

Bill 5: *The Police Services Amendment Act (First Nation Safety Officers)*

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I. INTRODUCTION

Policing in First Nations communities in Manitoba has always been a contentious issue. These communities are exposed to many unique geographical and social issues and despite the need for continued police presence, the model has always seemed to fall short. Although the Royal Canadian Mounted Police (RCMP) provide primary policing services to many First Nations communities in Manitoba as the provincial police service, the issue of continued police presence persists. The Band Constable Program (BCP) was introduced in 1965 in an attempt to fill this gap and was intended to *enhance* primary police services; however this federally funded program was unilaterally terminated, effective March 31, 2015.

There have been many concerns with deficiencies in the BCP for some time, but regardless of its effectiveness, or lack thereof, it is unquestionable that the program would need to be replaced. Bill 5, *The Police Services Amendment Act (First Nation Safety Officers)*,¹ was proposed to amend *The Police Services Act*² (PSA) to create safety officers to replace the band constables.

This paper will outline Bill 5 and is divided into eight sections. Sections I through III will provide introductions generally, on policing and to Bill 5. Section IV will detail the legislative debate surrounding Bill 5.

* J.D. (2018).

¹ Bill 5, *The Police Services Amendment Act (First Nation Safety Officers)*, 4th Sess, 40th Leg, Manitoba, 2014 (assented to 30 June 2015) [Bill 5].

² *The Police Services Act*, CCSM c P94.5.

Section V will address varying opinions on Bill 5. Section VI will discuss the jurisdictional issue with policing and section VII will consider whether the new program created by Bill 5 adequately addresses the deficiencies in the BCP. This is followed by a brief conclusion on the implications for the future in section VIII.

II. BACKGROUND

A. Policing in Manitoba

In Manitoba, policing is governed by legislation and/or contractual agreements. This section briefly outlines policing in Manitoba to provide some context to where policing in First Nations communities fits into this larger picture.

1. *The Police Services Act (PSA)*

*The Police Services Act*³ (PSA) was assented to on October 8, 2009, replacing *The Provincial Police Act*. Part 3 of the PSA outlines the responsibility for policing in Manitoba. The policing options vary depending on if the area is classified as a large urban municipality (with a population over 5,000),⁴ mid-sized urban municipality (with a population between 750 and 5,000),⁵ or another area in Manitoba (which includes municipalities with under 750 people, rural municipalities and areas in Manitoba that are not municipalities).⁶

An urban municipality with over 5,000 people may establish its own police service, enter into an agreement with the Government of Canada to have the RCMP provide policing services, create a regional police service, or enter into an agreement with a neighboring municipality to use that municipality's police force.⁷ Mid-sized urban municipalities have the same options available as large urban municipalities, however when entering into an agreement with the Government of Canada to have the RCMP

³ Bill 16, *The Police Services Act*, 3rd Sess, 39th Leg, Manitoba, 2009 (assented to 8 October 2009), SM 2009, c 32.

⁴ *Ibid*, s 13(1).

⁵ *Ibid*, s 13(2).

⁶ *Ibid*, s 14(1).

⁷ *Ibid*, s 13(1)(a)–(c).

provide policing services, the agreement will be made under section 18(1) of the PSA, which states that the RCMP would act as a provincial police service.⁸

The Minister must ensure that policing services are provided in urban municipalities with fewer than 750 people, and rural municipalities.⁹ These municipalities still have the same options as large and mid-sized municipalities but they need not enter into an agreement with the Government of Canada, if they wish to have the RCMP provide the services. If they do not exercise these other options, the Minister is responsible for policing the area.¹⁰ The Minister must ensure that policing services are provided in any part of Manitoba that is not in a municipality.¹¹

2. Police Service Agreements

Police service agreements “outline the duties and responsibilities of the RCMP in financial, operational, and administrative areas within the provisions of the provincial and municipal policing services.”¹² Provinces and municipalities consult with the RCMP to set out the level of resources, budget and policing priorities and the RCMP will deliver the services within that budget.¹³

Under the *Provincial Police Service Agreement* (PPSA), the RCMP will provide policing services pursuant to section 18 of the PSA as the Provincial Police Service. This agreement is 20 years in length and is cost-shared 70/30 between the provincial and federal government, respectively.¹⁴ *Municipal Police Service Agreements* (MPSA) are used by municipalities with a population over 5,000, since they do not qualify to

⁸ *Ibid*, s 18(1).

⁹ *Ibid*, s 14.

¹⁰ *Ibid*, s 14 (a)–(b), s 14(2).

¹¹ *Ibid*, s 14(1)(c).

¹² Royal Canadian Mounted Police, “Contract Policing” (30 October 2013), RCMP (website), online: <<http://www.rcmp-grc.gc.ca/ccaps-spcca/contract-eng.htm>> [RCMP Website].

¹³ *Ibid*.

¹⁴ *Ibid*.

use the RCMP under section 18 of the PSA.¹⁵ The cost-share of these agreements depends on factors such as population size,¹⁶ and they are also 20 years in length.¹⁷

B. Policing in First Nations Communities in Manitoba

1. *The Police Services Act (PSA)*

According to section 45(1) of the PSA, a First Nation Police Service can be established by one or more First Nations entering into an agreement with the provincial and federal governments.¹⁸ This type of standalone police service is under-exercised as an option in Manitoba, with only one regional Aboriginal police service operating in the province. It is unclear as to why this is the case. First Nations in Manitoba rely almost exclusively on the RCMP to provide primary policing through the *Provincial Police Service Agreement* (PPSA).

2. *The Band Constable Program (BCP)*

The BCP is a legacy program that was first developed in 1965. As will be discussed in section VII, the powers and duties of band constables were limited.¹⁹ In 1992, after reviewing policies and programming in First Nations communities, a decision was made to form the First Nations Policing Program (FNPP).²⁰ Funding for the BCP was then frozen, responsibility switched from the Department of Indian and Northern Affairs (INAC) to the Solicitor General's Department and the program was to be phased out.²¹ First Nations could instead apply to be funded

¹⁵ *Supra* note 2, s 13(1)(b).

¹⁶ RCMP Website, *supra* note 12.

¹⁷ *Ibid.*

¹⁸ *Supra* note 2, s 45(1).

¹⁹ Manitoba, Provincial Court: Report on the Inquest and Recommendations of Judge Malcolm McDonald, *An Inquest into the Death of Brian McPherson*, (9 February 2016) at para 65, online: <http://www.manitobacourts.mb.ca/site/assets/files/1051/brian_mcperson_inquest_-_feb_9_2016_mcdonald_amended.pdf at para 65> [McPherson Inquest].

²⁰ *Ibid* at para 66.

²¹ *Ibid* at para 67.

through the FNPP.²² Although the funding of the BCP program was frozen in 1992 upon the development of the FNPP, many First Nations in Manitoba continued to use the BCP. The Government of Canada, which funded the BCP 100%, unilaterally discontinued its funding, effective March 31, 2015.²³ Up to the date of cancellation, as many as 31 First Nations in Manitoba still relied on this program.²⁴

3. Federal First Nations Policing Program (FNPP)

The FNPP made Canada the first Country to develop “a comprehensive national policing strategy for Aboriginal peoples.”²⁵

Malcolm McDonald, the judge in the Brian McPherson Inquest summarized the development of the FNPP:

The FNPP was born out the conclusions of the policy review conducted by the Government of Canada in 1991. The review occurred close in time to the recommendation of a number of inquiries across the country including the Aboriginal Justice Inquiry in Manitoba. The conclusion was that aboriginal communities were receiving inadequate and culturally inappropriate policing both in manpower and in responsiveness to the needs of the communities. The FNPP was developed to address the deficiencies and to supplement the core policing provided by provincial police forces.²⁶

Through this program, First Nations have two options for funding police services. They could either enter into an agreement to create a standalone police service, such as the Dakota Ojibway Police Service (DOPS), or enter into a Community Tripartite Agreement (CTA) to have policing services provided in their community.²⁷ The majority of agreements under the FNPP in Canada are CTAs. In these cases the

²² *Ibid.*

²³ *Ibid* at para 71.

²⁴ Chinta Puxley, “Manitoba wants more money to finance policing for First Nations”, CBC News (30 December 2015), online: <<http://www.cbc.ca/news/canada/manitoba/manitoba-wants-more-federal-money-to-finance-policing-for-first-nations-1.3384165>> [Manitoba Wants More Funding].

