

# The Enactment of Bill 5, *The Francophone Community Enhancement and Support Act*: A Proud Moment for Manitoba

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## I. INTRODUCTION

Canada is a bilingual country in which English and French are constitutionally recognized as official languages.<sup>1</sup> Language is an area in which both the federal and provincial governments can legislate<sup>2</sup> and language regimes therefore vary from one province or territory to another.<sup>3</sup> To date, every province except British Columbia has implemented some form of legislation, policy or regulatory framework with respect to French-language services.<sup>4</sup>

This article is focused on Bill 5, *The Francophone Community Enhancement and Support Act*,<sup>5</sup> Manitoba's recent legislative action concerning French-language rights. This legislation will be referred to as the "FCESA", the "Bill", and "Bill 5". The FCESA is a significant achievement for Manitoba because it marks an important shift away from

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<sup>1</sup> *The Constitution Act*, 1982, Schedule B to the Canada Act 1982 (UK), 1982, c 11, s 16.

<sup>2</sup> Canada, Library of Parliament, "Language Regimes in the Provinces and Territories" by Marie-Eve Hudon, in *Legal and Social Affairs Division*, Publication No 2011-66-E (Ottawa: 6 January 2016) at 1 [Library of Parliament].

<sup>3</sup> *Ibid.*

<sup>4</sup> *Ibid.*

<sup>5</sup> *The Francophone Community Enhancement and Support Act*, SM 2016, c 9, s 1(2) [FCESA].

a long history of political tensions surrounding language rights in the province. This article supports the view that the FCESA has, in some respects, made Manitoba a leader in supporting the development of francophone communities and recognition of French-language rights.<sup>6</sup>

This article will first set out the historical context of French language rights in Manitoba from the 18<sup>th</sup> century until the present day. It will then summarize Bill 5 and the key elements of each step of the legislative process from first reading until Royal Assent. Media coverage of the Bill will also be briefly discussed. Finally, an analysis of the bill will be conducted. The analysis will consider the success of the Bill from a political and historical perspective. To further illustrate some of the successes and limitations of the Bill, some of its elements will be contrasted to similar legislation in Ontario that was once seen as progressive in the area.

## II. BACKGROUND

Before attempting to fully understand the importance, successes, and limitations of Bill 5, it is necessary first to consider the historical context from which it arose.

In 1867, three provinces united to form Canada under the *Constitution Act, 1867*, including Canada, Nova Scotia, and New Brunswick.<sup>7</sup> The territories to the west and north-west of the newly formed country were, at the time, known as Rupert's Land and the North-Western Territory.<sup>8</sup> It was not until 1870 that Manitoba became a part of Canada.

The establishment of Manitoba as the first Canadian-made Province<sup>9</sup> is particularly relevant to this article. In the 1730s, fur traders of the

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<sup>6</sup> See Raymond M Hébert, "Manitoba rises above its history on francophone rights", *Winnipeg Free Press*, (5 July 2016), online: <<http://www.winnipegfreepress.com/opinion/analysis/manitoba-rises-above-its-history-on-francophone-rights-385505381.html>>; and François Boileau, "Manitoba is breaking new ground" (16 June 2016), *Commissioner's Blog* (blog), online: <<http://csfontario.ca/en/articles/5883>>.

<sup>7</sup> *Caron v Alberta*, 2015 SCC 56, at para 11, [2015] 3 SCR 511 [*Caron*].

<sup>8</sup> *Ibid* at para 12.

<sup>9</sup> Emily Grafton, "The Manitoba Legislative Assembly" (2011) 34:1 *Canadian Parliamentary Rev* 35 at 35.

North-West Company of Montreal began trading at what has become known today as “The Forks.”<sup>10</sup> The Forks is the place where the Red and Assiniboine Rivers meet in what is now the province of Manitoba.<sup>11</sup> It was not until 1812 that Scottish and English settlers arrived in the area.<sup>12</sup> During the 1800s the French, Anglo-Scottish and the Métis peoples, “the descendants of unions between white traders and explorers and Aboriginal women”<sup>13</sup>, lived predominantly in peace, despite any social or cultural differences.<sup>14</sup> To illustrate their peaceful co-existence, “the first churches, schools, community governments, courts, newspapers, and the legal records of much of this daily life were established in French as well as in English, and ... for over three generations the region function[ed] in French or English or both languages simultaneously.”<sup>15</sup>

The Canadian Parliament sought to annex this western territory in 1869.<sup>16</sup> At this time, the majority of the Red River Settlement population was French-speaking Métis.<sup>17</sup> Concern that Canadian Parliament would exert unwelcome dominance created unrest amongst the Métis and French populations of the Red River Settlement.<sup>18</sup> “The French-speaking Roman Catholic Métis viewed with alarm the prospect of Canadian control leading to a wave of English-speaking Protestant settlers that would threaten their traditional way of life.”<sup>19</sup> In response, a provisional government was eventually formed by the Métis peoples under the leadership of Louis Riel to oppose the annexation.<sup>20</sup> Riel’s “Legislative

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<sup>10</sup> Emmet Collins, “Divided minority: Franco-Manitobans and the Forest case” (2010) 64 *Manitoba History* 3 at 3.

<sup>11</sup> *Ibid.*

<sup>12</sup> *Ibid.*

<sup>13</sup> *Manitoba Métis Federation Inc. v Canada (Attorney General)*, 2013 SCC 14, [2013] 1 SCR 623 [*Manitoba Métis Federation*].

<sup>14</sup> Collins, *supra* note 10 at 3.

<sup>15</sup> Raymond Hébert, *Manitoba’s French Language Crisis: A Cautionary Tale* (McGill-Queen’s University Press, 2004) at 4.

<sup>16</sup> Caron, *supra* note 7 at para 17.

<sup>17</sup> *Manitoba Métis Federation*, *supra* note 13 at para 23.

<sup>18</sup> Collins, *supra* note 10 at 3.

<sup>19</sup> *Manitoba Métis Federation*, *supra* note 13 at para 25.

<sup>20</sup> Collins, *supra* note 10 at 3.

Assembly of Assiniboia,” which consisted of equal Francophone and Anglophone parish representatives, created a “List of Rights” that eventually became the template for the *Manitoba Act, 1870*.<sup>21</sup> Although the List of Rights formed the template for the *Manitoba Act, 1870*, the piece of legislation that officially brought Manitoba into Confederation,<sup>22</sup> many of the demands were not ultimately adopted into legislation.<sup>23</sup> Nevertheless, similar to the express legislative bilingualism provided for in s. 133 of the *Constitution Act, 1867*,<sup>24</sup> the *Manitoba Act* clearly and expressly deals with bilingualism. Article 23 states:

Either the English or the French language may be used by any person in the debates of the Houses of the Legislature and both those languages shall be used in the respective Records and Journals of those Houses; and either of those languages may be used by any person, or in any Pleading or Process, in or issuing from any Court of Canada established under the Constitution Act, 1867, or in or from all or any of the Courts of the Province. The Acts of the Legislature shall be Printed and published in both those languages.<sup>25</sup>

Despite this constitutional recognition of bilingualism in Manitoba, Riel’s hard-fought battle to ensure the protection of French language rights was far from settled. Since 1870, Winnipeg saw a significant influx of people, the majority coming from Ontario.<sup>26</sup> As a result, by 1890 only a small minority of Manitoba’s population was Franco-Manitoban.<sup>27</sup> This set the stage for fundamental legislative changes that “were to sweep away all guarantees enshrined in the *Manitoba Act* in 1870.”<sup>28</sup> Specifically, the *Official Languages Act* of 1890 made English the sole official language in Manitoba, and although “for most mainstream historians, [sections 22 and 23 of the *Constitution Act, 1867*] made Manitoba a bilingual province

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<sup>21</sup> Grafton, *supra* note 9 at 35.

<sup>22</sup> Collins, *supra* note 10 at 4.

<sup>23</sup> Caron, *supra* note 7 at para 68.

<sup>24</sup> *Ibid* at para 42.

<sup>25</sup> *Manitoba Act, 1870*, 33 Vict c 3, s 23.

