

# Bringing the Thin Blue Line into Line: Bill 16, *The Police Services Act*

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J A S O N   E .   R O B E R T S \*

## I. INTRODUCTION

Bill 16, *The Police Services Act*<sup>1</sup> was introduced by the Government of Manitoba on 14 April 2009 and brought in long overdue changes to the legislation controlling policing in the province of Manitoba. At the time of its introduction, there was a general consensus among politicians, civil servants, and members of municipal police forces alike that the *Act*'s predecessor, *The Provincial Police Act*<sup>2</sup> was “badly outdated and in need of review.”<sup>3</sup> In particular, the *PPA* lagged behind similar legislation in other Canadian provinces in terms of civilian oversight of police, as well as the provision of an independent and accountable mechanism for investigation and review of serious police officer misconduct.<sup>4</sup>

Despite the fact that the *PPA* was “a number of decades old” and “was one of the oldest police acts...in Canada,”<sup>5</sup> the reforms brought about by the *Act* were only introduced after the most recent tragedy involving police acted as a catalyst for change.<sup>6</sup> This tragedy was the unfortunate death of Crystal Taman

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<sup>1</sup> Bill 16, *The Police Services Act*, 3rd Sess, 39th Leg, Manitoba, 2009 (assented to 8 October 2009), SM 2009, c 32 [*Act* or Bill 16 or bill].

<sup>2</sup> CCSM c P150 [*PPA*].

<sup>3</sup> Manitoba, Legislative Assembly, *Standing Committee on Justice*, 39th Leg, 3rd Sess, vol LXI No 1 (18 June 2009) at 8 (Keith Atkinson) [*Committee*].

<sup>4</sup> See e.g. *Police Act*, RSBC 1996, c 367, ss 23–30; *Police Act*, RSA 2000, c P-17, ss 23–32, 46.1–46.2; *Police Act*, 1990, SS 1990-91, c. P-15.01, ss 27, 29–31, 33–35, 91.1; *Police Services Act*, RSO 1990, c P.15, ss 27–37, 39–40, 113.

<sup>5</sup> Manitoba, Legislative Assembly, *Debates and Proceedings (Hansard)*, 39th Leg, 3rd Sess, vol LXI No 67B (22 September 2009) at 3299 (Kelvin Goertzen) [*Debates* (22 September 2009)].

<sup>6</sup> This fact is largely in accord with the development of reforms in other jurisdictions. See Joel Miller & Cybele Merrick, “Civilian Oversight of Policing: Lessons from the Literature” (Paper presented to the Global Meeting on Civilian Oversight of Police, Los Angeles, 5–8 May 2002) [unpublished] (“...civilian oversight typically emerges in the context of public reaction to high-

caused by the dangerous driving of off-duty police officer Derek Harvey-Zenk.<sup>7</sup> After crashing his truck full speed into Taman's car, which was stopped at a red light, the fact that Harvey-Zenk was a police officer should have been irrelevant to bringing him to justice. However, his officer status played a crucial role in the "incompetent"<sup>8</sup> investigation into the accident conducted by the East St. Paul Police Service. Ultimately, a plea to dangerous driving causing death was entered in conjunction with a highly-criticized joint recommendation made by the independent prosecutor, Martin Minuk, and counsel for Harvey-Zenk.<sup>9</sup> This recommendation, a conditional sentence of two years less a day, was reluctantly accepted by Chief Judge Raymond Wyant.<sup>10</sup>

Subsequently, an inquiry into this series of events was conducted, the report of which was issued on 30 September 2008.<sup>11</sup> The report concluded in part that:

[this series of events]...showed the perils of having police officers investigate, or even interview, other police officers from their own force in criminal cases. Both the loyalty so important in permitting officers to rely on one another in moments of peril, and the

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profile examples or allegations of police misconduct, often accompanied by a perception that justice against the police officers concerned is not achieved." at 14).

At this juncture, it should be noted that at least two of the *Act's* purposes—to increase the Aboriginal presence in police services as well as establish the Independent Investigation Unit (as discussed in Part II of this paper)—may be traced back to the Report of the Aboriginal Justice Inquiry of Manitoba (Manitoba, *Report of the Aboriginal Justice Inquiry of Manitoba* (Winnipeg: Queen's Printer, 1991)).

<sup>7</sup> That Bill 16 arose from the events surrounding the death of Crystal Taman was well summarized by Mr. Kelvin Goertzen, Steinbach MLA and Justice Critic of the Official Opposition. See Manitoba, Legislative Assembly, *Debates and Proceedings (Hansard)*, 39th Leg, 3rd Sess, vol LXI No 47B (26 May 2009) [*Debates* (26 May 2009)] ("...the government...decided to act on this issue when...the sad circumstances regarding the Taman case and the East St. Paul police force and the various issues that flowed from that...came to light, and then they recognized that there was a need to ensure that there was a modern police act in place. ...[A]ll of us, I think, remember and will always remember the terrible circumstances around the death of Crystal Taman, and if there's some good that can come from tragedy, we're glad that this and perhaps other pieces of legislation and changes can at least be that reflection in the long run and can be a lasting testament and a lasting legacy" at 2355).

<sup>8</sup> Manitoba, Taman Inquiry into the Investigation and Prosecution of Derek Harvey-Zenk, *Report of the Taman Inquiry*, online: Taman Inquiry into the Investigation and Prosecution of Derek Harvey-Zenk <<http://www.tamaninquiry.ca>> [Taman Inquiry] ("It is clear from the evidence that this investigation was conducted incompetently by all five officers Bakema, Graham, Woychuk, Carter and Pedersen" at 55).

