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# Unconstitutional or Just Unworkable? The Life and Death of a Prohibition on Floor-Crossing in *Fletcher v the Government of Manitoba*

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A N D R E W F L A V E L L E M A R T I N \*

## ABSTRACT

*Fletcher v the Government of Manitoba* is the first reported challenge to a floor-crossing prohibition under the *Canadian Charter of Rights and Freedoms*. This case comment begins with the legislative history of the challenged provision and then provides an overview and critique of the reasons in *Fletcher*. Against this backdrop, it then reflects on the lessons of the case in two respects. The first is the difficulty in translating a policy idea into legislation – specifically, defining the conduct to be prohibited and determining the appropriate deterrent or penalty for breach. The second respect is the government’s role in defending legislation in court, particularly legislation that it considers to be bad policy and plans to repeal. The comment concludes that *Fletcher* ultimately demonstrates that governments should defend constitutionally viable laws in court – even laws that were adopted by a previous government and that are destined for repeal as bad policy.

**Keywords:** Manitoba; *Canadian Charter of Rights and Freedoms*; Floor-crossing; Party switching; Legislation; Lawmaking; Attorney General

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## I. INTRODUCTION

One of the most controversial things a legislator can do is cross the floor, i.e. join the caucus of a party other than that under which he or she was elected.<sup>1</sup> *Fletcher v the Government of Manitoba*<sup>2</sup> is the first reported challenge to such a prohibition under the *Canadian Charter of Rights and Freedoms*.<sup>3</sup> *Fletcher* presents an excellent opportunity to reflect on larger themes in lawmaking and the government's legal defence of legislation. Steven Fletcher, the member of the Legislative Assembly of Manitoba for the riding of Assiniboia, was expelled from the governing Conservative caucus.<sup>4</sup> He was then bound by a floor-crossing prohibition in the *Legislative Assembly Act* that prevented him from joining another party's caucus.<sup>5</sup> He applied for a declaration that the prohibition breached the *Charter*, specifically sections 2(b) (expression), 2(d) (assembly), and 3 (democratic rights). While the application was unsuccessful, the government simultaneously passed a bill repealing the prohibition.<sup>6</sup> The bill received Royal Assent fifteen days before Fletcher's application was denied.<sup>7</sup>

This comment analyzes the reasons in *Fletcher* and their larger implications, and is organized in four parts. In Part I, I establish the context for my commentary: the language and legislative history of the prohibition and the legislative history of its repeal. In Part II, I canvas and critique the Court's decision in *Fletcher*. In Part III, I consider the lessons for lawmaking, and in Part IV I consider the implications for the government's legal defence

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<sup>1</sup> For a recent and fairly standard account of floor-crossing, see e.g. "Leona Alleslev and the unseemly politics of crossing the floor", *The Globe and Mail* (19 September 2018) online: <[theglobeandmail.com/opinion/editorials/article-globe-editorial-leona-alleslev-and-the-unseemly-politics-of-crossing/](http://theglobeandmail.com/opinion/editorials/article-globe-editorial-leona-alleslev-and-the-unseemly-politics-of-crossing/)> [perma.cc/NKW9-B5RS] [*Globe* editorial].

<sup>2</sup> *Fletcher v the Government of Manitoba*, 2018 MBQB 104 [*Fletcher*].

<sup>3</sup> *Canadian Charter of Rights and Freedoms*, ss 2(b), 3, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK), 1982*, c 11 [*Charter*].

<sup>4</sup> *Fletcher*, *supra* note 2 at paras 1-2.

<sup>5</sup> *Ibid* at para 3; *The Legislative Assembly Act*, CCSM c L110, s 52.3.1.

<sup>6</sup> *The Legislative Assembly Amendment Act (Member Changing Parties)*, SM 2018, c 3; Manitoba, Bill 4, 34th Leg, 3rd Sess (2018) [*Member Changing Parties Act*].

<sup>7</sup> Manitoba, Legislative Assembly, Debates and Proceedings, 41-3, vol LXXI No 58 (4 June 2018) at 2846 [*Hansard* (4 June 2018)].

of legislation. I then conclude by reflecting on these lessons and their implications.

## II. PART I – CONTEXT: THE PROHIBITION’S ADOPTION AND REPEAL

Prior to its repeal, section 52.3.1 of *The Legislative Assembly Act* read as follows:

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 he 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.<sup>8</sup>

Other than fixing a minor typographical error,<sup>9</sup> the section was never amended.

When section 52.3.1 was adopted in 2006, then-Premier Gary Doer of the NDP framed the issue as one of voter trust: “We believe the voters trust, if you run as a Tory, even if you do not agree with their policies, you have to stay with the Tories or be an independent. You cannot cross the floor to another political party.”<sup>10</sup> The Liberal party argued that recall legislation would be a more comprehensive and direct way to ensure voter trust than an outright ban on floor-crossing, allowing voters to judge legislators and their reasons for doing so.<sup>11</sup> The Conservative party argued instead for a prohibition on “inducements,” such as cabinet membership, to cross the

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<sup>8</sup> *The Legislative Assembly Act*, *supra* note 5, s 52.3.1, as added by *The Elections Reform Act*, SM 2006, c 15, Sched E, s 1.

<sup>9</sup> *The Statutes Correction and Minor Amendments Act*, 2010, SM 2010, c 33, s 31(4): “Clause 52.3.1(b) of the English version is amended by striking out “her” and substituting “he”.”

<sup>10</sup> Manitoba, Legislative Assembly, *Debates and Proceedings*, 38-4, vol LVII No 66 (10 May 2006) [*Hansard* (10 May 2006)] at 1985 (Hon Gary Doer). For my purposes, Doer’s expressed belief is more important than its accuracy. See below note 52 and accompanying text.

