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## MEMORANDUM

**TO:** BC AFN  
**FROM:** MILLER TITERLE + COMPANY  
**SUBJECT:** FIRST NATIONS POLICE SERVICE LEGISLATION LEGAL ANALYSIS  
**DATE:** March 2nd, 2023

### 1. OVERVIEW

The BC AFN has requested a strategy paper regarding the proposed Federal First Nations Police Services Legislation (“FNPSL”). It has asked for the identification of primary issues in co-developing legislation that recognizes First Nations policing as an essential service. The negotiations are in a crucial stage, as the federal government anticipates that the bill will be tabled in June of this year.

This paper presents an overview of key areas and specific recommendations that First Nations may wish to advance in negotiations regarding the FNPSL as well as a question for consideration.

### 2. EXECUTIVE SUMMARY

Across Canada, there are 35 First Nations police services, serving 155 First Nations and Inuit communities. First Nations police services all receive financial support through the First Nations and Inuit Policing Program (“FNIPP”). In B.C., 134 First Nations have agreements with the provincial and federal governments. Under the FNIPP program there are two service delivery models; there are Self-Administered Agreements (“SA”) and Community Tripartite Agreements (“CTA”). In B.C., the only example of a SA’s is the Stl’at’l’imx Tribal Police Service. Several First Nations have also developed policing agreements with other jurisdictions outside of the FNIPP.

First Nations police services have faced significant challenges and financial obstacles in delivering appropriate policing services. Some of these issues include limited budgets, time-limited government contribution agreements, inability to deliver specialized police services in their communities, and inequity at the negotiation table between First Nations and Government.

For years, First Nations in Canada have been demanding change from the federal government on the delivery of inadequate police services to First Nations communities. What is clear from the voices of First Nations leaders across the country is that the status quo relating to First Nations policing cannot continue. The new legislation must live up to the obligation in the *United Nations Declaration on the Rights of Indigenous Peoples Act*<sup>1</sup> and address First Nations’ jurisdiction over policing.

<sup>1</sup> *United Nations Declaration on the Rights of Indigenous Peoples Act* S.C. 2021, c. 14. Online: <https://laws-lois.justice.gc.ca/eng/acts/U-2.2/page-1.html>



In the new policing legislation, the federal government must commit to the recognition and implementation of First Nations jurisdiction over policing in a manner consistent with the *United Nations Declaration on the Rights of Indigenous Peoples*<sup>2</sup>, (“UN Declaration”) First Nations’ inherent Title and Rights, the Treaty and Aboriginal rights of Aboriginal peoples, and the *Constitution Act, 1982*<sup>3</sup>. This must include appropriate mechanisms for coordination, cooperation, and funding.

Lack of funding for First Nations policing has been identified as the primary reason First Nations Police services are often inadequate. First Nations policing must move away from “program funding” and must be treated as an “essential service” with the associated outcome that First Nations are guaranteed sustainable, adequate funding.

The full list of recommendations are presented below and explored in greater depth throughout this paper.

### **3. RECOMMENDATIONS**

1. Through the FNPSL, the federal government must commit to the recognition and implementation of First Nations jurisdiction over policing in a manner consistent with the UN Declaration, First Nations’ inherent Title and Rights, the Treaty and Aboriginal rights of Aboriginal peoples, and the *Constitution Act, 1982*<sup>4</sup>.
2. Through the FNPSL, the federal government affirms that First Nations and First Nations police services are **not** subject to provincial policing legislation and standards and instead sets out a federal framework for recognizing First Nations jurisdiction over policing equal to that of the provinces; while leaving open the possibility that First Nations could “opt-in” to provincial legislation and standards.
3. The FNPSL includes mechanisms for coordination between jurisdictions to ensure effective and equitable service delivery.
4. Through the FNPLS, policing should move away from “program funding” to being treated as an “essential service” with the associated outcome that First Nations are guaranteed sustainable, adequate funding to have police services serve their community in alignment with self-determination and established standards.
5. The FNPSL should provide for an “adequate and effective” service standard which is tied to a minimum standard of financial support required for police forces that support First Nations communities. First Nations should be able to “opt-in” to these standards. These standards should be broad enough to account for the unique and specific needs of First Nations, Including culturally responsive police services.

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<sup>2</sup> *United Nations Declaration on the Rights of Indigenous Peoples*, A/RES/61/295 (the “UN Declaration”), 13 September 2007. Online: <[https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP\\_E\\_web.pdf](https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP_E_web.pdf)>

<sup>3</sup> *Constitution Act, 1982*. Online: <https://laws-lois.justice.gc.ca/eng/const/page-12.html#h-39>

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

6. The FNPSL should ensure funding for First Nations policing is consistent with the calculation of costs for policing arrangements in other communities with similar conditions in the region.
7. The FNPSL should ensure funding considers the social, political, and economic context of First Nations. This includes the historic and ongoing challenges faced by First Nations in the context of policing and community safety.
8. The FNPSL should ensure funding that reflects the unique and specific needs of First Nation communities, including the local needs, health and social supports, and the unique context of remote communities.
9. The FNPSL should include provision for a timely, independent, and equitable binding funding arbitration as a specific section in the legislation.
10. Provide funding for community safety programs, including those which serve peacekeeping and prevention functions, and victim's support and liaison services.
11. Provide funding to ensure that community safety services can integrate and coordinate with other health and social services.
12. Police should be required to receive comprehensive ongoing training that is developed and delivered by the communities they serve, and which should be tied to core competencies.
13. First Nation police services should be funded at a rate at least comparable to other BC police forces, including salaries, benefits, and pensions.
14. That the FNPLS provide for oversight and accountability mechanisms for First Nations police services.
15. Simplify police accountability mechanisms by removing layers of bureaucracy to focus on oversight that brings transparency, timeliness, and meaningful resolutions.
16. The civilian oversight bodies must have jurisdiction to audit First Nations police services and to investigate claims of police misconduct. These oversight bodies must report publicly at least annually.
17. The civilian oversight bodies must not include mechanisms that allow for the police or former police to investigate themselves.
18. The oversight bodies must be reflective of the populations they serve.
19. The FNPSL should require police services to collect and publicly report disaggregated race-based and other demographic data and conduct comprehensive reviews of and amend policies and procedures to address systemic racism in policing.