<sup>9</sup> Taman Inquiry, *ibid.*

<sup>10</sup> *Ibid.*

<sup>11</sup> *Ibid.* For a stinging criticism of the Taman Inquiry, the way in which it was conducted, and the conclusions which it drew, see The Black Rod, Blog, online: The Black Rod <<http://blackrod.blogspot.com>>.

importance of maintaining morale and the reputé of one's own police force positively, undermine our ability to rely on internal police investigations.<sup>12</sup>

Consistent with this conclusion, one of the major changes brought about by Bill 16, the creation of the independent investigation unit,<sup>13</sup> stemmed directly from the third recommendation from the Taman Inquiry that:

...the Minister of Justice give consideration to creating a provincial special investigative unit independent of all police enforcement agencies in Manitoba for the purpose of investigating any alleged criminal activity of a member of a police service.<sup>14</sup>

This paper will briefly describe the *Act*, explore its passage through the House, and analyze both its form and substance in order to provide insights into this piece of legislation and the legislative process which generated it.

## II. SUMMARY OF THE *ACT*

Here, it is necessary to succinctly set out the key provisions of the *Act* in order to provide context for the remainder of the discussion, the primary focus of which will be the legislative process leading to the enactment of Bill 16.

Generally speaking, the *Act* replaced the *PPA* and usurped its role of governing policing in Manitoba. Specifically, the *Act* introduced the following key developments, which will briefly be described below: (A) the foundation of the Manitoba Police Commission; (B) the requirement of municipal police boards; (C) the recognition of specific First Nation police services and the development of the community safety cadet program; (D) the regulation of policing standards; and (E) the establishment of an independent investigation unit.

### A. The Manitoba Police Commission

Part 2 of the *Act*, specifically section 6, establishes the Manitoba Police Commission ("Commission"). The purpose of the Commission may be inferred by examining section 7 of the *Act*, which sets out the duties of the Commission, including:

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<sup>12</sup> Taman Inquiry, *ibid* at 8.

<sup>13</sup> The independent investigation unit is described in detail in Part II, below.

<sup>14</sup> Taman Inquiry, *supra* note 8 at 139. See also related recommendation number 4 of the Taman Inquiry, *supra* note 8 ("That regardless of what form that independent investigative agency takes, the Minister of Justice cause appropriate measures to be taken to prevent police investigators in the province from giving police witnesses special procedural concessions in criminal investigations..." at 139).

- (a) providing advice to the minister on regulations dealing with the operation of police services and the conduct of police officers, including regulations prescribing standards for police services and police officers;
- (b) consulting with the public on matters relating to law enforcement and policing, and providing the results of those consultations to the minister;
- (c) developing a policy and procedures manual for police boards and a code of ethical conduct for members of police boards;
- (d) arranging for training to be provided to members of police boards and civilian monitors; and
- (e) performing any other duties assigned by the minister.<sup>15</sup>

As may readily be noted, this Commission, which will consist of five to nine members appointed by the Lieutenant Governor in Council,<sup>16</sup> will serve as the general oversight body for policing in the province.

## B. Municipal Police Boards

Division 2 of Part 4 of the *Act* provides for mandatory police boards (“boards”) in every municipality which operates a police service.<sup>17</sup> These boards will supply “general direction and supervision”<sup>18</sup> to their respective municipal police forces and provide:

- (a) civilian governance respecting the enforcement of law, the maintenance of public peace and the prevention of crime in the municipality; and
- (b) the administrative direction and organization required to provide adequate and effective police service in the municipality.<sup>19</sup>

In addition, the boards will be responsible for setting the “priorities and objectives”<sup>20</sup> of the municipal police services.

The size of the boards will range from three to at least seven members, depending on the size of the municipality which the board services; at least one or two of whom, depending on the size of the municipality, must be appointed by the Lieutenant Governor in Council.<sup>21</sup> The remainder of the members are to be appointed by the corresponding municipal council, but no more than half may be

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<sup>15</sup> *Act*, *supra* note 1, s 7.

<sup>16</sup> *Ibid*, s 9(1).

<sup>17</sup> *Ibid*, s 26(1). See also *ibid*, s 42(1) regarding the requirement of a police board where two or more municipalities jointly operate a regional police service.

<sup>18</sup> *Ibid*, s 26(2).

<sup>19</sup> *Ibid*, s 27.

<sup>20</sup> *Ibid*, s 28(1)(a).

<sup>21</sup> *Ibid*, s 30.

council members or employees of the municipality.<sup>22</sup> Moreover, “every member of the police board must undergo training arranged by the [C]ommission.”<sup>23</sup>

Importantly, the police boards will be responsible for providing their respective municipal councils with the requisite information to be used in determining the overall budget for the police service. After this determination is made by council, allocation of the budget to various priorities and programs of the police service is to be performed by the board.<sup>24</sup> As will be discussed below, the narrow focus and limited mandate of each board made this framework contentious.

### C. First Nation Police Services and the Community Safety Cadet Program

Part 5 of the *Act* allows for the Government of Manitoba or the Government of Canada to enter into an agreement with one or more First Nations to “establish a police service to provide policing services to a First Nation community or group of First Nation communities.”<sup>25</sup> Under the *Act*, such services require the establishment of their own police boards<sup>26</sup> and are subject to all of the provisions of the *Act*.<sup>27</sup>

Section 83 of the *Act* provides for the establishment of a community safety cadet program by the Minister of Justice or a police service. The purpose of such a program is to serve as a stepping stone for members of the Aboriginal community and other minority communities to become police officers.

### D. Policing Standards

Part 6 of the *Act* provides for three main ways in which policing standards may be regulated. First, section 48 stipulates that the Minister may prescribe regulations with respect to the operation of police services and the conduct of officers with the aim of ensuring “adequate and effective policing.”<sup>28</sup> The second mechanism available to set standards for policing is that the Director of Policing (“Director”) appointed under section 3 of the *Act* may develop, or require a police service to develop, guidelines on specific matters pertaining to law

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<sup>22</sup> *Ibid.*

<sup>23</sup> *Ibid.*, s 36.

