

Reconsidering Bill 4 - *The Legislative Assembly Amendment Act (Member Changing Parties)*: Finding a Balanced Approach to Floor Crossing in Manitoba

B R E N D A N R O Z I E R E *

I. INTRODUCTION

To voters, political affiliation matters. During elections, electoral candidates tend to be endorsed by a political party and in turn offer voters an opportunity to support that party's platform at the ballot box. Yet, once in office, elected officials sometimes change their political affiliation and join a competing party. In the Westminster system of government, this is known as crossing the floor or floor crossing. The practice, routinely criticized for undermining voters' wishes, was first banned in Manitoba in 2006. But just over ten years later Bill 4 was introduced in the Third Session of the Forty-First Legislature, with the goal of repealing the ban.

Understanding how Manitoba went from a prohibitory to unrestricted regime requires a comprehensive examination of floor crossing in the province, as well as Canada more broadly. Further, how floor crossing should be responded to in law is worth considering because of its potentially significant impact on both voters and elected officials. While floor crossing frequently places the interests of voters at odds with those of their representatives, this is not always the case. Thus, any legislative response should reflect this nuance. Revealing the complex nature of floor crossing

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in terms of interests and perception, I argue that the appropriate legislative approach in Manitoba falls between the previous floor crossing ban and the current unrestricted regime.

I will begin this examination first by presenting the history of Manitoba's floor crossing ban. The implementation and repeal of the ban were not self-contained events. Rather, they were influenced by political issues of the day. Second, the progress of Bill 4 from its introduction in November, 2017 to its Royal Assent in June, 2018 will be outlined. The Progressive Conservative (PC) government and NDP opposition each adopted a competing narrative of the merits of banning floor crossing. While the parties agreed that floor crossing should be prohibited when the ban was first implemented, they were divided during its repeal. Finally, I will examine floor crossing more broadly as a unique political and procedural issue. Although elected officials have crossed the floor almost as far back as Confederation, perceptions of the practice have changed and multiple legislative responses have been suggested. Noting Manitoba's relatively high risk, but interestingly limited history of floor crossing, I propose a minor amendment to *The Legislative Assembly Act* which would allow the practice but address the public's greatest concern, Cabinet appointment induced floor crossings.

II. HISTORY AND BACKGROUND

Most politicians elected to the Canadian Parliament or a provincial legislature are affiliated with a political party.¹ Their political affiliation is likely even a driving, if not determinative, cause of their electoral success. Yet in Canada, seats attach to the candidate that wins an election not the political party.² Thus, once elected, the candidate (now member) is entitled to their seat even if their political affiliation changes.³ When a member

¹ House of Commons, "House of Commons Procedure and Practice: Second Edition, 2009: Assignment of Seats in the House" (last visited 28 February 2019), online: <ourcommons.ca/procedure-book-livre/document.aspx?sbdid=2ae20cbe-e824-466b-b37c-8941bbc99c37&sbpidx=9> [perma.cc/C24R-3FDN].

² *Ibid.*

³ *Ibid.*

changes political affiliation mid-session, it is commonly referred to as “crossing the floor”⁴ or floor crossing.

For most of Canada’s history, elected officials have crossed the floor, with several even doing so “during Canada’s first Parliament.”⁵ Although relatively uncontroversial early on, over time the practice has become an increasingly riskier proposition for members seeking re-election.⁶ This is perhaps best evidenced by the early-mid 2000s, a period in which the public visibility of floor crossings became significantly heightened. Unlike in previous decades, floor crossing began to be exercised frequently, rising from approximately two to seven such instances across Canada each year.⁷ Additionally, several high profile and extremely controversial floor crossings, specifically those of Belinda Stronach and David Emerson, drew heavy public criticism.⁸

⁴ *Ibid.*

⁵ Canada, Library of Parliament, *Changes in a Parliamentarian’s Party Affiliation*, by Michael Dewing, Publication No 2016-101-E (Ottawa: Library of Parliament, 2016) at 2 [Library of Parliament].

⁶ Semra Sevi, Antoine Yoshinaka & André Blais, “Legislative Party Switching and the Changing Nature of the Canadian Party System, 1867-2015” (2018) 51:3 *Can J Political Science* 665 at 667.

⁷ Heather MacIvor, “Federal Bill C-208 of 2006 and 2007: A Legislative Proposal on Floor Crossing” (2009) 2 *JPLP* 329 at 330.

⁸ *Ibid.*; Feodor Snagovsky & Matthew Kerby, “The Electoral Consequences of Party Switching in Canada: 1945-2011” (2018) 51:2 *Can J Political Science* 425 at 426; Sevi, Yoshinaka & Blais, *supra* note 6 at 668. Another notable floor crossing during that period was that of Scott Brison, who left the newly formed Conservative Party of Canada to join the Liberals in late 2003. Although Brison would be appointed as a parliamentary secretary a few days later, his crossing was far less impactful in part due to long-standing rumours of his intent to switch parties and the Liberals’ majority government status. See “MacKay slams Brison for joining Liberals”, *CBC News* (10 December 2003), online: <cbc.ca/news/canada/mackay-slams-brison-for-joining-liberals-1.371668> [perma.cc/7R82-UFKY]; Paco Francoli “Tory MP Brison denies he’s in Liberal talks with Martin’s team: popular Bluenose MP Scott Brison says he wants to shape a single Conservative Party”, *The Hill Times* (20 October 2003), online: <hilltimes.com/2003/10/20/tory-mp-brison-denies-hes-in-liberal-talks-with-martins-team/2650> [perma.cc/DT6N-R3XY]; Rebecca Lindell “Food for Thought: Scott Brison on coming out and why the Charter has changed his life”, *Global News* (20 May 2018), online: <globalnews.ca/news/4217941/scott-brison-coming-out-charter-of-rights/> [perma.cc/RP2F-BPYG].

The first of these occurred when Stronach left the Conservative Party of Canada (CPC) to join Paul Martin's Liberal minority government just days before a critical budget vote in May 2005.⁹ She would immediately be appointed Minister of Human Resources and Skills Development upon her defection.¹⁰ While Stronach claimed that her switch was based on principle,¹¹ critics, including CPC leader Stephen Harper, suggested that her decision was purely a career move.¹² Less than a year later, David Emerson was elected as the Member of Parliament for B.C.'s Vancouver-Kingsway riding under the Liberal Party banner.¹³ However, he would be sworn in that February as a member of the Conservatives and Minister of International Trade.¹⁴ Emerson claimed he would be in a better position to serve his constituents as part of the ruling party,¹⁵ though many of them protested his defection¹⁶ which gave the Conservatives control over a riding they had not won in almost 50 years.¹⁷

Legislative proposals to restrict the practice soon followed both federally and provincially. In the House of Commons, multiple private members' bills were brought forward, though each predictably failed to be adopted. Similar legislation proposed by the Manitoba government, however, did eventually become law. First introduced in the Manitoba Legislative Assembly on April 10, 2006, Bill 22: *The Elections Reform Act* contained

⁹ "Conservative Stronach joins Liberals", *CBC News* (17 May 2005), online: <cbc.ca/news/canada/conservative-stronach-joins-liberals-1.545840> [perma.cc/8C3Q-JFY3] [CBC, "Stronach joins Liberals"].

¹⁰ *Ibid.*

¹¹ CBC, "Stronach joins Liberals", *supra* note 9.

¹² Allison Dunfield, "Stronach crosses floor to join Liberal Cabinet", *The Globe and Mail* (17 May 2005), online: <theglobeandmail.com/news/national/stronach-crosses-floor-to-join-liberal-cabinet/article1118925/> [perma.cc/76X7-JWEC].

¹³ "Emerson 'flabbergasted' by reaction to defection", *CBC News* (9 February 2006), online: <cbc.ca/news/canada/british-columbia/emerson-flabbergasted-by-reaction-to-defection-1.585039> [perma.cc/5CHS-RC6W] [CBC, "Emerson flabbergasted"]; "No rules broken in Emerson affair: watchdog", *CBC News* (20 March 2006), online: <cbc.ca/news/canada/no-rules-broken-in-emerson-affair-watchdog-1.587184> [perma.cc/7X4X-36HL] [CBC, "Emerson affair"].

¹⁴ CBC, "Emerson affair", *supra* note 13.

¹⁵ CBC, "Emerson flabbergasted", *supra* note 13.