#### **4. QUESTION FOR CONSIDERATION**

- A. How would First Nations prefer to establish an oversight body or bodies?

- i. Through legislation recognizing First Nations jurisdiction over police oversight equal to that of the provinces, set up oversight or opportunity to delegate oversight at the First Nation level?
- ii. Would they be arms-length national, provincial, or regional in scope?

## 5. BACKGROUND

Currently, there are currently 35 First Nations police services across Canada and one Inuit police service serving 155 First Nations and Inuit communities. They are located mainly in Ontario and Quebec, with a smaller presence across all western Canadian provinces. All First Nations and Inuit police services operate according to existing provincial police legislation and regulations.

First Nations police services all receive financial support through the First Nations and Inuit Policing Program (FNIPP), a discretionary contribution program created in 1991 that provides federal funding to support professional, dedicated, and culturally responsive policing services in eligible First Nations and Inuit communities. Eligible costs are shared between the federal government and the provinces and territories in accordance with a 52% federal and 48% provincial/territorial cost-share ratio.

Approximately 134 of the 204 First Nations in B.C. have agreements with the provincial and federal governments. Under the FNIPP there are two service delivery models. There are Self-Administered Agreements (“SA”) and Community Tripartite Agreements (“CTA”). In B.C., the only example of an SA is the Stl’atl’imx Tribal Police Service which serves 10 First Nations communities in the interior. Self-Administered Police Service Agreements are signed by three parties: the First Nation(s) or Inuit communities, the relevant province, and the federal government.

There are over 50 CTAs in B.C. covering a majority of First Nations communities. CTAs are agreements between First Nations, the Government of Canada, the Province/Territory, and the RCMP (service provider) to provide police service in the designated areas. Several First Nations have also developed policing agreements with other jurisdictions outside of the FNIPP.

For many years now, First Nations police services have faced significant challenges and financial obstacles in being able to deliver adequate and culturally appropriate policing services, in part due to the limitations of the FNIPP. First Nations police services and community leaders have raised various issues, including:

- *Limited Budgets*, as well as First Nation communities competing with each other to access limited government funding;
- *Time-limited government contribution agreements* impacting the ability of police services to undertake long-term planning;
- *Inequities "at the table"* whereby First Nations do not feel they have a true voice at the negotiating table due to the limitations of negotiating agreement provisions and government funding levels; and,
- *Restrictive program terms and conditions* limit the ability of police services to offer certain specialized services to respond to the specific needs of the communities they serve.

Recognizing these challenges, many reports, inquiries, and research studies have called for reforms to the program or the creation of federal legislation recognizing First Nations police services as essential services.<sup>5</sup>

#### MANDATE

The BCAFN Chiefs-in-Assembly mandated the BCAFN to advocate for First Nations self-determination over policing through resolution, 22/2022 “Support for the Findings and Recommendations from the “What We Heard” Report on Police Reform and Policing as an Essential Service”. The BCAFN Chiefs-in-Assembly also gave direction to the BCAFN through resolution 09/2021, “Need for Immediate Policing Reform and Support for First Nations Jurisdiction of Policing”.

At the national level First Nations-in-Assembly mandated the AFN to work with Public Safety Canada on the co-development and implementation of a legislative framework that recognizes First Nations policing services as an essential service through resolution 07/2021 titled “Creation and Implementation of Legislation for First Nations Policing as an Essential Service”. The resolution includes directing the AFN to create a First Nations policing taskforce committee to provide support and guidance for the development of a new First Nations policing legislative framework. The AFN was also directed to reform and address institutional racism in the justice system through resolution 07/2020 titled “Call for Reform to Address Institutional Racism in the Justice System”. First Nations-in-Assembly also passed resolution 11/2020 titled, “Implementation of the National Indigenous Justice Summit’s Immediate Action Points” which include a directive to create a national Indigenous led police oversight body. Finally, Resolution 51-2022 “First Nations Sovereignty over Policing” mandated the AFN to co-develop policing legislation that recognizes First Nations Sovereignty in a manner similar to *An Act respecting First Nations, Inuit and Métis children, youth and families* (S.C. 2019, c. 24)<sup>6</sup>.

## **6. JURISDICTION**

### FIRST NATIONS SELF-DETERMINATION & THE UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES ACT

UNDA came into force on June 21<sup>st</sup>, 2021. The UN Declaration provides a human rights framework that federal and provincial legislative initiatives must follow. One of the primary principles that the UN Declaration fosters is the self-determination of Indigenous peoples. With UNDA coming into force, obligations were placed on the federal government to align its laws with the UN Declaration. This means that any legislation establishing First Nations policing as an essential service should align with the UN Declaration regarding process and content. UNDA also obliges government to consult and cooperate with Indigenous peoples and obtain their free, prior, and informed consent before adopting and implementing legislative or administrative measures that may affect them. First Nations were not engaged in co-developing the FNIPP when it was originally established, but now there is an opportunity to redefine First Nations policing.

While it's important to consider the UN Declaration in its totality, the Articles below may relate to policing:

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<sup>5</sup> Engaging on Federal First Nations Police Services Legislation – Discussion Guide. Online: <https://www.publicsafety.gc.ca/cnt/rsrscs/pblctns/nggng-fdrl-frst-ntns-plc-srvcs-lgsltn-2022/index-en.aspx#>

<sup>6</sup> *An Act respecting First Nations, Inuit and Métis children, youth and families* (S.C. 2019, c. 24). Online: <https://laws.justice.gc.ca/eng/acts/F-11.73/index.html>

- *Article 2 - the right of Indigenous peoples and individuals to be free from discrimination;*
- *Article 3 – Indigenous peoples have the right to self-determination. By virtue of that right, they freely determine their political status and freely pursue their economic, social, and cultural development.*
- *Article 4 – Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.*
- *Article 7 - the right of Indigenous peoples and individuals to life, physical and mental integrity, liberty and security of person; and*
- *Article 46(3) - the provisions set out in UNDRIP shall be interpreted in accordance with the principles of justice, democracy, respect for human rights, equality, non-discrimination, good governance and good faith.*

The BC First Nations Justice Strategy's<sup>7</sup> objectives also align with self-determination and supporting First Nations jurisdiction. The Strategy's goals are to are 1) Reform the Justice system to be safer and more responsive to Indigenous peoples; and 2) Restoration of First Nations Justice systems, legal traditions, and structures.