²⁵ Lithopoulos & Ruddell, “Aboriginal Policing in Rural Canada: Establishing a Research Agenda” (2013) 2:1 International Journal of Rural Criminology 101 at 102 [Aboriginal Policing in Rural Canada].

²⁶ *Supra* note 19 at para 119; See also *Aboriginal Policing in Rural Canada*, *ibid* at 105.

²⁷ *Supra* note 19 at para 67; See also Public Safety Canada, “Aboriginal Policing: First Nations Policing Program (9 December 2015), PSC (website), online: <<http://www.publicsafety.gc.ca/cnt/cntrng-crm/plcng/brgnl-plcng/index-eng.aspx>>.

RCMP will try to “fill the on-reserve positions with Aboriginal officers.”²⁸ First Nations with standalone police services under the FNPP are expected to establish a police commission, while those First Nations under CTAs are expected to maintain a Community Consultative Group as a liaison between the band, police, and community.²⁹ The purpose of the FNPP is to *enhance*, rather than act as a substitute for core policing services.³⁰ 52% of this program is funded by Canada and 48% is funded by Manitoba.³¹

As of 2014, Manitoba had one standalone police service and only eight First Nations with CTAs, leaving as many as 55 First Nations without *enhanced* police services under the FNPP.³² Around 2006, funding under the FNPP was frozen for a 5-year period, followed by another 5-year period in 2013.³³ Consequently, First Nations that had not made previous agreements under the FNPP would be denied, and would have to rely on funding under the BCP at the 1992 frozen levels.³⁴ This funding freeze would make it impossible to have the BCP phased out in a way that did not have adverse impacts on the First Nations relying on the BCP. Due to the high number of First Nations in Manitoba that had not entered into agreements under the FNPP before this funding freeze, cutting the BCP had disproportional effects on First Nations in Manitoba.³⁵

III. SUMMARY OF THE BILL

Bill 5 “enables a First Nation safety officer program [FNSOP] to be established by a First Nation or an entity that represents a group of First Nations.”³⁶ This program will replace the BCP and provide community based police services to First Nations under individual operating agreements.

²⁸ *Supra* note 25 at 107.

²⁹ *Ibid* at 108.

³⁰ *Supra* note 19 at para 83.

³¹ *Ibid.*

³² *Ibid.*

³³ *Ibid* at para 70.

³⁴ *Ibid.*

³⁵ *Ibid* at para 108.

³⁶ *Bill 5, supra* note 1, explanatory note.

The explanatory note for Bill 5 outlines the role of the safety officers as follows:

First Nation Safety Officers [FNSOs] will deliver crime prevention programs, connect persons in need with appropriate social services and provide information to the local policing authority on public safety issues in First Nation communities. [FNSOs] may also provide general assistance to police officers, exercise prescribed powers and enforce specific provincial enactments.³⁷

Bill 5 also legislates what qualifications and training safety officers must have, the powers afforded to them, and what is required in the operation agreement between each First Nation, the Minister, and the RCMP. The next section, with respect to the legislative debate around Bill 5, will speak to the bill in some detail.

IV. LEGISLATIVE DEBATE

A. Throne Speech

The Throne Speech briefly addressed Bill 5 by stating that the government was working with First Nations to address the federal government's cut of the BCP to ensure that First Nations have access to community policing.³⁸

B. First Reading

Minister of Justice and Attorney General, New Democratic Party (NDP) member, Honourable James Allum (Mr. Allum) introduced Bill 5 on November 26, 2014.³⁹ When introducing the bill, Mr. Allum stated that the amendments creating First Nation safety officers would help address the “significant public safety challenges resulting from the federal government's unilateral decision to terminate the [BCP]”.⁴⁰ Mr. Allum briefly discussed the bill, stating that the legislation would create a framework where First Nations can enter into agreements with Manitoba,

³⁷ *Ibid.*

³⁸ Manitoba, Legislative Assembly, *Throne Speech*, 40th Leg, 4th Sess (20 November 2014), online: <http://gov.mb.ca/thronespeech/thronespeech_2014.html>.

³⁹ Manitoba, Legislative Assembly, *Hansard*, 40th Leg, 4th Sess, No 5 (26 November 2014) at 131 (Hon James Allum).

⁴⁰ *Ibid.*

Canada and the local policing authority to create safety officers. He stated that the FNSOP would “replace and improve”⁴¹ the BCP and would emphasize “a holistic community-based approach to First Nations policing which is adaptive to the diverse characteristics and needs of each individual First Nation community.”⁴²

The motion was adopted without further debate.⁴³

C. Second Reading

On December 4, 2014, seconded by the Minister of Conservation and Water Stewardship, the Honourable Gord Mackintosh (Mr. Mackintosh), Mr. Allum moved to have Bill 5 read a second time.⁴⁴ Speaking for his side of the House, Mr. Allum voiced his disappointment with the federal government’s decision to terminate the BCP and the deadline that such cancellation would take effect.⁴⁵ He stated that due to this decision, an immediate legislative solution was necessary, and made a point to refer to the cut as the federal government “balanc[ing] their budget on the backs on Manitobans”, while mentioning the 2006 to current freeze on the FNPP.⁴⁶

Mr. Allum went on to say that the bill reflects feedback from First Nations leaders for a program that will address the unique needs of First Nations communities. He described the bill as “framework legislation”, speaking to its flexibility where agreements entered into by an individual First Nation can be tailored to meet their needs.⁴⁷ Mr. Allum stated the purpose of the bill, which is to have safety officers “work with local police to enhance public safety.”⁴⁸ He further discussed the safety officers’ role as “implementing crime prevention strategies and initiatives, connecting persons in need with social service and community resources and

⁴¹ *Ibid.*

⁴² *Ibid.*

⁴³ *Ibid.*

⁴⁴ Manitoba, Legislative Assembly, *Hansard*, 40th Leg, 4th Sess, No 11B (4 December 2014) at 390 (Hon James Allum) [*Bill 5 Second Reading*].

⁴⁵ *Ibid* at 391.

⁴⁶ *Ibid.*

⁴⁷ *Ibid.*

⁴⁸ *Ibid.*

maintaining a visible presence within the community.”⁴⁹ Through the consultations with First Nations, the safety officers may also enforce band by-laws and specific provincial statutes that are named in the regulation and they will have peace officer status while enforcing those “political-provincial statutes”.⁵⁰ They may further assist the local police service in non-criminal matters.⁵¹

Mr. Allum spent some detail discussing the contractual agreement side of the legislation. He emphasized that each FNSOP “must be based on an agreement between a First Nation or entity representing a group of First Nations, the local policing authority, the government of Manitoba and the Government of Canada.”⁵² He spoke to the agreement addressing the operation of the program, including management, financing, direction and supervision of the safety officers, the relationship between the local police and the safety officers and the process for dealing with complaints.⁵³ Under this legislation, safety officers are employees of the First Nation.⁵⁴

Mr. Allum went into some detail about what this means exactly:

First Nations will appoint First Nation safety officers and will be responsible for ensuring that they perform their duties and exercise their powers in a proper manner. First Nations will also be liable for the actions of their First Nation safety officers. Rules outlining qualifications, training, duties, equipment, and uniforms will also be prescribed in regulation.⁵⁵

Mr. Allum ended by stating his party’s commitment to enhancing public safety in all communities, and the urgency of such legislation given the federal government’s budget cuts and the “real public safety” consequences flowing from it.⁵⁶

Progressive Conservative (PC) member, Mr. Kelvin Goertzen, spoke next to the bill, suggesting that a theme of “urgency” would play out in the house that day, given the timing of the house debates, and cautioned

⁴⁹ *Ibid.*

⁵⁰ *Ibid.*

⁵¹ *Ibid.*

⁵² *Ibid.*

⁵³ *Ibid.*

⁵⁴ *Ibid.*

⁵⁵ *Ibid.*

⁵⁶ *Ibid* at 391–392.

against making decisions based on this alone. He instead called for a proper review and discussions with stakeholders.⁵⁷

NDP member, Mr. Andrew Swan took the defence by pointing out that Mr. Goertzen ignored the public safety issue of the BCP coming to an end in a few months' time, and discussed the unique geographical issues these regions face in getting resources.⁵⁸ He reiterated what Mr. Allum stated regarding the legislation being a response to the unilateral decision of the federal government to cancel the BCP, which had been operating in the province since 1969.⁵⁹

NDP member Mr. Clarence Pettersen went on record supporting the bill, reiterating the role of the safety officers as stated by Mr. Allum and noting that at times it can take the RCMP two or three days to respond to issues in First Nations communities, some of which have a population between 1500 and 3000, and do not have RCMP offices.⁶⁰

Liberal member Honourable Jon Gerrard (Mr. Gerrard) agreed with the substance of the bill but seconded not rushing it, and suggested to have committee meetings and hearings, providing individuals with notice and then having a third reading when the house would return in March.⁶¹ PC member Mr. Wayne Ewasko, seconded by PC member, Mr. Shannon Martin, moved to adjourn the debate and the motion was agreed to.⁶²

The debate resumed on June 18, 2015, where PC member Mr. Stuart Briese discussed the bill further.⁶³ This included how the funding between the federal and provincial governments would be shared, and how the province of Manitoba would take over policing in First Nations communities, as well as create a training program for safety officers.⁶⁴ He expressed his concern over the costs associated with the program, and considering that 31 First Nations are currently under the BCP, he

⁵⁷ *Ibid* at 392 (Kelvin Goertzen).

