



Ontario's Pursuit of Indigenous Policing Backed by the Rule of Law



Litigation with a conscience.

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SAFETY BACKED BY THE RULE OF LAW

PART I PRINCIPLES AND INTERPRETATION

Declaration of principles

1 Policing shall be provided throughout Ontario in accordance with the following principles:

1. The need to ensure the safety and security of all persons and property in Ontario, including on First Nation reserves.
2. The importance of safeguarding the fundamental rights and freedoms guaranteed by the *Canadian Charter of Rights and Freedoms* and the *Human Rights Code*.
3. The need for co-operation between policing providers and the communities they serve.
4. The importance of respect for victims of crime and understanding of their needs.
5. The need for sensitivity to the pluralistic, multiracial and multicultural character of Ontario society.
6. The need to be responsive to the unique histories and cultures of First Nation, Inuit and Métis communities.
7. The need to ensure that police services and police service boards are representative of the communities they serve.
8. The need to ensure that all parts of Ontario, including First Nation reserves, receive equitable levels of policing.

PRESENTATION OVERVIEW



➤ TRIPARTITE AGREEMENTS AND A LACK OF LEGISLATIVE FRAMEWORK

➤ INEQUITIES IN FIRST NATION POLICING

➤ PAST RECOMMENDATIONS REGARDING FUNDING AND LACK OF LEGISLATIVE FRAMEWORK

➤ ADEQUACY STANDARDS TABLE

➤ CURRENT STANDARDS FOR MUNICIPAL POLICE SERVICES

➤ Bill 175 - SAFETY BACKED BY THE RULE OF LAW

TRIPARTITE AGREEMENT AND A LACK OF LEGISLATIVE FRAMEWORK



- Indigenous police services, such as Nishnawbe Aski Nation Police Service (“NAPS”) and Treaty Three Police Service, were founded on Tripartite Agreements, formulated under Canada's First Nations Policing Policy.
- The Tripartite Agreements are between respective First Nations, Canada and Ontario.
- Funding is divided between Canada (52% and Ontario 48%).
- This means that:
 - these services are prohibited from owning assets and using government funds for major capital expenditures; and
 - They are not backed by the rule of law.

INEQUITIES IN FIRST NATION POLICING



- Program status, not an essential service
- Governed by tripartite agreement; not the *Police Services Act (PSA)*

“Police services shall be provided throughout Ontario...”

BUT

“**Board**” only means a municipal police services board

“**Chief of Police**” does not include the Chief of a First Nation Police Service

“**Police Force**” does not include a First Nation Police Service

“**Police Officer**” does not include First Nations Constables

PAST RECOMMENDATIONS REGARDING FUNDING AND LACK OF LEGISLATIVE FRAMEWORK



➤ The issues of inadequate funding and lack of a regulatory framework were addressed in the Final Report of the Ipperwash Inquiry, released on May 31, 2007:

➤ 59. Federal, provincial, and First Nation governments should commit to developing a secure legislative basis for First Nation police services in Ontario.

CONTINUED



➤ On May 21, 2009, the Coroner's Jury released its verdict for the Inquest into the Death of Jamie Goodwin and Ricardo Wesley, and made several recommendations:

- 28. First Nations, Canada and Ontario should work together to ensure that policing standards and services levels in First Nations communities are equivalent to those in non-First Nations communities in Ontario.
- 30. Canada and Ontario should provide NAPS with the funding required to ensure that the communities it serves receive the same level and quality of policing services and infrastructure that non-First Nations communities receive. Funding levels should be sufficient to allow NAPS to comply with adequacy standards set out in the Ontario *Police Services Act* and the Policing Standards Manual of the MCSCS and Royal Canadian Mounted Police (RCMP) guidelines.