<sup>24</sup> *Ibid.*, s 29.

<sup>25</sup> *Ibid.*, s 45(1).

<sup>26</sup> *Ibid.*, s 45(2).

<sup>27</sup> *Ibid.*, s 47.

<sup>28</sup> *Ibid.*, s 48(1). See also *ibid.*, s 48(2). Compare *PPA*, *supra* note 2, s 29 (regulatory power vested in the Lieutenant Governor in Council).

enforcement.<sup>29</sup> The Director may also expound a model code of conduct for officers to be subsequently adopted by a police service.<sup>30</sup> Third, the Minister of Justice may issue notice to the police board and chief responsible for a service that adequate and effective policing services are not being provided.<sup>31</sup> Such notice must detail how the specific failures to ensure adequate and effective policing are to be remedied or prevented in the future.<sup>32</sup> Consequences are provided in the event that the police board and/or service fail(s) to comply with the measures stipulated.<sup>33</sup> Furthermore, the Minister may invoke these consequences without giving notice to the board and chief of police in question if he/she finds it to be in the public interest to do so.<sup>34</sup>

## E. Investigations into Police Officer Misconduct

Part 7 of the *Act* introduces what is arguably the most critical component of this piece of legislation: the independent investigation unit ("unit") set up to probe police misconduct.<sup>35</sup> As mentioned above, it is this Part of the *Act* which directly serves to fulfill recommendation number 3 of the Taman Inquiry.

The unit is to be made up of a civilian director appointed by the Lieutenant Governor in Council and individuals chosen by the civilian director to serve as investigators.<sup>36</sup> While the civilian director must not be a current or former police officer,<sup>37</sup> the *Act* explicitly contemplates current and former members of the

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<sup>29</sup> *Act, ibid*, s 49(1).

<sup>30</sup> *Ibid*, s 50.

<sup>31</sup> *Ibid*, s 53(1).

<sup>32</sup> *Ibid*, s 53(2).

<sup>33</sup> *Ibid*, s 53(4). *Cf. PPA, supra* note 2, s 21.1 (similar powers provided to the Minister of Justice, including the power to suspend, in whole or in part, the operation of a police service).

<sup>34</sup> *Act, ibid*, s 54. It is acknowledged that this section provides a sweeping power to the Minister of Justice to take remedial actions, including suspending the operation of a police service, without so much as providing notice to the board and chief of police. This constitutes a marked departure from the *PPA*, under which notice to the municipal council was always required before such actions were taken. Somewhat surprisingly, this section was not at all debated at the committee stage and representatives of police forces registered no formal objections to it. It is suspected, however, that this may be largely explained by the fact that this power will be controlled politically, though not legally. By this it is meant that the Minister will only exercise this broad statutory public interest discretion after careful reflection for if the exercise of this discretion is not, in fact, in the public interest, it will come at the heavy cost of popular support for the Minister and/or the government.

<sup>35</sup> *Ibid*, s 56.

<sup>36</sup> *Ibid*, ss 56(2), 57(1).

<sup>37</sup> *Ibid*, s 57(2).

force serving as investigators.<sup>38</sup> Section 59 sets out the duties of the civilian director as including responsibility for:

- (a) the management, administration and operation of the independent investigation unit;
- (b) overseeing investigations conducted by the independent investigation unit;
- (c) performing any other duties imposed by this Act.<sup>39</sup>

As may be inferred from the foregoing, investigators are subject to “the sole command and direction of the civilian director” while performing tasks pursuant to the *Act*.<sup>40</sup>

Sections 65–68 of the *Act* are also of critical importance as they prescribe the situations in which, and the procedures to be followed when, an investigation by the unit must take place. The unit is to be immediately notified when:

- ...a police officer is at the scene of an incident where it appears that
  - (a) the death of a person may have resulted from the actions of a police officer;
  - (b) a serious injury to a person may have resulted from the actions of a police officer; or
  - (c) a police officer may have contravened a prescribed provision of the *Criminal Code* (Canada) or a prescribed provision of another federal or provincial enactment.<sup>41</sup>

The above notice provisions apply whether or not the officer involved was on duty when the incident occurred.<sup>42</sup> Sections 65(3) and 65(4) stipulate that the unit must assume conduct of the investigation of such an incident upon arrival at the scene and that, until its arrival, the officers at the scene must take any steps in the investigation which they would otherwise take were a police officer not involved.<sup>43</sup> In other words, the officers who first arrive at the scene of such an incident must do their job properly and carry out their duties as they would in the normal course.

Section 66 states that the above investigatory procedures apply with necessary modifications in the event that: (i) “a police service conducting an investigation into the conduct of a police officer”<sup>44</sup> discovers evidence of any such situation listed in section 65(1), or (ii) “a police service receives a formal complaint”<sup>45</sup> concerning such a situation.

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<sup>38</sup> *Ibid.*, s 60.

<sup>39</sup> *Ibid.*, s 59.

<sup>40</sup> *Ibid.*, s 62.

<sup>41</sup> *Ibid.*, s 65(1).

<sup>42</sup> *Ibid.*, s 65(2).

<sup>43</sup> *Ibid.*, s 65(3)–(4).

<sup>44</sup> *Ibid.*, s 66(1).

<sup>45</sup> *Ibid.*, s 66(2).