⁵⁸ *Ibid* (Andrew Swan).

⁵⁹ *Ibid*.

⁶⁰ *Ibid* at 394 (Clarence Pettersen).

⁶¹ *Ibid* at 395 (Hon Jon Gerrard).

⁶² *Ibid* (Wayne Ewasko).

⁶³ Manitoba, Legislative Assembly, *Hansard*, 40th Leg, 4th Sess, No 49B (18 June 2015) at 2010 (Stuart Briese) [Committee Hearing].

⁶⁴ *Ibid* at 2011.

estimated that the program would cost a total of three million dollars.⁶⁵ He restated the unique geographical and safety issues that many of these First Nations communities face and concluded by saying that the bill may be one small piece of the puzzle in addressing issues such as high crime rates.⁶⁶

The motion on second reading was adopted by the house.

D. Committee Hearing

On June 24, 2015, Bill 5 went to the Standing Committee on Social and Economic Development.⁶⁷ Mr. Allum reiterated what was said in the throne speech and earlier debates regarding the bill's purpose and the roles of the FNSOP that the bill would create.⁶⁸

Mr. Briese went on record again to speak to his concerns regarding escalating costs of the program and to the fact that these costs were not being discussed upfront.⁶⁹ The debate concluded quickly and no other members spoke to the bill.

E. Report Stage Amendment, Third Reading & Royal Assent

On June 30, 2015, seconded by the Honourable Steve Ashton (Mr. Ashton), Mr. Mackintosh moved to have the bill amended as follows:

THAT Bill 5 be amended in Clause 2

(a) in the proposed subsection 77.12(1) by striking out ", the Government of Canada"; and

(b) by adding the following after the proposed section 77.12:

Requirement for agreement with Government of Canada 77.12.1 The minister must not enter into an agreement under section 77.12 unless there is an agreement in place between the Government of Manitoba and the Government of Canada respecting the operation of First Nation safety officer programs in Manitoba.⁷⁰

⁶⁵ *Ibid.*

⁶⁶ *Ibid.*

⁶⁷ Manitoba, Legislative Assembly, *Standing Committee on Social and Economic Development*, 40th Leg, 4th sess, Vol LXVII No 4 (24 June 2015) at 90.

⁶⁸ *Ibid* (Hon James Allum).

⁶⁹ *Ibid* (Stuart Briese).

⁷⁰ Manitoba, Legislative Assembly, *Hansard*, 40th Leg, 4th Sess, No 55 (30 June 2015) at 2284 (Hon Gord Mackintosh).

Mr. Mackintosh characterized the amendment as a “minor” one that would change the requirement for the Government of Canada to enter into individual agreements with both the province and First Nations to the Government of Canada having to enter into a single agreement with the province instead.⁷¹

In speaking further about the amendment he stated: “The amendment acknowledges Canada's role and responsibility with respect to First Nations and the need for the federal government to partner with the Province, but it makes a procedural change that is intended to streamline the agreement-making process.”⁷²

Mr. Gerrard went on record to say that he viewed the amendment as reasonable, stating that so long as this was not going to be used to exclude First Nations from the program, they would not be opposed to the amendment.⁷³ The motion was ultimately adopted.⁷⁴

Mr. Ashton, seconded by Mr. Mackintosh, moved to have the bill read for a third time.⁷⁵ Mr. Briese went on record voicing his concerns about the safety officers’ duties, and again about the funding of the program.⁷⁶ He pointed out worries with the new training regime and potential increasing costs as more First Nations join the program, and with regards to cost-sharing, commenting that the federal money was not guaranteed.⁷⁷

Mr. Gerrard went on record to say that the bill should have been passed prior to March, when the BCP was set to end.⁷⁸ He then put forward his hopes that the provincial government would work alongside First Nations to ensure the effectiveness of the program in serving its functions and to help “keep First Nations communities safer and healthier”.⁷⁹

⁷¹ *Ibid.*

⁷² *Ibid.*

⁷³ *Ibid* at 2285 (Hon Jon Gerrard).

⁷⁴ *Ibid.*

⁷⁵ *Ibid* (Hon Steve Ashton).

⁷⁶ *Ibid* (Stuart Briese).

⁷⁷ *Ibid.*

⁷⁸ *Ibid* at 2286 (Hon Jon Gerrard).

⁷⁹ *Ibid.*

Bill 5 received Royal Assent on June 30, 2015.⁸⁰

V. OPINION

At the provincial level, the First Nation Safety Officer Program (FNSOP) is viewed positively. NDP Aboriginal and Northern Affairs Minister Eric Robinson issued the following approving statement:

Safety is a big concern in many of our communities, which is why the First Nations Safety Officer Program has been established to replace the Band Constable program cancelled by the previous federal government. [...] I am pleased that we are moving forward to ensure safety officers will be equipped with the training they need to help keep their communities safe.⁸¹

The provincial government has at times been apprehensive with regards to potential cost and funding issues of the bill.⁸²

Grand Chief Sheila North Wilson of Manitoba Keewatinowi Okimakanak (MKO), a lobby group representing Manitoba's northern chiefs, referred to the change from band constables to safety officers as a demotion.⁸³ In her opinion, this version of the program simply leaves officers "as the eyes and ears of the RCMP", without any real authority to detain and arrest people for the safety of the community.⁸⁴ This concern has been echoed by other First Nations leaders.⁸⁵

One of the main concerns is related to special constables (appointed by the provincial government) being able to be part of the PPSA.⁸⁶ Band

⁸⁰ *Ibid* at 2298.

⁸¹ Government of Manitoba, News Release, "Province Launches Training For First Nations Safety Officers" (13 January 2016), online: <<http://news.gov.mb.ca/news/index.html?item=37276&posted=2016-01-13>> [*Safety Officer Training News Release*].

⁸² Committee Hearing, *supra* note 63. See also *Manitoba Wants More Funding*, *supra* note 24.

⁸³ *Manitoba Wants More Funding*, *ibid*.

⁸⁴ *Ibid*.

⁸⁵ Chinta Puxley, "Manitoba to replace front-line band constables after Ottawa cancelled program", *CTV News* (26 November 2014), online: <<http://winnipeg.ctvnews.ca/manitoba-to-replace-front-line-band-constables-after-ottawa-cancelled-program-1.2120802>> [*MB to Replace Band Constables*].

⁸⁶ Molly Gibson Kirby, "MKO concerned over legislation to replace band constables",

councils thought that appointed special constables could assist in criminal law matters (which was not the case), and Manitoba made a decision to no longer make these appointments.⁸⁷ It remains the provincial government's position that "special constable appointments should not be made and that a special constable appointment cannot confer peace officer status unless specifically provided for in legislation."⁸⁸

Previous Grand Chief David Harper spoke to the skepticism that Aboriginal leaders had about Bill 5 with respect to the dependence on the support of the federal government that had not been assured.⁸⁹ He further stated that Chiefs of the affected communities were not consulted on the new program.⁹⁰ It is interesting that Mr. Harper claims that no consultations took place with affected communities on the program in a news article published on November 26th 2014, since during second reading on December 4th of 2014, Mr. Allum stated that the bill "reflects feedback from First Nation leaders for a program that will address the unique needs of First Nation communities", as well as the safety officers' powers to enforce band by-laws and specific provincial statutes and having peace officer status while enforcing them.⁹¹

A lack of consultations continues to be an issue with decisions involving First Nations. Mr. Harper states that no consultations were made with MKO with the proposal of the *Police Service Act* (PSA) in 2009, or with the *Provincial Police Service Agreement* (PPSA) negotiations and renewal in 2012, and despite the fact that primary policing services to First Nations are almost exclusively delivered under the PPSA, the agreement does not mention Aboriginal policing.⁹² According to MKO's website, it is their view that under the PSA safety officers should be given peace officer

Thompson Citizen (11 December 2014), online: <<http://www.thompsoncitizen.net/news/nickel-belt/mko-concerned-over-legislation-to-replace-band-constables-1.1661059>> [MKO Concerned Over Legislation].

