* at 30.

85 *Ibid.*

86 *Retail Council of Canada Submission, supra* note 17.

87 *Supra* note 71 at 30.

88 Man. Reg. 98/2007, s. 3(2).

(v) Finally, on the issue of timing, the RCC expressed their appreciation for being heard by the Committee prior to the implementation of the legislation and Mr. McInnes advised that he anticipated that the Government would continue to consult with retailers and other interested parties prior to the legislation coming into force.[89]

D. Edward Bachewich, Private Citizen

The final submission with respect to Bill 4 was made by a private citizen, Mr. Ed Bachewich. His written submission addressed many of the advantages and disadvantages of gift cards that were discussed earlier in this paper.[90]

Mr. Bachewich made a number of suggestions to the government regarding gift card legislation. He suggested that expiry dates should be eliminated, that the balance of a gift card should be redeemable as cash, that a gift card issued by company no longer in business should be redeemable at an entirely different business, that the value of gift card purchases should be held in trust until the gift card is used, that gift cards should be cash equivalents, and that mail-in-rebates should be eliminated.[91] Some of these suggestions had far reaching implications and would involve the government encroaching considerably on the regulation of the retail industry which would likely attract a great deal of criticism. The government did not amend the legislation to include any of his suggestions.

E. Comments of the Critic from the Official Opposition, Mr. Hawranik

Progressive Conservative Member Mr. Hawranik asked Mr. Selinger whether he was going to specifically exempt the prepaid wireless cards from the definition section of Bill 4 (or via the Regulations) or whether he was, in fact, planning on exempting them at all. The minister dodged the question by stating that his office still needed to clarify whether or not the prepaid wireless cards actually fell within federal or provincial jurisdiction—given the fact that communications fall within the ambit of the federal government.[92] Thus, the final word with respect to the legislation's applicability to prepaid wireless cards at the close of the

---

89 *Supra* note 71 at 30.

90 Manitoba, Legislative Assembly, *Debates and Proceedings*, LVIII No. 1 (4 December 2006) [*Debates* (4 December 2006)] at 31-33 (Edward Bachewich).

91 *Ibid* at 32.

92 Manitoba, Legislative Assembly, *Debates and Proceedings*, LVIII No. 1 (4 December 2006) [*Debates* (4 December 2006)] at 18 (Greg Selinger).

Committee Stage was still unclear. They were ultimately not found to be within provincial jurisdiction and so they were unaffected by the new legislation.[93]

Another issue brought up by Mr. Hawranik was one of the issues addressed by the RCC, namely, the legislation's application to promotional gift cards. Mr. Hawranik's concern was that the definition of "prepaid purchase card" in the bill seemed to include promotional cards, by virtue of the word 'or' between the words "issued" and "sold":[94]

> "[P]repaid purchase card" means, subject to the regulations, an electronic card, written certificate or other voucher or device with a monetary value, that is issued *or* sold in exchange for the future purchase or delivery of goods or services, and includes a gift card and gift certificate.[95] [Emphasis added]

Mr. Hawranik did not support the notion that promotional gift cards should fall within the scope of this legislation. He indicated he believed these types of cards would simply cease to exist if the legislation eliminated expiry dates for promotional gift cards. He advised Mr. Selinger that a simple remedy to this problem would be to amend the word "or" to "and." Mr. Hawranik was concerned that if this issue was not addressed in the legislation or regulations, it was likely that the provision would be challenged, and the court would likely hold that promotional cards should not have expiry dates.[96]

Unfortunately, Mr. Selinger refused to amend the definition section. He stated the importance of keeping the legislation "flexible" to accommodate the "rapidly changing" variety of prepaid cards offered. He felt the Regulations should reflect these kinds of issues. He also suggested that the government would consider regulating the consumer disclosure requirements with respect to promotional cards. Mr. Selinger stressed the importance of ensuring that consumers were not duped into believing they were getting something for free when certain strings were attached. However, despite the fact that he did not give an unequivocal promise that the Regulations would exempt promotional cards from having expiry dates, he did admit that it *might* be possible given sufficient consumer disclosure. He advised Mr. Hawranik that he would keep him up to date as he and his staff worked through the Regulations.[97] At that point all clauses of the bill were passed and the bill was to be reported. Ultimately, the government did exempt charitable and promotional cards from

---

93 *Supra* at note 18.