¹⁶ *Ibid.*

¹⁷ *Ibid.*

multiple updates to Manitoba's electoral system.¹⁸ Most of the changes were based on recommendations made by the Chief Electoral Officer,¹⁹ but among the provisions was an amendment to *The Legislative Assembly Act* which would add a near complete ban on floor crossing by Members of the Legislative Assembly (MLAs).²⁰ The ban was presented as a measure to ensure respect for voters' wishes, specifically as they related to their chosen political party.²¹ Under the proposed law, MLAs who left or were kicked out of their party's caucus would be required to sit as an independent member until the next general election, or otherwise vacate their seat to trigger a by-election in which they could run as a member of a different party.²² The Progressive Conservatives supported the ban on floor crossing from the beginning, citing the risk that the ruling party could otherwise offer inducements, such as Cabinet positions, to convince opposition members to switch parties.²³

However, the ban was not without its critics. During second reading debate, Liberal Party member Kevin Lamoureux argued that the ban was purely a reactionary response to the high-profile floor crossings occurring in Parliament.²⁴ In Manitoba, no MLA had crossed the floor since 1988 when Steinbach MLA, Gilles Roch, left the Progressive Conservative minority government to join the Liberals.²⁵ Lamoureux noted that MLAs may choose to cross the floor for a variety of reasons, and referenced the principle motivated floor crossings of Winston Churchill.²⁶ Rather than implement a ban, Lamoureux contended that Manitoba should adopt recall legislation,

¹⁸ Manitoba, Legislative Assembly, *Debates and Proceedings*, 38-4, No 46 (10 April 2006) at 1415.

¹⁹ *Ibid* (Hon Gary Doer).

²⁰ Manitoba, Legislative Assembly, *Debates and Proceedings*, 38-4, No 66 (10 May 2006) at 1985 (Hon Gary Doer) [Hansard (10 May 2006)].

²¹ *Ibid*.

²² *Ibid*.

²³ Manitoba, Legislative Assembly, *Debates and Proceedings*, 38-4, No 79B (30 May 2006) at 2787 (Hugh McFadyen); Manitoba, Legislative Assembly, Standing Committee on Legislative Affairs, 38-4, No 6 (5 June 2006) at 66 (Hugh McFadyen) [Committee (2006)].

²⁴ Hansard (10 May 2006), *supra* note 20 at 1987 (Kevin Lamoureux).

²⁵ *Ibid*.

²⁶ *Ibid*.

which he claimed had already proven to be successful in B.C.²⁷ Under such legislation, constituents would be able to hold MLAs accountable by recalling them should they be neglectful in their duties.²⁸

At the Standing Committee on Legislative Affairs, Winnipeg lawyer Sidney Green offered a further critique of Bill 22.²⁹ He asserted that the proposed ban went against parliamentary tradition by preventing members from fully exercising their freedom of conscience.³⁰ In his view, members should not be prevented from crossing the floor through law, they should have to face the electorate who would be left to decide whether it was acceptable to them.³¹

Although somewhat confusingly, Mr. Green simultaneously criticized Bill 22 for not having any real affect on members' actions.³² He pointed out that members would still be entitled to vote how they wished on any given bill, and that in failing to define what a 'caucus' was, enforcement of the legislation would be dubious.³³ Perhaps missed by Mr. Green was that the ban never attempted to regulate member conduct outside of the Legislative Assembly to begin with. The ban was to be applied strictly in relation to the treatment of members during proceedings. Moreover, as will be discussed in Part IV, members' freedom of conscience was largely preserved by the fact that their rights, specifically to participate in debate and to vote, remained within their control.

Despite the criticisms raised during second reading and in committee, the ban provision remained, receiving Royal Assent as part of *The Elections Reform Act* on June 13, 2006.³⁴ The ban was added as section 52.3.1 of *The Legislative Assembly Act*, reading as follows:

²⁷ *Ibid.*

²⁸ *Ibid.*

²⁹ Committee (2006), *supra* note 23 at 62-63.

³⁰ *Ibid* at 62.

³¹ *Ibid* at 63.

³² *Ibid* at 62.

³³ *Ibid.*

³⁴ Manitoba, Legislative Assembly, *Debates and Proceedings*, 38-4, No 89B (13 June 2006) at 3347-3348.

Member who crosses the floor must sit as independent

A member who

(a) is elected with the endorsement of a political party; and

(b) ceases to belong to the caucus of that party during the term for which her [sic] or she was elected;

must sit in the Assembly as an independent and is to be treated as such for the purposes of this Act and all proceedings in the Assembly during the remainder of the member's term.³⁵

For over a decade the floor crossing ban operated without much controversy. Then in August 2017, former Progressive Conservative MLA, Steven Fletcher, filed a legal challenge to the ban, arguing that it violated his *Charter* rights to freedom of expression and association.³⁶ Fletcher had been kicked out of the PC caucus in June, following months of criticizing his own party.³⁷ Due to the ban, he was unable to join a competing party and was faced with the choice of either continuing to sit as an independent or resign his seat with the hope of winning re-election under a new party banner. Yet, Fletcher maintained that his challenge to the ban was based purely on principle and claimed he had no desire to join an opposing party.³⁸ Prior to the case being heard in court, the PC government responded by announcing their plan to repeal the floor crossing ban on the basis that it was a “bad policy.”³⁹ Bill 4: *The Legislative Assembly Amendment Act (Member Changing Parties)* was introduced shortly thereafter with the sole

³⁵ *The Legislative Assembly Act*, RSM 1987, c L110, s 52.3.1 as it appeared on 13 June 2006 [*Legislative Assembly Act*] [bolding in original]. In 2010, “her” was corrected to “he”.

³⁶ Jason Markusoff, “Is a ban on floor-crossing politicians unconstitutional?”, *Macleans* (24 August 2017), online: <macleans.ca/politics/the-case-for-politicians-who-want-to-cross-the-floor/> [perma.cc/9MUE-5DF2].

³⁷ *Ibid*; Bartley Kives & Cameron MacLean, “Steven Fletcher expelled from Manitoba PC caucus”, *CBC News* (30 June 2017), online: <cbc.ca/news/canada/manitoba/steven-fletcher-expelled-from-caucus-1.4185892> [perma.cc/7LXU-NJVD].

³⁸ “Legislature, not courts, should determine Manitoba legislators’ ability to switch parties: Judge”, *CBC News* (19 June 2018), online: <cbc.ca/news/canada/manitoba/manitoba-judge-party-switching-1.4712733> [perma.cc/A9EF-TD2W].

³⁹ Steve Lambert, “Manitoba government will change law banning floor-crossing, avoid lawsuit”, *CBC News* (19 September 2017), online: <cbc.ca/news/canada/manitoba/floor-crossing-ban-law-change-1.4297517> [perma.cc/XQ3S-KWVD].

purpose of repealing s. 52.3.1 of *The Legislative Assembly Act*.⁴⁰ Fletcher's legal challenge continued however, as the government firmly maintained that its ability to impose the floor crossing ban was nevertheless protected by parliamentary privilege.⁴¹

III. LEGISLATIVE DEBATE

To fully understand how Bill 4 ended up before the Legislative Assembly and eventually became law, it is helpful to review its journey through the legislative process. During debate, each party adopted its own narrative on the merits of the floor crossing ban, as well as on the ban's origins and its pending repeal. While claims put forward about the ban's merits largely reflected those made during its original implementation, those surrounding its origins and repeal demonstrated how current political events can shift policy positions. The review which follows is therefore meant to illustrate not only the dominant arguments that arose in debating Bill 4, but also provide insight into the external political factors which may have influenced them.

A. Introduction and First Reading

Bill 4 was introduced on November 24, 2017 by The Honourable Heather Stefanson, Minister of Justice and Attorney General.⁴² She briefly commented that the bill would repeal s. 52.3.1 of *The Legislative Assembly Act*, before the Assembly voted to proceed with first reading.⁴³

B. Second Reading

Second Reading of Bill 4 occurred on November 30, 2017.⁴⁴ Mrs. Stefanson,⁴⁵ presented the bill's repeal of the floor crossing ban as a

⁴⁰ Manitoba, Legislative Assembly, *Debates and Proceedings*, 41-3, No 4 (24 November 2017) at 79 (Hon Heather Stefanson) [Hansard (24 November 2017)].

⁴¹ *Fletcher v The Government of Manitoba*, 2018 MBQB 104 at paras 47-49 [Fletcher].

⁴² Hansard (24 November 2017), *supra* note 40 at 79 (Hon Heather Stefanson).

⁴³ *Ibid.*

⁴⁴ Manitoba, Legislative Assembly, *Debates and Proceedings*, 41-3, No 8B (30 November 2017) at 262 [Hansard (30 November 2017)].