<sup>11</sup> *Ibid* at 1992 (Hon Jon Gerrard); *Ibid* at 1987 (Kevin Lamoreux).

floor.<sup>12</sup> Opposition members further noted that some legislators cross the floor for principled reasons by stating: “If somebody wants to cross the floor on a matter of principle, that is important. We think they should have the right to do that.”<sup>13</sup> As well, they noted that Winston Churchill did so twice.<sup>14</sup>

In the shadow of Fletcher’s court application, the Conservative government introduced a bill to repeal the prohibition. The Minister of Justice gave two main reasons for the repeal. One was that the prohibition was “unparliamentary” and “goes against...the Westminster parliamentary traditions that we uphold in our country.”<sup>15</sup> The second reason was to avoid spending money defending against Fletcher’s application in court – “saving taxpayers thousands in potential legal expenses defending the floor-crossing ban.”<sup>16</sup> The Minister also made two revealing comments that I will return to below – that the prohibition was “an... unworkable policy” and that it “should never have been introduced in the first place.”<sup>17</sup> While the Minister refused to state whether or not the prohibition was constitutional, Fletcher referred to previous government statements that it was unconstitutional, and suggested a faster way to avoid the costs of defending against his application would be to concede it.<sup>18</sup> In contrast, NDP legislator and former Minister of Justice Andrew Swan suggested that the government had received advice that the prohibition was arguably constitutional, and that

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<sup>12</sup> Manitoba, Legislative Assembly, *Debates and Proceedings*, 38-4, vol LVII No 79B (30 May 2006) at 2787 (Hugh McFadyen).

<sup>13</sup> *Ibid.*

<sup>14</sup> *Hansard* (10 May 2006) *supra* note 10 at 1992 (Hon Jon Gerrard).

<sup>15</sup> Manitoba, Legislative Assembly, *Debates and Proceedings*, 41-3, vol LXXI No 8B (30 November 2017) at 263, 264 (Hon Heather Stefanson) [*Hansard* (30 November 2017)].

<sup>16</sup> *Ibid* at 263. See also 264, 265.

<sup>17</sup> *Ibid* at 263.

<sup>18</sup> *Ibid* at 266 (Steven Fletcher). See also 264, 265. Fletcher at 264 also quite reasonably suggested, in the alternative to conceding the application, that the Minister of Justice seek unanimous consent to fast-track the bill.

was why the government could not concede the application.<sup>19</sup> He also argued that the prohibition remained necessary for voter trust.<sup>20</sup>

In this comment, I use the term “bad policy” to reflect the government’s public position that the floor-crossing prohibition was unparliamentary and unworkable and never should have been adopted. I emphasize that “bad policy” is about laws that pose problems other than unconstitutionality.<sup>21</sup>

### III. PART II – THE COURT’S DECISION AND MY CRITIQUE

In this Part, I canvass the arguments made by the parties and the reasons given by the Court for denying the application. I then offer a critique of those reasons.

#### A. The Positions of the Parties

Fletcher argued that the prohibition infringed his *Charter* rights and “has the practical effect of limiting [his] ability to represent his constituents.”<sup>22</sup> According to his argument, his freedom of association under section 2(d) was infringed because the prohibition prevented him from associating with a recognized political party, which would provide him advantages in the legislature that were not available to independent members,<sup>23</sup> thus “preventing [him] from fully exercising [his] freedom of

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<sup>19</sup> *Ibid* at 278 (Andrew Swan): “He’s [Fletcher’s] asked a number of times, well, why don’t they just throw in the towel? Well, the reason they can’t throw in the towel is because they’ve got advice, I know, from their own department saying, well, actually, we think there is a very arguable case that this legislation continues to be constitutional. That’s the problem that this minister has.”

<sup>20</sup> *Ibid* at 274.

<sup>21</sup> Indeed, this is consistent with the language of the application judge. See *Fletcher, supra* note 2 at paras 47, 60, 82 (“bad public policy”).

<sup>22</sup> *Fletcher, supra* note 2 at para 13.

<sup>23</sup> *Ibid* at para 26: “a) the ability to caucus; b) the right to have a House Leader to participate in procedural discussions with the House leader of the Government and the Official Opposition; c) the right to participate in the Legislative Assembly by asking questions to the full extent contemplated by the Rules; d) the right to sit and vote on Committees of the Legislative Assembly; e) the right to an allocation of resources of the Legislative Assembly; f) the right to fund raise and to issue tax receipts to donors; g) the right to one of the opposition days established by the Rules of the Legislative Assembly; h) the right to select up to three private members’ bills as a

association by pursuing [his] goals/objectives as an MLA.”<sup>24</sup> His freedom of expression under section 2(b) was infringed because the prohibition prevented him “from joining any other political party to caucus,”<sup>25</sup> and because of the same limitations on his activities as an independent MLA as noted above.<sup>26</sup> Fletcher also argued that section 3 was infringed because “[b]y denying his right to join another political party, [his] constituents have lost the ability to understand their member’s views on the issues of the day.”<sup>27</sup> Fletcher further argued that none of these infringements were justifiable under section 1 of the *Charter* because the objective of “preventing members from changing political parties during the course of the term in which they were elected cannot be considered pressing and substantial,”<sup>28</sup> the impairment was not minimal, and the harms exceeded the benefits.<sup>29</sup>

In response, the government argued that the prohibition was protected from judicial review as “part of the inherent parliamentary privilege to control its internal proceedings,”<sup>30</sup> and in any event did not violate the *Charter*:

[N]otwithstanding s. 52.3.1, the applicant is free to associate with whomever he pleases. He is not restricted from joining or caucusing with any political party he chooses. There are no limitations on the topics where he can offer an opinion. He can campaign and raise money for himself or any political party. As with all MLAs, he is bound by the internal procedural rules and practices of the legislature, which

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member of an opposition caucus to come to a second reading vote each session.” See also Cameron Siles, “Modest Steps Toward Reform: A Review of Post-Emerson Initiatives to Curtail Floor Crossing” (2012) 30:2 NJCL 171 at 179: “If an MLA wishes to sit as an independent, they can do so without triggering a by-election, but at the cost of doing without the rights and privileges (primarily additional staff and research resources) that come with being a member of a recognized party caucus.”