Strategy 22 of the BC First Nations Justice Strategy<sup>8</sup> speaks to the need to establish new models of structured relations between First Nations, the RCMP, and other police forces, that support new strategic and policy level, as well as community level, and cooperative change, while supporting greater community-level police forces.

The creation of the UNDA Action Plan is due to be completed in July 2023. First Nations policing jurisdiction and community safety transformation objectives in the Action Plan could strengthen and support a framework for accountability regarding this area of collaborative work. Ongoing regional dialogue will also be brought forward to influence the development of the National Indigenous Justice Strategy. First Nations in BC are advancing the recognition of their inherent Title and Rights, including the recognition of jurisdiction in many ways, including through work related to justice and policing.

#### **Recommendation:**

1. Through the FNPSL, the federal government must commit to the recognition and implementation of First Nations jurisdiction over policing in a manner consistent with the UN Declaration, First Nations' inherent Title and Rights, the Treaty and Aboriginal rights of Aboriginal peoples, and the *Constitution Act, 1982*<sup>9</sup>.

#### **HOW TO ADDRESS FIRST NATIONS JURISDICTION AND COORDINATION GIVEN OVERLAPPING CROWN JURISDICTION**

How First Nations jurisdiction over policing is addressed in relation to provincial and federal jurisdiction is a critical question in the development of federal legislation. It must provide clarity on the different

<sup>7</sup> B.C. First Nations Justice Strategy February 2020 [https://bcfnjc.com/wp-content/uploads/2022/04/BCFNJC\\_Justice-Strategy\\_February-2020.pdf](https://bcfnjc.com/wp-content/uploads/2022/04/BCFNJC_Justice-Strategy_February-2020.pdf)

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

<sup>9</sup> *Constitution Act, 1982.* supra note 2.

roles of federal, provincial, and First Nations governments regarding policing and how these jurisdictions will cooperate and coordinate services.

There is an outstanding question of whether First Nations jurisdiction over policing should be recognized at the federal level or if First Nations police services should be subject to provincial legislative frameworks and standards. This is a critical aspect of ongoing negotiations. Nationally, the AFN is mandated by Resolution 51-2022 to co-develop policing legislation that recognizes First Nations Sovereignty in a manner similar to *An Act respecting First Nations, Inuit and Métis children, youth and families*<sup>10</sup>.

The *Constitution Act, 1867*, ss. 91 and 92 divide legislative powers between the federal Parliament and provincial legislatures. S. 92 grants the provinces the power to pass laws relating to property and civil rights, the administration of justice, and local and private matters. S. 91 grants the federal government the right to pass laws of national concern, including criminal law and criminal procedure<sup>11</sup>. The other section of importance is s. 91(24) of the *Constitution Act, 1867*, which gives the federal government jurisdiction over "Indians, and Lands reserved for the Indians."

In the 1960s, several Supreme Court of Canada decisions<sup>12</sup> began to clarify that the provinces have increased jurisdiction both on and off-reserve. Thus, the RCMP began to withdraw from policing on reserve in some provinces. The Supreme Court of Canada also has confirmed that the federal government has the right to establish a national police force with jurisdiction to enforce federal laws across the country. As a result, the provinces and territories became more involved with policing on-reserve.

In reviewing the current legislation, court decisions, and current policing arrangements in Canada, there is much overlap and shared jurisdiction related to First Nations policing. There continues to be jurisdictional ambiguity and a need for clarity between the jurisdiction of federal and provincial/territorial governments regarding First Nations policing, and in relation, how First Nations jurisdiction should be recognized. Historically, as a result of this lack of clarity, the result has been that many First Nations communities don't have effective or existent policing in their communities.

Regardless of how First Nations jurisdiction is recognized, new legislation must ensure mechanisms for coordination between jurisdictions and their respective police services. Lack of jurisdictional cooperation has, and continues to contribute toward lack of effective policing, especially when it comes to missing persons, as highlighted by the Oppal Inquiry<sup>13</sup> and National Inquiry into MMIWG2S+<sup>14</sup>. This is especially critical when it comes to sharing information and the provision of specialized services.

## **Recommendations:**

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<sup>10</sup> *An Act respecting First Nations, Inuit and Métis children, youth and families* (S.C. 2019, c. 24). Online:

<https://laws.justice.gc.ca/eng/acts/F-11.73/index.html>

<sup>11</sup> *Constitution Act, 1857*. Online: <https://laws-lois.justice.gc.ca/eng/const/page-1.html>

<sup>12</sup> Public Safety Canada, 2014-2015 Evaluation of the First Nations Policing Program Final Report. Online: <https://www.publicsafety.gc.ca/cnt/rsracs/pblctns/vltn-frst-ntns-plcng-2015/vltn-frst-ntns-plcng-2015-en.pdf>

<sup>13</sup> Oppal, W. Forsaken: Report of the Missing Women Commission of Inquiry Executive Summary, 2021. Online: <https://www2.gov.bc.ca/assets/gov/law-crime-and-justice/about-bc-justice-system/inquiries/forsaken-es.pdf>

<sup>14</sup> Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls. Online: <https://www.mmiwg-ffada.ca/final-report/> (Call for Justice 9.5 iii)

2. Through the FNPSL, the federal government affirms that First Nations and First Nations police services are **not** subject to provincial policing legislation and standards and instead sets out a federal framework for recognizing First Nations jurisdiction over policing equal to that of the provinces; while leaving open the possibility that First Nations could “opt-in” to provincial legislation and standards
3. The FNPSL includes mechanisms for coordination between jurisdictions to ensure effective and equitable service delivery.