⁸⁷ *Supra* note 19 at para 84.

⁸⁸ *Ibid* at para 89.

⁸⁹ *MB to Replace Band Constables*, *supra* note 85.

⁹⁰ *Ibid*.

⁹¹ *Bill 5 Second Reading*, *supra* note 44 at 391 (Hon James Allum).

⁹² *Supra* note 86.

status while enforcing secondary policing services and that all of the costs of the safety officers should be under the PPSA instead of the FNPP.⁹³

Despite this, on January 16, 2015, current MKO Grand Chief Sheila North Wilson had positive things to say as training of the safety officers had been announced and the program appeared to be moving ahead quickly.⁹⁴ She acknowledged the new program “as a step toward public safety on First Nations that will provide safety officers from the communities with the necessary training to achieve that goal.”⁹⁵

Kevin Brosseau, the RCMP “D” Division Commanding Officer Assistant Commissioner at the time, stated that the RCMP looked forward to the new partnership with the First Nation Safety Officers, adding, “They will be an important resource for communities and will work closely with RCMP officers across Northern Manitoba to prevent crime and enhance public safety.”⁹⁶

VI. THE JURISDICTIONAL DISPUTE

Responsibility for policing on reserves has always been a contentious issue between the provincial and federal governments. The positions taken appear to stem largely out of the constitutional division of powers attributed to each of them. Under section 91(24) of the *Constitution Act*, the federal government is responsible for “Indians, and Lands reserved for the Indians”⁹⁷ whereas policing is a provincial responsibility under section 92(14).⁹⁸

As Judge McDonald noted in the Brian McPherson Inquest:

⁹³ Manitoba Keewatinowik Okimakanak, “Policing” MKO (website), online: <<http://www.mkonation.com/policing.html>>.

⁹⁴ Ian Graham, “First Nation safety officers being trained in Thompson”, *Thompson Citizen* (14 January 2016), online: <<http://www.thompsoncitizen.net/news/nickel-belt/first-nation-safety-officers-being-trained-in-thompson-1.2150968>>.

⁹⁵ *Ibid.*

⁹⁶ *Ibid.*

⁹⁷ *Constitution Act*, 1867 (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5, s 91(24).

⁹⁸ *Ibid.*, s 92(14).

The evidence in this inquest has revealed that a stumbling block for the implementation of past inquest recommendations respecting the condition of band run cells is that no senior level of government has taken responsibility for the maintenance, upkeep and supervision of detention cells on band land. The province has taken the position that such cells were part of the band constable program and hence outside the jurisdiction of the province. Canada takes the position that it provided funds to the Band Constable Program and had no supervisory duty.⁹⁹

This disagreement is not unique to policing and unfortunately crosses many other areas when it comes to resource allocation and providing services to First Nations communities. This issue was addressed in the recent Canadian Human Rights Tribunal (CHRT) case brought by the Caring Society with respect to child welfare laws in the province of Ontario. The issue in this case was whether the activities of Aboriginal Affairs and Northern Development Canada (AANDC), now known as Indian and Northern Affairs Canada (INAC), discriminated against First Nations children on the basis of race and/or national or ethnic origin, by providing inequitable and insufficient funding for child welfare services on reserves.¹⁰⁰ The federal government was found to be discriminating in this way.

AANDC argued based on *NIL/TU,O Child and Family Services Society v. B.C. Government and Service Employees' Union* that child welfare services was a provincial matter and that it “only became involved in First Nations child and family services as a matter of social policy under its spending power.”¹⁰¹ The CHRT rejected the idea that funding cannot be a service and stated that “the evidence in this case indicates the essential nature of the “assistance” or “benefit” offered by AANDC for the provision of child and family services on First Nations reserves is something more than funding.”¹⁰²

When discussing AANDC’s role, the CHRT stated that:

⁹⁹ *Supra* note 19 at para 134.

¹⁰⁰ *First Nations Child and Family Caring Society & Assembly of First Nations v Attorney General of Canada* (Representing the Minister of Indian Affairs and Northern Development Canada) 2016 CHRT 2 at paras 5 & 6 [Caring Society Case].

¹⁰¹ *Ibid* at para 34.

¹⁰² *Ibid* at para 45.

Instead of legislating in the area of child welfare on First Nations reserves, pursuant to Parliament's exclusive legislative authority over "Indians, and lands reserved for Indians" by virtue of section 91(24) of the Constitution Act, 1867, the federal government took a programing and funding approach to the issue. It provided for the application of provincial child welfare legislation and standards for First Nations on reserves through the enactment of section 88 of the Indian Act. However, this delegation and programing/funding approach does not diminish AANDC's constitutional responsibilities.¹⁰³

There are many parallels between the AANDC's First Nations Child Family Services (FNCFS) Program and the Federal Government's First Nations Policing Program (FNPP), under which the First Nation Safety Officer Program (FNSOP) will be funded. AANDC provides funding to FNCFS Agencies through cost-share agreements under the Canada-wide FNCFS Program.¹⁰⁴ This is similar to Public Safety Canada providing funding to First Nations in the FNSOP under the FNPP. These programs also share objectives like cultural appropriateness,¹⁰⁵ with a goal of safety,¹⁰⁶ and were born out of similar concerns.¹⁰⁷

The CHRT also found that Jordan's Principle was not being applied properly.¹⁰⁸ This principle "is designed to address issues of jurisdiction which can result in delay, disruption and/or denial of a good or service for First Nations children on reserve."¹⁰⁹

The principle provides that:

where a government service is available to all other children and a jurisdictional dispute arises between Canada and a province/territory, or between departments in the same government regarding services to a First Nations child, the government department of first contact pays for the service and can seek

¹⁰³ *Ibid* at para 83.

¹⁰⁴ *Ibid* at para 46.

¹⁰⁵ *Ibid* at para 52. See generally: Canada, Public Safety Canada, 2009-2010 *Evaluation of the First Nations Policing Program* (Ottawa: Evaluation Directorate Public Safety Canada, 2010) [Evaluation].

¹⁰⁶ *Caring Society Case*, *ibid*; *Evaluation*, *ibid*.

¹⁰⁷ *Caring Society Decision*, *ibid* at para 50. See also *supra* note 19 at para 119 & *supra* note 25 at 105.

¹⁰⁸ *Caring Society Decision*, *ibid* at para 458.

¹⁰⁹ *Ibid* at para 379.

reimbursement from the other government/department after the child has received the service.¹¹⁰

On the Government of Canada (Indigenous and Northern Affairs) website, Jordan's Principle is framed as applying in the context of health and social programs, in individual cases of discrimination, and where the child has multiple disabilities requiring services from multiple providers.¹¹¹ The CHRT broadened Jordan's Principle, stating that the narrow interpretation of Jordan's Principle by AANDC and Health Canada "ignores a large number of disputes that can arise and need to be addressed under this Principle."¹¹² The federal government has since announced that it will provide 382 million dollars to ensure children get specialized medical care when they need it; however some criticize the narrow application of the funding to "health and social services" alone as opposed to "all public services."¹¹³

Extending Jordan's Principle to more cases has the potential for positive changes with respect to many social and health programs delivered to First Nations that lack the appropriate resources due to jurisdictional disputes. Having this principle extend to policing services would be good practice. This is especially true given Aboriginal peoples' overrepresentation in the justice system. The Aboriginal population in Canada is on average very young (46.2% of the population is under 24 years of age), which has implications for justice systems since the population aged 15-24 generally has higher involvement in crime.¹¹⁴ We also see a cross between child welfare and policing in family violence situations. One study found that Aboriginal women were three times more likely to report being the victim of spousal violence than non-Aboriginal

¹¹⁰ *Ibid* at para 351.

¹¹¹ Government of Canada, Indigenous and Northern Affairs Canada, *Jordan's Principle* (3 February 2016), INAC (website), online: <<https://www.aadnc-aandc.gc.ca/eng/1334329827982/1334329861879>>.