⁴⁵ All member prefixes in this paper reflect those used by Hansard.

restoration of Westminster parliamentary tradition.⁴⁶ She contended that MLAs should be free to make decisions respecting their party association and leave it to voters to hold them accountable.⁴⁷ It was further suggested that the NDP had introduced the ban as a partisan and reactionary measure to events of the day and that keeping the ban would lead to thousands of dollars being spent defending it in court.⁴⁸

During Question Period, Official Opposition House Leader and (NDP) MLA for St. John's, Nahanni Fontaine, and James Allum, (NDP) MLA for Fort Garry-Riverview, asked Mrs. Stefanson how the government would ensure respect for voters' choices without the ban.⁴⁹ Mrs. Stefanson reiterated that voters should be the ones to hold members accountable for floor crossing.⁵⁰ The Honourable Steven Fletcher, MLA for Assiniboia, then asked whether Mrs. Stefanson as the Minister, would seek unanimous consent for Bill 4 or otherwise cease contestation of his court challenge in an effort to move onto other matters.⁵¹ Mrs. Stefanson declined to speak on the court case but suggested that Mr. Fletcher could seek unanimous consent for Bill 4 on his own.⁵² With respect to Mrs. Stefanson's claim that repealing the floor crossing ban would save taxpayers money, Mr. Allum questioned how the bill would do so, other than by avoiding potential by-elections.⁵³ Mrs. Stefanson answered that by repealing the ban, the government would no longer be at risk of having to defend it in court.⁵⁴ Mr. Fletcher pointed out the irony in this claim given that the government was actively spending taxpayer dollars to fight his legal challenge and defend a law they intended to repeal.⁵⁵

Beginning the debate period, Ms. Fontaine countered Mrs. Stefanson's claim that the floor crossing ban was unparliamentary. She emphasized the

⁴⁶ Hansard (30 November 2017), *supra* note 44 at 263-265 (Hon Heather Stefanson).

⁴⁷ *Ibid* at 263.

⁴⁸ *Ibid*.

⁴⁹ *Ibid* at 263, 265 (Nahanni Fontaine & James Allum).

⁵⁰ *Ibid* (Hon Heather Stefanson).

⁵¹ *Ibid* at 264 (Hon Steven Fletcher).

⁵² *Ibid* at 264-265 (Hon Heather Stefanson).

⁵³ *Ibid* at 265 (James Allum).

⁵⁴ *Ibid* (Hon Heather Stefanson).

⁵⁵ *Ibid* (Hon Steven Fletcher).

importance of a candidate's political party affiliation to voters when they go to the polls,⁵⁶ suggesting that repealing the ban was disrespectful to voters because their choices would no longer be protected.⁵⁷ Ms. Fontaine also questioned why Bill 4 was being brought forward to begin with, commenting that there had been little warning from the government about their plan. She further speculated that the repeal was motivated by the government's fight with Mr. Fletcher,⁵⁸ noting the context in which the ban had been first proposed – as a response to high-profile floor crossings involving Cabinet appointments – and the PCs support of the ban at the time.⁵⁹

Bob Lagassé, (PC) MLA for Dawson Trail, echoed Mrs. Stefanson's comments about returning to Westminster parliamentary tradition.⁶⁰ He further highlighted the remarks of University of Manitoba professor, Dr. Paul Thomas, who had referred to the floor crossing ban as a "political gimmick" that was likely unconstitutional.⁶¹ Andrew Swan, (NDP) MLA for Minto, reiterated Ms. Fontaine's suggestion that Bill 4 was a response to the PC's conflict with Mr. Fletcher, and again pointed out that the PCs had supported the ban in 2006.⁶² He then proceeded to highlight the context in which the ban had been implemented by reading out an article from *The Globe and Mail* on Belinda Stronach's floor crossing,⁶³ followed by several quotes from a CBC article on the floor crossing of David Emerson.⁶⁴ Mr. Swan concluded his comments by suggesting that the reason the government continued to contest Mr. Fletcher's legal action was because they believed the ban to be constitutional.⁶⁵

The final on-topic comments before the Assembly adjourned were made by Cindy Lamoureux, (LIB) MLA for Burrows. She briefly noted that

⁵⁶ *Ibid* at 266 (Nahanni Fontaine).

⁵⁷ *Ibid* at 267, 270-271.

⁵⁸ *Ibid* at 266-267.

⁵⁹ *Ibid* at 269-270.

⁶⁰ *Ibid* at 271 (Bob Lagassé).

⁶¹ *Ibid*.

⁶² *Ibid* at 274 (Andrew Swan).

⁶³ *Ibid* at 275-277.

⁶⁴ *Ibid* at 277-278.

⁶⁵ *Ibid* at 278.

Manitoba was the only province with a ban on floor crossing and asserted that it provided party leaders with an advantage over backbenchers.⁶⁶

Bill 4 would not appear in the Assembly again until April 19, 2018, when Mr. Fletcher attempted to delay its consideration. On a matter of privilege, he argued that the Assembly should refrain from progressing with the bill in order to prevent any potential interference with the pending decision in his legal case.⁶⁷ The Speaker ruled this motion out of order, as well as several following points of order raised by Mr. Fletcher.⁶⁸ No discussion of Bill 4 occurred that day and the bill did not appear again until April 23, 2018, when the Legislative Assembly voted to proceed to the committee stage.⁶⁹

C. Committee

Bill 4 came before the Standing Committee on Justice on May 8, 2018.⁷⁰ Possibly due to the bill's late placement in the proceedings of the meeting, neither Mrs. Stefanson (as Minister of Justice), nor Ms. Fontaine (as Justice Critic), chose to exercise their right to speak on Bill 4 at this time.⁷¹ All clauses of the bill were passed quickly and without incident.⁷²

D. Third Reading and Royal Assent

Third reading of Bill 4 proceeded on May 31, 2018.⁷³ The Honourable Cliff Cullen, Government House Leader and (PC) MLA for Spruce Woods, briefly began debate by stating that the repeal of the floor crossing ban would restore the “long-standing tradition in our Westminster

⁶⁶ *Ibid* at 279 (Cindy Lamoureux).

⁶⁷ Manitoba, Legislative Assembly, *Debates and Proceedings*, 41-3, No 37B (19 April 2018) at 1604 (Hon Steven Fletcher).

⁶⁸ *Ibid* at 1604-1605 (Hon Madam Speaker Myrna Driedger).

⁶⁹ Manitoba, Legislative Assembly, *Debates and Proceedings*, 41-3, No 38 (23 April 2018) at 1700.

⁷⁰ Manitoba, Legislative Assembly, Standing Committee on Justice, 41-3, No 1 (8 May 2018) at 1.

⁷¹ *Ibid* at 46-47.

⁷² *Ibid* at 47.

⁷³ Manitoba, Legislative Assembly, *Debates and Proceedings*, 41-3, No 57B (31 May 2018) at 2774.

parliamentary democracy⁷⁴ of granting freedom to members to caucus with the party of their choice.⁷⁵

Ms. Fontaine largely reiterated her comments from second reading, primarily arguing that the purpose of the floor crossing ban was to show respect for voters' election choices and that floor crossing MLAs should be willing to face voters in a by-election.⁷⁶ She also contested the claim that the NDP were responsible for any legal expenses incurred as a result of the ban, pointing to the PC government's continued defence against Mr. Fletcher's legal challenge as the cause.⁷⁷

Ms. Lamoureux once again spoke to the fact that Manitoba was the only province to have a floor crossing ban and that floor crossings may occur on matters of principle, such as those of Winston Churchill.⁷⁸ She concluded by commenting on the disadvantages faced by independent members in terms of resources and on her party's hope that members "consult with their constituents"⁷⁹ before deciding to cross the floor.⁸⁰

Mr. Fletcher voiced his frustrations with the government's decision to fight his legal challenge to the floor crossing ban. He asserted that the ban was unconstitutional and that the government could have avoided incurring any legal costs by simply agreeing with him on this point.⁸¹ Moreover, he claimed that Bill 4 was a direct response to his legal action, highlighting that no party attempted to challenge the ban since it became law.⁸²

Ultimately Bill 4 was passed by a vote of 36 to 11,⁸³ and received Royal Assent on June 4, 2018.⁸⁴

⁷⁴ *Ibid* (Hon Cliff Cullen).

⁷⁵ *Ibid*.

⁷⁶ *Ibid* at 2774-2775 (Nahanni Fontaine).

⁷⁷ *Ibid* at 2774.

⁷⁸ *Ibid* at 2775 (Cindy Lamoureux).

⁷⁹ *Ibid*.

⁸⁰ *Ibid*.

⁸¹ *Ibid* at 2775-2776 (Hon Steven Fletcher).

⁸² *Ibid*.

⁸³ *Ibid* at 2777.