Section 67 mandates that if the civilian director is contemplating laying an information against an officer following an investigation, then he or she must seek independent legal advice concerning same. If such an information is laid, it must then be prosecuted by an independent prosecutor.<sup>46</sup> This prosecutor must reside outside of Manitoba if the information “alleges that the officer caused the death of a person.”<sup>47</sup>

The *Act* also provides for the appointment by the Commission of civilian monitors of investigations conducted by the unit.<sup>48</sup> These individuals must not be current police officers.<sup>49</sup> They must be assigned to those investigations where an officer potentially caused the death of another, and those where the civilian director considers such an assignment to be in the public interest.<sup>50</sup> A report of any investigation monitored must be furnished by the monitor to the chair of the Commission.<sup>51</sup>

Finally, sections 73–76 detail the involvement of the unit when police services are performing investigations into the conduct of their own officers. Notice must be provided to the unit by the police chief when, on the basis of receipt of a formal complaint or the conduct of an internal investigation, it becomes clear that an officer may have violated any federal or provincial enactment not prescribed by regulation pursuant to section 65(1).<sup>52</sup> In addition, at the request of the civilian director, the police chief must provide information about any such complaint or investigation and the status of any internal investigation pursuant thereto.<sup>53</sup> Furthermore, the police chief must provide the results of such an internal investigation to the civilian director.<sup>54</sup> It is also open to the civilian director to order that a civilian monitor or unit member monitor the progress of this internal investigation or that the unit assume control of the investigation altogether.<sup>55</sup> Lastly, the Minister of Justice may make regulations

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<sup>46</sup> *Ibid.*, s 68(1). Although the term “independent prosecutor” is not defined in the *Act*, it will likely be prescribed by regulation so as to ensure sufficient independence from the police service to which the officer against which an information is laid belongs (see *ibid.*, s 91(1)(h)).

<sup>47</sup> *Ibid.*, s 68(2)(a).

<sup>48</sup> *Ibid.*, s 69(1).

<sup>49</sup> *Ibid.*

<sup>50</sup> *Ibid.*, s 70(1).

<sup>51</sup> *Ibid.*, s 72.

<sup>52</sup> *Ibid.*, s 73(1).

<sup>53</sup> *Ibid.*, s 73(2).

<sup>54</sup> *Ibid.*, s 73(3).

<sup>55</sup> *Ibid.*, ss 74–75(1).



respecting the manner in which internal investigations into possibly unlawful officer conduct are carried out.<sup>56</sup>

### III. PASSAGE OF BILL 16 THROUGH THE LEGISLATIVE ASSEMBLY

#### A. First Reading

As mentioned above, first reading of the Act was moved on 14 April 2009 by the Minister of Justice and Attorney General of Manitoba, Dave Chomiak, and was seconded by the Minister of Family Services and Housing, Gord Mackintosh. Because this motion was not debatable,<sup>57</sup> only a brief statement of the purpose of Bill 16 was made by Minister Chomiak. Specifically, he stated that, “the tabling of this bill marks the occasion of the complete rewriting of the police act of the province of Manitoba to make it into a modern and made-in-Manitoba act.”<sup>58</sup> The motion was then adopted by the House.

#### B. Second Reading

At second reading, the debate respecting the *Act* was, once again, quite limited. Minister Chomiak moved, seconded by the Minister of Advanced Education, Diane McGifford, that the bill be read a second time and referred to committee.<sup>59</sup> In doing so, Minister Chomiak again highlighted the datedness of the *PPA* and the need to “modernize police governance and police services across the province.”<sup>60</sup> Minister Chomiak then briefly discussed four of the notable features of the *Act*, including: the establishment of the Commission, the creation of police boards, the possibility for a community safety cad

general agreement with the bill and the purposes it serves. In his speech, Mr. Goertzen brought to light one of the most contentious issues with the *Act*: the requirement of mandatory police boards in all municipalities which operate a police service. In this respect, he commented that:

...it's hard to sort of have a cookie-cutter solution for different communities that might have very different needs and very different experiences, and in many cases, these communities have very long-term relationships with their police forces and have very good and positive relationships.<sup>63</sup>

Mr. Goertzen went on to suggest that in many communities the police service is functioning very well and meeting the needs of those it serves. In those communities, he argued, it is desirable to simply maintain the status quo. Mr. Goertzen then briefly discussed the desirability of law enforcement training colleges mandated by statute, an item absent from the *Act*. These, explained Mr. Goertzen, would provide uniform training to police officers, special constables, cadets, and conservation officers, in keeping with the theme of uniform policing standards set out in the *Act*. He acknowledged, however, that the Government had indicated their intention to put the question of police colleges to the Commission following the coming into force of the *Act*. Finally, Mr. Goertzen lamented the fact that further consultations with the public had not taken place following the drafting, but prior to the introduction of, the bill. On 11 June 2009, the bill passed second reading, signalling the Legislative Assembly's agreement with its principle.<sup>64</sup>

## C. Standing Committee on Justice

### 1.

and accountable system of police oversight.”<sup>67</sup> Specifically, he pointed out that it would be difficult for municipal councils to refuse the budgetary requests provided by the police boards and that these requests would likely be too high, given the narrow focus of the boards on matters of policing. Mr. Klassen also lamented the inefficiencies and unnecessary administrative costs associated with these boards, whose role would be duplicative of that currently played by municipal councils. He therefore suggested that these boards be voluntary as opposed to mandatory. Mr. Klassen was, however, supportive of the creation of the Commission as well as of the unit.

Three other speakers, who were all generally pleased to see the bill move forward, were also opposed to mandatory police boards, preferring that the appointment of these boards be a discretionary matter for municipal councils. Mr. Maurice Butler, representing the Town of Morden,<sup>68</sup> remarked that the municipal councils would have no authority over how their funds for policing would be spent and would cease to have ongoing, productive relationships with their respective chiefs of police. He also suggested that the use of civilian boards may lead to morale breakdown within the police services and made the logical point that civilian boards, unlike municipal councils, are unaccountable to the electorate. Mr. Keith Atkinson, representing the City of Brandon,<sup>69</sup> commented that the role of police boards is somewhat confusing in that, under the *Act*, they have the power to appoint police chiefs and officers, yet these individuals remain in the employ of the municipality. Mr. Atkinson also expressed his concerns about the bureaucratic inefficiencies of the boards and how they will “complicate council’s role in establishing citywide priorities and budgets.”<sup>70</sup> In addition, he made the point that if a police board in a smaller community only met once every three months, the statutory minimum,<sup>71</sup> a significant lag may develop between the time a problem is made known by a member of the public and when it is heard by the board; and, consequently, when the police