## **7. FUNDING**

There are several reasons why many First Nation communities do not have adequate police services. The primary reason is the lack of funding from the federal and provincial governments or, ideally, new fiscal relationships which reflect jurisdictional authorities. The federal government has stated that the new legislation to establish First Nations policing an essential service will result in First Nations communities with better-funded police services that can provide better service to First Nations communities. In this context, it is important to understand the meaning of “essential service” and how this can be ensured. In Canada, essential services are predominantly defined by each province and territory. There is an absence of federal legislation defining the term “essential services.”

In British Columbia essential services were defined during the COVID-19 pandemic. They were defined as those daily services essential to preserving life, health, public safety and basic societal functioning<sup>15</sup>. In the more detailed definition the government of BC states police services are included as an essential service.

To ensure appropriate funding going forward, several legislative mechanisms are proposed to help define the provision of essential services:

1. Adequate and effective service standards
2. At least equivalent policing models and costs comparable to nearby communities with similar conditions
3. Focus on substantive equality
4. First Nations’ unique and specific considerations

### **UNDERSTANDING “ESSENTIAL SERVICE”**

In the 2019, the Council of Canadian Academies released the *Toward Peace, Harmony, and Well Being: Policing in Indigenous Communities Report*<sup>16</sup> (“CCA 2019 Report”). In the report the authors write that the provision of basic public services is supported under international human rights law *in the Universal Declaration of Human Rights*,<sup>17</sup> as well as *Canadian Charter of Rights and Freedoms*<sup>18</sup>, where the federal

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<sup>15</sup> Government of British Columbia. Online: [https://www2.gov.bc.ca/assets/gov/family-and-social-supports/covid-19/list\\_of\\_essential\\_services.pdf](https://www2.gov.bc.ca/assets/gov/family-and-social-supports/covid-19/list_of_essential_services.pdf)

<sup>16</sup> *Toward Peace, Harmony, and Well-being: Policing in Indigenous Communities Report: The Expert Panel on Policing in Indigenous Communities*. Online: <https://cca-reports.ca/wp-content/uploads/2019/04/FullReport-Toward-Peace-Harmony-and-WellBeing.pdf>

<sup>17</sup> *Universal Declaration of Human Rights*. United Nations. Online: <https://www.un.org/en/about-us/universal-declaration-of-human-rights>

<sup>18</sup> *Constitution Act 1982*. Online: <https://laws-lois.justice.gc.ca/eng/const/page-12.html#h-39>



and provincial governments committed to "providing essential public services of reasonable quality to all Canadians."

The CCA 2019 Report<sup>19</sup> also has a helpful definition of "essential service." It reads,

*Finally, this report uses the term essential service, which is a reference to those basic public services that governments provide to their citizens in modern democracies. In general, these include services such as education, health, social services, public infrastructure, and emergency and security services.*

It's of extreme importance that the new legislation address this lack of funding with specific clauses and mechanisms in the legislation to ensure First Nations police forces are no longer left behind in regards to policing. Several key principles that emerged during engagement at the Moving Towards a New Approach: Findings from the Policing as an Essential Service Forum ("Moving Towards a New Approach Forum")<sup>20</sup> and which are affirmed by other bodies that have made recommendations for improving First Nations policing are contemplated below:

#### 1. ADEQUATE AND EFFECTIVE SERVICE STANDARDS

The Joint Position Paper of the First Nations Chief of Police Association, Indigenous Police Chiefs of Ontario, and Quebec Association of First Nation and Inuit Police Directors *Re: Federal Policing Legislation ("Joint Position Paper")*<sup>21</sup> also highlights the terms "adequate and effective," which is a common phrase found in legislation related to policing across Canada, including British Columbia<sup>22</sup>. The term is important because it defines the standard of policing that governments must provide to the police and therefore acts as a guarantee of the levels of funding required to meet those standards.

*"The 'adequate and effective' standard for policing is common across jurisdictions and can be found in the relevant policing legislation of provinces from British Columbia to Newfoundland and Labrador. While the exact definition of "adequate and effective" varies across jurisdictions, at its core, it is the way by which provinces establish the minimum standards expected of each police service for non-Indigenous communities. Each police service operating under these standards is therefore guaranteed funding in order to meet the standards.*

*Presently, Indigenous police services are excluded from the "adequate and effective" standards. As the CHRT noted in its recent decision, the inability to access such standards is one of the core failings of the FNPP: In the view of the Commission, the structure of the FNPP necessarily results in the denial of services since it is impossible for [the complainant] to benefit from the base police service standards, which are effectively excluded from the funding formula. As a result, funding is arbitrary and insufficient."*

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<sup>19</sup> Toward Peace, supra note 15 at page 8

<sup>20</sup> *Moving Towards a New Approach: Findings from the Policing as an Essential Service Forum*, May 25 & 26, 2022, for recommendations.

<sup>21</sup> Joint Position Paper of the First Nations Chiefs of Police Association, Indigenous Police Chiefs of Ontario, and Quebec Association of First Nation and Inuit Police Directors ("QAFNIPD") *Re: Federal Indigenous Policing Legislation*. Online: [https://www.fncca.ca/wp-content/uploads/FNCCA-Essential-Services-Position-Paper\\_Final\\_220629.pdf](https://www.fncca.ca/wp-content/uploads/FNCCA-Essential-Services-Position-Paper_Final_220629.pdf)

<sup>22</sup> *Police Act [RSBC 1996] Chapter 367*. Online: [https://www.bclaws.gov.bc.ca/civix/document/id/complete/statreg/00\\_96367\\_01#section2](https://www.bclaws.gov.bc.ca/civix/document/id/complete/statreg/00_96367_01#section2)

The Joint Position Paper recommends that the new legislation adopt the “adequate and effective” standards that provincial and territorial governments use. In the What We Heard Report,<sup>23</sup> the authors recommend an “opt-in” provision similar to Ontario Community Safety and Policing Act<sup>24</sup>, where First Nations can “opt-in” to legislated standards of policing, equivalent to standards of non-indigenous police forces.