<sup>24</sup> *Fletcher*, *supra* note 2 at para 27.

<sup>25</sup> *Ibid* at para 31.

<sup>26</sup> *Ibid* at paras 32-33.

<sup>27</sup> *Ibid* at para 38.

<sup>28</sup> *Ibid* at para 40.

<sup>29</sup> *Ibid* at paras 39-44.

<sup>30</sup> *Ibid* at para 48.

are part of the Assembly's inherent parliamentary privilege to control its internal proceedings, and does not violate his *Charter* rights in the ways suggested.<sup>31</sup>

At the same time, the government “conceded that s. 52.3.1 of the Act runs counter to the parliamentary tradition in Canada.”<sup>32</sup>

## B. The Reasons

Justice Lanchbery held that the prohibition was protected by parliamentary privilege and that it did not infringe sections 2(b), 2(d), or 3 of the *Charter*.<sup>33</sup> Section 3 was not infringed because the prohibition “has no effect on the right to vote, or to be an MLA.”<sup>34</sup> The alleged infringement of expression was not supported by the evidence, as Fletcher “remains able to attempt to persuade others ... to come to his point of view whether inside or outside the legislature.... his speech has not been subject to any restrictions as he has claimed.”<sup>35</sup> Indeed, as an independent member Fletcher actually had greater ability to express himself.<sup>36</sup> Neither was his freedom of association infringed:

The applicant is incorrect that he is prohibited from joining any political party that permits him to be a member. Section 52.3.1 does not limit this ability in any way. The applicant can caucus with any political party or group of members of the legislature that permits him to caucus. Caucusing is the ability to join discussions with others with their permission. It does not mean that you have to be a member of that party. I take judicial notice that in fact independent members in the legislature and in the House of Commons are able to caucus with members of a different political party without restrictions placed upon that activity by the

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<sup>31</sup> *Ibid* at para 49.

<sup>32</sup> *Ibid* at para 47.

<sup>33</sup> *Ibid* at paras 82 (privilege), 69 (*Charter*).

<sup>34</sup> *Ibid* at para 68. I note here Siles' argument that the floor-crossing prohibition promotes the section 3 rights of voters, because floor-crossing “cast[s] doubt about whether their choice was a fully informed one based on accurate and complete information provided to them by candidates”: Siles, *supra* note 23 at 182-183. See also Karen Eltis, “Proportionally Reconciling Floor-Crossing With Conflicting *Charter* Rights: A Proposal for Regulating the Practice” (2008) 22:2 NJCL 215 esp at 219-223, 230-233. Eltis also argues that floor-crossing is contrary to voters' freedom of expression in choosing the party for which to vote at 221, 233-235.

<sup>35</sup> *Fletcher, supra* note 2 at para 74.

<sup>36</sup> *Ibid* at paras 71-79.

legislature or Parliament. The only restrictions on his ability to do so is having other members agreeing to caucus with him.<sup>37</sup>

Furthermore, parliamentary privilege applied because “[t]here is nothing to suggest that s. 52.3.1 does anything but provide for the dignity, integrity and efficient functioning of the legislature.”<sup>38</sup>

In reaching his decision, Lanchbery J also made important observations about the role of the court in these circumstances. First, the government’s repeal of the prohibition did not affect the question of its legality or the court’s responsibility to decide the matter before it:

In a *Charter* argument that involves a question of parliamentary privilege, it must be remembered that if one political party is of the view that the legislation is bad public policy, it does not and should not end the matter. Revocation does not mean that a different political party or even a future government of the same political stripe may seek to reintroduce similar legislation.<sup>39</sup>

Second, the fact that a provision “may be bad public policy” is not an appropriate reason for courts to interfere, especially as the provision relates to the legislature.<sup>40</sup>

While not essential to his decision, Lanchbery J also made some important comments about floor-crossing generally. Near the beginning of his reasons, Lanchbery J discussed what floor-crossing means and why it is considered to be objectionable:

The record is clear that the legislation was designed to prevent "floor crossing". Floor crossing is commonly understood to mean when a member leaves the benches of the political party to whom he/she was elected to serve, and seeks to join the ranks of another political party, without facing the electorate. The most publicized instances, and therefore the most recognizable by members of the general public, are those where the member is ... offered an inducement such as a seat in the Cabinet of the governing party.

Public sentiment about floor crossing has generally been negative .... The theory behind the ban against floor crossing and joining another political party is that if

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<sup>37</sup> *Ibid* at para 76.

<sup>38</sup> *Ibid* at para 80. I note here Siles’ argument that floor-crossing is political and so not justiciable: Siles, *supra* note 23 at 185. However, I would argue that parliamentary privilege (which Siles also considers at 185-186, without naming it explicitly) is a better and more Canadian fit than political non-justiciability.

<sup>39</sup> *Fletcher, supra* note 2 at para 60.

<sup>40</sup> *Ibid* at para 82.

a member wishes to leave his/her political party, it is the voter that should decide the fate of such a member before he/she is allowed to cross the floor, and not the unilateral wishes of the member, or another political party.<sup>41</sup>

Justice Lanchbery also noted that Fletcher's circumstances were different than the typical floor-crossing scenario but the prohibition as written did not recognize that difference:

In this case, the applicant did not cross the floor, but was expelled from the Progressive Conservative caucus. This is a distinction without a difference for the purpose of the Act. The applicant must face the voters if he wants to be recognized as a member of another party in the legislature.<sup>42</sup>

Later in his reasons, Lanchbery J returned to this point, again distinguishing Fletcher's circumstances from what he termed "traditional floor crossing":

It is clear that the applicant follows his own conscience. He has always displayed a sense of independence, which is at times at odds with party discipline. Should such a member be penalized by s. 52.3.1 when his actions were not the traditional "floor crossing"? Section 52.3.1 is a blanket provision that does not distinguish between the different types of floor crossing.<sup>43</sup>

These observations raise important questions about the appropriate scope and design of a prohibition on floor-crossing.