The next individual to speak to the bill was David M. Sanders, a private citizen<sup>74</sup> who was the first of the speakers at the committee level to favour the establishment of municipal police boards, at least with respect to the City of Winnipeg. Based on the successful experience of Crown corporations and other bodies that are somewhat independent of government, he believed that municipal police boards could be successful as well. He then suggested that section 30(1)(c) of the *Act* be amended to provide for a minimum of thirteen members on the City of Winnipeg police board so as to ensure a “broad range of representation from the larger community.”<sup>75</sup> Although Mr. Sanders praised the implementation of the unit to investigate criminal offences and other very serious matters, he expressed the view that the *Act* fell short in the area of investigation of non-criminal police misconduct:

I am most concerned that while Bill 16 deals with the matter of alleged police criminal offences, it simply doesn't address the totally unacceptable manner in which alleged non-criminal offences, or misconduct, or service defaults, and other breaches of discipline are largely dismissed, or disregarded, or ignored.<sup>76</sup>

The next speaker was Mr. Tom Simms of the Community Education Development Association.<sup>77</sup> On the issue of municipal police boards, Mr. Simms emphasized the importance of independent police services and oversight which are free from undue political interference, and applauded the *Act* for bringing Manitoba back into line with the rest of Canada in this respect. However, he questioned the composition of the City of Winnipeg's future board, with two members being appointed by Provincial Cabinet and five being appointed by City Council,<sup>78</sup> arguing that it would detract from the independence of the service from political interference and its accountability. He therefore recommended that there be three appointments each made by City Council and the province,

organizations that have had a long standing interest in looking at issues of safety in their respective communities and their neighbourhoods.”<sup>80</sup> Ms. Roussin criticized the recent move of the City of Winnipeg to put in place only an advisory, as opposed to governing and decision making, civilian board to oversee police services in the city. She then reinforced the importance of the role of municipal police boards to represent citizens, particularly those which the groups making up the Coalition serve to protect. She was pleased with the general model of the boards but also opined that more could be done to harness the leadership capacity of individuals and groups, particularly Aboriginal political groups, within the communities the Coalition represents for the purpose of board appointments. With respect to the community safety cadet program, she noted that more fundamental changes needed to be made to police recruitment to attract members from these communities.

Mr. Wise, for his part, also praised the government for creating mandatory municipal police boards with decision-making, as opposed to purely advisory, roles. In agreement with Mr. Simms, he recommended that the same type of 3-3-1 appointment model be used for the City of Winnipeg board and that the statute mandate that the Winnipeg board be reflective of the gender and racial diversity of the City.

Mr. David Chartrand, President of the Manitoba Métis Federation, was next to speak to the bill.<sup>81</sup> He praised the introduction of the bill, finding it to be long overdue and a potential path to justice and fairness for the Métis nation. He then turned his attention to clause 9(2) of the bill which, at that time, stated that the Commission must be comprised of at least one First Nations person and one other Aboriginal person. He argued that this was discriminatory toward the Métis nation and proposed that section 9(2) be amended to prescribe one First Nations person and one Métis person. Along the same lines as the presenters from the Coalition, Mr. Chartrand advocated for legislated Aboriginal representation on the

Mr. Cyril Keeper, speaking as a private citizen, was the last presenter of the evening.<sup>83</sup> He began by discussing the unit and how it was now, in the public eye, the appropriate time for its introduction. However, he made it clear that the idea of having officers act as investigators and then return to the force would undercut the independence of the investigations. He therefore suggested that the *Act* provide for permanent investigators who would not be subject to the pressures inherent in returning to the force following an investigation. Moreover, based on Winnipeg City Council's willingness to create an advisory board overseeing the police service and the expressed desires of the citizens of that city to see a governing oversight board put in place, Mr. Keeper submitted that "making a board necessary or compulsory as opposed to optional is a good idea for Winnipeg, or...for any other community in Manitoba that's over 500,000."<sup>84</sup> He suggested that this should be so regardless of the positions of smaller communities. Although he applauded the bill's potential for a cadet program for attempting to increase the Aboriginal presence in police services, he recommended that a more direct approach to this objective be taken.

Following the presentations, the bill was considered clause-by-clause by the committee and three amendments proposed by Minister Chomiak relating to: (i) independent prosecutors residing outside of Manitoba in certain circumstances, (ii) the labour relations of senior officers, and (iii) a technicality concerning the continuation of police services, were adopted.<sup>85</sup> Surprisingly, none of these amendments arose from the presentations made to the Committee. The Report of the Committee on Bill 16 was received by the House on 14 September 2009.<sup>86</sup>

## *2. The Absence of the Police at the Committee Stage*

fact, informally consulted on the workings of the *Act* for more than a year prior to its introduction in the House.<sup>88</sup>

Two significant conclusions may be drawn from this result. First, one may surmise that this informal, non-public consultation process may well have had the unintended effect of reinforcing public perception of the closed culture of the police and, in this sense, it is suggested that it may have been a public relations misstep by the police. Second, and more importantly, the absence of the police at the committee stage demonstrates a procedural flaw in the legislative process. Because the police services and associations—some of the most highly-affected groups in this case—were consulted by the government but chose not to make presentations at the committee hearing, the transparency of the public process was undermined. That is to say, the public remained in the dark and was rendered incapable of scrutinizing the perspectives of these groups on the bill and how, if at all, the informal consultations with police impacted the shape of Bill 16. It is acknowledged, however, that it would clearly be unfair and contrary to the *Canadian Charter of Rights and Freedoms*<sup>89</sup> to require key groups such as these to make presentations at the committee stage. Moreover, any universal procedural solution to this issue would also have to consider respect for the privacy of constituents who consult their MLA on issues of concern to them. With these concerns in mind, it is suggested that the type of access to the legislative process provided to various stakeholders, particularly key stakeholders, be carefully reconsidered so as to remedy the lack of transparency exemplified by this case. This task admits of no simple solution but it is one to which greater attention should be paid.