While it is unclear how federal legislation may impact provincial policing legislation, First Nations must consider how and if they want to access legislated standards that exist at the provincial level.

## 2) AT LEAST EQUIVALENT POLICING MODELS AND COSTS COMPARABLE TO NEARBY COMMUNITIES WITH SIMILAR CONDITIONS:

In the Canadian Human Rights Tribunal (“CHRT”), Gilbert Decision<sup>25</sup> the CHRT wrote, quoting the 1990 Indian Policing Policy Review Task Force Report:

*“Pursuant to the Policy, the policing models in First Nation communities must be at least equivalent to those offered in nearby communities in similar circumstances. First Nations also have the right to participate in the decision as to which model of policing they wish to receive...*

*...Pursuant to the Policy, Canada is required to ensure that funding for First Nations policing is “consistent with the calculation of costs for policing arrangements in other communities with similar conditions in the region.”*

The Joint Position Paper states<sup>26</sup>:

*“Calculating the costs of a policing arrangement for a community should be consistent with the calculation of costs for policing arrangements in other communities with similar conditions in the region. ....”*

## 3) FOCUS ON SUBSTANTIVE EQUALITY:

The CHRT also wrote about funding in First Nations communities<sup>27</sup>:

*“Substantive equality requires consideration of the social, political, and economic context of First Nations. This includes the historic difficulties faced by First Nations in the context of policing and community safety. In Mashteuiatsh, this includes high rates of crime, the types of crime, the level of social disorder, and the workload of police officers in the community.”*

In the Joint Position Paper<sup>28</sup> (bold added):

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<sup>23</sup> *Moving Towards*, supra note 19

<sup>24</sup> *Community Safety and Policing Act, 2019, S.O. 2019, c. 1, Sched. 1*. Online: <https://www.ontario.ca/laws/statute/19c01>

<sup>25</sup> *Gilbert Dominique (on behalf of the members of the PekuakamiInuatsh First Nation) v. Public Safety Canada*, 2022 CHRT 4.

<sup>26</sup> *Joint Position Paper*, supra note 20 at 10

<sup>27</sup> *Gilbert Dominique*, supra Note 23

<sup>28</sup> *Joint Position Paper*, supra note 20

*The ongoing First Nations child welfare settlement discussions are a prime example of the Government of Canada working collaboratively with First Nations to define a new funding formula that reflects the needs of communities, including the unique needs of remote communities.”*

The CHRT decision, the Joint Position Paper, and the wording above may be of assistance in crafting legislation to ensure equity between First Nations police forces compared to non-First Nations police forces.

#### 4) UNIQUE CONSIDERATIONS FOR FIRST NATION COMMUNITIES

Of interest to First Nations communities is the Special Committee on Reforming the Police Act (“SCORPA”)<sup>29</sup> Report recommendation regarding specific funding models for municipalities that consider the unique and specific needs of communities:

*Create a fair and equitable shared funding model for municipalities. This includes:*

- a) Consideration of local needs, health, and social supports, and the geography of a service delivery area.*
- b) Exploring options to phase in or incrementally increase the municipal share of policing costs.*

Municipalities have specific considerations they would like considered. It is important for First Nations to ensure that their unique and specific considerations are also taken into account. An example of this is a First Nation community that is rural and isolated - it's likely that certain costs for policing will be more expensive than for an urban police forces.

#### **Recommendations:**

4. Through the FNPLS, policing should move away from “program funding” to being treated as an “essential service” with the associated outcome that First Nations are guaranteed sustainable, adequate funding to have police services serve their community in alignment with self-determination and established standards.
5. The FNPSL should provide for an “adequate and effective” service standard which is tied to a minimum standard of financial support required for police forces that support First Nations communities. First Nations should be able to “opt-in” to these standards. These standards should be broad enough to account for the unique and specific needs of First Nations, including culturally responsive police services.
6. The FNPSL should ensure funding for First Nations policing is consistent with the calculation of costs for policing arrangements in other communities with similar conditions in the region.

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<sup>29</sup> Transforming Policing and Community Safety in British Columbia. Online: [https://www.leg.bc.ca/content/CommitteeDocuments/42nd-parliament/3rd-session/rpa/SC-RPA-Report\\_42-3\\_2022-04-28.pdf](https://www.leg.bc.ca/content/CommitteeDocuments/42nd-parliament/3rd-session/rpa/SC-RPA-Report_42-3_2022-04-28.pdf)

7. The FNPSL should ensure funding considers the social, political, and economic context of First Nations. This includes the historic and ongoing challenges faced by First Nations in the context of policing and community safety.
8. The FNPSL should ensure funding that reflects the unique and specific needs of First Nation communities, including the local needs, health and social supports, and the unique context of remote communities.

#### BINDING FUNDING ARBITRATION

In the Joint Position Paper, the authors state that the current FNIPP lacks any mechanisms to address inadequate funding levels. In both the Joint Position Paper<sup>30</sup> and Moving Towards a New Approach Forum<sup>31</sup> the authors recommend binding funding arbitration to address the inadequacy of funding when it comes to First Nations police.

In the Joint Position Paper<sup>32</sup>, it's recommended that when binding funding arbitration takes place, the standard First Nations police will be compared to is the "adequate and effective" standard, as is present in current provincial policing standards. It's also recommended that every Indigenous police service in Canada should have a recourse to binding funding arbitration when the "adequate and effective" standard of funding isn't being met.

The report also recommends that an arbitrator would take into consideration any additional costs associated with ensuring culturally responsive policing in First Nations communities, even if those costs go beyond what would be expected in a non-Indigenous community. In developing First Nations policing legislation, Canada and the provinces should be equally aware of the reality that the unique context of First Nations policing often requires something different, and potentially more costly, than non-Indigenous policing.

#### **Recommendation:**

9. The FNPSL should include provision for a timely, independent, and equitable binding funding arbitration as a specific section in the legislation.