¹¹² *Supra* note 100 at para 391.

¹¹³ APTN National News, "Is the federal government really funding Jordan's Principle? Cindy Blackstock doesn't think so", *APTN National News* (7 July 2016), online: <<http://aptn.ca/news/2016/07/07/is-the-federal-government-really-funding-jordans-principle-cindy-blackstock-doesnt-think-so/>>.

¹¹⁴ N.A. Jones et al, "First Nations Policing: A Review of the Literature" (2014) Regina, SK: Collaborative Centre for Justice and Safety at 10 & 12.

women in the past 5 years.¹¹⁵ These types of issues suggest that resources for community policing initiatives are important and a lack of funding can result in harm to children in First Nations communities.

VII. AN ADEQUATE SOLUTION?

Before discussing the new First Nation Safety Officer Program (FNSOP) which replaces the Band Constable Program (BCP), it is helpful to address some of the shortfalls of the First Nations Policing Program (FNPP) under which the new FNSOP will operate.

A. First Nations Policing Program

The FNPP set out to address many concerns regarding policing in First Nations communities. The Department of Indian Affairs and Northern Development (DIAND) identified the following shortcomings with Aboriginal policing after consultations with stakeholders from Aboriginal communities:

- a. Chronic under-policing reflected by a lack of regular police presence and a poor response time to incidents;
- b. A lack of preventive patrol and crime prevention programs in such critical areas as family violence and substance abuse;
- c. A lack of understanding of, and sensitivity to, Aboriginal culture by non-Aboriginal police officers;
- d. Absence of a clear federal policy, leadership, and professional standards across Canada;
- e. Confusion over jurisdiction and responsibilities with and between governments;
- f. Absence of provincial legislation providing for the establishment and regulation of Aboriginal police services; and
- g. Insufficient and inequitable funding of Aboriginal policing.¹¹⁶

According to one article, any critical review of the FNPP is almost completely absent and this “lack of scholarly interest is rather surprising considering that Canada’s Aboriginal peoples have a high involvement in crimes reported to the police and are disproportionately incarcerated.”¹¹⁷

¹¹⁵ *Ibid* at 13.

¹¹⁶ *Supra* note 25 at 105.

¹¹⁷ *Ibid* at 105.

Much of the review of the FNPP is found in reports released by the federal government.¹¹⁸

Although the issues with Aboriginal policing set out by DIAND were identified many years ago, they largely still persist today in the FNPP framework. A recent report released by Public Safety Canada (PSC) uncovers some of these shortfalls. The report states that PSC failed to implement and administer the FNPP “in a manner that promoted partnerships based on trust, mutual respect, and participation in decision-making.”¹¹⁹ Negotiations with communities when establishing and renewing agreements were limited¹²⁰ and, “based on information from all lines of evidence, contribution agreements are not an ideal funding model that lends itself to the delivery of a service like policing that requires long-term planning.”¹²¹

Each FNPP community that operates under a Community Tripartite Agreement (CTA) is required to maintain a community consultative group, but only 60% of these communities have such groups.¹²² Some reasons for not meeting this requirement, as highlighted in a 2010 comprehensive review were “lack of funding for members; lack of training for new or existing members; disinterest among community volunteers in participating on advisory bodies; language barriers; and a lack of capacity at the community level to understand the requirements for governing.”¹²³

In a 2010 report, cultural appropriateness, responsiveness and accountability in police services were all found to require improvement.¹²⁴ Police Officers working under SAs noted a lack of resources available to them while those working under CTAs have access to RCMP resources for tools and training.¹²⁵ Notwithstanding this, only 53% of officers operating

¹¹⁸ *Ibid.*

¹¹⁹ Canada, Public Safety Canada, “2014-2015 Evaluation of the First Nations Policing Program”, (Ottawa: PSC, 17 March 2016) online: <<http://www.publicsafety.gc.ca/cnt/rsrccs/pblctns/vltn-frst-ntns-plcng-2015/vltn-frst-ntns-plcng-2015-en.pdf>> at ii.

¹²⁰ *Ibid* at 17.

¹²¹ *Ibid* at 21.

¹²² *Ibid* at 17.

¹²³ *Ibid* at 18.

¹²⁴ *Ibid* at 19.

¹²⁵ *Ibid* at 20.

under CTAs said that their time was dedicated to the community they serve as compared to 85% of officers working under a Self-Administered Agreement (SA).¹²⁶ With a “lower level of dedication, opportunities for community engagement and responsiveness are lost.”¹²⁷ It would appear that each of the two types of agreements that operate under the FNPP possess a quality necessary for success that the other is lacking.

The FNPP is also not accessible to all communities. In 2013-14, only 60% of Aboriginal communities in Canada were utilizing the program and to add to this issue, the funding freeze leaves little opportunity to expand the program further.¹²⁸ This is contrary to the original 1991 policy goal to cover 100% of First Nation and Inuit Communities.¹²⁹ Ultimately, the FNPP fails to meet both its broad policy objectives as well as the objectives found under its terms and conditions.

A 2008 report out of Saskatchewan discusses the concept of plural policing, finding that there are benefits to using peacekeepers.¹³⁰ The report states that replacing band constables with “fully functional professional police” was causing problems in remote or smaller communities, where it was not feasible to locate detachments.¹³¹ In this sense, the supplemental police services provided by band constables are crucial to some communities. The report therefore argues for peacekeepers to be incorporated into the FNPP framework as a “supplementary component”.¹³²

Interestingly, the type of framework that the report is arguing for is reflected in the new FNSOP. It will operate under the FNPP to supplement policing services in communities that choose or are able to opt into the FNSOP. This is to say that the safety officers operate separately

¹²⁶ *Ibid.*

¹²⁷ *Ibid.*

¹²⁸ *Ibid* at ii.

¹²⁹ *Ibid* at 15.

¹³⁰ George S. Rigakos, “Plural Policing in Saskatchewan First Nations” (2008) Report submitted to the Aboriginal Policing Directorate of Public Security and Emergency Preparedness Canada 1, online: <http://www.academia.edu/9490368/Plural_Policing_in_Saskatchewan_First_Nations>.

¹³¹ *Ibid* at 108.

¹³² *Ibid* at 109.

from any SA or CTA based policing agreement where “full-fledged” police officers provide primary policing services to the community in question. While this model may help address some of the issues around funding for standardized training, better equipment and uniforms, as well as allow for more formalized information sharing with the RCMP, many concerns still exist.¹³³ This is especially so, given the deficiencies found with the FNPP in its current review.

B. Band Constable Program

There have been many Inquests over the years involving the BCP¹³⁴ and yet no real changes have been made to address the identified shortcomings. This section will focus on the Brian McPherson Inquest since it took place around the time that the BCP was set to be cut and Bill 5 was proposed. In this sense, it provides a good context to contrast the deficiencies existing with the BCP against the new FNSOP framework.

After Brian McPherson died in the custody of the band constables on Garden Hill First Nation, an Inquest was called to look into the circumstances surrounding his death. Testimony by various witnesses painted a picture of a rundown, makeshift holding cell area.¹³⁵ Other testimony revealed a failure of those detained to be read their *Charter* rights and that eight persons were detained overnight in a crowded 2X4 metre cell.¹³⁶

It was not until the morning that Mr. McPherson was discovered dead.¹³⁷ The two “securities” working were volunteers to assist the band constables in making arrests who had not received any law enforcement training.¹³⁸ The band constable who detained the group of individuals had

¹³³ *Ibid.*

¹³⁴ See e.g. Manitoba, Provincial Court: Report on the Inquest and Recommendations of Judge Janice L. leMaistre, *An Inquest into the Death of Darlene Rose Owens*, May 11, 2009; Accord Manitoba, Provincial Court: Report on the Inquest and Recommendations of Judge Tracey Lord, *An Inquest into the Death of Calvin Waylon McDougall*, July 23, 2015.

¹³⁵ *Supra* note 19 at para 13.

¹³⁶ *Ibid* at paras 15 & 16.

¹³⁷ *Ibid* at para 16.