### C. Critique of the Reasons

There are two respects in which the reasons are curious: mootness, and the scope and meaning of freedom of association. There is also an overlooked question about the constitutional nature and role of parliamentary tradition and the part it ought to play in circumstances such as these.

The first and most obvious curiosity in the reasons is that there is no explicit discussion of mootness. As mentioned above, the decision came down fifteen days after the repeal received royal assent.<sup>44</sup> While there were nonetheless good reasons to continue – in particular, judicial economy and, as Lanchbery J noted, the possibility that the prohibition could be re-

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<sup>41</sup> *Ibid* at paras 5-6 [emphasis in original]. As for the generalization that "[p]ublic sentiment about floor crossing has generally been negative", see below note 52 and accompanying text.

<sup>42</sup> *Fletcher*, *supra* note 2 at para 7.

<sup>43</sup> *Ibid* at para 63.

<sup>44</sup> *Hansard* (4 June 2018), *supra* note 7.

enacted in future – it seems surprising that the issue was not addressed explicitly.

The second curiosity in the reasons is that the reasons given set out a fairly narrow or thin conception of freedom of association. Recall that Lanchbery J adopted a thin conception of caucusing:

The applicant can caucus with any political party or group of members of the legislature that permits him to caucus. Caucusing is the ability to join discussions with others with their permission. It does not mean that you have to be a member of that party.<sup>45</sup>

Under this conception, Fletcher’s freedom of association is purportedly maintained because he is able to associate with other members, even though he is not able to be recognized and to identify himself to others as a member of a party’s caucus. This seems to be a surprisingly minimalist conception of freedom of political association. Indeed, one can reasonably presume that caucusing with legislators of a different party is rare in modern Canadian politics, given the dominance and centrality of political parties and the consequences of perceived disloyalty.<sup>46</sup> Moreover, it is the formal party and caucus membership, not mere caucusing itself in the sense invoked by Lanchbery J, that is meaningful and provides advantages.

The reasons in *Fletcher* also leave a key question about parliamentary privilege unanswered. The recognition of parliamentary privilege in the written constitution comes from the preamble to the *Constitution Act, 1867*.<sup>47</sup> However, the preamble arguably recognizes and incorporates

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<sup>45</sup> *Fletcher*, *supra* note 2 at para 76. See above note 34 and accompanying text.

<sup>46</sup> See e.g. Semara Sevi, Antoine Yoshinaka & Andrew Blais, “Legislative Party Switching and the Changing Nature of the Canadian Party System, 1867-2015” (2018) 51:3 Can J Political Science 665 at 665: “Organized less around connecting citizens to government and more around getting politicians elected, contemporary parties are professionalized campaign machines tuned to complex information environments. To a greater extent than before, party officials fundraise, develop brand images, conduct market research, advertise, and, if successful, manage the affairs of government. Parties are therefore seen as “in service” to the elected officials whose careers depend on receiving party support” [citations omitted]. See also 666: “Those who do not toe the party line do so to the detriment of their political careers.... Parties discipline disloyal MPs and isolate them from their colleagues” [citation omitted]. Presumably caucusing with a non-party legislator would be seen as disloyalty.

<sup>47</sup> *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5. See e.g. *Canada (House of Commons) v Vaid*, 2005 SCC 30 at para 29: “Parliamentary privilege does not create a gap in the general public law of Canada but

Westminster parliamentary tradition as part of the Constitution. Insofar as floor-crossing was allowed under that tradition,<sup>48</sup> the preamble itself arguably provides duelling answers. Does it protect a prohibition on floor-crossing because that prohibition is part of parliamentary privilege for the legislature to determine its own internal governance and processes? This is the answer given in *Fletcher*. But it could also be the case that the preamble prevents a prohibition on floor-crossing, because that prohibition is contrary to Westminster parliamentary tradition.<sup>49</sup> In other words, does parliamentary privilege allow the legislature to contravene parliamentary tradition? There is a compelling argument to be made that, insofar as floor-crossing was a recognized part of Parliamentary practice in the United Kingdom and thus an aspect of the unwritten Canadian constitution, the prohibition in *Fletcher* was actually contrary to the preamble instead of protected by it. This argument remains unraised and unanswered. However, it does suggest that the government's concession that the prohibition was contrary to parliamentary tradition was not as innocuous as it seemed and was perhaps unwise.

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is an important part of it, inherited from the Parliament at Westminster by virtue of the preamble to the *Constitution Act, 1867*" [citations omitted] [*Constitution Act UK*].

<sup>48</sup> See e.g. Robert Leach, *Turncoats: Changing Party Allegiance by British Politicians* (Aldershot: Dartmouth, 1995) at 3, who traces UK floor-crossing back as far as 1886. For a list of floor-crossing from 1900 to 2015 in the UK Parliament, see Roger Mortimore & Andrew Blick, eds, *Butler's British Political Facts* (London: Palgrave MacMillan, 2018) at 388-395. In the Canadian context, see e.g. Gregory Tardi, "Change of Political Allegiance in Parliamentary Life" (2007) 33:3 *Commonwealth L Bulletin* 429 at 430, who traces floor crossing in post-confederation Canada back to 1868.

<sup>49</sup> See e.g. Tardi, *supra* note 48 at 433-434: "A reasonable argument can be made that once a member has been elected to the House of Commons, their most significant parliamentary privilege is their ability to speak in favour of, to vote with, and therefore, to ally themselves with, the political formation of their choice. This privilege applies throughout the MP's time in Parliament, and includes their ability to change the direction of their speech, their vote and their allegiance at any time. Considering the constitutional nature and character of Parliamentary privilege, this ability on the part of MPs is thus opposable to any duty or obligation that may be born out of simple statute or claimed to have arisen from the common law. The lineage of this line of argumentation is based on Canada's inheritance of parliamentary privilege from the United Kingdom" [emphasis added].