#### **8. CULTURALLY RESPONSIVE POLICE SERVICES**

Cultural responsiveness of police services and consideration of local and unique community safety needs and priorities must be considered in the new legislation. The new legislation is an opportunity to connect community programs, prevention, police recruitment and training, and research directly to funding for police services.

Some of the areas that the new legislation could address are below.

#### COMMUNITY PROGRAMS AND INTEGRATION WITH SOCIAL SERVICES

Ensuring that First Nations communities have access to essential police services must not be narrowly pursued. Many First Nation communities have and need more community programs, like community-

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<sup>30</sup> *Joint Position Paper, supra* note 20 at 11

<sup>31</sup> *Moving towards, supra* Note 19

<sup>32</sup> *Joint Position Paper, supra* Note 20 at 11

based security patrols and liaison programs for victims and families to complement police services. These types of community-led initiatives are central to First Nations self-determined approaches to community safety.

In the SCORPA report<sup>33</sup> it states:

*The Committee heard that community-based security patrols can often offer a timelier response, particularly in northern, rural, or remote communities, and may be more effective at de-escalating situations due to their own local knowledge. Additionally, the Nuu-chah-nulth Tribal Council stated that community-based security models, such as local peacekeeper officers or the Bear Clan Patrol program based in Winnipeg, need to be expanded and legitimized.*

It is also critical that community safety services have the capacity to integrate with other health and social services and cultural initiatives in the community.<sup>34</sup> For example, how and whether police attend wellness checks can be considered in conjunction with appropriate health services and professionals.

It is also important that the police are supportive of other programs like First Nations court, healing circles, and restorative justice. First Nations elders also can be a valuable resource in many different aspects related to policing.

#### RECRUITMENT & TRAINING

In the Findings from the Policing as an Essential Service forum, there were many recommendations specific to training<sup>35</sup>, which were also recommended by the SCORPA, National Inquiry Calls for Justice, and discussed during BCAFN engagement on the development of the National Action Plan on MMIWG2S+.

Culturally appropriate training of police officers on an ongoing basis is important so the police can better serve the communities they work and live in. It is important that education and training for those working in policing be locally focused, including the First Nations culture and history where they are living and serving. When police officers have a deeper understanding of the local culture, they can establish and build stronger relationships, and gain the respect and trust of community members. In tandem with this core, ongoing training and competency evaluation is required in anti-racism, human rights, trauma-informed approaches, de-escalation, mental illness, substance use, responses to gender-based violence, and working the 2SLGBTQIA+ community.

Recruitment of police, staff, and members of a civilian oversight body needs to be representative of the communities they serve (including diversity of race, ethnicity, gender, and sexuality). Representation is important in terms of equity, and to help protect against systemic discrimination and build trust.

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<sup>33</sup> Transforming Policing, supra Note 27 at 53

<sup>34</sup> Reclaiming Power and Place (Call for Justice 9.7); and BCAFN What We Heard Report: Missing and Murdered Women, Girls, 2-Spirit+ (MMIWG2SLGBTQIA+) Regional Engagement Process for the Development of the National Action Plan on MMIWG2SLGBTQIA+, 2021, p. 57. Online: [https://www.bcafn.ca/sites/default/files/docs/reports-presentations/BCAFN-What%20We%20Heard%20Report\\_Digital%20\(1\).pdf](https://www.bcafn.ca/sites/default/files/docs/reports-presentations/BCAFN-What%20We%20Heard%20Report_Digital%20(1).pdf)

<sup>35</sup> *Moving Towards*, supra note 19 at page 44

The National Inquiry Calls for Justice calls for measures to build respect and ensure representation in police services:

*9.2 We call upon all actors in the justice system, including police services, to build respectful working relationships with Indigenous Peoples by knowing, understanding, and respecting the people they are serving. Initiatives and actions should include, but are not limited to, the following measures:*

- i. Review and revise all policies, practices, and procedures to ensure service delivery that is culturally appropriate and reflects no bias or racism toward Indigenous Peoples, including victims and survivors of violence.*
- ii. Establish engagement and partnerships with Indigenous Peoples, communities, and leadership, including women, Elders, youth, and 2SLGBTQQIA people from the respective territories and who are resident within a police service's jurisdiction.*
- iii. Ensure appropriate Indigenous representation, including Indigenous women, girls, and 2SLGBTQQIA people, on police services boards and oversight authorities.*
- iv. Undertake training and education of all staff and officers so that they understand and implement culturally appropriate and trauma-informed practices, especially when dealing with families of missing and murdered Indigenous women, girls, and 2SLGBTQQIA people.*

*9.3 We call upon all governments to fund an increase in recruitment of Indigenous Peoples to all police services, and for all police services to include representation of Indigenous women, girls, and 2SLGBTQQIA people, inclusive of diverse Indigenous cultural backgrounds, within their ranks. This includes measures such as the following:*

- i. Achieve representative First Nations, Inuit, and Métis diversity and gender diversity within all police services through intensive and specialized recruitment across Canada.*
- ii. Ensure mandatory Indigenous language capacity within police services.*
- iii. Ensure that screening of recruits includes testing for racial, gender, gender identity, and sexual orientation bias.*
- iv. Include the Indigenous community in the recruitment and hiring committees/process.*
- v. In training recruits, include history of police in the oppression and genocide of Indigenous Peoples; anti-racism and anti-bias training; and culture and language training. All training must be distinctions-based and relevant to the land and people being served; training must not be pan-Indigenous. ...*

The SCORPA Report<sup>36</sup> outlines the importance of training in relation to officers and staff:

*9.2, iv Undertake training and education of all staff and officers so that they understand and implement culturally appropriate and trauma-informed practices, especially when dealing with families of missing and murdered Indigenous women, girls, and 2SLGBTQQIA people.*

*9.3, v In training recruits, include: history of police in the oppression and genocide of Indigenous Peoples; anti-racism and anti-bias training; and culture and language training. All training must be*

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<sup>36</sup> *Transforming Policing, supra* Note 27 at 55

*distinctions-based and relevant to the land and people being served; training must not be pan-Indigenous. (Calls for Justice from The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls)*

The SCORPA report<sup>37</sup> also recommends that:

*Requiring police officers to complete training and education that is based on the historical, cultural, and socio-economic context of the communities in which they will be serving and is developed and delivered in consultation with the communities.*

#### PROPER FUNDING FOR POLICE OFFICERS

To attract high-quality personnel and retain them, it's important that First Nation police services offer equivalent salaries, benefits, and pensions. The Findings from the Policing as an Essential Service Forum outlined many recommendations<sup>38</sup> specific to First Nations Self-Administered Agreements and the need for financial support for police officers.