⁸⁴ Manitoba, Legislative Assembly, *Debates and Proceedings*, 41-3, No 58 (4 June 2018) at 2846.

IV. SCHOLARLY COMMENTARY AND ANALYSIS

A. Putting Floor Crossing in Context

Having explored the events leading up to the floor crossing ban through to its eventual repeal, the question that may remain is “So what?” Thus, before moving on to compare possible legislative responses to floor crossing, I will briefly provide the case for why serious consideration should be given to them in the first place. Relying on recent academic research and polling data, it becomes clear that floor crossing matters to the electorate. While this alone should provide ample reason to engage in open debate of the issue, as will be shown, the importance of doing so is heightened in Manitoba by the province’s unique political reality.

1. Impact on Electoral Outcomes

Floor crossing has not always been as controversial or politically risky as it is today. Early in Canadian history floor crossing was in fact relatively common and re-election was not only possible, but more likely than not.⁸⁵ Several political parties’ origins can even be traced back directly to groups of members coming together after casting aside their prior political affiliations.⁸⁶ In part, this can be explained by the evolution of Canada’s political system. Sevi, Yoshinaka, and Blais argue that prior to the institutionalization of political parties, local candidates were the central focus of Canadian elections,⁸⁷ and a well-known local candidate could easily change their political affiliation without damaging their future political career.⁸⁸ Additionally, weaker party discipline meant that the costs of going against one’s own party were much lower.⁸⁹ However, over time Canada’s political system shifted from being candidate focused to party focused, and with this came an increased risk to those who broke with their party.⁹⁰ Sevi, Yoshinaka, and Blais find support for these claims in their study of floor crossing MPs from Confederation to 2015. According to their analysis, the

⁸⁵ Sevi, Yoshinaka & Blais, *supra* note 6 at 668, 676.

⁸⁶ *Ibid* at 674-675, 692.

⁸⁷ *Ibid* at 670.

⁸⁸ *Ibid* at 667, 674, 676, 692.

⁸⁹ *Ibid* at 666-667.

⁹⁰ *Ibid*.

electoral success of MPs from 1867-1958 was largely unaffected by party switching.⁹¹ But from 1962-2015, MPs who crossed the floor faced an almost 20 percentage point penalty compared to non-floor crossers during the next election,⁹² regardless of whether they joined government or an opposition party.⁹³ Sevi, Yoshinaka, and Blais explain that changes such as the addition of party affiliation to the ballot in 1974, and the increasing importance of “coherent platforms”⁹⁴ and “national agendas”⁹⁵ to electoral success, helped to establish an electoral system that valued party over candidate.⁹⁶ Moreover, with the institutionalization of political parties came stronger party discipline, largely quashing public dissent by members.⁹⁷ Combined, the effect of these shifts has been that voters in the modern era are noticeably less tolerant of floor crossing by their elected representatives.

However, what exactly these shifts in federal Canadian politics mean for the provincial level is less clear as research on provincial floor crossings has received far less attention. This may be due in part to the fewer number of salient examples of provincial level floor crossings or the greater inconsistency that exists between the provinces in terms of occurrences. For instance, recent floor crossings have taken place in Alberta,⁹⁸ Quebec,⁹⁹ and

⁹¹ *Ibid* at 682-683.

⁹² *Ibid* at 679, 682-683.

⁹³ *Ibid* at 684.

⁹⁴ *Ibid* at 667.

⁹⁵ *Ibid*.

⁹⁶ *Ibid* at 666-670.

⁹⁷ *Ibid* at 667, 669.

⁹⁸ “9 Wildrose MLAs, including Danielle Smith, cross to Alberta Tories”, *CBC News* (17 December 2014), online: <cbc.ca/news/canada/edmonton/9-wildrose-mlas-including-danielle-smith-cross-to-alberta-tories-1.2876412> [perma.cc/5KAV-5PHY]; Dean Bennett, “Floor crossing, revitalized UCP mark start of Alberta legislature session”, *Global News* (31 October 2017), online: <globalnews.ca/news/3833719/floor-crossing-revitalized-ucp-mark-start-of-alberta-legislature-session/> [perma.cc/XGJ9-XBTJ].

⁹⁹ “2 more MNAs leave Parti Quebecois”, *CBC News* (22 June 2011), online: <cbc.ca/news/canada/montreal/2-more-mnas-leave-parti-quebecois-1.998281> [perma.cc/P9RR-ZLUH]; Benoit Charette sat as an independent for several months before joining the Coalition Avenir Quebec in December 2011, see Martin Patriquin, “Quebecers look poised to vote the CAQ into power for first time. But what exactly are they voting for?”, *National Post* (28 September 2018), online: <nationalpost.com/news/politics/quebecers-look-poised-to-vote-francois-legaults-caq-

Newfoundland,¹⁰⁰ several of which involved multiple members. Yet, floor crossing has been relatively rare in provinces such as Manitoba, where no MLA has crossed the floor since 1988.¹⁰¹ Provincial political cultures may help to explain this variation, but they do little to explain the overall lack of research on provincial level floor crossings, which continue to be a feature of provincial politics, just as they are federally.¹⁰² Still, there is little reason to believe that established research on federal floor crossings should not hold true provincially.¹⁰³ Thus, for the purposes of this piece, I proceed under the assumption that federal level findings are also consistent with provincial realities.

into-power-for-the-first-time-but-what-exactly-are-they-voting-for> [perma.cc/3D59-VE77]; Jean-Martin Aussant created the short-lived Option Nationale party after leaving the PQ in 2011, see “Jean-Martin Aussant returns to PQ after quitting to form rival party”, *CBC News* (22 February 2018), online: <cbc.ca/news/canada/montreal/jean-martin-aussant-jumps-back-parti-quebecois-1.4547992> [perma.cc/Z9K8-HN6R].

¹⁰⁰ “Paul Lane crosses floor to Liberals, blames Kathy Dunderdale”, *CBC News* (20 January 2014), online: <www.cbc.ca/news/canada/newfoundland-labrador/paul-lane-crosses-floor-to-liberals-blames-kathy-dunderdale-1.2503211> [perma.cc/FXJ5-8WJX]; “Dale Kirby and Christopher Mitchelmore join Liberals”, *CBC News* (4 February 2014), online: <www.cbc.ca/news/canada/newfoundland-labrador/dale-kirby-and-christopher-mitchelmore-join-liberals-1.2522282> [perma.cc/T4FD-WB88].

¹⁰¹ “MLA Biographies - Living” (last visited 13 March 2019), online: *The Legislative Assembly of Manitoba* <www.gov.mb.ca/legislature/members/mla_bio_living.html#r> [perma.cc/4BR4-KKES].

¹⁰² See Robert Benzie, Rob Ferguson & Kristin Rushowy, “Ford fears disgruntled Tory MPPs might defect to Liberals, source says”, *Toronto Star* (23 November 2018), online: <thestar.com/politics/provincial/2018/11/23/ford-fears-disgruntled-tory-mpps-might-defect-to-liberalssource-says.html> [perma.cc/X4S8-797T]; “UCP election reform pitch interesting but a bit contradictory, political scientist says”, *CBC News* (15 February 2019), online: <cbc.ca/news/canada/calgary/ucp-election-reform-1.5021995> [perma.cc/P7EV-93N8].

¹⁰³ This is in part because while provincial political cultures may influence “aspects of legislative operations and styles,” every Canadian legislature is “fundamentally the same.” See Paul Thomas & Graham White, “Evaluating Provincial and Territorial Legislatures” in Christopher Dunn, ed, *Provinces: Canadian Provincial Politics*, 3rd ed (Toronto: University of Toronto Press, 2016) 363 at 364, 368.

2. *Public Perception*

In recent history, the public perception of floor crossing has been mixed and often highly partisan. When former MP Eve Adams left the Conservatives to join the Liberals in 2015, an Abacus Data poll found that 59% of Conservative Party supporters believed the Liberals should have rejected her, while 58% of Liberal Party supporters felt they should have accepted her.¹⁰⁴ NDP supporters were split almost in half (38% accept; 37% reject).¹⁰⁵ Conservative Party supporters also overwhelmingly believed that Ms. Adams changed allegiances because the Conservatives no longer wanted her in their party.¹⁰⁶ Liberal Party and NDP supporters on the other hand were more likely to believe that her decision was motivated by a mix of the Conservatives not wanting her and her own discomfort with Stephen Harper's leadership.¹⁰⁷

On the practice of floor crossing generally, an Angus Reid poll conducted in November 2018 found that Canadians were split on whether floor crossing should be allowed (42% should not be allowed; 41% should be allowed; 17% unsure).¹⁰⁸ Of those who believed it should not be permitted, 55% said floor crossing members should have to give up their seat and run in a by-election to change parties, 29% percent said the member should serve as an independent until the next election, and 16% said the member's seat should be vacated until the next election.¹⁰⁹ Among Manitobans, 40% said floor crossing should not be allowed, while only 34% said that it should be allowed, 26% were unsure.¹¹⁰

¹⁰⁴ Bruce Anderson & David Coletto, "Conservatives and Liberals locked in Dead Heat. Eve Adams defection reactions mixed" (23 February 2015), online (pdf): *Abacus Data* <abacusdata.ca/wp-content/uploads/2015/02/Abacus-Release-Headline-Political-Data-Eve-Adams_Feb22.pdf> [perma.cc/KLN7-SVB2] at 8.