### *3. Did Stakeholders Have a*

issues. Often there isn't a lot of notice around when the committee hearings are held and so that's a bit of a challenge. And there simply are just some people who don't find it a very comfortable experience to come and speak before a legislative committee, and so that's a reality that has to be recognized as well.<sup>90</sup>

- At the committee stage, Ms. Roussin regretfully noted:

...there are many...organizations that are represented on the [C]oalition, so we were able to get 27 organizations, including a number of other coalitions to sign, or to support the, the position that we're taking here tonight and *there's 14 additional organizations that are a part of the [C]oalition that just didn't have the time to fully review*. It is AGM season, and as you can imagine, everyone's racing towards June 30th here so we didn't get all the signatures, but certainly you would know many of the organizations in Winnipeg that do, that represent, you know, large groups of citizens out there.<sup>91</sup>

- At the committee stage, Mr. Keeper lamented:

*When I came in here this evening, I felt despair because I saw how few delegations there were here this evening.*<sup>92</sup>

Thus, it certainly appears that, in the case of this bill, the legislative process may not have been adequately accessible to those members of the public who were interested



In addition to the lack of notice and resulting scheduling conflicts highlighted above, Mr. Goertzen also commented on two further problems related to committee meetings in this interview. First, “public presenters do not know when they will present until they show up at committee and sometimes, they have to come back another day.”<sup>95</sup> The second problem, which is related to the first, is that committees rarely travel to areas of the province outside of Winnipeg to receive input. Therefore, input from rural stakeholders is limited. This limitation is exacerbated by the first difficulty in that individuals and groups from rural Manitoba who are considering making the trek to Winnipeg for a committee meeting may be dissuaded from doing so by the lack of a guarantee that they will be heard on a particular day.<sup>96</sup>

One can only speculate as to the impact of these procedural flaws. However, it seems unlikely that they had any sweeping impact in this case. This is evidenced below by the fact that only two amendments to the bill were implemented pursuant to the ten presentations made at the committee stage. Regardless, the comments of Mr. Goertzen above suggest that committees are one area of the legislative process where reform should be considered.

#### **D. Report Stage**

Report stage amendments were considered by the legislature on 22 September 2009, where three amendments were proposed. First, Minister Chomiak moved to amend clause 9(2) to state that the Commission be comprised of at least one First Nations person and one Métis person, in accordance with Mr. Chartrand’s recommendation at the committee stage. This amendment was given the stated consent of both the government and the opposition and was subsequently adopted.

Second, Minister Chomiak moved to amend clause 32(1), which stated that a board chair and vice-chair must be elected from among the members of a municipal police board at the first meeting of each year. Minister Chomiak proposed that it read: “The council must designate one member of the police board as chair and another member as vice-chair.”<sup>97</sup> This amendment, he said, “attempts to deal with both extremes of the [municipal boards] issue and that is to have a governance board that’s completely civilian and independent, 100 percent, and on the other hand, to have a municipality council completely be the police board.”<sup>98</sup> Although the amendment was supported by the Opposition Justice Critic Mr. Goertzen, he continued to express reservations over the

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<sup>95</sup> *Ibid.*

<sup>96</sup> *Ibid.*

<sup>97</sup> *Debates* (22 September 2009), *supra* note 5 at 3298.

<sup>98</sup> *Ibid.*

mandatory nature of police boards in all municipalities operating a police service. The amendment was thus adopted.

The final amendment considered was moved by Mr. Goertzen.<sup>99</sup> It consisted of a series of amendments making police boards mandatory only in municipalities with populations over 200 000. In support of this amendment, Mr. Goertzen essentially summarized the viewpoints of those presenters at the committee stage who were opposed to mandatory police boards. Minister Chomiak dealt with these arguments in this way:

The effect of this particular amendment would be to have essentially one police board in only one community in all of Manitoba. And I think that the amendment that had been previously passed by this House that provides for the flexibility for the existing council to have the chair and the vice-chair on the police board will go some way towards dealing with that particular item.<sup>100</sup>

He also pointed to the acts of other Canadian provinces with similar schemes to support his point of view. Not surprisingly, given the New Democratic Party majority in the House, the amendment did not pass.

### E. Third Reading and Royal Assent

Bill 16's third reading occurred on 5 October 2009. Royal Assent was given on 8 October 2009, passing the bill into law.

## IV. FEEDBACK ON BILL 16

Following in-depth research on the subject, some media commentary on the bill, published between 14 April 2009 and 14 June 2009, was found. This section will provide a brief survey of the landscape in this regard.

On 14 April 2009, Minister Chomiak was reported in the *Winnipeg Free Press* as promising that the first order of business of the Commission would be the establishment of a police college in Manitoba to standardize officer training. The same article also reports Minister Chomiak's confidence that the *Act* will apply to RCMP officers, whose misconduct would be subject to investigations performed by the unit.<sup>101</sup>

Another article, entitled "Police act tears down 'blue wall'",<sup>102</sup> sheds light on two aspects of the *Act*. The first is simply the procedural fact that consultations

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<sup>99</sup> *Ibid* at 3300.

<sup>100</sup> *Ibid* at 3302.

<sup>101</sup> "Province to create civilian oversight boards for police", *Winnipeg Free Press* (14 April 2009) online: *Winnipeg Free Press* <<http://www.winnipegfreepress.com>>. With respect to RCMP officer misconduct being subject to investigation by the unit, see *Act, supra* note 1, s 77.