94 Manitoba, Legislative Assembly, *Debates and Proceedings*, LVIII No. 1 (4 December 2006) [*Debates* (4 December 2006)] at 18 (Gerald Hawranik).

95 *Bill 4, supra* note 10.

96 *Supra* note 94.

97 *Supra* note 92 at 18-20.

the prohibition on expiry dates in the Regulations,[98] although it seems these types of cards still must disclose certain information the consumer.[99] Also, the government went one step further by allowing fees to be associated with these types of cards.[100]

IV. Concurrence And Third Reading, Royal Assent, And Coming Into Force

On 6 December 2006, Bill 4 was concurred, read for a third time, and passed. Progressive Conservative member Jack Reimer from Southdale put some supportive comments on the record regarding Bill 4, but his comments were reflective of an unenlightened consumer who didn't fully understand the far-reaching implications of this legislation. His view, essentially, was that it was commendable that the government was stepping in to protect the vulnerable consumer from impending expiry dates.[101] However, there were several issues he did not discuss. He did not specifically address service or maintenance fees of any kind, or discuss their relative merits. Furthermore, as he failed to differentiate between the various types of gift cards, it is unclear from his comments whether he even appreciated their differences and how this legislation has the potential to negatively affect certain retailers, which in turn would ultimately affect consumer choice. At first blush, one might think this legislation could do no harm, but on closer inspection there are many parties potentially affected.

The next speaker was the Honorable Jon Gerrard, the leader of the Manitoba Liberal party. He advised that he supported the purported purpose of Bill 4, but that he did have some concerns with it. He suggested that the bill was essentially smoke and mirrors. Although the bill prohibited expiry dates, there was nothing in the bill itself to prevent a company from charging inactivity fees.[102] This is true strictly speaking, although the bill specifically gives the

---

98 *Supra* note 80.

99 *Supra* note 81.

100 *Supra* note 82.

101 Manitoba, Legislative Assembly, *Debates and Proceedings*, LVIII No. 15 (6 December 2006) [*Debates* (6 December 2006)] at 567 (Jack Reimer).

102 Manitoba, Legislative Assembly, *Debates and Proceedings*, LVIII No. 15 (6 December 2006) [*Debates* (6 December 2006)] at 567 (Jon Gerrard).

Lieutenant Governor the authority to make Regulations pertaining to "inactivity fees or service fees".[103]

Next, Mr. Gerrard addressed the way in which the government introduced the legislation. He took the opportunity to reiterate the comments of the RCC, and criticized the government for the lack of information provided to retailers when the legislation was first considered. He repeated the RCC's concerns regarding the "prepaid purchase card" definition, agreeing with the RCC that the definition was vague and that the government should have looked more to Ontario's legislative model. Mr. Gerrard noted that there had been no conclusive statement by the government with respect to the legislation's treatment of promotional cards. He suggested this was an ambiguity which would only cause more confusion among retailers. Overall, Mr. Gerrard indicated his party will be closely analyzing the government's implementation of the legislation and the Regulations to ensure its application actually addresses its intention.[104]

The bill was given Royal Assent the following day, 7 December 2006.[105] Clause 3 of Bill 4 indicated the Act was to come into force on a day to be fixed by proclamation.[106] On 11 August 2007 the *Manitoba Gazette* reported that the Act was to come into force on 1 November 2007.[107] The Regulations pertaining to this bill were registered on 31 July 2007.[108]

V. Other Provincial Legislation Pertaining To Gift Cards

A. Ontario

Ontario, through Bill 152, *Ministry of Government Services Consumer Protection and Service Modernization Act, 2006*,[109] was the first Canadian jurisdiction to regulate gift cards.[110] It amended the Ontario *Consumer*

---

103 *Bill 4, supra* note 10, s.173(f).