<sup>26</sup> Collins, *supra* note 10 at 4.

<sup>27</sup> *Ibid*.

<sup>28</sup> Hébert, *supra* note 15 at 11.

where confessional rights were guaranteed,”<sup>29</sup> “dual, equally funded denominational schools” were abolished.<sup>30</sup> The *Official Languages Act* was eventually successfully challenged; however, Manitoba continued to disregard its constitutional obligations to a great extent, which further contributed to historical tensions surrounding language rights in the province.<sup>31</sup>

In 1897 the Government of Manitoba and Government of Canada made an agreement that reestablished some French language protection after the *Official Languages Act* of 1890. This agreement became known as the Laurier-Greenway compromise.<sup>32</sup> It provided that where the necessary numbers and demand were present, catholic teachers could be employed and religious instruction could be conducted in public schools.<sup>33</sup> This was noteworthy because language was significantly intertwined with religion, and Catholicism was predominantly associated with French.<sup>34</sup> In acknowledgment of the relationship between religion and language, the agreement stipulated that minority languages could be taught where there were at least ten students in a particular school who spoke that language.<sup>35</sup> In effect, French was treated the same as any other minority language in Manitoba.<sup>36</sup> This change theoretically made the Manitoba school system multilingual, at least for a time.

The year 1916 marked another step back for French language rights in Manitoba. Due to the population influx, by 1907 thirteen different languages were being used as the language of instruction in Manitoba schools, and the department of education was having a difficult time finding enough bilingual, or even unilingual teachers.<sup>37</sup> This factor, among

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<sup>29</sup> *Ibid* at 8.

<sup>30</sup> Collins, *supra* note 10 at 4.

<sup>31</sup> *Re Manitoba Language Rights*, [1985] 1 SCR 721 at paras 12-14, 19 DLR (4th) 1 [*Re Manitoba Language Rights*].

<sup>32</sup> Hébert, *supra* note 15 at 12.

<sup>33</sup> *Ibid*.

<sup>34</sup> *Ibid*.

<sup>35</sup> *Ibid*.

<sup>36</sup> *Ibid*.

<sup>37</sup> Nelson Wiseman, “The Questionable Relevance of the Constitution in Advancing Minority Cultural Rights in Manitoba” (1992) 24:4 *Can J of Political Science* 697 at

others, helped to set the stage for a legislative response to the diminishing reputation of Manitoba's school system.<sup>38</sup> With the influence of Dr. R. S. Thornton, the Minister of Education at the time, the Liberal government passed the *Thornton Act*.<sup>39</sup> The *Thornton Act* abolished bilingual schools, making English the sole language of instruction in public schools.<sup>40</sup> In the words of Ken Osborne, Dr. Thornton was "an untiring advocate of using the schools to teach British citizenship."<sup>41</sup> Therefore, although the Franco-Manitoban community quietly resisted through somewhat covert French language instruction,<sup>42</sup> the compromises made in the late 1890s lost traction and the French community lost what little rights they had left. For about 40 years from 1916, the Franco-Manitoban community, to a large extent, merely subsisted.<sup>43</sup> It was not until 1970 that the first NDP Government of Manitoba, under the leadership of Edward Schreyer, reinstated French-language education rights to all grades and French was recognized as an official language of instruction alongside English.<sup>44</sup>

Although commendable, the legalization of French language education was not enough for all members of the Francophone community. Georges Forest was a persistent advocate for the Francophone community who was dissatisfied with progress being made in Manitoba concerning French-language rights.<sup>45</sup> Forest found himself at the Supreme Court of Canada after receiving a parking ticket in 1976 written in English only.<sup>46</sup> The issue was whether provisions of the *Official Languages Act* of 1890, which made English the only official language of Manitoba, were *ultra vires* or inoperative to the extent that they abrogated section 23

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<sup>38</sup> Hébert, *supra* note 15 at 13.

<sup>39</sup> *Ibid.*

<sup>40</sup> *Ibid.*

<sup>41</sup> Ken Osborne, "One Hundred Years of History Teaching in Manitoba Schools: Part 1: 1897-1927" (1998) 36 *Manitoba History* 3 at 10.

<sup>42</sup> Collins, *supra* note 10 at 4-5.

<sup>43</sup> *Ibid* at 4.

<sup>44</sup> *Ibid* at 5.

<sup>45</sup> *Ibid.*

<sup>46</sup> *Ibid.*

of the *Manitoba Act, 1870*.<sup>47</sup> Forest stood for the position that French was an official language of Manitoba and the ticket ought to have been written in both languages. Freeman C.J. of the Court of Appeal stated: “s. 23 of the *Manitoba Act* embodies a constitutionally based right to the use by any person of English or French in the courts of Manitoba, and that that right cannot be unilaterally abrogated by the legislature of the province of Manitoba.”<sup>48</sup> This view was affirmed by the Supreme Court, and the appeal of the Attorney General of Manitoba was dismissed.<sup>49</sup> In effect, section 23 of the *Manitoba Act* had been restored.

The *Forest* decision was a significant step in the right direction, however, it was far from the end. Politicians refusing to legally recognize French language rights, despite victories in the court room for the francophone community, was an ongoing theme. For instance, the *Official Languages Act* was found unconstitutional in lower courts three times before the Supreme Court ruling, including in 1892, 1909 and 1976.<sup>50</sup> Politicians even disregarded the 1979 *Forest* Supreme Court decision to an extent. For example, in the 4<sup>th</sup> and 5<sup>th</sup> session of the 31<sup>st</sup> Legislature of Manitoba, occurring between 1980-81, “the vast majority of the Acts of the Legislature of Manitoba were enacted, printed and published in English only.”<sup>51</sup>

In the early 1980s, political inaction on French language rights was once again brought to the forefront when Roger Bilodeau challenged a speeding ticket issued in Manitoba. He argued the ticket was invalid because the statute under which it was issued was only written in English.<sup>52</sup> In other words, the statute was constitutionally required to be in both English and French as per section 23 of the *Manitoba Act*. To avoid a potentially more drastic remedy from the Supreme Court of Canada, the

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<sup>47</sup> *Attorney General of Manitoba v Forest* [1979] 2 SCR 1032, at para 1, 101 DLR (3d) 385 [Forest].

<sup>48</sup> *Forest v Manitoba (Attorney General)* (1979), 98 DLR (3d) 290 at para 33, [1979] 4 WWR 229.

<sup>49</sup> *Forest*, *supra* note 47 at para 13.

<sup>50</sup> *Re Manitoba Language Rights*, *supra* note 31.

<sup>51</sup> *Ibid* at para 17.

<sup>52</sup> Bryan Schwartz & Erin Melrose, “The French Language Debate” (2003) 30:1 Man LJ - UTGB 31 at 31.

Howard Pawley NDP government entered into negotiations with the Francophone community and the federal government in 1982.<sup>53</sup> They came to an agreement in which Bilodeau would adjourn his case before the Supreme Court, in exchange for some important changes in Manitoba law. Significantly, Manitoba would amend the constitution so that French language services would be guaranteed at government offices, French and English would be declared the official languages of Manitoba, and the government would translate only the major unilingual statutes into French.<sup>54</sup> The draft resolution on constitutional amendments was tabled in 1983.<sup>55</sup> This resulted in uproar amongst the public and in the legislature, ultimately causing great political divide.<sup>56</sup> This became known as Manitoba's French-language crisis.<sup>57</sup>

Raymond Hébert describes the French language crisis in Manitoba as: "one of the worst political and legislative crises in Manitoba history, a crisis that was to divide Manitobans profoundly and that, at its height, repeatedly tore the provincial legislature into chaos and virtually paralyzed the provincial government."<sup>58</sup> This description truly reflects the realities of the time. When the draft constitutional amendments were tabled in 1983 by Attorney General Ronald Penner, the Conservative Opposition (the "Opposition") resisted them relentlessly. Constant bell-ringing, signaling division in the legislature, was used by the Opposition to delay votes on the issue in the House.<sup>59</sup> In February of 1984, the bells rang continuously for 12 consecutive days.<sup>60</sup> The Pawley government ultimately determined it was unable to wait any longer for the Opposition to return and they were forced to back down on the issue.<sup>61</sup> This political resistance led to the

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<sup>53</sup> *Ibid.*

<sup>54</sup> *Ibid.*

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

<sup>56</sup> *Ibid* at 32.