CONTINUED



➤ On November 10, 2016, the Coroner's Jury released its verdict for the Inquest into the death of Lena Anderson and made 9 recommendations related to policing including the following:

- 5. To Canada, Ontario and NAN: In order to ensure that policing standards and service levels in First Nations communities are identical to those in non-First Nations communities in Ontario, the *Police Services Act* should be followed as the primary governing legislation. First Nations, Canada and Ontario will commit to work together to ensure that policing standards and service levels in First Nations communities are equivalent to those in non-First Nations communities in Ontario. Canada and Ontario will determine how to fund policing in First Nations communities. Funding levels will be sufficient to allow First Nations communities to comply with adequacy standards set out in the Ontario Police Services Act and the Policing Standards Manual of the MCSCS and Royal Canadian Mounted Police Guidelines. The governments of Canada & Ontario shall ensure capital and operational funding for First Nations police services in Ontario.
- 6. To Canada, Ontario and NAN: Ensure the provision of adequate and sustainable funding to provide an adequate complement of backup officers and supervising officers to ensure that community members have access to the police services.
- 7. To Canada, Ontario and NAN: Ensure adequate and sustainable funding and policy support to ensure that police officers in First Nations communities have access to a central communications dispatch centre that meets the requirements of the *Police Services Act*.

ADEQUACY STANDARDS TABLE



- Initiative to amend the *PSA* to cover First Nation policing
- Goal is to provide First Nation residents with the same standard of police services as off-Reserve communities across Ontario
- Speedy process allowed for creation of draft package of legislative amendments within 18 months
 - Legislation designed to allow subsequent “designations” for First Nation police services. Legislated adequacy standards would entail:
 - Same legal status as municipal police forces and police officers
 - Statutory remedy for inadequate funding or services
 - Increased community safety

CURRENT STANDARDS FOR MUNICIPAL POLICE SERVICES

4. (1) Police forces shall, using their own police officers, and not pursuant to an agreement made under [section 7](#) of the Act, respond to emergency calls for service 24 hours a day. O. Reg. 3/99, s. 4 (1).

(2) Police forces shall, using their own police officers, and not pursuant to an agreement made under [section 7](#) of the Act, provide community patrol consisting of,

(a) general patrol; and

(b) directed patrol in the areas and at the times where it is considered necessary or appropriate. O. Reg. 3/99, s. 4 (2).

5. (1) Police forces shall have,

(a) a communications centre;

(b) a criminal intelligence capacity;

(c) a crime analysis, call analysis and public disorder analysis capacity; and

(d) investigative supports, including supports in the areas of scenes of crime analysis, forensic identification, canine tracking, technical collision investigation and reconstruction, breath analysis, physical surveillance, electronic interception, video and photographic surveillance, polygraph and behavioral science. O. Reg. 3/99, s. 5 (1).

6. (1) Police forces shall,

(a) have a member of the police force available 24 hours a day to supervise police communications and dispatch services; and

(b) provide police officers on patrol with portable two-way voice communication capability that allows the police officers to be in contact with the communications centre when away from their vehicle or on foot patrol. O. Reg. 3/99, s. 6 (1).

LEGISLATED ADEQUACY STANDARDS

➤ Board Constitution Model

- Board would be “constituted” under the PSA
 - As a constituted board, it would be subject to the standards in the Act
- Board would become responsible for a “police force”
 - It would have to ensure that the police force met all legislated standards
- Board would gain the authority to appoint “police officers”
 - Same status, subject to same standards as other Ontario police officers
- Civilian oversight mechanisms would apply
 - OCPC, OIPRD, SIU
- The labour relations provisions in the PSA would become applicable
 - Officers must form an “association”, not a union
- Ontario and/or Canada must provide sufficient funding to meet standards
 - Neutral arbiter would have authority to resolve funding disputes

Bill 175 - SAFETY BACKED BY THE RULE OF LAW



➤ Overview:

- Bill 175 received Royal Assent on March 8, 2018;
- In our view, the *Safer Ontario Act* (Bill 175) is historic legislation;
- *Safer Ontario Act* (Bill 175) allows First Nations police services to be governed by provincial policing legislation and have access to community safety backed by the rule of law;
- By January 2019, Indigenous police services will have the power to decide if they want to be a fully constituted police service under the *Police Services Act*.