<sup>102</sup> Owen, *supra* note 88.

took place regarding the changes introduced by the *Act*, including discussions with police services across the province and the RCMP for more than a year prior to the introduction of the *Act*. Second, this article highlights a fundamental tension in the legislation between the expertise and independence of the independent investigation unit. It reports Minister Chomiak as saying that the selection process involved, which allows for current and former police officers to serve as investigators, may create a perception of bias in that they will be investigating fellow members of the police service. On the other hand, having current and former officers serve in this capacity is necessary to allow for the unit to have sufficient expertise to carry out its investigations.

A third article heavily criticizes the government for failing to set up the unit in a way that is “independent and free of any perceived bias”<sup>103</sup> due to the fact that current and former police officers will likely be acting as investigators. In this sense, the article suggests that nothing has really changed from the internal investigatory structure which existed prior to the *Act*’s introduction and that there still exists a “blue wall that separates the police and their closed culture from the public and their need for confidence in the justice system.”<sup>104</sup>

Yet another article reveals Minister Chomiak’s motivation for the committee stage amendment requiring the independent prosecutor to reside outside of Manitoba when the unit lays an information against an officer alleging that he or she caused the death of a person. The article quotes the Minister as saying that it simply adds another layer of independence to the independent investigation process.<sup>105</sup>

Similar criticisms of the unit to those described above were meted out in an article entitled “Policing is about service, not power”:

While the new Police Services Act addresses the civilian governance and oversight role, it misses the mark on the proposed independent investigation unit that will probe the most serious incidents and criminal allegations against police officers. One of the key shortcomings of the legislation is that the investigators will be existing and former police officers.

Simply put -- this does not pass the smell test. This newly proposed unit will not be seen to be independent by the public.<sup>106</sup>

The article goes on to suggest that the structuring of the unit was due to pressure placed on the government by police services having a “besieged persecution

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<sup>103</sup> Gordon Sinclair Jr., “Police investigations unit a watered-down cop-out”, Editorial, *Winnipeg Free Press* (18 April 2009) B1.

<sup>104</sup> *Ibid.*

<sup>105</sup> Tom Brodbeck, “NDP wants sweeping changes to cop prosecutions”, *The Winnipeg Sun* (6 June 2009) 3.

<sup>106</sup> Tom Simms, “Policing is about service, not power”, Editorial, *Winnipeg Free Press* (14 June 2009) A10.

mentality” and that the result will be loss of public trust in the unit and its investigations. It then recommends that the public interest would be better served by the government directing resources to the training of civilians who would act as investigators for the unit.

Other topical articles discuss the potential ineffectiveness of the unit<sup>107</sup> and the public consultations on the bill conducted by the province prior to its introduction.<sup>108</sup>

## V. ANALYSIS

This section will briefly consider the merits of the *Act* as well as revisit some of the contentious issues discussed above. In doing so, it will attempt to provide some insight into how the legislative process operated as well as the value of having this process in place.

### A. The Non-Contentious Merits of the Act

First and foremost, this bill should be applauded for its clarity as compared with its predecessor, the *PPA*. Overall, it is fair to say that a fitting descriptor of the *Act* is “comprehensive.” Nevertheless, the *Act* is written in a very logical, linear fashion, which makes it easy to understand. In this respect, the *Act* stands in stark contrast to the scattered and poorly organized *PPA*. In addition, the language used is simple and straightforward; again, a welcomed change when compared to the more antiquated language of the *PPA*. In sum, the drafters of the *Act*<sup>109</sup> should be commended, in my view, for its clarity.

Secondly, there are many meritorious provisions in the *Act* from a substantive point of view. In fact, based on a reading of *Hansard*, it is fair to say that the establishment of the Commission, the sections dealing with First Nations police services and the potential for a cadet program, the provisions as to policing standards, and the creation of the unit (in principle) all met with support from both sides of the House as well as public stakeholders. The fact that agreement was reached on these provisions is no great surprise. The presence of a province-wide, civilian-led police Commission which continuously monitors policing trends and advises as to adjustments which should be made to police

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<sup>107</sup> Tom Brodbeck, “Hope in Police Act? Harvey-Zenk case wouldn’t have been changed”, Editorial, *The Winnipeg Sun* (17 April 2009) 5.

<sup>108</sup> Paul Turenne, “New law aims to improve oversight of police”, *The Winnipeg Sun* (13 April 2009) 4.

<sup>109</sup> To be clear, the term “drafters” refers to Legislative Counsel—a department of Manitoba Justice composed of civil servants with legal expertise who are charged with the responsibility of drafting bills for the Legislative Assembly of Manitoba. See “About Us”, online: Manitoba Justice <<http://www.gov.mb.ca/justice>>.

services will go some way toward best meeting the policing needs of this dynamic and diverse province. The sections dealing with First Nations police services and the potential for a cadet program will serve to increase the presence of underrepresented socio-cultural groups on police forces, particularly the Aboriginal cohort.<sup>110</sup> Hopefully this will aid in reversing the unfortunate trend of Aboriginal overrepresentation in the justice system.<sup>111</sup> Regulations and the various pieces of “soft law”<sup>112</sup> which may be issued to govern policing standards will serve to provide a degree of uniformity across the province in terms of the operation of police services. Finally, even those who disagree with the structure of the unit must admit that it will effect positive change by decreasing, at least in comparison to the existing system, the presence of real and/or perceived conflicts of interest while investigations into serious police officer misconduct are being carried out.

## B. Municipal Police Boards

As mentioned above, the municipal police boards will be responsible for the overall management of the police services for which they are established and will set the priorities and objectives of these forces. Given their composition, the boards will provide civilian oversight to all of the police services in Manitoba: a desirable development in the eyes of many.