<sup>57</sup> Hébert, *supra* note 15.

<sup>58</sup> *Ibid* at 71.

<sup>59</sup> Schwartz & Melrose, *supra* note 52 at 33.

<sup>60</sup> *Ibid.*

<sup>61</sup> *Ibid* at 32.

longest legislative session in Manitoba's history,<sup>62</sup> and it prefaced an era of further political caution concerning French-language rights.

In the words of Steve Ashton, the appointed Government Whip of Pawley's NDP, "there was a gut reaction against a constitutional amendment at the time."<sup>63</sup> Concerns for the costs and effects of a constitutional guarantee of bilingual services and official bilingualism were apparent.<sup>64</sup> The Opposition expressed concern that there was no need for further constitutional establishment of French language rights because the goal of improving French-language services was already being satisfied.<sup>65</sup> This highlights a fear of permanent recognition of constitutional French language guarantees and skepticism towards their irrevocable protection through a constitutional amendment. Furthermore, whereas the NDP government was operating under the pressure of the Bilodeau case and the potential risk of more severe action by the Supreme Court, the Opposition did not share the same reality.<sup>66</sup> They were not fully convinced of the chaos that would ensue from a decision in favour of Bilodeau, and they were unhappy with the notion that a small minority could essentially hold the province hostage.<sup>67</sup> In essence, they were unwilling to concede that constitutional amendment was the solution to minority rights protection in this instance.

The polarization with respect to the constitutional initiative can also be explained, in part, by political strategy. In an interview conducted years later with Ronald Penner, he stated:

[S]ome opposed [the amendments] ideologically. Most, I would think just opportunistically, thought this could defeat the government and that the opposition should do everything to make sure that this becomes a hot-button political issue from which the NDP would never recover.<sup>68</sup>

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<sup>62</sup> *Ibid* at 34.

<sup>63</sup> *Ibid* at 90.

<sup>64</sup> *Ibid* at 32.

<sup>65</sup> Hébert, *supra* note 15 at 92.

<sup>66</sup> *Ibid*.

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

<sup>68</sup> Schwartz & Melrose, *supra* note 52 at 81.

Although Penner believed the Opposition was wrong on the principles involved, he thought they were “doing the ‘right thing’ politically.”<sup>69</sup> These arguably self-serving motives played a role in the calculated governmental actions that were to follow regarding French language rights in Manitoba.

Arising out of the Manitoba French Language Crisis and failed attempts at constitutional amendments, in 1985 the Supreme Court of Canada released a momentous decision in *Reference Re Manitoba Language Rights*.<sup>70</sup> The court decided that all statutes and regulations in Manitoba not printed and published in French and English were invalid and of no force and effect.<sup>71</sup> This meant that all laws passed since 1890 had to be translated into French. However, to avoid a legal vacuum and chaos, the court issued a delayed declaration of invalidity to afford time to the province to translate its statutes.<sup>72</sup>

In 1989, Premier Gary Filmon’s Progressive Conservative government issued the first version of the French Language Services Policy (“FLSP”).<sup>73</sup> The policy was amended in 1999 after the publication of the Chartier Report, *Above All, Common Sense*, prepared by the Commissioner Honourable Judge Richard Chartier, now Chief Justice of Manitoba.<sup>74</sup> The purpose of this policy “is to allow this community and the institutions serving it to access comparable government services in the language of the laws of Manitoba.”<sup>75</sup> In other words, it is intended to help provide a comparable level of government services in French and English. The early measures taken to implement it were originally focused primarily on the delivery of services, however now there is a more comprehensive approach

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

<sup>70</sup> *Re Manitoba Language Rights*, *supra* note 31.

<sup>71</sup> *Ibid* at para 166.

<sup>72</sup> *Ibid.*

<sup>73</sup> Government of Manitoba, News Release, “Premier Marks 20th Anniversary of Manitoba’s French Language Services Policy on the International Day of the Francophonie” (19 March 2010), online: <<http://news.gov.mb.ca/news/print,index.html?item=8004>>.

<sup>74</sup> Commissioner Honourable Judge Richard Chartier, *Above All, Common Sense, Report and Recommendations on French Language Services Within the Government of Manitoba* (Manitoba: May 1998) [Chartier Report].

<sup>75</sup> Francophone Affairs Secretariat, *French Language Services Policy* (Statement of Policy) (Manitoba: Francophone Affairs Secretariat, March 1999) [FLSP].

to promote the development and vitality of the francophone community.<sup>76</sup> The policy incorporates the key principle of “Active Offer” which will be discussed in greater detail below.<sup>77</sup> Importantly, the policy was not backed with legislative guarantees.

Since the amendments to the FLSP in 1999, incremental steps have been taken to continue to recognize Francophone rights. Notably, *The Bilingual Service Centres Act* enacted in 2012 legislated for the provision of government programs and services in French and English in service centres located in 6 specified regions in Manitoba with a high degree of French language vitality.<sup>78</sup> Bill 5, however, has provided a broad legislative framework for enhancing the vitality of Manitoba’s Francophone community and supporting and assisting its development, marking significant progress in the province.

### III. SUMMARY OF BILL 5

In June 2016, Bill 5 became the most recent change to Manitoba’s protection of its Francophone community. The purpose clause states: “The purpose of this Act is to provide a framework for enhancing the vitality of Manitoba’s Francophone community and supporting and assisting its development through the work of the secretariat and the advisory council and the use of French language services plans.”<sup>79</sup> It essentially legislates existing administrative structures and tools designed to support the Francophone community.<sup>80</sup>

The Bill sets out a broad and inclusive meaning of francophone in Manitoba. It stipulates that to be Francophone, one need not necessarily

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<sup>76</sup> Francophone Affairs Secretariat, *The Provincial Government and the French Fact in Manitoba: From a Difficult Past to a Promising Future* (Powerpoint Presentation) (Manitoba: Francophone Affairs Secretariat, September 2009) at 22, online: <<http://www.gov.mb.ca/fls-slf/bilingual.html>> [Manitoba PowerPoint].

<sup>77</sup> FLSP, *supra* note 75.

<sup>78</sup> *The Bilingual Service Centres Act*, CCSM, c B37.

<sup>79</sup> FCESA, *supra* note 5, s 1(2).

<sup>80</sup> Government of Manitoba, News Release, “Manitoba Government Adopts the Francophone Community Enhancement and Support Act” (30 June 2016), online: <<http://news.gov.mb.ca/news/index.html?item=38513>>.

have French as their mother tongue.<sup>81</sup> The meaning of Francophone also extends to those who use French in their daily life and who have a “special affinity for the French language.”<sup>82</sup>

The Bill defines four principles that are fundamental to its administration.<sup>83</sup> Firstly, recognition of the continuing contribution of, and benefit of enhancing the vitality of the Francophone community to Manitoba.<sup>84</sup> Secondly, the principle of progress provides that “steady growth in the provision of French language services across sectors will enhance the vitality of Manitoba’s Francophone community and benefit the province as a whole.”<sup>85</sup> Thirdly, regard must also be had for the benefits of collaboration and dialogue between all levels of government, public bodies and Francophone community representatives in achieving the purpose of the FCESA. Finally, “[t]he active offer concept is the cornerstone for the provision of French language services whereby these services are to be made evident, readily available and easily accessible to the public and are to be of comparable quality to English language services.”<sup>86</sup>

A significant portion of the Bill is dedicated to formally setting out the role of the minister responsible for Francophone Affairs,<sup>87</sup> the Francophone Affairs Secretariat,<sup>88</sup> and the Francophone Affairs Advisory Council.<sup>89</sup> The minister “is responsible for taking measures to enhance the vitality of Manitoba’s Francophone community.”<sup>90</sup> This includes such things as the encouragement of Francophone representation on the boards of government agencies<sup>91</sup> and advocating for the needs of the

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<sup>81</sup> FCESA, *supra* note 5, s 1(2).