104 *Supra* note 102 at 568.

105 Manitoba, Legislative Assembly, *Debates and Proceedings*, LVIII No. 16B (7 December 2006) [*Debates* (7 December 2006)] at 636.

106 *Bill 4, supra* note 10, Clause 3.

107 Acts and parts of Acts coming into force after 2006 by proclamation, online, Manitoba Laws: <http://web2.gov.mb.ca/laws/statutes/index_procs.php>

108 *Supra* note 12.

109 *Supra* note 26.

110 *Ontario Government News Release, supra* note 67.

Protection Act[111] and came into force on 1 October 2007. The Ontario legislation is similar to the Manitoba legislation: the bulk of the legislative effect comes from the Regulations.[112] The legislation does not define "prepaid purchase card" as the Manitoba legislation does, but does define the terms "gift card" and "gift card agreement" as follows:

> "[G]ift card" means a voucher in any form, including an electronic credit or written certificate, that is issued by a supplier under a gift card agreement and that the holder is entitled to apply towards purchasing goods or services covered by the voucher;
> "[G]ift card agreement" means a future performance agreement under which the supplier issues a gift card to the consumer and in respect of which the consumer makes payment in full when entering into the agreement.[113]

The effects of the new Regulations are very similar to Manitoba's legislation and are essentially threefold; (i) the elimination of expiry dates, (ii) the elimination of gift card fees (except fees associated with the replacement of lost or stolen cards or fees charged to customize a gift card) and (iii) the requirement that certain information be disclosed to the consumer (*i.e.*, any applicable fees, limitations on the use of the card, etc.).[114] The apparent harmonization of the two pieces of legislation is no coincidence. The Manitoba Director of Consumer and Corporate Affairs advised that Manitoba worked openly with Ontario officials to have a mutual understanding of the Ontario Government's legislative intent. Manitoba had consistency in mind, as gift cards have cross border implications.[115]

A noteworthy difference between the two pieces of legislation is Ontario's treatment of the MSGC. Unlike the Manitoba legislation, which only permits a monthly account maintenance fee for accounts which have been dormant for a year,[116] the Ontario Regulations specifically exempt MSGCs from the legislation for a period of 270 days.[117] This delay was allowed so that the government could analyze how to regulate these cards.[118] Also similar to Manitoba's approach, the Ontario Ministry of Government Services has not regulated prepaid wireless phone cards since it concluded that they are the subject of federal jurisdiction.[119]

---

111 *Consumer Protection Act* R.S.O. 2002, c. 30.

112 O. Reg. 17/05 amended by O. Reg. 187/07.

113 *Ibid* s. 23.

114 *Ontario Government News Release, supra* note 67.

115 Interview of Director of Consumer and Corporate Affairs (31 October 2007).

116 Man. Reg. 98/2007, s. 2(1)(3).

117 *Supra* note 113, s. 25.4(1).

118 *Ontario Government News Release, supra* note 67.

119 *Ibid.*

B. British Columbia

On 28 May 2007, Private Members Bill M 219, The *Business Practices and Consumer Protection Amendment Act*[120] was introduced. According to Guy Genter, who introduced the bill, it does not seek to regulate expiry dates with respect to promotional cards.[121] However, the bill's definition of 'gift certificate' seems to suggest otherwise:

> "*[G]ift certificate*" means a record evidencing a promise by the *seller or issuer* of the record that consumer goods or services will be provided to the bearer of the record…[Emphasis added].[122]

'Issue' is defined as follows:

> "[I]ssue" means to sell or otherwise provide a gift certificate to any person… [Emphasis added].[123]