¹⁰⁵ *Ibid.*

¹⁰⁶ *Ibid* at 9.

¹⁰⁷ *Ibid.*

¹⁰⁸ Angus Reid Institute, "Crossing the Floor: Canadians weigh in on elected members who quit their parties between elections" (11 December 2018), online (pdf): <angusreid.org/wp-content/uploads/2018/12/2018.11.29-floor-crossing-release.pdf> [perma.cc/M5GJ-SBTQ] at 2.

¹⁰⁹ *Ibid* at 3.

¹¹⁰ *Ibid* at 5.

Although these findings may be of some value in gauging public perception of floor crossings generally, caution is warranted. In conducting the poll, Angus Reid did not ask respondents about whether their view changed based on the nature of the floor crossing. In other words, it did not consider whether a member's perceived motivations for crossing impacted how respondents viewed the practice's legitimacy. This gap may be meaningful because political affiliation and political views are complex and malleable. There is no single motivation for crossing the floor that can be attributed to all members who chose to do so,¹¹¹ and voters may recognize some motivations as legitimate while rejecting others.¹¹²

Evidence for this belief can be found in a study of party switching from 1945-2001 by Snagovsky and Kerby. Analyzing over 50 years of floor crossings at the federal level, Snagovsky and Kerby revealed that the perceived motivation of floor crossers did impact their electoral success.¹¹³ Floor crossers who appeared to be acting opportunistically, crossing either to increase their re-election chances or to secure a higher office (eg. Cabinet position), were penalized on average by 8.8 percentage points at the ballot box.¹¹⁴ By contrast, floor crossers who appeared to be motivated by ideological or policy differences with their party, saw no statistically significant impact on their electoral support (controlling for other variables).¹¹⁵ Based on these results, Snagovsky and Kerby theorize that elected representatives who transparently attempt to benefit themselves are actively punished by voters, while those who appear to have legitimate concerns with their party's positions are not.¹¹⁶ In other words potentially induced or self-serving floor crossers are viewed far more negatively by voters than those seen as taking a principled stand against their party.

3. Floor Crossing in Manitoba

Compared to other provinces, Manitoba's electoral system has performed strongly. It has never suffered from "plurality reversals or any

¹¹¹ Snagovsky & Kerby, *supra* note 8 at 425-426.

¹¹² *Ibid* at 426.

¹¹³ *Ibid* at 441.

¹¹⁴ *Ibid* at 438.

¹¹⁵ *Ibid*.

¹¹⁶ *Ibid* at 438-442.

overly lopsided victories.”¹¹⁷ Yet, Manitoba has also experienced a higher number of hung Parliaments than any other province or territory, besides Ontario.¹¹⁸ Each of these electoral facts are revealing of the political reality in Manitoba that a winning party’s potential seat advantage is relatively small.¹¹⁹ With this comes the reality that a small number of seats or even a single one could end up making the difference between majority and minority rule in the province. In other words, Manitoba’s electoral system may leave the province particularly vulnerable to instability caused by floor crossings should the practice ever rise to prominence. Though whether a legislative response is desirable, and if so, what the response should entail remains open to debate.

Any decision with respect to how our system responds to floor crossings will inherently involve making certain value judgments. A variety of competing interests are raised by the practice, perhaps most noticeably those of elected officials to exercise control over their actions as representatives and those of voters to have their preferences reflected in democratic governance. How these interests, and others, are prioritized will naturally lead to different legislative responses and the debate over Bill 4 largely reflected this fact. In arguing against a ban, the Progressive Conservatives and Manitoba Liberals, in different ways, signaled their belief that a members’ freedoms of conscience and association should come first. By contrast the NDP opposition, in support of the ban, contended that these freedoms should be restricted in favour of enforcing voters’ choice of political representation. Neither position is necessarily wrong, but how these interests are balanced in practice is at the very least worth considering.

B. Legislative Responses to Floor Crossing

The debate over Bill 4 was focused on the merits of the floor crossing ban or lack thereof. However, other legislative responses are possible and

¹¹⁷ Alan Siaroff, “Plurality Voting and Comparative Systemic Failure Since 1956” in Christopher Dunn, ed, *Provinces: Canadian Provincial Politics*, 3rd ed (Toronto: University of Toronto Press, 2016) 217 at 231 [Siaroff, “Plurality Voting”].

¹¹⁸ *Ibid* at 224; Alan Siaroff, “Provincial and Territorial Political Data since 1900” in Christopher Dunn, ed, *Provinces: Canadian Provincial Politics*, 3rd ed (Toronto: University of Toronto Press, 2016) 240 [Siaroff, “Political Data”]; Thomas & White, *supra* note 103 at 373.

¹¹⁹ Siaroff, “Political Data”, *supra* note 118 at 231-232.

should be considered as well. There is value in debating improvements to the functioning of democracy because when citizens feel that “traditional representative institutions”¹²⁰ are failing them, democratic malaise may follow.¹²¹ Therefore, in this part I will examine the merits of not only the ban and unrestricted approaches, but also alternative floor crossing responses which could be implemented in Manitoba.

First, I will reflect on the floor crossing ban and unrestricted approaches, the two most recently used regimes in Manitoba. They will be considered together because in some ways they represent two extremes or sides of a coin. Simply put, these two options prioritize competing values. Second, I will examine the election recall power. More specifically, I will look to the B.C. model suggested by Kevin Lamoureux in 2006 when the floor crossing ban was first proposed. Recall legislation can exist in a number of forms, but B.C. remains the only Canadian province to have tried it to date, providing perhaps the best example of what Manitoba could expect should it go down that road. Finally, I will consider what I believe to be the optimal approach: a partial-ban, or perhaps more accurately a restricted right to cross the floor. Under the proposed system, members would be allowed to switch parties freely, but unable to accept Cabinet positions (after floor crossing) without first winning a by-election. In doing so, the partial-ban would largely preserve member freedoms as they have existed throughout Canadian history, but simultaneously offer voters protection against blatantly opportunistic floor crossings.

1. Floor Crossing Ban and Unrestricted Approaches

Floor crossings did not begin with those of Stronach and Emerson, nor have they historically been limited to the Canadian Parliament. Rather they have been a pervasive, though admittedly infrequent, aspect of Canadian politics both federally and provincially. Though interestingly, other than a short-lived ban in New Brunswick,¹²² to date Manitoba is the only province or territory to have tried restricting them. For most of Manitoba’s history,

¹²⁰ Karen Eltis, “Proportionally Reconciling Floor-crossing with Conflicting Charter Rights: A Proposal for Regulating the Practice” (2008) 22:2 NJCL 215 at 218.

¹²¹ *Ibid* at 217-219.

¹²² Markusoff, *supra* note 36.

and indeed that in most of Canada's provinces and territories,¹²³ elected representatives have been free to switch parties mid-session at their pleasure.

Without legal restrictions on crossing the floor, only a member's constituents can ultimately hold them accountable. The rationale of this approach is that if a member chooses to cross the floor against the will of their constituents, they can be voted out of office during the next election. The advantage of this system is that members have control over their party affiliation, including within Assembly proceedings. If members are kicked out of their party's caucus or leave on principle, they can join another party that better aligns with their views and continue to enjoy the benefits of party membership without waiting for an election. Moreover, members who are particularly in-tune with their constituents' views may change their party affiliation to better represent them – although members who have switched parties on this basis historically have more often than not got it wrong.¹²⁴

Generally, this hands-off approach works well. Floor crossings are infrequent in most provinces and have been exceptionally rare in Manitoba. However, there is a risk to constituents in that they have little actual power to hold MLAs accountable where the member no longer wishes to seek re-election (or assumes their seat is already lost). David Emerson's floor crossing, while an extreme example, demonstrates this weakness well. In that instance, since Emerson switched parties immediately following the 2006 federal election, his constituents had no choice but to wait an entire election cycle to pass judgement. By the time the election came, Emerson had already decided not to seek re-election. Adding to his constituents' frustration was the fact that Emerson took a Cabinet position, placing him in the upper levels of a government with little support in his riding.¹²⁵ Emerson's actions were so controversial that calls to restrict floor crossing soon followed, and helped lead to the floor crossing ban in Manitoba.¹²⁶

¹²³ Nunavut and the Northwest Territories have consensus style governments. Floor crossing is impossible in those assemblies as there are no political parties. See "Consensus Government" (last visited 14 March 2019), online: *Government of Nunavut* <gov.nu.ca/consensus-government> [perma.cc/R53L-ZVJD]; "What is Consensus Government" (last visited 14 March 2019), online: *Legislative Assembly of the Northwest Territories* <assembly.gov.nt.ca/visitors/what-consensus> [perma.cc/K5MX-4HGV]; Thomas & White, *supra* note 103 at 368-369.