<sup>82</sup> *Ibid.*

<sup>83</sup> *Ibid.*, s 3.

<sup>84</sup> *Ibid.*

<sup>85</sup> *Ibid.*

<sup>86</sup> *Ibid.*

<sup>87</sup> *Ibid.*, s 4.

<sup>88</sup> *Ibid.*, s 6.

<sup>89</sup> *Ibid.*, s 8.

<sup>90</sup> *Ibid.*, s 4.

<sup>91</sup> *Ibid.*, s 4(c).

Francophone community to be considered in policies, programs, and services of relevant bodies.<sup>92</sup> It also requires that the minister encourage government agencies and departments to be supportive of Francophone community development,<sup>93</sup> as well as take measures to support continuing implementation of the FLSP.<sup>94</sup> The minister must review the policy at least once every five years and may recommend amendments.<sup>95</sup>

Bill 5 also contains specific provisions relating to the mandate and role of the Francophone Affairs Secretariat, which was established in 1981.<sup>96</sup> The Bill stipulates that the Secretariat continues under the direction and control of the minister and that she or he must advise the government about francophone affairs, including what measures are to be taken to support and assist the development and vitality of the Francophone community.<sup>97</sup> In fulfilling its mandate, the secretariat may, among other things, help with the implementation of the FLSP, serve as a liaison between the Government and French-speaking organizations in the Province, and assist with the development of French-language services plans required by the FCESA.<sup>98</sup>

Another important aspect of the Bill is that it establishes an advisory council.<sup>99</sup> Through the establishment of the Advisory Council, senior officials of the government work with leaders from the francophone community to achieve the goals of the FCESA. It may provide recommendations or advise the minister about any matter “relating to enhancing the vitality of Manitoba’s Francophone community and supporting and assisting its development.”<sup>100</sup> For instance, it may review and make recommendations on the FLSP and French-language service

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<sup>92</sup> *Ibid*, s 4(b).

<sup>93</sup> *Ibid*, s 4(d).

<sup>94</sup> *Ibid*, s 4(a).

<sup>95</sup> *Ibid*, s 5(2).

<sup>96</sup> Government of Manitoba, “Francophone Affairs Secretariat”, online <<https://www.gov.mb.ca/fls-slf/intro.html>>.

<sup>97</sup> FCESA, *supra* note 5, ss 6(1)-(2).

<sup>98</sup> *Ibid*.

<sup>99</sup> *Ibid*, s 8(1).

<sup>100</sup> *Ibid*, s 10(1).

plans.<sup>101</sup> It is required to include the Clerk of the Executive Council and the president and chief executive officer of the Société Franco-Manitobaine (“SFM”).<sup>102</sup> The SFM was established in 1968 and is a well-known advocate and political representative for Manitoba’s French-speaking community.<sup>103</sup> They work to ensure there is an ongoing dialogue between the Franco-Manitoban community and Manitoba government regarding the maintenance of the French language and culture.<sup>104</sup> The Advisory Council must have at least five deputy ministers appointed by the minister or their designates, the executive director, and at least five more people from the Manitoba Francophone community appointed by the minister, upon the recommendation of the SFM, who have shown a commitment to enhancing the vitality of their community.<sup>105</sup>

The Bill also requires every public body to prepare and submit a proposed multi-year French-language service plan.<sup>106</sup> This feature of the Bill is significant because the scope of this requirement is quite broad, as “public body” includes not only government departments, but also an array of government agencies including Crown corporations.<sup>107</sup> Furthermore, independent officers such as the Children’s Advocate and the Ombudsman must also prepare and submit a plan.<sup>108</sup> An important role of the Advisory Council is to review these plans and provide advice and recommendations to the minister.<sup>109</sup> These plans must include a description of how the priorities of Manitoba’s Francophone community relates to their French language services, and their capacity to provide these services.<sup>110</sup> They must also describe the provision of French language

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<sup>101</sup> *Ibid*, s 10(2).

<sup>102</sup> *Ibid*, s 8(2).

<sup>103</sup> Office of the Commissioner of Official Languages, “Official languages in the provinces and territories” online: <[http://www.ocolclo.gc.ca/en/language\\_rights/provinces\\_territories](http://www.ocolclo.gc.ca/en/language_rights/provinces_territories)>.

<sup>104</sup> *Ibid*.

<sup>105</sup> FCESA, *supra* note 5, s 8(2).

<sup>106</sup> *Ibid*, s 11(1).

<sup>107</sup> *Ibid*, s 1(1).

<sup>108</sup> *Ibid*, s 15.

<sup>109</sup> *Ibid*, s 12.

<sup>110</sup> *Ibid*, s 11(2).

services by each administrative tribunal that falls within its mandate, describe any other measures it takes concerning the purpose of the FCESA, and any other matter that is required by regulation or by the minister.<sup>111</sup> To help ensure actual implementation of the plan, the minister may require that a public body provide a progress report.<sup>112</sup>

Finally, it is also worth mentioning that the FCESA gives broad regulation-making powers to the Lieutenant Governor in Council. This will be further discussed in the analysis section below as a positive element of the Bill.<sup>113</sup>

#### IV. DEBATE IN THE LEGISLATURE

This section will summarize the legislative process of Bill 5 from first reading until Royal Assent. A significant feature of the Bill is that it was amicably and unanimously passed. Many of the speakers alternated between the two languages, which is symbolic of the unifying spirit of the Bill. A general theme of cooperation and acknowledgement of the Bill's importance permeated each stage.

##### A. First Reading

On June 14, 2016, the Honourable Rochelle Squires, MLA for Riel and Minister responsible for Francophone Affairs, moved that Bill 5 be read for the first time.<sup>114</sup> She stated that the purpose of the Bill is to support the enhancement of the Francophone community.<sup>115</sup> Furthermore, she stated that it sets out the mandate of the Minister responsible for Francophone Affairs, of the Francophone Affairs Secretariat and of the Advisory Council on Francophone Affairs.<sup>116</sup>

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<sup>111</sup> *Ibid.*

<sup>112</sup> *Ibid.*, s 14.

<sup>113</sup> *Ibid.*, s 17.

<sup>114</sup> Manitoba, Legislative Assembly, *Debates and Proceedings*, 41st Leg, 1st Sess, Vol LXIX, No 20B, (14 June 2016) at 799.

<sup>115</sup> *Ibid.*

<sup>116</sup> *Ibid.*

## B. Second Reading

On June 21, 2016, the Hon. Squires moved that Bill 5 be read for the second time.<sup>117</sup> The tone of the proceedings was amicable. Squires identified that the Bill is very similar to the bill introduced by the previous administration but that it incorporated some feedback from the SFM.<sup>118</sup>

Mr. Greg Selinger, MLA for St. Boniface and former Premier of Manitoba as official leader of the NDP party, commended the minister for bringing Bill 5 forward so early in the new government's mandate.<sup>119</sup> Having tabled a very similar bill in the previous legislative session, it was predictable that he would support the Bill. He did not offer any criticism of the changes made. Among other things, he highlighted the broad scope of the French-language service plan requirement and the important role the Bill will play in the support and protection of the Francophone community.<sup>120</sup>

Ms. Cindy Lamoureux, a member of the Liberal party, stated that she thought it was encouraging to have the roles of the Minister Responsible for Francophone Affairs, Francophone Affairs Secretariat, and the Francophone Affairs Advisory Council spelled out so they could be better understood.<sup>121</sup> She specifically noted that she was reassured by the requirement that the Advisory Council meet at least twice a year.<sup>122</sup> In closing, she stated that the Liberal caucus would support Bill 5.<sup>123</sup>

The Hon. Jon Gerrard mirrored many of the positive comments concerning Bill 5 that were already made. As others already had, he spoke to the diversity of the francophone community and the importance of a Bill that recognizes that.<sup>124</sup> He also placed some friendly pressure on Minister Squires to ensure French-language services plans be put into place

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<sup>117</sup> Manitoba, Legislative Assembly, *Debates and Proceedings*, 41st Leg, 1st Sess, Vol LXIX, No 25A, (June 21 2016) at 1182 [*Debate* (21 June 2016)].