In any event, the bill proposes to eliminate expiry dates, service fees, and dormancy fees without exception.[124] The bill also has a rather unique requirement—foreign to both the Ontario and Manitoba legislation. If a consumer makes a purchase with a gift card that is less than the card's value, the retailer is obligated to give whatever amount is remaining on the card to the consumer in the form of either cash or a gift card.[125] Furthermore, where the remaining balance is less than five dollars, the retailer must make the balance of the card available in cash upon demand of the consumer.[126] It is possible that this could potentially engender the development of fraudulent gift cards. Furthermore, the legislation should be looked at more carefully as it seems to cover a number of types of gift cards without differentiating between them. In any event, the bill has not progressed past first reading.[127]

The British Columbia Government also expressed some interest in regulating gift cards. The Ministry of Public Safety and Solicitor General issued a

---

120 Bill M 219, *Business Practices and Consumer Protection Amendment Act,* 3rd Sess., 38th Leg., British Columbia 2007.

121 British Columbia, Legislative Assembly, *Debates of the Legislative Assembly*, Vol. 21. No. 7 (28 May 2007) [*Debates* (28 May 2007)] at 8229 (Guy Gentner).

122 *Supra* note 120 s. 14.1(1).

123 *Ibid.*

124 *Ibid* s. 14.2(1).

125 *Ibid* s. 14.2(3).

126 *Ibid* s. 14.2(4).

127 Legislative Assembly of British Columbia, *Progress of Bills*, online: <http://www.leg.bc.ca/38th3rd/votes/progress-of-bills.htm>

public consultation directed at obtaining the public's views with respect to gift card regulation.[128] The consultation closed on 15 June 2007.

On 10 April 2008, the Honourable John Van Dongen, Minister of Public Safety and Solicitor General, introduced Bill 17, the *Public Safety and Solicitor General (Gift Card Certainty) Statutes Amendment Act.*[129] It received Royal Assent on 1 May 2008.[130] It amends the *Business Practices and Consumer Protection Act.* The bill defines prepaid purchase card as:

> [A] card, written certificate or other voucher or device with a monetary value that is issued or sold to a person in exchange for the future supply of goods or services to a consumer, and includes a gift card and gift certificate…[131]

Essentially the bill prohibits expiry dates, prohibits fees (subject to the regulations), and requires certain disclosures to be made to the consumer such as information relating to restrictions and limitations.[132] It also requires vendors of gift cards to explain how information may be obtained about the card, including how to ascertain the card's remaining balance.[133] The bill also gives the Lieutenant Governor the authority to make regulations refining the definition of "prepaid purchase card," exempting certain types of prepaid purchase cards from the legislation, and governing fees and disclosure associated with prepaid purchase cards.[134] Similar to the Manitoba legislation, the bulk of the bill's legislative effect seems to come from the Regulations, which had not been published as of 10 June 2008.[135] The bill comes into force by regulation of the Lieutenant Governor.[136]

---

128 British Columbia Ministry of Public Safety and Solicitor General, "Regulating Gift Cards and Certificates: Consultation Paper and Questionnaire", online: <http://www.pssg.gov.bc.ca/legislation/docs/2007-May-CP-GiftCards.rtf>

129 Bill 17, Public Safety and Solicitor General (Gift Card Certainty) Statutes Amendment Act, 2008 4th Sess. 38th Leg., British Columbia, 2008 (assented to 1 May 2008), S.B.C. , c. 15 [Bill 17].

130 British Columbia, Legislative Assembly, Debates of the Legislative Assembly No. 2 (1 May 2008) [Debates (1 May 2008)] at 11899.

131 Bill 17, *supra* note 129, s. 3.

132 Bill 17, *supra* note 129, s. 3.

133 *Ibid.*

134 *Ibid.*

135 British Columbia Government, Cumulative B.C. Regulations Bulletin (10 June 2008), online: <http://www.qp.gov.bc.ca/statreg/bulletin/index.htm#list>

136 Bill 17, *supra* note 129, s. 24.

C. Nova Scotia

On 11 January 2007 Private Members Bill No. 133, *An Act to amend Chapter 92 of the Revised Statutes, 1989, the Consumer Protection Act*,[137] was introduced by NDP Member Mr. Percy Paris and given its first reading.[138] Essentially the bill proposes to amend the *Consumer Protection Act*[139] to permit the Governor in Council to make Regulations with respect to expiry dates on gift cards.[140] Like the British Columbia private member's bill, the Nova Scotia bill has not progressed past first reading.[141]