¹²⁴ See Snagovsky & Kerby, *supra* note 8 at 434.

¹²⁵ CBC, "Emerson flabbergasted", *supra* note 13.

¹²⁶ "Court challenge of Manitoba's floor-crossing law to be ruled on by March", CBC

At the other extreme is the floor crossing ban. The rationale for this approach is relatively clear. Members are elected under the banner of a political party and will support that party's platform as long as they continue to be a party member. But by providing members with the freedom to change political affiliation comes the risk that members will go against voters' wishes and join a competing party. Some scholars have even suggested that floor crossing undermines voters' s. 3 Charter right to meaningful participation in democracy.¹²⁷ Floor crossing is thus seen as inherently undemocratic and something that needs be restricted.¹²⁸ By banning floor crossings it is therefore argued that voters' choices will be better respected and apathy will be reduced, and indeed this was the argument put forth by the Manitoba NDP when the floor crossing ban was first proposed.¹²⁹ Although the argument for the ban largely assumes that voters' choices are primarily motivated by the political affiliations of candidates, research and polling does seem to support this assumption.¹³⁰ Party platforms matter to voters and since voters are unable to directly elect their leader of choice, local constituency races do in effect act as proxy elections.

However, there are some noticeable disadvantages to dealing with floor crossings in this way. First, the ban approach fails to recognize that floor crossings are not always motivated by the same factors. Whether a member is forcibly ejected from their party or chooses to leave on their own is of no consequence under a ban, and so-called induced floor crossings are treated identically to those based on principle. By contrast, voters' perceptions of

News (18 December 2017), online: <cbc.ca/news/canada/manitoba/court-challenge-manitoba-floor-crossing-law-1.4454034> [perma.cc/HLG4-DEN7].

¹²⁷ Eltis, *supra* note 120 at 229-233; Cameron Siles, "Modest Steps Toward Reform: A Review of Post-Emerson Initiatives to Curtail Floor Crossing" (2012) 30:2 NJCL 171 at 180.

¹²⁸ Eltis, *supra* note 120 at 119-120.

¹²⁹ Hansard (10 May 2006), *supra* note 20 at 1985.

¹³⁰ See Andrew Russell "Voters influenced by party stance, not leaders or candidates: Ipsos poll", *Global News* (8 September 2015), online: <globalnews.ca/news/2209685/voters-influenced-by-party-stance-not-leaders-or-candidates-ipsos-poll/> [perma.cc/7PL8-BJ38]; Sevi, Yoshinaka & Blais, *supra* note 6 at 666-667; See also David McGrane, "Centrism, Ideological Polarization, and the Canadian Provincial Voter" in Christopher Dunn, ed, *Provinces: Canadian Provincial Politics*, 3rd ed (Toronto: University of Toronto Press, 2016) 184.

floor crossing are often more nuanced. Voters may accept certain motivations as being legitimate while rejecting others, where procedurally a ban may recognize no difference. Though in fairness to legislators, it would be nearly impossible to implement a ban that is perfectly responsive to these nuances. Motivations may be debated, and often partisan framings come to directly opposed conclusions. Yet, this complexity would seem to support the argument that voters, not legislation, should be the final judge.

A second potential disadvantage to banning floor crossing, and one of the Manitoba Liberals' primary arguments against such a response, is that the power of party leaders over backbenchers may be increased to an undesirable level. While the goal of a floor crossing ban is at least in part to reinforce party lines, some contend that the results are too extreme and turn members into "uncritical voting machines."¹³¹ Since MLAs are prevented from joining another party, there is arguably increased pressure on them to vote within party lines even when doing so is unpopular with their own constituents. The risk to members of being kicked out of their party's caucus for dissenting also represents a risk of losing resources and privileges they otherwise would have enjoyed.¹³² Thus, it is submitted that members in effect lose the freedom of conscience the Westminster system has traditionally allowed for. In Canada though, where party discipline is already exceptionally high and free votes are rare,¹³³ it is hard to imagine that the floor crossing ban would ever become the deciding factor for a member considering whether to vote against their party.

Finally, a lesser critique of banning floor crossing is that where members seek to adopt a new political affiliation, a ban may simply deny what is already reality. Procedurally, members control their own vote and may exercise it as they see fit. Party discipline may be used to direct members of a political party to exercise their vote in a particular way, but independent members are not subject to this mechanism and may vote as they wish. Thus, a member could be prevented by a ban from fully participating within

¹³¹ Aaron Freeman "Floor crossing's delicate balance: may be a chill now, but history shows floor-crossing is almost inevitable", *The Hill Times* (8 May 2006) [perma.cc/L9EA-MTFN].

¹³² Sevi, Yoshinaka & Blais, *supra* note 6 at 666; Thomas & White, *supra* note 103 at 366.

¹³³ Thomas & White, *supra* note 103 at 365.

the ranks of a new party but in effect vote as if they were a party member.¹³⁴ That being said, this final critique in some ways reflects the relative restraint in which Manitoba's ban was implemented. Under the Manitoba floor crossing ban, members could remedy the disadvantage it created by simply resigning their seat and running in a by-election under their new party's banner. However, in other Westminster countries, floor crossing bans have often been far more restrictive, with some even being implemented through constitutional amendment.¹³⁵ For instance, in India, Members of Parliament are fully prevented from crossing the floor.¹³⁶ Where a member ceases to maintain their political affiliation or votes against their party, they do not sit as an independent but lose their seat entirely.¹³⁷

The scope of Manitoba's former ban provision is notable in this respect because in limiting its application to proceedings within the Legislative Assembly, it fell squarely within the realm of parliamentary privilege. Indeed while some scholars and Steven Fletcher¹³⁸ criticized s. 52.3.1 as unconstitutional due to its perceived impact on members' freedoms of expression and association,¹³⁹ Justice Lanchbery of the Manitoba Court of Queen's Bench found the ban to merely allow "for the dignity, integrity and efficient functioning of the legislature,"¹⁴⁰ thus insulating it from judicial scrutiny.¹⁴¹ Despite the government's admission that the ban was a "bad policy,"¹⁴² it was one they were entitled to enforce.

¹³⁴ Some critics of the ban suggested that needless and expensive by-elections would result from this procedure. While possible, floor crossings have never been an extremely frequent occurrence and as such no increased by-election costs were ever borne. Eltis, *supra* note 120 at 226.

¹³⁵ For example, New Zealand banned floor crossing from 2001-2005. South Africa amended its constitution to restrict floor crossing to specific periods (twice electoral per term). India has banned floor crossing entirely. See Eltis, *supra* note 120 at 236-239; Library of Parliament, *supra* note 5 at 5.

¹³⁶ Library of Parliament, *supra* note 5 at 5.

¹³⁷ *Ibid.*

¹³⁸ Fletcher, *supra* note 41 at paras 12-14.

¹³⁹ Markusoff, *supra* note 36; Lambert, *supra* note 39.

¹⁴⁰ Fletcher, *supra* note 41 at para 80.

¹⁴¹ *Ibid* at paras 80-82.

¹⁴² Lambert, *supra* note 39.