<sup>118</sup> *Ibid* at 1183.

<sup>119</sup> *Ibid* at 1186.

<sup>120</sup> *Ibid* at 1188.

<sup>121</sup> *Ibid* at 1185.

<sup>122</sup> *Ibid* at 1185.

<sup>123</sup> *Ibid* at 1185.

<sup>124</sup> *Ibid* at 1193.

as soon as possible and to ensure that resources are available for the quick development of these plans.<sup>125</sup>

### C. Committee

After the cordial second reading, Bill 5 went before the standing committee on Legislative Affairs on June 28, 2016.<sup>126</sup> Fourteen public speakers appeared to present, offering a variety of perspectives. The committee stage continued the overarching tone of support for the Bill and commendation of the new provincial government in their expedience in bringing Bill 5 forward. The presentations were well prepared, often personal, and very positive.

The first presenter was Mr. Edmond Labossiere, an out of town presenter for the Economic Development Council for Manitoba Bilingual Municipalities.<sup>127</sup> He offered an economic perspective, stating that Bill 5 will contribute to continuing economic development of Francophone communities.<sup>128</sup> He emphasized that bilingualism is economically beneficial for Canada as a whole.<sup>129</sup> Mr. Labossiere also commended the inclusive definition of francophone.<sup>130</sup> In conclusion, he expressed his hope that the Bill would receive unanimous support.<sup>131</sup>

Offering a historical perspective, Ms. Paulette Carriere-Dupont subsequently spoke on behalf of “L’Union nationale métisse Saint-Joseph du Manitoba”.<sup>132</sup> She explained that the Union is the oldest association in Manitoba’s Francophone community and that it has played an active role in protecting and fighting for Métis rights since its creation.<sup>133</sup> She highlighted the turbulent history of Métis peoples and their struggle to

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<sup>125</sup> *Ibid* at 1192-1193.

<sup>126</sup> Manitoba, Legislative Assembly, *Standing Committee on Legislative Affairs*, 41st Leg, 1st Sess, Vol LXIX, No 1 (28 June 2016) at 8 [*Committee* (28 June 2016)].

<sup>127</sup> *Ibid* at 10.

<sup>128</sup> *Ibid*.

<sup>129</sup> *Ibid*.

<sup>130</sup> *Ibid* at 11.

<sup>131</sup> *Ibid*.

<sup>132</sup> *Ibid* at 14.

<sup>133</sup> *Ibid* at 15-16.

preserve their culture and identity.<sup>134</sup> In light of historical tensions, she emphasized the importance of political parties uniting to pass Bill 5.<sup>135</sup> In unreserved support, she commended the Bill in its contribution to a bilingual, multicultural, respectful and socially just Manitoba.<sup>136</sup>

Mr. Bernard Lesage of the Division scolaire franco-manitobaine was one of the many who stood to offer support for the Bill at the committee stage and to congratulate the government in introducing it. However, Mr. Lesage's presentation was unique in that it proposed suggestions for the Bill. Firstly, he suggested that the requirement that five members of Manitoba's Francophone community be on the Advisory Council be increased to eight, six of whom would come from the education, health, immigration, economic development, arts and culture sectors.<sup>137</sup> He further suggested that rather than the SFM advising for the appointment of these members, organizations within those sectors should be directly involved.<sup>138</sup> There was no debate on this, and no such changes were ultimately made.

Ms. Jacqueline Blay, the president of SFM, later spoke on behalf of the organization. Ms. Blay explained that Francophones have been waiting for this Bill since 1890 when Francophone rights were abolished and that the SFM has been expressly calling for it since 2007.<sup>139</sup> In strong support of Bill 5, she stated:

On behalf of our members and the entire Francophone community, we look forward to the unanimous passing of Bill 5 on the enhancement and support of the francophone community, as soon as possible, we are of the view that it is the key to the longevity and sustainability of our community, which we have been waiting and searching for, for such a long time. In 2016, our wait and our quests are over.<sup>140</sup>

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<sup>134</sup> *Ibid* at 16.

<sup>135</sup> *Ibid* at 16.

<sup>136</sup> *Ibid* at 17.

<sup>137</sup> *Ibid* at 40.

<sup>138</sup> *Ibid*.

<sup>139</sup> *Ibid* at 19.

<sup>140</sup> *Ibid* at 20.

Ms. Blay went so far as to state that this Bill restored the status of Francophones as equal citizens in Manitoba.<sup>141</sup> She commended the government on consulting with them and tabling the Bill early in their mandate.<sup>142</sup> She also indicated an appreciation of SFM's ability to have an ongoing dialogue with the Minister by the establishment of the Advisory Council.<sup>143</sup>

Overall, the community leaders who appeared at the committee stage applauded this important step in the relationship between Franco-Manitobans and the Manitoba government. No amendments were made.

#### **D. Third Reading**

The third reading took place on June 30, 2016.<sup>144</sup> There was once again a general theme of reiterating the importance of Bill 5 in enhancing support for the francophone community. The House adopted the Bill unanimously.<sup>145</sup>

#### **E. Royal Assent and Coming into Force**

Bill 5 received Royal Assent and came into effect on June 30, 2016, the same day as the third reading.<sup>146</sup>

### **V. MEDIA COVERAGE**

Bill 5 not only received overwhelmingly positive feedback from politicians and the participating community representatives and members throughout the formal legislative process, but the media coverage also portrayed the Bill in a positive light. On June 14, 2016, the day the Bill was introduced, Nick Martin of the *Winnipeg Free Press* wrote: "the provincial NDP and Progressive Conservatives have finally found

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<sup>141</sup> *Ibid* at 19.

<sup>142</sup> *Ibid*.

<sup>143</sup> *Ibid* at 20.

<sup>144</sup> Manitoba, Legislative Assembly, *Debates and Proceedings*, 41st Leg, 1st Sess, Vol LXIX, No 32B, (June 30 2016) at 1762.

<sup>145</sup> *Ibid* at 1766.

<sup>146</sup> *Ibid* 1767.

something to agree upon.”<sup>147</sup> His article was illustrative of the political unity marked by Bill 5, despite any current or historical divides.

Shortly after the adoption of Bill 5, the *Winnipeg Free Press* released an article titled “Manitoba rises above its history on francophone rights.” The author, Raymond Hébert, an academic authority on Francophone rights in Manitoba, stated that “[a]t the national level, Manitoba is being recognized as a leader among provinces because of its explicit legislative recognition of the francophone community.”<sup>148</sup> In this article, Hébert also cited Ontario’s French Language Services Commissioner, François Boileau, as stating that Manitoba is now a “beacon” in the field.<sup>149</sup>

Bernard Bocquel reported on the Bill for La Liberté, Manitoba’s French-language newspaper. In his article titled “La Nouvelle Francophonie Reconnue,” he expressed the opinion that Bill 5 showed progress in Manitoba surrounding language rights.<sup>150</sup> However, he indicated that the Bill was presented at a time in which there was less resistance surrounding the subject and therefore perhaps accepted with greater ease than what may have been the case for previous governments. Bocquel also highlighted an interesting difference in the French and English titles of the Bill. Whereas the English title of the Bill expressly contains the term ‘community,’ the French translation does not. He noted that the absence of the word ‘community’ in the French title is important as it includes anyone who wishes to cultivate a French/English Bilingualism, and does not restrict the accessibility of language rights to those who have integrated into a hypothetical community. Overall, he believed work must still be done in Manitoba, but that Bill 5 is an encouraging step for recognizing bilingualism in the province, and he wishes for the minister to continue to work for positive change.

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<sup>147</sup> Nick Martin, “Francophone bill spurs consensus”, *Winnipeg Free Press* (14 June 2016), online: <<http://www.winnipegfreepress.com/local/francophone-bill-spurs-consensus-383040351.html>>.