However, Bill 38, *An Act to Amend Chapter 92, of the Revised Statutes, 1989, the Consumer Protection Act*, (another private member's bill introduced by NDP Member Percy Paris) was first read on 28 November 2007 and came into force on 13 December 2007.[142] The bill is quite brief. In its entirety, it allows for the Governor in Council to make regulations:

> [I]mposing restrictions, including the regulation or prohibition of expiry dates on goods, including gift certificates or gift cards, that are exchangeable or redeemable for goods or services.[143]

As of June 2008, no regulations under this bill had been filed.[144]

D. Saskatchewan

Saskatchewan also recently decided to regulate prepaid purchase cards. On 13 March 2008, Saskatchewan Party Member Don Morgan introduced and first

---

137 Bill 133, *An Act to amend Chapter 92 of the Revised Statutes, 1989, the Consumer Protection Act,* 1st Sess., 60th General Assembly, Nova Scotia, 2007.

138 Nova Scotia, Legislative Assembly, *Debates and Proceedings* (11 January 2007) at 2964 (Percy Paris).

139 *Consumer Protection Act*, R.S.N.S. 1989, c. 92.

140 *Supra* note 137.

141 Nova Scotia Legislature, House Business, Status of Bills, 1st Session, 60th General Assembly, Progress of Bills 2006, online: <http://www.gov.ns.ca/legislature/HOUSE_BUSINESS/status60_1.html#133>

142 Bill 38, An Act to Amend Chapter 92 of the Revised Statutes, 1989, the Consumer Protection Act, 2nd Sess. 60th General Assembly. Nova Scotia, 2007.

143 *Ibid.*

144 Nova Scotia, Department of Justice, Registry of Regulations, Listed by Act, online: http://www.gov.ns.ca/just/regulations/rxaa-l.htm#conpr (viewed 22 June 2008).

read Bill 12, *The Consumer Protection Amendment Act*, 2008.[145] It received Royal Assent on 28 April 2008 and will come into force on proclamation.[146]

The legislation is quite comprehensive. A director may be appointed under the bill to administer the amendments and regulations pertaining to prepaid purchase cards.[147] Similar to the other provinces' legislation, the bill prohibits expiry dates and fees (subject to the regulations) and requires information to be provided to the consumer.[148] However, unlike other provinces, this bill has comprehensive sections dealing with the powers the director has to demand documents or records from "any person".[149] Furthermore, a search warrant may be issued by a justice or provincial court judge if satisfied by information under oath that there are reasonable grounds to believe that someone has contravened, is contravening, or will contravene the sections dealing with prepaid purchase cards.[150] The director can also order compliance and can apply to court for an order directing compliance, or for any other order or remedy.[151] The bill also creates an "offences and penalties" section for those who contravene the new sections: for a first offence individuals face fines up to $5 000 and imprisonment for up to a year. Corporations face fines up to $100 000. The penalties increase for second or subsequent offences.[152] The court can also order restitution.[153] Finally, the Lieutenant Governor may also make Regulations governing fees and consumer disclosure and exempting certain types of prepaid purchase cards.[154]

VI. THE RAMIFICATIONS OF BILL 4

At Bill 4's Second Reading, on 27 November 2007, Minister of Finance Gregory Selinger said:

---

145 Bill 12, *The Consumer Protection Amendment Act, 2008*, 1st Sess., 26th Leg., Saskatchewan, 2008 (assented to 28 Apr 2008) S.S. 2008, c. 4. [Bill 12].

146 The Legislative Assembly of Saskatchewan, Progress of Bills, 1st Sess. 26th Legislative Assembly, online: <http://www.legassembly.sk.ca/bills/progbill.htm>.