## IV. PART III – LESSONS: FROM IDEA TO LEGISLATION

Aside from the merits of the reasons themselves, the decision in *Fletcher* and the prohibition itself offer compelling case studies in two respects: the process of translating an idea into legislation, and the proper role of the Attorney General in defending legislation that the government intends to repeal. In this Part, I consider the former.

The prohibition itself and the decision in *Fletcher* form a compelling case study in the difficulty of translating an idea into legislation. First, how do we define floor-crossing? Justice Lanchbery provided a definition that seems appropriate: “Floor crossing is commonly understood to mean when a member leaves the benches of the political party to whom he/she was elected to serve, and seeks to join the ranks of another political party, without facing the electorate.”<sup>50</sup> He also noted that the most objectionable kind of floor-crossing is “where the member is [...] offered an inducement such as a seat in the Cabinet of the governing party.”<sup>51</sup>

Next, why is floor-crossing objectionable enough that a prohibition is appropriate – to those who do consider it objectionable? I acknowledge here that voter opposition to floor-crossing may be “conventional wisdom” more than empirical fact.<sup>52</sup> However, that is the wisdom that appeared to animate the comments of Lanchbery J and the Manitoba legislators during both the adoption and the repeal of the floor-crossing prohibition. Floor-crossing is objectionable because voters incorporate party affiliation into their voting choices, running as a party’s candidate implies a commitment to that party

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<sup>50</sup> *Fletcher*, *supra* note 2 at para 5; see above note 41 and accompanying text.

<sup>51</sup> *Ibid*; see above note 41 and accompanying text.

<sup>52</sup> Feodor Snagovsky & Matthew Kerby, “The Electoral Consequences of Party Switching in Canada: 1945-2011” (2018) 51:2 Can J Political Science 425 at 426: “conventional wisdom portrays [party] switching as an act of political self-immolation: few MPs who switch parties get re-elected.” See also Sevi, Yoshinaka & Blais, *supra* note 46 at 666: “Floor crossing in the contemporary era is the ultimate risky proposition.” Snagovsky & Kerby provide a thoughtful quantitative analysis of whether MPs who switch parties receive more or fewer votes in the subsequent election. While “the proportion of MPs who switch parties and fail in their bids for re-election is considerably higher than it is for those [who] do not switch at all” (431), the impact and degree of impact varies depending on the reasons for, and circumstances surrounding, the switch: 441-442. For a longer-term historical analysis, see Sevi, Yoshinaka & Blais, *supra* note 46 at 685-692.

(at least for the term of office), and a change in party is a substantial change on which voters should be able to reconsider their voting choices. Or, as Heather MacIvor puts it, “the act of campaigning under a particular political banner creates a principled and political link between the MP so elected, the party and the constituents, which the law ought not allow to be breached.”<sup>53</sup> Similarly, Cameron Siles describes the act of floor crossing as invoking, “[t]he sense that voters had somehow been ‘duped’... and deprived of their right to be fully-informed and participate meaningfully in the electoral process.”<sup>54</sup> Consider also Karen Eltis’ articulation of a prevalent view that “a vote for one’s member of Parliament is tantamount to a vote for a particular party, its program and its leader.”<sup>55</sup> Thus a prohibition may be an appropriate legislative response.

However, the Manitoban prohibition might be overinclusive, i.e. there are some situations that may be captured by this prohibition that might be different and permissible. As noted by Lanchbery J, Fletcher’s situation was that he was expelled from his party’s caucus. Is that different enough that he should be able to join another party? During the debates on the repeal of the prohibition, one NDP legislator suggested not, saying that “when folks are kicked out of their caucus, they have to deal with the

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<sup>53</sup> Heather MacIvor, “Federal Bill C-208 of 2006 and 2007: A Legislative Proposal on Floor Crossing” (2009) 2 JPPL 329 at 329. See also Lori Turnbull, “Rules are Not Enough: How Can We Enforce Ethical Principles?” (2008) 1 JPPL 351 at 357: “[floor-crossing] is now interpreted widely as an MP’s betrayal of his constituents’ preferences and an abuse of their trust.”

<sup>54</sup> Siles, *supra* note 23 at 172.

<sup>55</sup> Eltis, *supra* note 34 at 222. See also Sevi, Yoshinaka & Blais, *supra* note 46 at 667: “Canada’s electoral system went from a candidate-centred system to a party-centred one, where the party leader and the label play a huge role in deciding the fortune of the individual candidate.” See similarly *Globe* editorial, *supra* note 1: “After all, many if not most MPs are elected because of the banner they carry”. But see for example the work of Andre Blais and Jean-Francois Daoust, suggesting that approximately 4% of voters in federal elections vote for a local candidate they prefer even though the candidate is running for a party other than the party they prefer: Andre Blais & Jean-Francois Daoust, “What Do Voters Do When They Like a Local Candidate From Another Party?” (2017) 50:4 Can J Political Science 1103 at 1107: “In short, in these three provinces [BC, Ontario, and Quebec], around one voter out of ten particularly liked a candidate from a party other than the one he or she preferred in the 2015 Canadian election. For two out of five of such voters, the preference for the local candidate trumped the party preference.”

consequences.”<sup>56</sup> Fletcher’s intended change in party affiliation was also the opposite of the usual floor-crossing – he sought to join an opposition party, not the governing party.

Moreover, what if the member leaves the party in circumstances such as a change in leadership or a dramatic shift in party policy? During the 2006 debates on the prohibition, one legislator invoked the example of Winston Churchill and suggested that “his party deserted him.”<sup>57</sup> Consider, at the federal level, the merger of the Canadian Alliance Party and the Progressive Conservative Party into the Conservative Party.<sup>58</sup> One Member of Parliament, Joe Clark, chose to continue as a member of the Progressive Conservative Party.<sup>59</sup> Another member, Scott Brison, chose to join the Liberal Party.<sup>60</sup> In a sense, they abandoned the official and majority stance of their party by refusing to join the merged party. However, the Progressive Conservative party arguably deserted them both by merging with the Canadian Alliance party. If there had been a prohibition on floor-crossing, should it have affected these members?