<sup>148</sup> Raymond M Hébert, “Manitoba rises above its history on francophone rights”, *Winnipeg Free Press*, (5 July 2016), online: <<http://www.winnipegfreepress.com/opinion/analysis/manitoba-rises-above-its-history-on-francophone-rights-385505381.html>>.

<sup>149</sup> *Ibid.*

<sup>150</sup> Bernard Bocquel, “La Nouvelle Francophonie Reconnue”, *La Liberté* (22 June 2016).

In summary, although media coverage was not extensive, it was telling of the importance of the Bill, portraying it to the public as a significant step for Manitoba and Francophone rights.

## VI. ANALYSIS

This section will analyze the *FCESA*. It will first highlight keys aspects of the historical and political context from which it arose that suggest it is a success for Manitoba. It will then discuss some successes and limitations of its specific features. For illustrative purposes, this article will discuss some aspects of similar Ontario legislation, though it will not engage in a full comparative analysis. As previously noted, this analysis will ultimately corroborate the view that the passing of Bill 5 has, in some ways, put Manitoba in a leading position concerning Francophone community development.

Manitoba's French-language rights progress has been incremental and politically measured. To a great extent, this cautious approach persisted in Manitoba until the tabling of Bill 5. In Penner's interview, upon being asked if there was anything he would do differently with respect to the French language issue, he responded he would not have tried to solve the problem by amending the *Manitoba Act* back in 1983.<sup>151</sup> The Conservative opposition to the NDP's solution at the time proved to be too great a hurdle to overcome.<sup>152</sup> Penner notes, however, that it was not just the Opposition that opposed the amendments, but there was also skepticism amongst the public and even in their own caucus.<sup>153</sup> This division was detrimental to what could have been a momentous shift in Francophone rights. Broad legislative and constitutional strokes without public and political support were ineffective then, and Manitoba did not attempt it again in enacting the *FCESA*. This, in turn, emphasizes that a more low-key and incremental approach is an important element of Manitoba's success.

The unanimous political acceptance of Bill 5 was empowered by the incremental establishment of Francophone rights in Manitoba and is a key

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<sup>151</sup> Schwartz & Melrose, *supra* note 52 at 82.

<sup>152</sup> *Ibid* at 83.

<sup>153</sup> *Ibid* at 82-83.

element of the success of Bill 5. When the Pawley government introduced the negotiated agreement for constitutional change in the early 1980s, Sterling Lyon's Conservatives expressed disapproval of the government "attempting to 'shove' the agreement down the throat of the people of Manitoba."<sup>154</sup> This was a significant objection to the proposed amendments that eventually lead to paralysis in the legislature. The shift in political support through incremental governmental action is helping to ensure a sustainable recognition of Francophone rights in Manitoba. In this sense, Francophone minority rights have been profoundly protected through the enactment of the Bill.

The time frame in which it was tabled by the Conservative government is further indicative of reconciled political tensions. As previously mentioned, a similar Bill was initially introduced by Selinger's NDP on November 24, 2015.<sup>155</sup> The Progressive Conservative party, under the leadership of Brian Pallister, was sworn into power on May 3, 2016.<sup>156</sup> They wasted no time introducing Bill 5, having introduced it just over one month into their mandate. Furthermore, the Conservative government left it mostly unchanged.<sup>157</sup> In fact, an argument could be made that they went slightly further than the previous government in supporting the Francophone community. For example, Bill 5 lists a greater number of government agencies under the definition section that in turn must submit French-language service plans.<sup>158</sup> Commissioner François Boileau went so far as to state: "By introducing this bill so early in the new session of Parliament, the government is making it clear that the Manitoban Francophonie is no longer a partisan issue but rather a matter of equity and respect for a community that has made such a great contribution to

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<sup>154</sup> Hébert, *supra* note 15 at 93.

<sup>155</sup> Government of Manitoba, News Release, "Manitoba Government Introduces Proposed Legislation that would Support Francophone Community" (24 November 2015) online: <<http://news.gov.mb.ca/news/index.html?item=36861>>.

<sup>156</sup> "Brian Pallister sworn in as Manitoba premier" *CBC News* (3 May 2016) online: <<http://www.cbc.ca/news/canada/manitoba/manitoba-brian-pallister-progressive-conservatives-sworn-in-1.3564106>>.

<sup>157</sup> Bill 6, *The Francophone Community Enhancement and Support Act*, 5th Sess, 40th Leg, Manitoba, 2015.

<sup>158</sup> FCESA, *supra* note 5, s 1.

building the province.”<sup>159</sup> Even if this is too optimistic and the extent of Franco-Manitoban rights remains a topic of debate in the future, the collegiality, swiftness in legislative action, and mutual support amongst the political parties suggest a successful progression towards reconciliation of political tensions concerning francophone rights in Manitoba.

The enthusiasm for Bill 5 shown by the SFM further underscores Manitoba’s success. The SFM has experienced a very long, and uphill battle to have Francophone rights protected in law. At the pinnacle of the French language crisis, SFM members were harassed and the SFM office was fire-bombed.<sup>160</sup> Whereas their support for the constitutional amendment in 1983 faltered when disagreeable modifications were proposed by the Pawley government in the face of uproar,<sup>161</sup> the SFM’s support for Bill 5 has been unwavering. As already mentioned, the president of the SFM went so far as to say that the Bill restored the status of Francophones as “equal citizens within Manitoba’s population as a whole.”<sup>162</sup> Support from the Franco-Manitoban community is undoubtedly an important element of the success of French language legislation in the province. Through consultation with the SFM in preparing the Bill, in addition to the ongoing legislated requirement that the Francophone community be consulted by virtue of the Advisory Council, Manitoba has taken proactive measures to ensure reconciliation is an ongoing effort.

Although support from the SFM is encouraging for the protection and enhancement of Francophone rights in Manitoba, it is important to remember that the SFM is merely one advocate for Francophone rights, and may not necessarily represent the needs or desires of all sectors of the Francophone community. As a result, some may be of the view that the role the SFM plays in advising for the appointment of members of the Advisory Council may be too far-reaching. For example, as already discussed, Mr. Lesage of the Division scolaire franco-manitobaine who stood to speak to the Bill at the Committee stage, took the position that organizations within specific sectors such as education, health,

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<sup>159</sup> Boileau, *supra* note 6.

<sup>160</sup> Frances Russell, *The Canadian Crucible: Manitoba’s Role in the Great Divide*, (Winnipeg: Heartland Associates, 2003) at 311.

<sup>161</sup> Hébert, *supra* note 15 at 136.

<sup>162</sup> *Committee* (28 June 2016), *supra* note 126 at 19.

immigration, economic development, arts, and culture should have direct involvement. In other words, some may argue that the needs of different sectors of the community may be better served with the involvement of organizations with specialized knowledge in a particular area, rather than the SFM playing such an integral role. Therefore, the requirement that five members of the Advisory Council be appointed on the recommendation of the SFM is encouraging and well-intentioned, but it may not be viewed as an unequivocal success of the Bill by all.

Despite this potential limitation, a look at the context from which Bill 5 arose demonstrates that broad legislative strokes on this historically tense issue without appropriate communication and consultation has proven to be unproductive. An incremental approach has been more successful in ensuring legislated and long-term protection of French minority rights. The unanimous political acceptance and express support from leaders of the Francophone community on Bill 5 demonstrates that the importance and recognition of Francophone rights is becoming common ground within Manitoba's legislature. This is an achievement for Manitoba in itself, not only in terms of reconciling the past but also in ensuring progress is continually made.

In addition to the success of the enactment of Bill 5 in the absence of great controversy and political division, specific provisions of the Bill are also commendable and encouraging. As mentioned, this article will not engage in a full comparative analysis with any other French-language legislation. Rather, it will highlight some key differences with comparable Ontario legislation to gain a better understanding of some of the successes and limitations of Bill 5. To do so, it is helpful first to consider the broad context in which Manitoba French language legislation exists.