147 Bill 12, supra note 145, s. 77.12.

148 *Ibid.* s. 77.13 - 77.15.

149 *Ibid.* s. 77.18.

150 *Ibid.* s. 77.19.

151 *Ibid.* s. 77.20 and 77.21.

152 *Ibid.* s. 77.22.

153 *Ibid.* s. 77.23.

154 *Ibid.* s. 77.28.

> The legislative amendments in Bill 4 will allow the government to ensure the proper balance between the rights of consumers and the interests of the retail industry with respect to fees and conditions.[155]

Based on the foregoing discussion, this begs the question (simply stated), "Where is the balance?" At first blush it seems the scales are tipped largely in favor of protecting the consumer. However, a closer analysis reveals that it is unlikely that the legislation will really protect those whom it was designed to protect. It is conceded that the Regulations dealing with consumer disclosure requirements and expiry dates will likely satisfy the bill's purported objective of consumer protection. However, the same cannot be said about the effects of the legislation on MSGCs in Manitoba.

Polo Park did not offer their MSGC, ("shop!") in the 2007 holiday season: Cadillac Fairview was not provided with sufficient time to create a new card that would be in compliance with the new legislation that came into force shortly before the holiday season (1 November 2007). According to Cadillac Fairview communications manager Heath Applebaum, 40 000 "shop!" cards were sold within the preceding 12 months, a 25% increase from the previous year.[156] Was it really within the best interests of those consumers who wanted to purchase "shop!" cards that the card was not offered?

Cadillac Fairview owns and manages retail properties in several other provinces,[157] and Manitoba was the only province where the "shop!" card was not offered for the 2007 holiday season.[158] It is unclear why the Manitoba Government did not allow an exemption period similar to Ontario's. Delaying implementation would have allowed more time to consider how to implement this legislation to balance the various stakeholder rights, while also allowing the "shop!" cards to be offered during the 2007 holiday season. When the writer asked the Director of Consumer and Corporate Affairs if she had any comments with respect to this, she essentially said that the decision not to offer the card was a business decision entirely within the discretion of Cadillac Fairview, not a decision of the government, so she really was not in a position to comment.[159]

Essentially, Cadillac Fairview has responded to the new legislation by discontinuing sales of the "shop!" card at Polo Park. However, "shop!" cards purchased outside Manitoba at other Cadillac Fairview shopping centres may

---

155 Manitoba, Legislative Assembly, *Debates and Proceedings*, LVIII No. 9 (27 November 2006) [*Debates* (27 November 2006)] at 310 (Greg Selinger).

156 *Supra* at note 40, also see: *Turenne, supra* note 47.

157 *Cadillac Fairview Portfolio, supra* note 32.

158 *Supra* at note 40.

159 *Supra* at not 115.

still be redeemed within Manitoba.[160] Furthermore, according to Cadillac Fairview, all "shop!" cards purchased prior to 1 November 2007 may also be redeemed at Polo Park.[161] When asked about the potential effects on retailers in Polo Park, Mr. Applebaum advised that 52 of the 165 retailers in Polo Park do not have their own gift card programs: they are relatively expensive to set up, and many smaller retailers do not have the time and resources necessary for their implementation. He advised that the sales of these smaller retailers, who all relied on the Cadillac Fairview "shop!" card, will be the most severely impacted by the loss of the card.[162] Arguably, this will also have an effect on the end price the consumer may pay at these smaller retailers, as these retailers will have to make up for lost sales which have accompanied the elimination of the "shop!" card. It might be argued that Cadillac Fairview could offer a very basic model of its previous card in Manitoba without all the additional services such as the card replacement program and the online account access. However, since the program is a *national* gift card program, Cadillac Fairview indicated they did not have sufficient time or notice to create an alternative type of gift card for Polo Park that would be in compliance with the legislation.[163]

Mr. Applebaum accurately framed the crux of the controversy behind this legislation: does the Government have the right to impose how much a company should charge for a service where the evidence clearly indicates this is a service consumers are quite willing to pay for? Essentially Cadillac Fairview's position is that the government should not intervene and that consumers should be able to purchase what they choose to as long as full disclosure is made to them.[164]