The prohibition might also be underinclusive. For example, if it is problematic for a member elected under one party to change parties, why is it not problematic for a member elected as an independent to join a party? Voters presumably took the candidate’s lack of party affiliation into account in a similar way as they would consider a candidate’s party affiliation.

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<sup>56</sup> *Hansard* (30 November 2017), *supra* note 15 at 271 (Nahanni Fontaine). See also MacIvor, *supra* note 53 at 332: “One might argue that an MP who has run afoul of the leader and been cast out of caucus should not be required to seek re-election for that reason, but there are other ways to protect dissidents.”

<sup>57</sup> *Hansard* (10 May 2006), *supra* note 10 at 1992 (Hon Jon Gerrard).

<sup>58</sup> MacIvor, *supra* note 53 at 331-332 describes this as one of the “peculiar consequences” of a floor-crossing bill I will discuss below: “Had it been in force in December 2003, the Bill would have required the resignation and re-election of the entire Canadian Alliance caucus—and those members of the Progressive Conservative caucus who did not become Independents—before they could take their seats as Conservatives.”

<sup>59</sup> See e.g. Clark Campbell “Martin’s Prize Catch”, *The Globe and Mail* (11 December 2003) A1, online <[theglobeandmail.com/news/national/martins-prize-catch/article18439670/](http://theglobeandmail.com/news/national/martins-prize-catch/article18439670/)> [perma.cc/ZXX2-PUMJ].

<sup>60</sup> See e.g. *ibid.* See also Sevi, Yoshinaka & Blais, *supra* note 46 at 668, citing Brison in support of their proposition that “not all party switching is done in the service of political ambition.”

Once the conduct to be prohibited is identified and defined, what is the appropriate penalty to be imposed or the deterrent to be threatened? The prohibition Fletcher challenged provided that the member “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.”<sup>61</sup> The penalty, if it can be called that,<sup>62</sup> is “to be treated as” an independent. The provision functions by binding the Speaker and the apparatus of the Assembly.

The provision challenged in *Fletcher* is similar to a prohibition enacted in New Brunswick in 2014 (and repealed in 2015), which provided that a member who:

ceases to belong to the caucus of that registered political party during the term for which he or she was elected.... shall be treated during the remainder of the member's term as an independent member of the Legislative Assembly with respect to the proceedings in the Legislative Assembly and for all other purposes.<sup>63</sup>

(The New Brunswick prohibition also explicitly identifies resignation as an alternative for a member who leaves a caucus).<sup>64</sup> However, the act adopting the New Brunswick prohibition, perhaps concerned about retrospective application of the law, also amended the *Elections Act* to state that “[t]he nomination papers of a candidate of a registered political party shall include a statement” acknowledging the prohibition.<sup>65</sup> Like the Manitoba prohibition, the New Brunswick prohibition does not consider whether the member left the caucus voluntarily, and does not prevent a member elected

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<sup>61</sup> *The Legislative Assembly Act*, *supra* note 5, s 52.3.1.

<sup>62</sup> See e.g. Tardi, *supra* note 48 at 435, arguing that the practical effect is minimal: “the solution adopted by Manitoba merely prevents rival political parties from benefiting from the member's intention to change allegiance. The provision recognises that allegiances can change over time and with altered political circumstances. While it is the decision of the member that disadvantages the party with which they were elected, such a decision cannot advantage a rival political party. However, nothing prevents the floor-crossing member from voting, even consistently, with a rival political party. The inability of the floor-crosser to actually join a rival party is a small, perhaps even symbolic, legislated fig-leaf of protection for the party that loses the floor-crosser.”

<sup>63</sup> *An Act Respecting Floor Crossing*, SNB 2014, c 62, s 2, adding ss 23.1(1) and (2) to the *Legislative Assembly Act*, RSNB 1973, c L-3. Removed from the *Legislative Assembly Act*, RSNB 2014, c 116, by *An Act Respecting Responsible Governance*, SNB 2015, c 6, s 4.

<sup>64</sup> *Ibid*, s 23.1(1).

<sup>65</sup> *Ibid*, s 1, adding s 51(4.1) to the *Elections Act*, RNSB 1973, c E-3.

as an independent from joining a caucus, or a member of a caucus leaving that caucus to sit as an independent.

Contrast here Eltis' narrower and more nuanced prohibition proposal, in which members who cross the floor would be prohibited from Cabinet membership until after a by-election or the next general election.<sup>66</sup> This approach targets only the most problematic kinds of floor-crossing and does so in a more defensible way that is less impairing of members' *Charter* rights.<sup>67</sup>

The provision challenged in *Fletcher* and the New Brunswick prohibition can also be contrasted with bills from other Canadian jurisdictions that would have banned floor-crossing. Consider, for example, Bill C-212, which would have amended the *Parliament of Canada Act*:

Any person holding a seat in the House of Commons who becomes a member of a registered party as defined in subsection 2(1) of the *Canada Elections Act* is deemed to have vacated the seat and ceases to be a member of the House if, in the last election, the person was endorsed by another registered party or was not endorsed by a registered party.<sup>68</sup>

The penalty here is that the member actually loses his or her seat (this prohibition also applies to a member elected as an independent). To similar effect is the Ontario *Respect for Voters Act*, which would have amended the *Legislative Assembly Act*:

If a member who is elected to the Assembly while a member of a political party registered under the *Election Finances Act* leaves that party or a successor of that party, as the case may be, the member is disqualified by law to continue to sit or

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<sup>66</sup> Eltis, *supra* note 34 at 240-243.

<sup>67</sup> *Ibid* at 240.