¹³⁸ *Ibid* at paras 17 & 18.

received no formal training aside from “on the job” self-defence.¹³⁹ Simple police procedure such as the use of warrants, note taking, and advising arrestees of their *Charter* rights, were not exercised.¹⁴⁰ It was also found that there was no formal training as a guard or on what to do in emergency situations,¹⁴¹ nor was there counselling for trauma in situations like this one.¹⁴²

The McPherson Inquest referred to one band constable’s testimony regarding her training:

She described the course as consisting of training in self-defence, car chase techniques, how to write reports and statements, and how to handle prisoners. When asked how much time was spent on handling prisoners, she described it as being “20 minutes.” When asked by inquest counsel what instruction was given to her on the powers of arrest, she described being given a small book but that she never uses it when she goes on a call because she has lost the book.¹⁴³

There was a lack of oversight with the BCP. Public Safety Canada did not exercise on-site inspections to ensure compliance with the terms, and self-reporting by First Nations was relied on.¹⁴⁴ Public Safety Canada has taken the position that it has no responsibility for the supervision of detention cells and rather acts as a “funding body.”¹⁴⁵ The provincial government takes the position that Manitoba did not have any involvement in the training of band constables and that this was a federal responsibility.¹⁴⁶ The province recognized shortcomings of the BCP, such as qualifications, training and retention, and that “fixing” the BCP was not the appropriate response to the gap in policing services in First Nations communities.¹⁴⁷

In recalling the evidence of Mr. Lewis (Director of Policing in Manitoba), the Inquest judge stated “[Mr. Lewis] asserted the program was

¹³⁹ *Ibid* at para 22.

¹⁴⁰ *Ibid* at paras 23 & 30.

¹⁴¹ *Ibid* at para 37.

¹⁴² *Ibid* at para 38.

¹⁴³ *Ibid* at para 29.

¹⁴⁴ *Ibid* at para 71.

¹⁴⁵ *Ibid* at para 77.

¹⁴⁶ *Ibid* at para 88.

¹⁴⁷ *Ibid* at para 90.

flawed from the start and that it was implemented with no provision for ongoing professional supervision or training, no structure for effective discipline and or a complaint mechanism and no impartial civilian oversight.”¹⁴⁸

C. First Nation Safety Officer Program

Through the Brian McPherson Inquest, five main deficiencies with the BCP can be easily identified. These are oversight, accountability, powers, training and funding. This section will discuss how Bill 5 seeks to address these issues, while paying particular attention to the gaps that may still exist.

The most noteworthy difference between the BCP and the new FNSOP is that there is now a clear legislative framework. As we will see, many elements of the BCP remain unchanged; however this clear framework may arguably make the difference when operating agreements are in place.

1. Oversight and Accountability

The legislation sets out elements of the program that must be included in the FNSOP Agreements:

- a. management of the program;
- b. financing of the program;
- c. the direction and supervision of FNSOs;
- d. the relationship between the local policing authority and FNSOs;
- e. the area where FNSOs are authorized to perform their duties and exercise their powers;
- f. the process for dealing with complaints respecting the conduct of FNSOs;
- g. termination of the agreement.¹⁴⁹

Although this appears to provide a more solid framework, a comparison between the previous BCP Agreement and the new FNSOP Agreement, both of which were released by Manitoba Kewatinowi Okimakanak (MKO), shows no real difference. In fact, many of the clauses in the BCP Agreement¹⁵⁰ and the FNSOP Agreement¹⁵¹ use very similar

¹⁴⁸ *Ibid* at para 109.

¹⁴⁹ *The Police Services Act*, CCSM c P94.5, s 77.12(2), as amended by Bill 5, *The Police Services Amendment Act*, s 2.

¹⁵⁰ Contribution Agreement for the Band Constable Program, Between Canada and [redacted] as Represented by the Chief and Council (1 April 2007) online:

language. These two agreements will be compared here to further illustrate this point. Regarding the complaint process, the FNSOP Agreement only states that the First Nation must develop and implement a process “that is responsive, timely, fair, independent and transparent”.¹⁵²

Bill 5 legislates that First Nation safety officers are employees of the “operator” of the program, who in turn “is responsible for ensuring that its officers perform their duties and exercise their powers in a proper manner.”¹⁵³ This is followed by a liability clause where the First Nation is liable for the “acts and omissions of its officers in the performance or exercise, or intended performance or exercise, of their duties and powers.”¹⁵⁴ This is also seen in the FNSOP Agreement, which states that Manitoba will not be liable for any injury, including death, any loss or damage to property, or for any other obligation incurred, including loans and capital leases.¹⁵⁵ Clauses with similar effects can be found under section 8 of the BCP Agreement.¹⁵⁶ Although the provincial government is making each First Nation responsible for the program here, the case of *Eldridge v. British Columbia* makes it clear that a government cannot dispose of its constitutional responsibility by “delegating the implementation of their policies and programs to private entities.”¹⁵⁷ The Caring Society’s recent CHRT case also mentions this in the context of the federal

<[http://www.mkonation.com/uploads/7/2/9/9/72991287/2007-2009_band_constable_program_contribution_agreement_\[public_safety_canada\]_ocr_red.pdf](http://www.mkonation.com/uploads/7/2/9/9/72991287/2007-2009_band_constable_program_contribution_agreement_[public_safety_canada]_ocr_red.pdf)> [BCP Funding Agreement].

¹⁵¹ Agreement for the Operation of the First Nations Safety Officer Program, Between Manitoba and [redacted] as Represented by the Chief and Council (17 April 2015) at 9.2 online: <[http://www.mkonation.com/uploads/7/2/9/9/72991287/manitoba-first_nation_first_nation_safety_officer_funding_agreement_ocr_red_\[april_17_2015\].pdf](http://www.mkonation.com/uploads/7/2/9/9/72991287/manitoba-first_nation_first_nation_safety_officer_funding_agreement_ocr_red_[april_17_2015].pdf)> [FNSOP Operation & Funding Agreement].

¹⁵² *Ibid*, Part B4.

¹⁵³ *The Police Services Act*, CCSM c P94.5, s 77.18(2), as amended by Bill 5, *The Police Services Amendment Act*, s 2.

¹⁵⁴ *Ibid*.

¹⁵⁵ FNSOP Operation & Funding Agreement, *supra* note 151 at 9.2.

¹⁵⁶ BCP Funding Agreement, *supra* note 150.

¹⁵⁷ [1997] 3 SCR 624 at para 42, 151 DLR (4th) 577.

government “delegating the implementation of child and family services” to the FNCFS agency or the province.¹⁵⁸

Bill 5 legislates that “[t]he operator of a First Nation safety officer program” is required to provide requested documents and information to the Director (of Policing) with respect to “the operation of the program and its officers.”¹⁵⁹ The Court in the Brian McPherson Inquest expressed concerns over the proposed sections 77.18 and 77.19 of Bill 5 stating that:

These proposed enactments result in very little direct supervision of the officers by anyone other than their employers [...] The concern is that the requirements to provide information and documents to the director on his or her request will be too little too late as demonstrated by the ineffective self-reporting regime put in place by the Federal Government on the band detention cell issue.¹⁶⁰

Clause 8.3(c) of the FNSOP Agreement outlines the requirement of the First Nation to provide financial statements with respect to the program.¹⁶¹ Once again, this follows the requirements as set out by the BCP Agreement.¹⁶² The parallels between the BCP Agreement and the FNSOP Agreement with respect to oversight and accountability are concerning. The legislation suggests that more detail would be required. Since the FNSOP Agreement was released in April of 2015 before Bill 5 had been passed, perhaps more information will be included in these agreements moving forward. As it stands now, the element of flexibility to the needs of the individual First Nation, as discussed by Mr. Allum, appears to be lacking in the new FNSOP Agreement.

These concerns aside, the provincial government did take the initiative to arrange these agreements prior to Bill 5 passing. This ensured that First Nations were not left without funding until the new program began. Further steps have been taken and a Director of First Nations Policing has been hired by the Province of Manitoba.¹⁶³

¹⁵⁸ *Caring Society Case*, *supra* note 100 at para 84.

¹⁵⁹ *The Police Services Act*, CCSM c P94.5, s 77.19, as amended by Bill 5, *The Police Services Amendment Act*, s 2.

¹⁶⁰ *Supra* note 19 at para 113.

¹⁶¹ *FNSOP Operation & Funding Agreement*, *supra* note 151 at 8.3(c).

¹⁶² *BCP Funding Agreement*, *supra* note 150 at 7.3(c).

¹⁶³ The Aboriginal Justice Implementation Commission, Final Report, *Policing* (29 June 2011) at s 3, ch 7, online: <http://www.ajic.mb.ca/reports/final_ch07.html>.