The other major shopping centre in Winnipeg, the St. Vital Centre, has also made some changes to its multi-store gift card policy. The St. Vital Centre card is slightly different than the Cadillac Fairview "shop!" card as it is only accepted at St. Vital retailers,[165] as opposed to several major shopping centres across Canada. The St. Vital Card is also not accepted at most food vendors in the mall.[166] Although there was never a service fee levied when purchasing the card, prior to the legislation coming into force, St. Vital charged a $2 monthly

---

160 "shop!" cards: Attention Polo Park Shoppers, *Polo Park,* online: <http://www.polopark.ca/giftcertificate/index.ch2>

161 *Ibid.*

162 *Supra* at note 40.

163 *Supra* note 160.

164 *Supra* at note 40.

165 St. Vital Centre, Gift Cards, online: <http://www.stvitalcentre.com/giftcertif.html>

166 *Ibid.*

maintenance or inactivity fee that came into effect when the card was not used for a period of 15 months.[167] St. Vital uses the same third party company as Cadillac Fairview to manage their multi-store gift cards, StoreFinancial Services,[168] so presumably they have similar costs for maintaining inactive accounts. Instead of providing consumers with more protection, however, due to the new legislation St. Vital has *reduced* the required inactivity time period from 15 months to 12 months, as 12 months is specifically mentioned in the Regulations.[169] The applicable Regulation reads as follows:

> If a supplier issues or sells a prepaid purchase card entitling the holder to apply it towards purchasing goods or services from multiple unaffiliated sellers, the supplier may — *if the card has not been activated for 12 months* — charge a maximum monthly fee of $2.50 thereafter. [Emphasis added][170]

It is arguable that the legislation sets the reasonable standard at 12 months. What incentive would a gift card issuer have to lengthen the time period before charging maintenance fees beyond that reasonable standard?

According to Holly Plato, Marketing Director of St. Vital, although St. Vital's gift cards were always in compliance with the legislation, 20VIC (the company that manages St. Vital) and StoreFinancial Services came to an agreement that they would change their gift card maintenance fee policy. Now the maintenance fee commences after twelve months of inactivity (presumably because the policy would be in perfect compliance with the legislation while also being more profitable).

So as it stands, fees start accumulating and affecting a consumer's gift card balance after 12 months, rather than the pre-legislation policy of 15 months. The consumer now has three months less grace. It is ironic that the purported purpose of this legislation is the protection of consumers when consumers are actually losing the benefit of an extra three months before inactivity fees reduce their cards' balances.

VII. CONCLUSION

The elimination of expiry dates and the requirement for consumer disclosure benefits consumers. They are rationally connected to the goal of consumer protection. Furthermore, these particular Regulations do not place an

---

[167] Interview of Holly Plato, Marketing Director of St. Vital Shopping Centre (5 November 2007).

[168] *Ibid.* Also, see, <https://www.getmybalance.com> When clicking on the link to check your balance for the St. Vital gift card it leads to a StoreFinancial Services-managed site.

[169] *Supra* note 167.

[170] Man. Reg. 98/2007, s. 2(1)(3).

unreasonable burden on the backs of retailers. The Manitoba Government should be commended for deciding not to regulate charitable or promotional gift cards. However, the way in which the government chose to regulate MSGCs has resulted in two very unfortunate situations. Ironically, the first leaves consumers without the option of purchasing an enormously popular holiday gift, namely, the multi-store gift card, and the second results in consumers having less time before their gift card balance is consumed by dormancy fees.

On a more optimistic note, the built-in statutory review mechanism promulgated in the Regulations that requires the minister to review the effectiveness of the legislation and consult relevant stakeholders within 18 months[171] will hopefully prompt the government to consult more carefully with affected groups and make the appropriate changes to reflect the foregoing concerns.

---

[171] Man. Reg. 98/2007, s. 7.