Whether a stricter style of ban, such as India's, would be found constitutional in Manitoba (or Canada generally) seems far less likely. In attempting to tightly control party membership and member voting, a similarly expansive ban would clearly go beyond regulating the internal workings of the Assembly, and potentially create a significant interference with members' freedoms of expression and association. Presumably parliamentary privilege would fail to protect a ban of this nature as a result.¹⁴³

2. Recall Power

Debating the floor crossing ban in 2006, Kevin Lamoureux suggested that a preferable legislative response would be to implement recall legislation, as was done in B.C. in 1995.¹⁴⁴ Under recall legislation a member who crossed the floor could be recalled by their constituents, thus vacating their seat and triggering a by-election.¹⁴⁵ However, initiating the recall process is not dependent on such an occurrence as the power is not one inherently meant to address floor crossings, but rather to increase member accountability generally. Unless restricted by legislation, recalls can be proposed for almost any reason.¹⁴⁶ Nevertheless, at first glance the recall power option looks promising. After all, it would allow members to cross the floor without needing to trigger a by-election but would still provide a member's constituents with an opportunity to hold the member immediately accountable should they oppose their decision. Yet, B.C.'s experience has been far from perfect. Despite over 25 recall attempts since the legislation's enactment, no MLA has ever successfully been recalled in B.C.¹⁴⁷ Further, logical solutions to the legislation's shortcomings may in

¹⁴³ For a brief explanation on the justiciability of parliamentary privilege see Justice Malcolm Rowe & J Michael Collins, "What is the Constitution of a Province?" in Christopher Dunn, ed, *Provinces: Canadian Provincial Politics*, 3rd ed (Toronto: University of Toronto Press, 2016) 297 at 306-308.

¹⁴⁴ Hansard (10 May 2006), *supra* note 20 at 1987 (Kevin Lamoureux).

¹⁴⁵ British Columbia, Legislative Assembly, Select Standing Committee on Parliamentary Reform, Ethical Conduct, Standing Orders and Private Bills, *First Report*, Recall (23 November 1993) [BC Standing Committee].

¹⁴⁶ *Ibid.*

¹⁴⁷ "Summary of Recall Petitions" (last visited 1 April 2019), online (pdf): elections.bc.ca/docs/rcl/Summary-of-Recall-Petitions.pdf [perma.cc/SQ56-47LK] ["Summary of Recall"].

fact lead to the creation of more serious issues, all of which illustrate the overall incompatibility of the recall power within the Westminster system.

Under B.C.'s current recall legislation, an MLA can be recalled if signatures are collected from at least 40% of voters who were registered in that MLA's riding at the time they were elected and who are still registered as voters in B.C.¹⁴⁸ The signatures must be collected within 60 days of the petition commencing, and no recall attempt can be initiated until at least 18 months following an election.¹⁴⁹ If enough signatures are collected, Elections B.C. then reviews the petition to ensure there are enough valid signatures.¹⁵⁰ Provided the 40% threshold is still met, the MLA's seat is vacated and a by-election is called.¹⁵¹ In practice a sufficient number of signatures have only ever been turned over to Elections B.C. twice, and never has the threshold still been found to be met following the verification process.¹⁵²

If Manitoba were to consider implementing recall legislation, some improvements over B.C.'s model could be made relatively easily. First, the threshold could be set lower to better match other jurisdictions with recall legislation. Most U.S. states (with a recall process) for instance place the threshold at 25% the number of votes cast in the previous election.¹⁵³ Second, the signatory eligibility could be opened to all registered voters in a riding, and not just to those who were registered during the previous election, so as to better reflect the wishes of current constituents. Finally, the recall process could be made to trigger an election to decide whether a recall would take place rather than immediately vacating a member's seat on the basis of the petition itself. This would formalize and increase confidence in the process and would better reflect the practice used in all jurisdictions besides B.C.¹⁵⁴

¹⁴⁸ Elections BC, *Report of the Chief Electoral Officer on the Recall Process in British Columbia*, (British Columbia: Elections BC, 17 November 2003) at 4 ["Recall Process Report"].

¹⁴⁹ *Ibid.*

¹⁵⁰ *Ibid.*

¹⁵¹ *Ibid.*

¹⁵² "Summary of Recall", *supra* note 147.

¹⁵³ "Recall Process Report", *supra* note 148 at 27; Shaun Bowler & Bruce Cain, "Introduction – Recalling the Recall: Reflections on California's Recent Political Adventure" (2004) 37:1 *Political Science & Politics* 7 at 7.

¹⁵⁴ "Recall Process Report", *supra* note 148 at 15-16.

However, there are certain fundamental issues with the recall process that cannot be adequately addressed in the context of a Westminster system. Most significant of these is that the recall process could create a greater risk of instability within government, because while the executive and legislative branches in the U.S. presidential system are independent, in Canada the two are intrinsically linked.¹⁵⁵ If a small majority were elected under the Westminster system, the recall process could be used to target vulnerable seats in an effort to undercut it or even establish a majority for another party.¹⁵⁶ If successful, an opposition party could therefore come into power without a new election ever taking place.¹⁵⁷ Moreover, because Cabinet members in the Westminster system are almost always chosen from among elected members of the legislative branch, there would be an additional risk that they could become targets of purely political recall attempts.¹⁵⁸ Instead of focusing on the good governance of the province, small majority governments could become pre-occupied with maintaining power as a result.¹⁵⁹ By contrast, similarly small shifts in the makeup of the legislative branch of the U.S. presidential system would have comparatively little impact. Due to the separation of the executive and legislative branches under that system, control of the executive would not shift with the legislative.¹⁶⁰ Increasing threshold requirements or restricting recall availability to larger majorities could offer possible solutions to these concerns in the Westminster context, but these adjustments would simultaneously undermine the effectiveness of the recall process by raising the bar to initiate it.

A related issue is that the recall process could be exploited by losing candidates to re-contest elections, what has been referred to as the “sore

¹⁵⁵ Thomas & White, *supra* note 103 at 364. While the recall power is unavailable at the federal level in the US (impeachment is available instead), each state government is “modeled after the federal government.” See White House, “State & Local Government” (last visited 2 July 2019), online: <obamawhitehouse.archives.gov/1600/state-and-local-government> [perma.cc/7ML7-FXMJ].

¹⁵⁶ BC Standing Committee, *supra* note 145.

¹⁵⁷ *Ibid.*

¹⁵⁸ *Ibid.*

¹⁵⁹ *Ibid.*

¹⁶⁰ *Ibid.*

loser” issue.¹⁶¹ This is not an issue that arises exclusively within the Westminster context, but it is more pronounced. In many jurisdictions with recall legislation the solution to the “sore loser” problem has been to add a post-election waiting period wherein the recall process cannot be initiated.¹⁶² This is relatively inconsequential in the U.S. system where election dates are fixed and constituents are aware of how much longer a representative’s term will last. Under the Westminster system though, the power to dissolve the government and call an election is almost completely discretionary.¹⁶³ A long waiting period could therefore have the effect of protecting a member from facing a recall for most of a term, particularly where their seat is won in a by-election or where a minority government is elected.¹⁶⁴ A short waiting period on the other hand could leave a seat open to frequent recall attempts. Unlike in the U.S. system which is dominated by only two parties, many Canadian provinces including Manitoba have multiple competitive parties.¹⁶⁵ Plurality rather than majority wins may be the norm in many ridings, thus always leaving a majority in support of an opposing party. In these ridings, regardless of outcome, there would almost always be sufficient support for a recall.

Although a recall process could be enacted as a response to floor crossing, as Mr. Lamoureux once contended, the process suffers from serious incompatibilities with Westminster parliamentary democracy. Stability and responsible government are not only core strengths of the Westminster system, but also form part of a longstanding political tradition in Canada.¹⁶⁶ The recall process at its most effective runs counter to these

¹⁶¹ *Ibid*; “Recall Process Report”, *supra* note 148 at 15.

¹⁶² “Recall Process Report”, *supra* note 148 at 15.

¹⁶³ For example, under Manitoba’s system an election must be called within 5 years, but the Lieutenant Governor may dissolve the Assembly earlier. By political convention the executive controls the power to dissolve. See *Legislative Assembly Act*, *supra* note 35, s 4(1); Justice Rowe & Collins, *supra* note 143 at 300.

¹⁶⁴ Typically, minority governments dissolve much quicker than majority governments (on average less than 2 years compared to 4). See Howard Cody, “Minority Government in Canada: The Stephen Harper Experience” (2008) 38:1 *American Rev Can Studies* 27 at 27; Paul EJ Thomas, “Measuring the effectiveness of a minority parliament” (2007) 30:1 *Can Parliamentary Rev* 22.

¹⁶⁵ By this I mean more than 2 parties with enough support that they can realistically win seats, though not necessarily enough to form government. See Siaroff, “Plurality Voting”, *supra* note Thomas & White, *supra* note 103 at 372-373.

¹⁶⁶ BC Standing Committee, *supra* note 145.

traditions, and at its weakest offers an ineffective accountability measure. If a legislative response to floor crossing is desirable, it should be one that operates effectively within our established political system.