The realities of language rights and legislation differ from province to province and territory to territory. Recall that both federal and provincial governments have the power to legislate concerning language. In the federal framework, the *Constitution Act, 1867* provides that either French or English can be used by any person in Canadian Parliament debates and in any Court of Canada.<sup>163</sup> Upon the establishment of the first *Official Languages Act* in 1969, French and English were given equal status in the

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<sup>163</sup> *The Constitution Act, 1867*, 30 & 31 Vict, c 3 at s 133.

federal administration.<sup>164</sup> Furthermore, the Canadian Charter of Rights and Freedoms sets out that English and French are the official languages of Canada and provides that both languages have equal status, rights and privileges in all Canadian Parliament and Government of Canada institutions.<sup>165</sup> It also provides for French and English minority language educational rights.<sup>166</sup>

Legislation, policies, and regulations vary from one province to another. As mentioned, every province except British Columbia has implemented some form of legislation, policy, or regulatory framework with respect to French-language services.<sup>167</sup> Some provinces, including Saskatchewan and Newfoundland and Labrador, have only policy measures for French-language services.<sup>168</sup> Manitoba is one of three provinces, alongside Quebec and New Brunswick, that has constitutionally entrenched language provisions.<sup>169</sup> Only Quebec and Manitoba were subject to constitutional linguistic obligations when they entered confederation.<sup>170</sup> By virtue of New Brunswick's *Official Languages Act* passed in 1969, English and French are both official languages, making it a fully bilingual province.<sup>171</sup>

Ontario does not have constitutional entrenchment of bilingualism, but it has legally recognized French language rights through the *French Language Services Act*<sup>172</sup> (“FLSA”). With the FLSA, Ontario was arguably once a leader in French-language rights legislation.<sup>173</sup> Ontario has the

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<sup>164</sup> Office of the Commissioner of Official Languages, “Understanding your language rights” (1 September 2016), online: <[www.ocolclo.gc.ca/en/language\\_rights/act](http://www.ocolclo.gc.ca/en/language_rights/act)>.

<sup>165</sup> *Ibid.*

<sup>166</sup> *Ibid.*

<sup>167</sup> *Library of Parliament*, *supra* note 2 at 1.

<sup>168</sup> *Ibid* at 2.

<sup>169</sup> *Ibid* at 1.

<sup>170</sup> *Ibid.*

<sup>171</sup> *Ibid* at 2.

<sup>172</sup> *French Language Services Act*, RSO 1990, c F 32 [FLSA].

<sup>173</sup> Ontario, Office of the French Language Services Commissioner, “French Language Services Commissioner calls for revision of the French Language Services Act”, by Sorinna Chim (1 June 2016), online: <<http://csfontario.ca/en/articles/5856>> at para 4.

largest French-speaking population outside of Quebec and therefore deals with a reality unlike other provinces.<sup>174</sup> Furthermore, the *FLSA* is particularly focused on the provision of French language services by the Government of Ontario.<sup>175</sup> The *FCESA*, on the other hand, provides a legislated framework for the protection and enhancement of the vitality of the Francophone community, more broadly.<sup>176</sup> Nevertheless, a look at some elements of the *FLSA* can provide for an interesting way to help measure the successes and limitations of Bill 5.

One element of the *FCESA* that should be commended is its broad and inclusive definition of Francophone. The interpretation clause states that Manitoba's Francophone community means: "those persons in Manitoba whose mother tongue is French and those persons in Manitoba whose mother tongue is not French but who have a special affinity for the French language and who use it on a regular basis in their daily life."<sup>177</sup> As Ms. Michèle Lécuyer-Hutton of Pluri-elles pointed out in the committee stage, "special affinity for the French language" and use in daily life can arise through immersion schools, immigration, or mixed marriages,<sup>178</sup> regardless of what a person's first language is.

In contrast, the *FLSA* does not include a broad and inclusive definition of Francophone. Commissioner Boileau has highlighted this difference in Manitoba and Ontario legislation, and suggests the *FCESA* definition should motivate Ontario legislators to enshrine the Inclusive Definition of Francophone in the *FLSA*.<sup>179</sup> In 2009, the Ontario government introduced the new Inclusive Definition of Francophone ("IDF").<sup>180</sup> It provides that francophone includes "persons whose mother tongue is French, plus those whose mother tongue is neither French nor

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<sup>174</sup> Statistics Canada, "French and the francophonie in Canada", by Jean-Pierre Corbeil, (Ottawa: Statistics Canada, 2011), online: <[https://www12.statcan.gc.ca/census-recensement/2011/as-sa/98-314-x/98-314-x2011003\\_1-eng.cfm](https://www12.statcan.gc.ca/census-recensement/2011/as-sa/98-314-x/98-314-x2011003_1-eng.cfm)>.

<sup>175</sup> *FLSA*, *supra* note 172, s 2.

<sup>176</sup> *FCESA*, *supra* note 5, s 2.

<sup>177</sup> *Ibid*, s 1(2).

<sup>178</sup> *Committee* (28 June 2016), *supra* note 126 at 25.

<sup>179</sup> Boileau, *supra* note 6.

<sup>180</sup> Ontario, Office of the French Language Services Commissioner, *Annual Report 2015-2016 FLSA 2.0*, (Toronto: 2016) at 25 [2015-2016 *Annual Report*].

English but have a particular knowledge of French as an Official Language and use French at home.”<sup>181</sup> Bill 5 is arguably even broader and more inclusive than the IDF as it extends the meaning of Francophone to those who use French in their daily life and who have a “special affinity for the French language.”<sup>182</sup> A special affinity does not necessarily mean French must be used at home, but can also, for example, include those who use French in their daily lives at work or schools. Furthermore, and notably, individuals whose mother tongue is English would be precluded under the IDF, whereas under the FCESA they are not. With these differences, Manitoba has arguably surpassed Ontario concerning an inclusive definition of Francophone.

An inclusive definition of Francophone is important to the growth of Manitoba’s Francophone community. For example, where a French-speaking community is growing through immigration, a more inclusive definition of Francophone can serve to enhance the community and can create a greater sense of belonging and pride.<sup>183</sup> In 2014 Manitoba received 407 new French-speaking immigrants.<sup>184</sup> The number of immigrants that Manitoba has received each year since 2002 has quadrupled.<sup>185</sup> A contributing factor to this increase is the efforts of the SFM and Accueil Francophone, who have worked together to aid francophone newcomers through their settlement in Manitoba.<sup>186</sup> These numbers highlight the changing dynamic of the French-speaking community in Manitoba and support the idea that the broad definition of

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<sup>181</sup> *Ibid* at 26.

<sup>182</sup> FCESA, *supra* note 5, s 1(2).

<sup>183</sup> Ontario, Office of the French Language Services Commissioner, *A Shared Engagement 2010-2011 Annual Report*, (Toronto: 2011) at 36.

<sup>184</sup> Manitoba Labour and Immigration, *Manitoba Immigration Facts: 2014 Statistical Report* (Winnipeg, 2015) at 18, online: <[http://www.immigratemanitoba.com/wp-content/uploads/2015/09/MIF-2014\\_E\\_Web\\_Programmed.pdf](http://www.immigratemanitoba.com/wp-content/uploads/2015/09/MIF-2014_E_Web_Programmed.pdf)>.

<sup>185</sup> *Ibid*.

<sup>186</sup> Ontario and Canada, Office of the Commissioner of Official Languages and Office of the French Language Services Commissioner of Ontario, *Time to Act for the Future of Francophone Communities: Redressing the Immigration Imbalance*, Joint Report by Graham Fraser and François Boileau (Minister of Public Works and Government Services of Canada, 2014) online: <<http://www.ocol-clo.gc.ca/en/publications/redressing-immigration-imbalance#fnb36>>.

francophone is justified as it more accurately reflects the needs of the Francophone community. Given the ever-changing dynamics of the Francophone community, a potential shortcoming of the Bill is that it does not include a requirement for the Minister to review the definition periodically to ensure it is properly representative.<sup>187</sup>

A broad definition of francophone has real implications. For instance, it may affect access to government funding. According to a report prepared by the Office of the French Language Commissioner in Ontario, the new IDF is not always applied consistently by various government ministries and agencies.<sup>188</sup> In 2010, that office received a complaint that some Ontario Early Years Centres received insufficient funding in relation to the proportion of Francophone children served. An investigation revealed that this was a result of the Ministry of Children and Youth services failing to use the IDF to calculate grants, which especially impacted areas in Ontario that attracted many immigrants.<sup>189</sup> If the IDF was enshrined in legislation, such limitations could be avoided. By incorporating an inclusive definition into legislation, Manitoba is taking steps to avoid these limitations and helping to ensure access to resources where it is due. Pending reporting from the Secretariat, it remains to be seen if the inclusive definition of francophone will make any tangible differences.