A NEW REGIME FOR INDIGENOUS POLICING: ORDER IN COUNCIL

➤ *Safer Ontario Act, 2018*, has been proclaimed with the **Indigenous opt-in mechanism** coming into force as law as of January 2019.



Ontario
Executive Council
Conseil exécutif

Order in Council Décret

On the recommendation of the undersigned, the Lieutenant Governor, by and with the advice and concurrence of the Executive Council, orders that:

A proclamation in respect of the *Safer Ontario Act, 2018* be issued in the form set out in the Schedule.

Sur la recommandation de la personne soussignée, la lieutenant-gouverneure, sur l'avis et avec le consentement du Conseil exécutif, décrète ce qui suit :

Est prise, à l'égard de la *Loi de 2018 pour plus de sécurité en Ontario*, une proclamation rédigée selon la formule figurant à l'annexe.

ORDER IN COUNCIL

**Recommandé par : La ministre de la Sécurité
communautaire et des
Services correctionnels,**

Recommended 
**Minister of Community
Safety and Correctional
Services**

Approuvé et décrété le

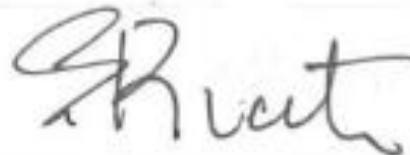
Approved and Ordered MAY 02 2018
Date

O.C./Décret [946 / 2018

**Appuyé par : La présidente du Conseil des
ministres,**

Concurred 
Chair of Cabinet

L'administrateur du gouvernement,



Administrator of the Government

Bill 175 - SAFETY BACKED BY THE RULE OF LAW

- Safety backed by the rule of law starts with First Nation police service boards being legally “constituted” as bodies that will be subject to the *PSA*. Once a First Nation board is constituted under the *Act*, it will have the same powers and duties as a municipal board and be subject to the same adequacy standards.
- The “constitution” process includes:
 - Sections 32(1) and (2): First Nation(s) may request that the Minister constitute a new or pre-existing police service board for the purposes of the *Act*.
 - Section 32(6): the Minister must consider the request and determine whether to constitute the board.
 - Section 32(17): the Minister may provide additional funding to the First Nation beyond what is available from the tripartite process or any other source. Funding may assist with the constitution process or with delivering police services once constituted.

Bill 175 - SAFETY BACKED BY THE RULE OF LAW

- Once “constituted” under the *PSA*, the board becomes the mechanism for adequacy standards to apply to the police service in several different ways:
- Section 2(1): the term “police services board” is defined to include both municipal and First Nation boards. This means the new definition of police services board will include First Nations police boards. A First Nations board has essentially the same status and duties as a municipal board all throughout the *Act*.
- Section 10(1): First Nation boards are required to deliver “adequate and effective” police services “in accordance with the needs of the population in the area and having regard for the diversity of the population in the area”. The delivery of “adequate and effective” services is the minimum standard under the *PSA*. This is the same legal standard that applies to municipal boards as well as the OPP.
- This means the police services board will be required to ensure that the service has an adequate number of officers, equipment, training, etc.
- If there is a dispute over funding, an arbitrator will answer the question of whether the funding is sufficient to deliver “adequate and effective” services.

EQUALITY IN FUNDING: INDEPENDENT ARBITRATION



- Adequacy standards are meaningless if police do not have the resources to meet them.
- There are two mechanisms under the *PSA* to ensure that police boards have the resources they require to meet applicable legal standards:
 - Funding review by an independent arbitrator; and
 - Complaints to the Inspector General.
- **The independent funding review is the key tool for ending the days of chronic underfunding. Such a review was previously only available to municipal police service boards.

EQUALITY IN FUNDING: INDEPENDENT ARBITRATION



- Under ss. 51(1) and (2), a First Nation board may refer its funding to an arbitrator at any time simply by giving notice to Ontario. The test to be applied by the arbitrator is whether the total funding available to the board is sufficient to:
 - (a) provide adequate and effective policing in the area for which it has policing responsibility, including the amounts required to provide the police service with required equipment and facilities, having regard for the various ways that the board can discharge this obligation; and
 - (b) pay the expenses of the board's operation.