The National Inquiry into MMIWG2S+ also highlighted this challenge and recommended:

*Retain Indigenous officers through relevant employment supports and offer incentives to Indigenous officers to meet their unique needs as Indigenous officers serving Indigenous communities, to ensure retention and overall health and wellness of the service.<sup>39</sup>*

#### RACE-BASED AND OTHER DEMOGRAPHIC DATA

Another important area where there is a lack of research and data is disaggregated race-based data. Disaggregated data is data that provides sub-categories of information, for example, by ethnic group, gender, sexuality, occupation, or educational status. Disaggregated data can reveal inequalities between the different categories and can show, for example, the inequalities between First Nations and other demographic groups, or within First Nations. Once the inequalities are visible after the data is gathered, the next step is to eliminate systemic racism and discrimination and move toward equity.

Disaggregated race-based data and its importance is described in the SCORPA report<sup>40</sup> it reads:

*Require police services to collect and publicly report disaggregated race-based and other demographic data and conduct comprehensive reviews of and amend policies and procedures to address systemic racism in policing.*

*Committee Members heard clear evidence of systemic racism and discrimination in policing during their consultation and emphasized the urgent need to acknowledge and address these issues. In addition to highlighting anti-racism as a value in a new Community Safety and Policing Act and enhancing training in this area, the Committee recommends collecting and publicly reporting race-based data that is standardized and consistently collected. Members noted that this data is needed to better understand systemic racism and make improvements to policies and practices across policing. To ensure communities are not further harmed by the collection and*

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<sup>37</sup> *Ibid.*

<sup>38</sup> *Moving Towards*, *supra* note 19 at 18

<sup>39</sup> *Reclaiming Power and Place* (Call for Justice 9.3 vi)

<sup>40</sup> *Transforming Policing*, *supra* note 27 on Page 83

*use of this data, they must be consulted in the process. To identify and address systemic racism at the department level, the Committee recommends that all police services review their policies and procedures and emphasizes the need to partner with the community in this process. These reviews should be conducted on an ongoing basis, and the results should be shared with the Ministry of Public Safety and Solicitor General to ensure accountability and monitor the progress of policy amendments.*

It's important that data be collected. However, at the same time, First Nations need to be able to provide input on the process to ensure that the data is not used to harm communities further but to benefit them.

It appears that data and research are not currently being considered as part of the new policing legislation. It is not clear whether this is because it's an oversight or because the parties find that it is not important. It can be argued that when funding for research is provided, inequalities in policing can be shown, and then police services can take steps to make police forces more equitable and effective.

#### **Recommendations:**

10. Provide funding for community safety programs, including those which serve peacekeeping and prevention functions, and victim's support and liaison services.
11. Provide funding to ensure that community safety services can integrate and coordinate with other health and social services.
12. Police should be required to receive comprehensive ongoing training that is developed and delivered by the communities they serve and which should be tied to core competencies.
13. First Nation police services should be funded at a rate at least comparable to other BC police forces, including salaries, benefits, and pensions.

### **9. OVERSIGHT & ACCOUNTABILITY**

The lack of proper police oversight and accountability has been an ongoing issue and directly affects First Nations communities and their community members. The issue of police oversight cannot be ignored with the upcoming policing legislation. For First Nations police to be effective, there must be some thoughtful deliberations on the issue.

Six provinces, including British Columbia, have civilian oversight bodies to investigate incidents and complaints involving police or police board members, while the rest of the provinces and territories do not have civilian oversight bodies<sup>41</sup>. Even in BC, however, there are ongoing issues with the full civilianization of provincial complaints bodies and lack of Indigenous-specific oversight. The Civilian Review and Complaints Commission is the federal oversight body for the RCMP, which also suffers from lack of accountability and timely resolution of complaints.

There has been an array of recommendations in several different reports specific to police oversight. The SCORPA report<sup>42</sup> made specific recommendations related to police oversight. It suggests that the province:

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<sup>41</sup> *Toward Peace*, supra note 15 at page 105

<sup>42</sup> *Transforming Policing*, supra note 27 on page 83



*Establish a single, independent, civilian-led oversight agency responsible for overseeing conduct, complaints, investigations, and disciplinary matters for all police and public safety personnel with powers or authority under the new Community Safety and Policing Act. This includes:*

*a) Prioritizing the creation of stand-alone legislation for police oversight.*

*b) Ensuring the oversight agency is reflective of the diverse population and cultures of BC.*

In the Journal of Community Safety and Well Being<sup>43</sup> it is suggested that one possible option (as a part of the authors' recommendation) is to have a national-level commission responsible for the planning, funding, delivery, and oversight of Indigenous policing. This could also include overseeing the investigation of police-related complaints for persons residing in First Nations communities, thus centralizing complaints to one body.

Finally, the Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls also has specific suggestions relating to police oversight. The report suggests that:

*There must be civilian oversight bodies with jurisdiction to audit Indigenous police services and to investigate claims of police misconduct, including incidents of rape and other sexual assaults, within those services. These oversight bodies must report publicly at least annually.*<sup>44</sup>

*We call upon all police services to establish an independent, special investigation unit for the investigation of incidents of failures to investigate, police misconduct, and all forms of discriminatory practices and mistreatment of Indigenous Peoples within their police service. This special investigation unit must be transparent in practice and report at least annually to Indigenous communities, leadership, and people in their jurisdiction.*<sup>45</sup>

The report suggests that the federal and provincial governments establish robust and well-funded Indigenous civilian police oversight bodies (or branches within established reputable civilian oversight bodies within a jurisdiction) in all jurisdictions, with proper Indigenous representation<sup>46</sup>.