3. Partial-Ban (Restricted Cabinet Eligibility) Approach

Thus far I have considered the merits of three potential floor crossing treatments. The first two, the ban and unrestricted approaches, in some ways represent two extremes. The floor crossing ban attempts to enhance voter confidence in democracy by restricting member freedoms of conscience and association, while by contrast the unrestricted approach prioritizes member freedoms at the sacrifice of formal enforcement of voter preferences. Neither option is inherently improper, though a more balanced approach could mitigate the shortcomings of each. The third alternative, the recall power, arguably does balance these interests, but it struggles to fit within the Westminster system effectively. Proceeding under the assumption that any floor crossing treatment should attempt to balance these competing interests and be operationalized in a way that is compatible with the democratic system as a whole, clearly the three aforementioned floor crossing responses are unsatisfactory. As such, I turn to what I believe is a superior legislative option, what I refer to as the partial-ban approach.

Recognizing the longstanding traditions of Manitoba's political system, its overall stability, and voters' particular disdain for opportunism, the partial-ban approach offers a compromise between Manitoba's former ban and current unrestricted approaches, by allowing MLAs to cross the floor but restricting their ability to accept a Cabinet position when they do so. Following functionally identical proposals by Eltis,¹⁶⁷ and Gussow,¹⁶⁸ floor crossing MLAs under the partial-ban approach would only be able to accept a Cabinet position after either resigning their Assembly seat and winning the resulting by-election, or by winning re-election in the next general election, under their new party banner. The underlying rationale is that members should be afforded maximum freedom over their expression and association in the Assembly, but that voters should be provided an opportunity to pass judgement on members who exercise that freedom in circumstances that are likely to offend the public's view of democracy. Since

¹⁶⁷ Eltis, *supra* note 120 at 239-243.

¹⁶⁸ David Gussow, "Crossing the Floor, Conflict of Interest and the Parliament of Canada Act" (2006) 29:2 Can Parliamentary Rev 9 at 10-11.

voters generally do not view principled floor crossings in the same light as opportunistic ones,¹⁶⁹ the partial-ban only seeks to prevent the latter. Accordingly, voters obtain an important protection with only a minor restriction being placed on the rights of MLAs.

Another advantage of the partial-ban is that it would be relatively simple to implement. Unlike the recall power option which would require developing and funding an entirely new legislative scheme, the partial-ban requires only a small amendment to the qualifications of members under *The Legislative Assembly Act*. Currently, s. 12 of *The Legislative Assembly Act* creates a prohibition on holding most offices concurrently with a seat in the Legislative Assembly, while s. 13 provides a specific exemption to that prohibition for members appointed to the Executive Council (Cabinet).

These sections read:

Certain office holders ineligible

12. Except as hereinafter specially provided, no person accepting or holding any office, commission or employment, or performing any duty, in respect of which any salary, fee, payment, allowance, or emolument, is payable from the Crown in right of the province, is eligible to be nominated for, or elected as a member of, the Legislative Assembly; nor shall he sit or vote in the assembly during the time he holds the office, commission, or employment, or he is performing the duty, or the salary, payment, allowance, or emolument, is payable to him.

Exception respecting members of Executive Council

13. Notwithstanding anything in this Act or any other Act, a member of the Executive Council whether in receipt of salary, allowance, fees or remuneration or not, is not ineligible to be nominated for, or elected as, a member of the Legislative Assembly; nor is he disqualified from sitting or voting in the assembly, if he is elected while he holds such an appointment, nor shall a member of the assembly who is appointed a member of the Executive Council, whether in receipt of salary, allowance, fees or remuneration or not, by reason only of the acceptance of the appointment, vacate his seat or be disqualified from sitting or voting in the assembly.¹⁷⁰

Section 13 in effect allows MLAs to accept a Cabinet position without creating a conflict of interest that otherwise would be created and prevent them from accepting the office. The partial-ban therefore could be introduced either by amending s. 13 or by adding a new section/subsection

¹⁶⁹ Snagovsky & Kerby, *supra* note 8 at 438.

¹⁷⁰ *Legislative Assembly Act*, *supra* note 35, ss 12, 13 [bolding in original].

to qualify the Executive Council exception. Similar to Gussow's proposal for amending the *Parliament of Canada Act*,¹⁷¹ the qualifying provision could be written to apply only to situations where a member's party endorsement in the previous election (or by-election) is different from that of the appointing Premier's political party. This would ensure that regardless of the timing of the Cabinet appointment or the number of party switches by the member after being elected, all MLAs would be prevented from joining the Cabinet of a party other than the one they were most recently elected under.

In some respects the amendment would reintroduce a similar practice that was observed in early Canadian history wherein members appointed to Cabinet would vacate their seat and run in a by-election before being allowed to take the office.¹⁷² Recognizing Cabinet appointments as creating a possible conflict of interest, members would first seek the support of their constituents to confirm their eligibility and dismiss the conflict.¹⁷³ This practice was followed in most provinces, including Manitoba,¹⁷⁴ and the Canadian Parliament,¹⁷⁵ for decades after Confederation. Manitoba eventually made holding the by-election unnecessary in 1927.¹⁷⁶ When Parliament followed in 1931,¹⁷⁷ several MPs raised concerns that Cabinet appointments would become a tool to induce floor crossing.¹⁷⁸ Noting the relatively uncontroversial nature of appointing members from within the governing party, they specifically criticized the removal of the by-election requirement as exposing voters to the risk that opposition party representatives would feel free to switch parties to benefit themselves.¹⁷⁹ It is precisely this kind of behaviour that the partial-ban would attempt to address.

¹⁷¹ Gussow, *supra* note 168 at 10-11.

¹⁷² *Ibid* at 10.

¹⁷³ *Ibid*.

¹⁷⁴ Emily Katherine Grafton, "The Manitoba Legislative Assembly" (2011) 34:1 Can Parliamentary Rev 35 at 38-39.

¹⁷⁵ Gussow, *supra* note 168 at 10.

¹⁷⁶ Grafton, *supra* note 174 at 38-39.

¹⁷⁷ Gussow, *supra* note 168 at 10.

¹⁷⁸ *Ibid*.

¹⁷⁹ *Ibid*.

While the effect of the partial-ban would be to prevent MLAs from crossing the floor and joining Cabinet, legally it would only impact an MLA's eligibility to sit in the Assembly concurrently with holding a Cabinet office, in cases where they crossed the floor. Members elected with the same political affiliation as the Premier would continue to enjoy the benefit of the s. 13 exception, and floor crossing members could gain the benefit of s. 13 by re-winning their seat. Moreover, the Premier's power to select Cabinet would be unaffected by the partial-ban.¹⁸⁰ Although Cabinet is typically chosen from among elected members of the Assembly, who continue to serve as MLAs, a floor crossing member could still accept a Cabinet appointment, even without winning re-election by simply vacating their seat. Thus, the partial-ban would apply narrowly, retaining members' longstanding right to move freely between parties, but insulating against the form of floor crossing viewed most egregiously by voters, that which is induced by a Cabinet appointment.

V. CONCLUSION

The history of floor crossing in Manitoba demonstrates clearly that the practice has had little impact to the province's governance. Even with relatively frequent minority governments, floor crossings have remained exceptionally rare, and for that reason it is perhaps somewhat strange that Manitoba was the first, and almost only, province to experiment with prohibiting the practice. Both the enactment and the eventual repeal of the ban raised debate about the legitimacy of floor crossing and how it should be treated, though in both cases the issue was arguably more about optics than reality. That being said, there is value in proactively dissuading opportunistic floor crossings. Although floor crossings have not been the norm in Manitoba, they remain a realistic possibility and one that often creates real fear for voters that their choice of party is not being protected. Voter confidence in democracy may be undermined by floor crossing, particularly when it is seemingly induced by the offer of a Cabinet position. Therefore, there is good reason to take legislative action to address it.

Balancing both the interests of MLAs to maximize their freedoms of expression and association, and those of voters to have some assurance that

¹⁸⁰ While the appointment power technically resides with the lieutenant-governor, by convention it is the premier who exercises it. See Justice Rowe & Collins, *supra* note 143 at 300.

their wishes will be respected and protected, I have suggested amending *The Legislative Assembly Act* to implement a partial-ban on floor crossing. Under the proposed system, floor crossing would be allowed but the eligibility of MLAs to accept an appointment to Cabinet after doing so would be restricted until voters had the opportunity to pass judgment on them. The partial-ban would have little impact on the rights of members or the daily functioning of the legislature but would offer an important protection to voters going forward. It may be true that Manitoba's floor crossing ban was a "bad policy" but ignoring the legitimate purpose it sought to achieve fails to appreciate the nuance of the floor crossing issue. Manitobans deserve the benefit of a floor crossing policy that balances their interests with those of their representatives, rather than one that simply prioritizes some interests over others. With only a minor amendment to *The Legislative Assembly Act*, the partial-ban approach could accomplish this objective.