The FCESA can also be commended for the broad powers that it bestows upon the Lieutenant Governor to make regulations. It expressly stipulates that she can make general or particular regulations “respecting any ... matter necessary or advisable to carry out the purposes of this Act.”<sup>190</sup> For example, she has the authority to designate a body as a government agency. Respecting French-language service plans, she can make regulations requiring additional contents, requiring public bodies to consult with persons and entities about their plans, and requiring plans to be reviewed and amended. To illustrate the breadth of these powers,

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<sup>187</sup> Idea derived from *2015-2016 Annual Report*, *supra* note 180 at 26 in the Ontario context.

<sup>188</sup> *2015-2016 Annual Report*, *supra* note 180 at 27.

<sup>189</sup> Legislative Assembly of Ontario, Office of the French Language Service Commissioner, *Impact of the Inclusive Definition of Francophone on Government Programs and Services* (Blog by François Boileau) (Ontario: Legislative Assembly of Ontario, 2012), online: <<http://csfontario.ca/en/articles/3017>>.

<sup>190</sup> FCSEA, *supra* note 5, s 17(1).

under the *FLSA* the Lieutenant Governor is limited to designating public service agencies, adding designated areas covered by that act, and is also given the power to exempt services.<sup>191</sup> In essence, the regulation-making powers under the *FCESA* legally establishes the power of government to resolve any shortcomings with respect to French-language services in Manitoba that may arise.

Another impressive and important element of the *FCESA* is that there is a strong consultation requirement. Section 17(3) of the *FCESA* states: "The minister must provide the opportunity for public consultation about proposed regulations and must consult with the advisory council about them."<sup>192</sup> The *FLSA*, on the other hand, does not contain such a clause. In fact, the *FLSA* expressly stipulates that the Lieutenant Governor can, through regulation, exempt services from the requirement that they be provided in both languages if she deems it reasonable or necessary to do so.<sup>193</sup> She can do so without any consultation, however she must abide by particular notice requirements.<sup>194</sup> Given the ultimate purpose of ensuring the vitality of the francophone community and ensuring their needs are understood and met, ongoing consultation with the francophone community is imperative. The *FCESA* accomplishes this through requiring consultation with the public and the Advisory Council.

The *FCESA* should also be commended for the express inclusion of the "Active Offer" principle.<sup>195</sup> The concept of active offer was introduced with the FLSP in 1989, and continues to be a fundamental element. The importance of "Active Offer" was reiterated in the Chartier Report, *Above All, Common Sense*.<sup>196</sup> Bill 5 states: "The active offer concept is the cornerstone for the provision of French language services whereby these services are to be made evident, readily available and easily accessible to the public and are to be of comparable quality to English language services."<sup>197</sup> As the Office of the French Language Service Commissioner

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<sup>191</sup> *FLSA*, *supra* note 172, s 8.

<sup>192</sup> *FCSEA*, *supra* note 5, s 17(3).

<sup>193</sup> *FLSA*, *supra* note 172, s 8(c).

<sup>194</sup> *Ibid*, s 10(2).

<sup>195</sup> Hébert, *supra* note 6; Boileau, *supra* note 6.

<sup>196</sup> *Chartier Report*, *supra* note 74 at "Context of the French Language Services Policy."

<sup>197</sup> *FCESA*, *supra* note 5, s 3.

of Ontario, with respect to the *FLSA*, stated: “without an express reference to this obligation in the Act, progress on active offer may be difficult and slow.”<sup>198</sup> Manitoba has now surpassed Ontario in this regard, as Ontario has yet to include this concept in their legislation.

Although the formal legislative process was successful, unifying and respectful, it nevertheless lacked some healthy debate. For example, given that the concept of active offer is a core principle of the Bill, some debate on this topic may have been constructive. Commissioner Boileau has recommended to the Minister responsible for Francophone Affairs that the *FLSA* also incorporate a formal definition of “active offer.” The recommended definition is:

An active offer refers to a series of measures that are taken in order to ensure that French language services are clearly communicated, visible, available at all times, easily accessible, and equivalent to the quality of services offered in English. This includes measures related to communications – signage, notices, social media and all other information on services – as well as at the time of initial contact with French speaking clients.<sup>199</sup>

The Ontario definition is simpler, clearer and contains less legalese than the one in Bill 5. Furthermore, the Ontario version requires an “equivalent” quality of services, whereas Bill 5 only requires a “comparable” quality. This is a subtle, yet crucial difference that was not acknowledged in the debates, perhaps to the detriment of the francophone community. If a goal of the *FCESA* is to firmly re-establish the status of French-language services in Manitoba as equal to those provided in English, it arguably follows that the legislation ought to expressly reflect this.

In addition, beyond the requirement that French-language services plans be submitted to the Minister, the *FCESA* offers limited enforcement mechanisms for the implementation of its principles. For example, under the *FLSA* of Ontario, an independent French Language Services

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<sup>198</sup> Office of the French Language Commissioner, *Special Report, Active Offer of Services in French: The Cornerstone for Achieving the Objectives of Ontario’s French Language Services Act*, (Toronto: Office of the French Language Commissioner, 26 May 2016) at 3 [Special Report].

<sup>199</sup> *Ibid* at 7.

Commissioner shall be appointed.<sup>200</sup> This Commissioner encourages compliance with the *FLSA* by investigating complaints with respect to compliance, monitoring progress made by government agencies in providing services in compliance with the *FLSA*, and advising and making recommendations to the Minister responsible for Francophone Affairs respecting the administration of the Act.<sup>201</sup> Although the *FCESA* is well intentioned and works to protect Francophone rights and enhance the Francophone community, it remains to be seen if stronger enforcement mechanisms will be required to ensure compliance with its objectives and principles.

Nevertheless, the establishment of the Advisory Council by the *FCESA* has helped to legally solidify and ensure dialogue between the government and the Francophone community. An advisory council can help to overcome any limitations or insufficiencies within the *FCESA* by better ensuring the needs of the francophone community are heard and understood. In turn, this contributes to the purposes of Bill 5 by better ensuring the francophone community is supported and its vitality is enhanced on an ongoing basis. Recognizing the importance of this dialogue, Boileau has commended the *FCESA*<sup>202</sup> and recommended to the Ontario Minister responsible for Francophone Affairs that the *FLSA* be changed to also establish an advisory council.<sup>203</sup> In this regard, Manitoba is leading by example for other provinces that strive to ensure protection of their francophone community.

## VII. CONCLUSION

What Manitoba has accomplished with the passing of Bill 5 is historically significant, but also progressive and encouraging for the future of Francophone rights in Manitoba. It is suggestive of a time of reconciliation after years of struggle and division between the French and English communities in the province. The importance of the political unity achieved after such a tumultuous history has not gone unrecognized

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<sup>200</sup> *FLSA*, *supra* note 172, s 12.1(1).

<sup>201</sup> *Ibid*, s 12.2.

<sup>202</sup> Boileau, *supra* note 6.

<sup>203</sup> 2015-2016 Annual Report, *supra* note 180 at 24.

by politicians and members of the community. This was made extensively evident in the amicable legislative process from first reading until Royal Assent. Manitoba has now surpassed Ontario, a leader in the area, in some important ways with respect to Francophone rights legislation. Although the full extent of the practical benefits and the enforceability of the important principles of the *FCESA* remains to be seen, Manitoba has established key elements of a successful framework for protecting Francophone rights. Despite any limitations, the enactment of the *FCESA* is a proud moment for Manitoba.