At the Policing as an Essential Service Forum, there were concerns voiced by the participants about B.C. oversight bodies. Some of the concerns mentioned were that the oversight structure is complicated with too many multiple layers. There were also concerns about police officers or former police officers investigating their own institutions. It was also suggested that a civilian oversight model be used and that there be mechanisms in place to give the oversight body the power to investigate complaints.

The CCA 2019 Report also discusses “public security boards” as a possible option. These are different from “police boards” in Canada in several different ways. Unlike the current police boards that exist, public security boards could have the power to appoint and dismiss chiefs of police and senior public police officers. They could also foster cooperation between police and other agencies involved in public safety and security. The Law Commission report states that the intent of the boards would be to create

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<sup>43</sup> Ruddell, R., & Kiedrowski, J. (2020) Reforming Indigenous Policing: Understanding the context for change. Journal of Community Safety and Well-Being, 5(4),144-155. Online: <https://www.journalcswb.ca/index.php/cswb/article/view/168>

<sup>44</sup> Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls. Online: <https://www.mmiwg-ffada.ca/final-report/> (Call for Justice 5.1 ii)

<sup>45</sup> Reclaiming Power and Place (Call for Justice 9.6)

<sup>46</sup> Reclaiming Power and Place (Call for Justice 9.8)

partnerships with other agencies that have a role in maintaining public peace and security under one umbrella. The report recommends that the boards be at a regional or municipal level, and they also have civilian representation. In the July 2006, Law Commission of Canada report<sup>47</sup> it was suggested these boards be created through legislation. It states that these boards look promising, but it may be too early to tell whether they should be formed in Canada. They could also have the same mechanisms that current police boards already have.

#### **Recommendations:**

14. That the FNPLS provide for oversight and accountability mechanisms for First Nations police services.
15. Simplify police accountability mechanisms by removing layers of bureaucracy to focus on oversight that brings transparency, timeliness, and meaningful resolutions.
16. The civilian oversight bodies must have jurisdiction to audit First Nations police services and to investigate claims of police misconduct. These oversight bodies must report publicly at least annually.
17. The civilian oversight bodies must not include mechanisms that allow for the police or former police to investigate themselves.
18. The oversight bodies must be reflective of the populations they serve.
19. The FNPSL should require police services to collect and publicly report disaggregated race-based and other demographic data and conduct comprehensive reviews of and amend policies and procedures to address systemic racism in policing.

#### **Question for Consideration:**

- A. How would First Nations prefer to establish an oversight body or bodies?
  - i. Through legislation recognizing First Nations jurisdiction over police oversight equal to that of the provinces, set up oversight or opportunity to delegate oversight at the First Nation level?
  - ii. Would they be arms-length national, provincial, or regional in scope?

#### **10. CONCLUSION**

For years, First Nations in Canada have been demanding change from the federal government on the delivery of inadequate police services to First Nations communities. The federal government has responded by committing to the co-development of the First Nations Police Services legislation.

What is clear from the voices of First Nations leaders across the country is that the status quo relating to First Nations policing cannot continue. First Nations will not accept 'tinkering around the edges' of the

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<sup>47</sup> In Search of Security: The Future of Policing in Canada. Online: <https://www.policingsecurity.ca/wp-content/uploads/2013/05/In-Search-of-Security.pdf>

FNIPP and the continued program delivery of First Nations policing. With only one First Nation self-administered police agreement in British Columbia and with many other First Nations interested in either having their own police force or working with other neighboring police forces, we must see a commitment to real change from the federal government.

The new legislation must live up to the obligation in the *United Nations Declaration on the Rights of Indigenous Peoples Act* and address and entrench First Nations' jurisdiction over policing.

### **PRINCIPLES FOR FEDERAL FIRST NATIONS POLICING LEGISLATION**

The Federal Government and the AFN have been working jointly together in developing principles for the proposed policing legislation. These negotiations are still ongoing. The federal government is clear that these principles should align with their mandate. The AFN has also been working to develop principles. The purpose of the principles is to support First Nations across Canada and to ensure the proposed policing legislation addresses the values and principles that we, as First Nations, deem important.

Below is a draft set of principles that BC First Nations may wish to consider as central to federal First Nations policing legislation:

1. First Nations policing legislation must respect and include the recognition and implementation of the right to self-determination, and First Nations' connection to their lands.
2. Reconciliation is a component of section 35 of the *Constitution Act, 1982*, and of primary consideration by the federal government in the negotiations of the new policing legislation.
3. The new policing legislation must create space for the revitalization of First Nations laws.
4. The new legislation will uphold the Honour of the Crown with respect to the health and safety of First Nation communities.
5. The Government of Canada must secure First Nations' free, prior, and informed consent when Canada takes actions that impact the rights of First Nations, including the policing legislation.
6. The Government of Canada and First Nations require a new fiscal relationship, developed in collaboration, and through which First Nations police forces are supported on a basis of substantive equity when compared to other non-First Nations police forces.
7. First Nations police services must be supported to enhance integration with other social and health services.
8. The recognition of First Nations jurisdiction must be implemented in tandem with mechanisms for coordination between jurisdictions to ensure effective and equitable service delivery.
9. First Nations must have access to policing standards, associated funding, and independent funding arbitration.

10. First Nations community-safety priorities must be supported to be delivered in a culturally responsive way, and approach which values prevention and relationship-building.
11. The new fiscal relationship between First Nations and the federal government will address the issues of recruitment, retention of police, and police responsiveness.
12. The Federal Government and First Nations will work together to ensure there is proper civilian oversight of police to ensure transparency, accountability, and appropriate collection and use of disaggregated data.
13. The new policing legislation will not take a one size fits all approach and will respect the diversity and uniqueness of First Nations across all of Canada, including “opt-in” clauses where appropriate.
14. The federal government will work with the provinces and territories to ensure that provincial and territorial legislation is amended to give full effect to federal legislation.