- S. 51(5) provides that an arbitrator must consider whether any First Nation board policies intended to reflect the cultural traditions of First Nation communities being policed affect the funding required to provide adequate and effective policing. In other words, even if it is more expensive for First Nation police to deliver necessary services in a manner that is culturally appropriate, Ontario must still fund those services. Funding for First Nation police to provide “adequate and effective” services must therefore cover adequate, effective, and culturally appropriate services.

EQUALITY IN FUNDING: INDEPENDENT ARBITRATION



- Under s. 51(3), the board and the Minister may jointly appoint an arbitrator.
- Under s. 51(4) an arbitrator will be appointed by the Arbitration Commission if the parties do not agree. Ontario acknowledged during the final technical table meeting that a roster of culturally competent arbitrators will have to be developed for the parties and/or Commission to choose from.

EQUALITY IN FUNDING: INDEPENDENT ARBITRATION



➤ Under s. 51(7), the Minister must provide additional funding if the arbitrator determines that it is required to deliver “adequate and effective” services. The only exception, pursuant to s. 51(6), is if it would be more reasonable and cost-efficient for certain services to be provided by contract with another police force. This might apply to services that are considered essential in large urban centres (e.g. a public order unit or bomb squad), but would be unreasonable to fund First Nation police to deliver as a regular service in small First Nation communities.

“POLICE OFFICER” STATUS



- The legal duties imposed directly on chiefs of police and police officers are another source of adequacy standards. “First Nations Constables” have the powers of police officers, but not the corresponding duties and legal status. First Nation “police officers” will now have identical status to municipal and OPP police officers. This affects not only their duties to the public, but also their employment rights. Among other things, they will no longer be allowed to unionize or go on strike, as they will be considered an essential service.
- Like all other chiefs of police, First Nation chiefs will have particular duties under s. 107 to “manage the members of the police service to ensure that they carry out their duties in accordance with this Act and the regulations and in a manner that reflects the needs of the community.”

CULTURAL AUTONOMY OF FIRST NATION POLICE SERVICES



- First Nations drive the board “constitution” process under s. 32. The process only begins upon First Nation request, and the Ontario Minister must consider all such requests. The Minister may impose terms and conditions that have to be accepted by the First Nation(s) as part of the request. However, the final business proposal is up to the First Nation(s). If Ontario constitutes the board, it may only do it in accordance with the First Nation request.
- The structure of First Nation boards is determined on a case-by-case basis in accordance with the First Nation constitution request. This is a welcome difference from municipal boards, which have standardized structures and must include representatives of the provincial government. First Nation boards have no such requirements.
- First Nation boards do have a unique requirement under s. 38(3) to consult the band council(s) of the First Nation(s) being policed about cultural traditions. The board must then consider those traditions when establishing its policing policies.

CULTURAL AUTONOMY OF FIRST NATION POLICE SERVICES



- In the case of a funding dispute, s. 51(5) provides that an arbitrator must consider whether any First Nation board policies intended to reflect the cultural traditions of First Nation communities being policed affect the funding required to provide adequate and effective policing. In other words, even if it is more expensive for First Nation police to deliver necessary services in a manner that is culturally appropriate, Ontario must still fund those services. Funding for First Nation police to provide “adequate and effective” services must therefore cover adequate, effective, and culturally appropriate services.
- Once constituted under the *PSA*, Ontario can only amend or revoke the status of a First Nation police service on request from the communities being policed or if strict conditions are met pursuant to ss. 32(10)-(12). Unless the First Nation(s) consent, there must be a material change in circumstances and the Minister must also consider:
 - (a) the importance of First Nation(s) determining the means by which culturally responsive policing is provided on their First Nation reserves; and
 - (b) the effect of the revocation or amendment on the long-term viability of providing policing through First Nation boards

CULTURAL AUTONOMY OF FIRST NATION POLICE SERVICES



➤ Even if it is more expensive for First Nations police to deliver necessary services in a manner that is culturally appropriate, Ontario must still fund those services.



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