2. Powers

As was the case with the BCP, safety officers can enforce band by-laws. This is something that is now legislated under section 77.17. A new development with the FNSOP is the ability of the safety officers to enforce certain provincial statutes with peace officer status.¹⁶⁴ These statutes are outlined in the regulation¹⁶⁵ and must be included in the agreements entered into under section 77.12(1).¹⁶⁶ Peace officer status is only granted while enforcing these prescribed statutes under the regulation.¹⁶⁷ Although at one time band constables could obtain status as peace officers by appointment, issues were identified with this system and the province has since stopped making appointments. Many of the critiques from First Nations regarding the new program were with respect to peace officer status not being granted to safety officers while they are performing all of their duties.¹⁶⁸ This is a valid concern and the reasoning for only including certain provincial statutes is unclear. Notwithstanding this, even limited peace officer status through legislation is a marked improvement from the powers that band constables had under the BCP.

As outlined in the regulation, safety officers can carry and use handcuffs, a defensive baton and an aerosol weapon while on duty.¹⁶⁹ They may also provide assistance to the local police service if requested, except for criminal law matters.¹⁷⁰ Although this is a step forward, many gaps still exist. For example, the fact that safety officers have no power regarding criminal law enforcement is in itself a concern. Part B11(4) of the FNSOP Agreement states that:

First Nations safety officers will only respond to calls for service from the public that involve non-violent, non-threatening activities which implicate no

¹⁶⁴ *The Police Services Act*, CCSM c P94.5, ss 77.15(1) & (2), as amended by Bill 5, *The Police Services Amendment Act*, s 2.

¹⁶⁵ Man Reg 229/2015, ss 4 & 5.

¹⁶⁶ *Ibid*, s 6.

¹⁶⁷ *The Police Services Act*, CCSM c P94.5, ss 77.16(2) & (2), as amended by Bill 5, *The Police Services Amendment Act*, s 2.

¹⁶⁸ MKO Concerned Over Legislation, *supra* note 86.

¹⁶⁹ *Supra* note 165, s 8.

¹⁷⁰ *The Police Services Act*, CCSM c P94.5, s 77.16, as amended by Bill 5, *The Police Services Amendment Act*, s 2.

foreseeable risk of injury for the safety officer(s) or for the public in general. Every other case will be referred to the Police Service of Jurisdiction.¹⁷¹

This fails to address many of the important challenges regarding policing in First Nations territories, such as increasing crime rates and the infeasibility of the RCMP to maintain a continued presence when providing primary policing services, or have speedy access to the area upon criminal law issues arising. Thus, although the program will improve police presence, which may help crime prevention, it does not solve the issue of poor response times in matters that are beyond the scope of the power of safety officers. The Director of Policing in Manitoba advised that “a strategic review respecting policing in the province is underway including reviewing the deployment of RCMP personnel and resources”, and acknowledged that a gap in police coverage exists, stating that this “is unavoidable and that the current measures are preferable to doing nothing.”¹⁷²

3. *Training*

The legislated training requirement is where the largest improvement appears. Bill 5 imposes minimum qualifications on safety officers under section 77.14(2) which are prescribed by regulation.¹⁷³ A safety officer must be at least 18 years of age, a Canadian Citizen or Permanent Resident, and hold a valid class 5 driver’s licence.¹⁷⁴

Under section 77.14(3), Bill 5 requires that training be completed in the areas of “crime prevention, public safety, victim and social services and other related matters”.¹⁷⁵ Specific training areas are prescribed in the regulations and a person must receive this training before they can be appointed as a safety officer:

- a. public safety and crime prevention;
- b. victims' services and social services;
- c. enforcement of provincial enactments;

¹⁷¹ FNSOP Operation & Funding Agreement, *supra* note 151, Part B11(4).

¹⁷² *Supra* note 19 at para 95.

¹⁷³ *The Police Services Act*, CCSM c P94.5, s 77.14(2), as amended by Bill 5, *The Police Services Amendment Act*, s 2.

¹⁷⁴ *Supra* note 165, s 2.

¹⁷⁵ *The Police Services Act*, CCSM c P94.5, s 77.14(3), as amended by Bill 5, *The Police Services Amendment Act*, s 2.

- d. arrests, searches and seizures;
- e. use of force and officer safety;
- f. note-taking, report writing, interview basics and court preparation.¹⁷⁶

The training can be provided by the RCMP, Winnipeg Police Service, Brandon Police Service, the Manitoba Department of Justice, or a service provider approved by the Minister.¹⁷⁷ On January 13, 2016, the province announced that a three week training course would be provided to 100 prospective safety officers over the next few months in the required areas.¹⁷⁸

The issue of the operation and use of detention facilities is not addressed directly through the legislation, although it could fall under one of the above mentioned requirements to be outlined in the agreements, such as arrests.

Training under the new FNSOP is a substantial improvement and Manitoba's swift implementation of the training program is a positive sign. There has also been praise of a new training program being developed at Holland College Institute. Ron D. Spence, deputy chief of Nelson House Cree Nation, spoke of his excitement to have a hand in helping to develop the curriculum of the 36-week program alongside the Holland College Institute and elders from the community.¹⁷⁹ Although this training is a substantial improvement and could possibly be the driving force in the success of the new program, its reliance on uncertain and potentially inadequate funding raises some concern for the future.

The Court in the Brian McPherson Inquest stated:

The evidence of Sergeant Huff [...] made clear another difficulty arising from the use of an undertrained and unsupervised police force – that being that the RCMP will not make their detention facilities available when they believe a detainee may have been detained unlawfully. RCMP detention facilities which are inspected, up to code, and presumably staffed by trained guards and matrons will not be made available to those detainees brought into custody by band

¹⁷⁶ *Supra* note 165, s 3(1).

¹⁷⁷ *Ibid*, s 3(2).

¹⁷⁸ *Safety Officer Training News Release*, *supra* note 81.

¹⁷⁹ Colin MacLean, "Police Academy, Manitoba First Nations to create new policing program", *The Guardian* (7 April 2016), online: <<http://www.theguardian.pe.ca/News/Local/2016-04-07/article4490335/Police-Academy-Manitoba-First-Nations-to-create-new-policing-program/1>>.

constables or securities without powers to detain persons beyond those of an ordinary citizen.¹⁸⁰

A further concern was expressed over “the training of matrons and guards for detention facilities used by [safety officers]” and “regulations respecting the building, maintenance, and operation standards for such facilities.”¹⁸¹ In response to the issue of a First Nation not being allowed to use the RCMP detention facility in one northern community, the RCMP stated that “there were no band constables on the reserve with the appropriate training”.¹⁸² This suggests that inadequate training has in the past, been a barrier for First Nations to use the RCMP detention facilities.

These “make-shift” detention facilities were used by Garden Hill, whose funding (for the BCP) was cut-off in 2012 when it came to the attention of Public Safety Canada that the First Nation was operating an unauthorized detention facility following Brian McPherson’s death.¹⁸³ The funding was cut based on the grounds that this was contrary to the BCP Contribution Agreement.¹⁸⁴

It is concerning that Bill 5 does not directly address detention facilities since this has been an issue in the past. The FNSOP Agreement does address this briefly under Part B11 by stating:

- (2) The First Nation will not authorize any of its safety officers to operate any type of detention cells;
- (3) If detention of an individual is required, the safety officer must refer these cases to the RCMP at the nearest detachment [.]¹⁸⁵

Once again, the BCP Agreement contains a provision to the same effect.¹⁸⁶ This is to say Public Safety Canada cut Garden Hill’s funding

¹⁸⁰ *Supra* note 19 at para 110.

¹⁸¹ *Ibid* at para 115.

¹⁸² Mia Rabson, “First Nation to be granted use of RCMP holding cell instead of using makeshift jail”, *Winnipeg Free Press* (13 January 2016), online: <<http://www.winnipegfreepress.com/local/First-Nation-will-soon-get-use-of-RCMP-holding-cell-instead-of-makeshift-jail-in-arena-365224551.html>> [FN Granted RCMP Holding Cell].

¹⁸³ *Supra* note 19 at para 71.

¹⁸⁴ *Ibid*.

¹⁸⁵ FNSOP Operation & Funding Agreement, *supra* note 151 at 11B (2)(3).