<sup>68</sup> *An Act to amend the Parliament of Canada Act (members who cross the floor)*, Bill C-212, 42nd Parl, 1st Sess (2016), s 1, adding s 27.1 to the *Parliament of Canada Act*, RSC 1985, c P-1. See MacIvor, *supra* note 53, discussing an identical bill from 38th Parl, 1st Sess (2006) and 38th Parl, 2d Sess (2007). MacIvor notes several shortcomings of the bill: its reliance on the definition of "registered party" under the *Canada Elections Act*, SC 2000, c 9, s 1 (at 330-331); the requirement that the leader of the party being joined to report the change in affiliation to the Speaker (at 332); and that an incentive (cabinet membership) for floor-crossing potentially constitutes a conflict of interest (at 330 and 333). On the conflict of interest point, see also Turnbull, *supra* note 53 at 357-363.

vote in the Assembly, his or her seat shall be vacated and a writ shall issue forthwith for a new election to fill the vacancy.<sup>69</sup>

Under the Ontario bill, it is the act of leaving a party that triggers the loss of the seat. Thus, a member who is kicked out of his or her party's caucus, or chooses to sit as an independent, suffers the same result as a member who chooses to leave his or her party's caucus for another party's caucus. In contrast, under Bill C-212, it is the act of joining a party that triggers the loss of the seat. Thus, a member who is kicked out of his or her party's caucus retains her seat so long as she does not join another party. Similarly, a member can leave a party to become an independent without losing her seat.<sup>70</sup> MacIvor characterizes this as one of the bill's "peculiar consequences."<sup>71</sup>

The Ontario bill is unique in that it incorporates the idea of a "successor party" – although it does not attempt to define this phrase. It is unclear how this concept applies. In the Scott Brison situation – a member refusing to join a successor party and joining another party instead – the member would presumably lose his seat. However, the Joe Clark situation is complicated. By remaining in the predecessor party, Clark did not "leave" the successor party, he merely did not join it.

These parameters demonstrate that a prohibition on floor-crossing, which may seem like a straightforward concept, becomes much more complex in drafting and implementation. Recall here the Minister of Justice's characterization of the Manitoba prohibition as "unworkable."<sup>72</sup>

## V. PART IV – LESSONS: THE ROLE OF THE ATTORNEY GENERAL IN DEFENDING LEGISLATION

*Fletcher* and the corresponding repeal of the floor-crossing prohibition also present a worthwhile case study in when a government should defend,

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<sup>69</sup> *An Act to amend the Legislative Assembly Act to promote respect for voters*, Bill 18, 40th Parl, 1st Sess (2011), adding s 15.1 to the *Legislative Assembly Act*, RSO 1990, c L.10.

<sup>70</sup> As emphasized by Siles, *supra* note 23 at 178.

<sup>71</sup> MacIvor, *supra* note 53 at 331-332, esp 332: "The Bill does not explain why an MP who joins a new party should forfeit her seat, whereas an MP who leaves her party to sit as an Independent should not."

<sup>72</sup> See text accompanying note 17 above.

or not defend, legislation in court. In particular, they raise the issue of the proper role of the Attorney General in defending legislation, adopted under a previous government, that the current government believes is bad policy and intends to repeal.

Recall Fletcher's repeated suggestion that if the government was repealing the prohibition because it was concerned about the cost of opposing his application, an easy solution would have been to concede the application.<sup>73</sup> Recall the Minister of Justice's comments in the legislative debates, and the government's concession on the application, that the prohibition was contrary to parliamentary tradition,<sup>74</sup> as well as the Minister's statement that the prohibition was "unworkable" and "should never have been introduced in the first place."<sup>75</sup> Finally, recall also Andrew Swan's assertion that the government could not concede the application because it had received advice that the legislation was arguably constitutional.<sup>76</sup>

Since it is impossible to know what advice the government received, it is best to set out two possibilities. In scenario one, the government thinks the prohibition is bad policy but has received advice that it is arguably constitutional. In scenario two, the government thinks the prohibition is bad policy and has received advice that it is not constitutional. Is conceding the application appropriate in either scenario? Arguably, only in scenario two.

The literature in this area is divided over whether the Attorney General, acting on behalf of the government, can properly concede the unconstitutionality of legislation. Grant Huscroft (now Justice Huscroft of the Ontario Court of Appeal) has argued that "a decision by an Attorney General to concede that legislation is unconstitutional is constitutionally objectionable because it undermines the legislative branch of government."<sup>77</sup> That is, there is a "constitutional interest inherent in

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<sup>73</sup> See text accompanying note 18 above.

<sup>74</sup> See text accompanying notes 15 and 32 above.

<sup>75</sup> See text accompanying note 17 above.

<sup>76</sup> See text accompanying note 19 above.

<sup>77</sup> Grant Huscroft, "The Attorney General and Charter Challenges to Legislation: Advocate or Adjudicator?" (1995) 5 NJCL 125 at 158-159 [Huscroft, "Advocate or Adjudicator"].

defence of the legislative process” and “the defence of legislation is constitutionally important for its own sake.”<sup>78</sup> Indeed, under this view, the Attorney General has a “constitutional duty to the legislative branch.”<sup>79</sup> Moreover, such concessions establish bad precedents and impede the proper role of the courts to determine constitutionality.<sup>80</sup> Under Huscroft’s view, the Attorney General should essentially never concede the unconstitutionality of a law. It is for the Attorney General to protect the lawmaking power of the legislature, and it is for the courts to determine constitutionality.

In contrast, former Attorney General for Ontario Ian Scott argued that concessions are appropriate where the Attorney General considers the legislation to be unconstitutional:

I think it is reasonable to conclude that an attorney general, if he advises the government that the provincial law is unconstitutional, is free to indicate, with Cabinet concurrence, that he will amend the legislation in the face of a challenge or settle the lawsuit on the basis that the law is unconstitutional.<sup>81</sup>

Scott himself directed government lawyers to concede unconstitutionality in some circumstances.<sup>82</sup> Similarly, Kent Roach argues that “[t]he Attorney General should not impose burdens on citizens by defending laws that are

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<sup>78</sup> *Ibid* at 154. See also Grant Huscroft, “Reconciling Duty and Discretion: The Attorney General in the Charter Era” (2009) 34:2 *Queen’s LJ* 773 at 800-805, esp 804 (“the Attorney General should not be able to undermine the constitutional validity of legislation by refusing to defend it”) and 804-805 (“The obligation to defend legislation that is subject to *Charter* challenge requires the Attorney General to put duty to the law, and to the legislature more broadly, ahead of the government’s interests and thus serves as an important check on executive power.”) [Huscroft, “Duty”].