¹⁸⁶ BCP Funding Agreement, *supra* note 150, schedule B 9.

relying on these clauses. Although it is good that the agreement disallows make-shift cells from being created, it does not address the larger issue that there will inevitably be times during which the safety officers will need to detain someone where it is not feasible to wait for the RCMP. This is problematic since funding agreements have been cancelled due to this very issue, leaving the First Nation with no resources. In either scenario, the safety of the community is undermined.

One article does show that the RCMP has been receptive to allowing the safety officers to use their detention facilities, announcing that for one First Nation, a key for the holding cell would be provided once "proper security clearances and training were completed for all personnel requesting access."¹⁸⁷ Due to concerns over funding that already exist, the use of the RCMP detention facilities is the best option with respect to resource management. So long as training is maintained, make-shift cells can be avoided in this way. This could help address some of the issues in communities such as Garden Hill, which is located 600 kilometres north of Winnipeg, with the closest RCMP detachment only accessible by plane or boat.¹⁸⁸ However, adequate training aside, if there is no RCMP detention facility in an isolated community, extra resources would need to be put into these communities so that proper detention facilities can be created and maintained.

4. Funding

Cancellation of the BCP disproportionately affected Manitoba since many First Nations still relied on the program, while other provinces took advantage of the FNPP before funding was frozen. In 2006, Garden Hill applied to the FNPP for funding, but was denied due to the freeze and consequently had to rely on the funding under the BCP that was frozen at the 1992 levels.¹⁸⁹ Although the FNSOP may help put Manitoba in a more comparable position to other provinces, there is still a question of adequate funding.

¹⁸⁷ FN *Granted RCMP Holding Cell*, *supra* note 182.

¹⁸⁸ Staff, With a Report From CTV's Jill Macyshon, "Manitoba First Nations communities demand police service", CTV News (24 October 2012), online: <<http://www.ctvnews.ca/canada/manitoba-first-nations-communities-demand-police-service-1.1009770>>.

¹⁸⁹ *Supra* note 19 at para 70.

Under the new section 77.12, funding is to be set out under the individual agreements with each First Nation.¹⁹⁰ PC member Mr. Stuart Briese expressed concerns in the house debates regarding the cost of the program and the potential escalation of these costs over time. In speaking about the cost-share, he expressed concern about getting the federal money at all.¹⁹¹ This is a real worry given the fact that after the BCP was cancelled in 1992 and the funding for the FNPP was frozen for 10 years.¹⁹² Since the funding for the FNSOP will be distributed through the FNPP, there are valid concerns that funding may be frozen, that escalating costs will not be addressed and that services will once again be insufficient, leaving First Nations at a loss.

There is also concern that the federal funding to be provided is already insufficient. Mr. Michael Anderson, the Director of the Natural Resource Directorate of MKO at the time, expressed this concern.¹⁹³ The federal funding was set at 1.4 million, totalling 52% of the total funding with Manitoba providing the remaining 48% at roughly 1.3 million.¹⁹⁴ This is an estimated total of 2.7 million. A survey completed by MKO in 2012 showed that the MKO Bands that reported (19 out of 30) had combined expenditures of “\$4,526,127.00 [and] of that sum Canada contributed \$1,182,484.00 leaving the bands’ contributions at \$3,343,673.00.”¹⁹⁵ Given that there are significantly more First Nations than this (about 63 in total), it is possible that the funding will be inadequate and that some First Nations will be left out of the FNSOP. Clause 8.2(b) of the FNSOP Agreement states that the financial arrangement that Manitoba sets out is subject to Canada’s contribution and Manitoba reserves the right to reduce or cancel its contribution under the agreement in the case where Canada’s contribution is reduced or not received.¹⁹⁶

¹⁹⁰ *Supra* note 2, s 77.12.

¹⁹¹ *Supra* note 70 at 2285 (Stuart Briese).

¹⁹² *Supra* note 19 at para 70.

¹⁹³ *Ibid* at para 101.

¹⁹⁴ *Ibid*.

¹⁹⁵ *Ibid*.

¹⁹⁶ FNSOP Operation & Funding Agreement, *supra* note 151 at 8.2(b).

In finding that funding formulas used for the FNCFS Program failed to meet the Program's objectives, the CHRT in the Caring Society Case stated:

It is difficult, if not impossible, for many FNCFS Agencies to comply with provincial/territorial child and family services legislation and standards without appropriate funding for these items; or, in the case of many small and remote agencies, to even provide child and family services.¹⁹⁷

Funding is critical to the success of public programming and without adequate funding, such programs will inevitably remain deficient and fail to meet the objectives they set out to meet. It is a narrow minded argument that the federal government makes in saying that they simply provided funding and are not responsible for these programs beyond that, since it is the very issue of inadequate funding that prevents these programs from operating properly in many ways.

VIII. IMPLICATIONS FOR THE FUTURE AND CONCLUSIONS

Although the First Nation Safety Officer Program (FNSOP) does address some of the deficiencies of the Band Constable Program (BCP), many issues remain. It appears still that neither level of government is willing to take responsibility over the jurisdiction of policing in First Nations communities. This could interfere with a collaborative working relationship between the provincial government, federal government and First Nation party to an agreement, as it is inevitable that some sort of issue, however big or small, will arise in the future.

Funding continues to be a concern. Inadequate funding with the BCP was the starting point in the failure of the program. Because funding was insufficient, training and resources were lacking as well. Inadequate training lead to RCMP detention facilities being revoked and make-shift detention facilities being used, which in turn led to the cancellation of BCP agreements and, in the most extreme cases, contributed to the death of detainees.

Interestingly, the structure of the new FNSOP is largely the same as the BCP that it replaced. For example, the safety officers are still

¹⁹⁷ *Caring Society Case*, *supra* note 100 at para 389.

employees of the First Nation and the FNSOP Agreement is very similar to the BCP Agreement. This begs the question, what will be different this time around? The legislation of the program may be a changing factor. Further, the creation of a formal structure requiring that training be provided by one of the specified agencies might contribute to quality and consistency. Perhaps the powers of the safety officers becoming clearer through the legislative framework will help bring about a more successful program as well.

The FNSOP Agreement released prior to the passing of Bill 5 does bring about some worry regarding termination of funding, where Manitoba reserves the right to limit or cancel funding if the federal government does not provide its contribution. This leaves the possibility that First Nations may at some point be left to fend for themselves. This is especially concerning given that the federal government has had a 10 year freeze on the First Nations Policing Program (FNPP), the program under which the FNSOP is funded. There is thus a real possibility of inadequate funding and even the potential for a jurisdictional disagreement on the sidelines.

Although there is a marked improvement with Bill 5 legislating peace officer status for safety officers while performing certain duties, there remains the issue of the FNSOP leaving a gap in policing services in matters outside the safety officers' jurisdiction. This fails to address delayed response times of the RCMP in cases involving criminal law matters in isolated communities where there are no RCMP detachments (a situation that the provincial government acknowledges as a pitfall of the current enhancement policing model).

A recent case of a double shooting on Manitoba's Dakota Tipi First Nation, located about 85 kilometres outside Winnipeg highlights that other issues exist outside the context of isolated First Nations. In April of 2016, two persons were shot and three hours passed between the first reported sightings of the suspect and the RCMP arresting the suspect.¹⁹⁸ The First Nation complained about poor response times, high

¹⁹⁸ CBC News, "Dakota Tipi officials criticize RCMP response to double shooting" *CBC News* (8 April 2016), online: <<http://www.cbc.ca/news/canada/manitoba/shooting-dakota-tipi-first-nation-rcmp-update-1.3526549>>.

unemployment and extreme violence, and called for a casino to solve some of these interrelated issues.¹⁹⁹

Investing resources into First Nations that would allow them to become more self-sufficient as communities is an appealing option. Bringing in revenue from businesses such as casinos would create employment opportunities for First Nations residents and attract non-residents to the area. A solution such as this one would help alleviate the cost pressure of First Nations policing on both levels of government, who continue to argue over who is responsible for what and for how much. Most importantly, it could allow First Nations to develop their own police forces and to remove some of the public safety issues that the current measures have been unable to address. This of course remains a challenge in more remote communities, where economic development may not be possible due to geographical issues. However, the development of those First Nations that do not have these geographical barriers would arguably help free up resources that could then be used in those isolated communities to address the deficiencies present with the current enhanced policing model. There is little doubt that there is a need to consider options outside of the enhanced policing measures currently being used, as it appears that these initiatives address only a small part of the public safety concerns present in First Nations communities, and ignore the larger issues with poor resource allocation in these communities.

¹⁹⁹ *Ibid.*