<sup>79</sup> Huscroft, “Advocate or Adjudicator”, *supra* note 77 at 143.

<sup>80</sup> *Ibid* at 158-161. See also Huscroft, “Duty”, *supra* note 78 at 803: “An Attorney General who concedes that legislation violates the *Charter* purports to determine the entire question before the Court.”

<sup>81</sup> The Honourable Ian Scott, “Law, Policy, and the Role of the Attorney General: Constancy and Change in the 1980s” (1989) 39:2 *UTLJ* 109 at 124. Scott’s position on federal legislation was more complex and is unnecessary to consider here for my purposes.

<sup>82</sup> See e.g. *ibid* at 124-125, describing two cases in which the government of Ontario conceded unconstitutionality.

clearly unconstitutional or conducting litigation in a manner that ignores clear constitutional obligations placed upon the state.”<sup>83</sup>

A mixed or more nuanced view would be that the government should defend legislation whenever there is a credible argument for its constitutionality.<sup>84</sup> While a credible argument is difficult to define, Noël J in *Schmidt v Canada (Attorney General)* described a credible argument as “[a]n argument that is credible, *bona fide*, and capable of being successfully argued before the courts.”<sup>85</sup> Under this view, it is the existence of a credible argument for constitutionality, not the government’s opinion that the legislation is constitutional or unconstitutional, that is determinative. It is this approach to which Andrew Swan referred in the legislative debates on the repeal of the prohibition.<sup>86</sup> This approach protects the lawmaking ability of the legislature to a reasonable but not absolute extent – the freedom to pass laws that are at least arguably constitutional.

However, none of these approaches indicate what a government should do when it believes legislation to be constitutional but bad policy. I would argue that the decision to defend against a constitutional challenge should be made regardless of the government’s view as to whether or not the law is problematic as policy. Under the Huscroft view, unconstitutionality should never be conceded; under the Scott view, concession is appropriate where the government believes the legislation is unconstitutional; under the mixed view, concession is inappropriate so long as there is a credible argument as to constitutionality. However, under no view is it appropriate to concede unconstitutionality merely because the government believes the legislation is bad policy, even if it plans to repeal the law for that reason. The government is free to concede in court that the law is bad policy, as the government of Manitoba did in *Fletcher* by conceding that the prohibition

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<sup>83</sup> Kent Roach, “Not Just the Government’s Lawyer: The Attorney General as Defender of the Rule of Law” (2006) 31:2 Queen’s LJ 598 at 610.

<sup>84</sup> See Huscroft, “Advocate or Adjudicator”, *supra* note 77 at 161, n 94, citing Patrick J Monahan & Marie Finkelstein, “The Charter of Rights and Public Policy in Canada” (1992) 30 Osgoode Hall LJ 501 at 526: “The Saskatchewan Attorney General ... will defend legislation if it is arguably constitutional.”

<sup>85</sup> *Schmidt v Canada (Attorney General)*, 2016 FC 269 at para 5, *aff’d* 2018 FCA 55. There are problems with the “credible argument” standard, but they are beyond the scope of this comment.

<sup>86</sup> See text accompanying note 19 above.

was contrary to parliamentary traditions, and indicate its plan to repeal the law, as the government also did in *Fletcher*.<sup>87</sup> But neither this concession nor this indication have legal consequences.<sup>88</sup>

The lesson, or reminder, from *Fletcher* is that, while the government should perhaps be willing to concede the unconstitutionality of legislation that it has been advised is unconstitutional, it should never concede unconstitutionality merely to expedite the nullification of a law that it considers to be bad policy. That is, the correct approach to legislation that is merely bad policy is to amend or repeal it.

## VI. CONCLUSION

In this comment, I have provided an overview of *Fletcher* and explained its important lessons for lawmaking and the legal defence of government legislation. In Part I, I provided the context of the passage and repeal of the prohibition on floor-crossing challenged in *Fletcher*. In Part II, I set out the arguments made and reasons given in *Fletcher*, and provided a brief critique of those reasons. Then in Part III I demonstrated that *Fletcher* provides a case study in the translation of ideas into legislation, a process that can be more difficult than it appears. In particular, defining the conduct that is to be prohibited can often result in underinclusive or overinclusive laws, and determining the appropriate sanction can be difficult. Finally, in Part IV, I considered the lessons from *Fletcher* in whether the Attorney General should concede the unconstitutionality of a law that the government considers bad policy and plans to repeal. I argued that while the government should perhaps be willing to concede the unconstitutionality of legislation that it has been advised is unconstitutional, it should never concede unconstitutionality merely to expedite the nullification of a law that it considers to be bad policy.

*Fletcher* ultimately demonstrates that governments should defend constitutionally viable laws in court – even laws that were adopted by a previous government and that are destined for repeal as bad policy. This

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<sup>87</sup> *Fletcher*, *supra* note 2 at para 47.

<sup>88</sup> As I discussed above, the fact that the legislature has already repealed the challenged provision does raise issues of mootness. See text accompanying note 44 above. Also, if being contrary to parliamentary tradition makes the prohibition suspect under the preamble to the *Constitution Act, 1867*, then this concession does have legal consequences. See text accompanying note 47 above.

defence is not a waste of public funds, even if it may appear so at some level. Furthermore, it is not for the courts to strike down laws that are bad policy but constitutional. The sole appropriate response to such bad laws is amendment or repeal by the legislature.