However, the main controversy with the establishment of these boards under the *Act* animates the tension between effective civilian oversight and bureaucratic efficiency. The controversy referred to is, of course, that over the mandatory nature of the boards for each and every municipality, including those where no reported problems with policing exist and those which, in fact, have tested out and rejected the municipal board model.<sup>113</sup> In these cases, the *Act* mandates what is arguably an unnecessary and administratively inefficient measure.

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<sup>110</sup> Recall, however, Ms. Roussin’s criticism at the committee stage that more fundamental changes to police recruitment than those provided by the latter initiative are required. See text accompanying note 79.

<sup>111</sup> See generally Carol La Prairie, “Aboriginal over-representation in the criminal justice system: A tale of nine cities” (2002) 44 Can J Crim 181.

<sup>112</sup> For the purposes of this paper, this term refers to the various directives, guidelines, standard operating procedures, and model codes of conduct which may be issued pursuant to Part 6 of the *Act*. See generally Andrew Green, “Regulations and Rule-Making: The Dilemma of Delegation” in Colleen M Flood & Lorne Sossin, eds, *Administrative Law in Context* (Toronto: Emond Montgomery, 2008) at 337.

<sup>113</sup> *Committee*, *supra* note 3 at 11 (Marc Robichaud, referring to the rural municipality of Ste. Anne, Manitoba).

After this point was debated vigorously at the committee stage, the government amended section 32(1) of the *Act* at the report stage, allowing municipal councils to designate the chairs and vice-chairs of their respective police boards. Although this compromise did not go as far as several of the presenters at the committee stage and the Opposition would have liked, it clearly demonstrates the value of the committee process in allowing government a chance to hear, and respond to, the needs of various communities and stakeholders.

### C. Details of the Independent Investigation Unit

As mentioned above, the establishment of the unit, in principle, seemed to be a unanimously supported measure. However, issues certainly existed concerning the independence of the unit and the failure of the *Act* to address how non-criminal disciplinary matters are to be dealt with.

As described above, the independence issue was not only a hot-button topic in the media but was also raised at the committee stage by Mr. Cyril Keeper.<sup>114</sup> Although no substantive amendments were ultimately introduced in this regard, Minister Chomiak did respond to Mr. Keeper's concerns by stating:

I don't think we envision in the independent investigation unit from both the type and the style of people we've talked to that it would be...a unit where people would come...and then go back....[M]ost of the conversation I've had has indicated it would be people who are experienced and perhaps towards the latter part of their careers who wanted to go into a different form of investigation, [and] have a lot of experience.<sup>115</sup>

It may be argued that the government's response demonstrates there being less value to the legislative process than would be the case if an amendment had been introduced to deal with the independence concerns. In my view, however, the response of the government to this issue at the committee stage played two important roles. First, at the very least, it served to inform the public. That is, Minister Chomiak's statement let citizens know that the structure of the unit

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<sup>114</sup> See text accompanying note 83. Of interest, this same issue has most recently re-emerged in British Columbia, following the report of the Braidwood Commission on the Death of Robert Dziekanski. This inquiry was convened to study the circumstances of Robert Dziekanski's death and found these circumstances to include the unjustified use of a taser against Dziekanski by a group of RCMP officers in Vancouver International Airport, just hours after Dziekanski had become a landed immigrant. In his report, Commissioner Braidwood recommended that British Columbia develop the Independent Investigation Office (IIO)—a civilian-based criminal investigative body similar in mandate to the unit. The main difference between the IIO and the unit, however, is set out in Recommendation 8(e) of the report: "No member of the IIO shall have served anywhere in Canada as a police officer." This structural difference is designed to ensure full independence of investigations carried out by the IIO. See British Columbia, Braidwood Commission on the Death of Robert Dziekanski, *Why? The Robert Dziekanski Tragedy* at 25, online: Braidwood Inquiry <<http://www.braidwoodinquiry.ca>>.

<sup>115</sup> *Committee, supra* note 3 at 36.

was designed with a certain degree of flexibility in mind to allow for an appropriate balance of independence and expertise in investigations of criminal and other serious misconduct of officers. Second, because Minister Chomiak's statement was put on the record, it allows the polity to hold the government to account. That is, if Cabinet later appoints a civilian director who appoints current police officers as a majority of investigators, the public will be able to point to the statement of Minister Chomiak and hold the government to account at the ballot box accordingly.

The second issue, the failure of the *Act* to legislate with respect to alleged non-criminal police misconduct, was most forcefully addressed by Mr. David Sanders at the committee stage.<sup>116</sup> As the *Act* is currently structured, such allegations are dealt with under separate legislation<sup>117</sup> and neither the unit nor the boards<sup>118</sup> are to play a role in handling them. The issue raised by Mr. Sanders was, however, a valid one given the presence of schemes to deal with these types of complaints in comparable provincial legislation.<sup>119</sup> Regardless, Minister Chomiak's response to Mr. Sanders in respect to this matter was cursory:

Thanks for the comments...I think the act that we've put together is...a good balance and...a very good model for dealing with criminal matters, and I think it's probably the most extensive. I also think we've made improvements to LERA [the Law Enforcement Review Agency] in terms of staffing that have dealt with...some of the concerns.<sup>120</sup>

The Minister's terse response may be explained, by and large, by the fact that review of these matters falls outside of the scope of the *Act*. Nevertheless, it demonstrates that where a presentation fails to lead to amendment of a bill, the committee process will not necessarily lead to the government acknowledging the presentation as otherwise valuable.

## VI. CONCLUSION

Bill 16 overhauled the governance, administration, and oversight of policing in the province of Manitoba. It repealed the outdated *PPA* and, in its place, introduced a clear and coherent scheme within which police services are required to operate. The vast majority of its provisions were construed as positive

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<sup>116</sup> See text accompanying note 76.

<sup>117</sup> *The Law Enforcement Review Act*, CCSM c L75. See also, *PPA*, *supra* note 2, s 26 (handling of complaints prior to the *Act* coming into force).

<sup>118</sup> *Act*, *supra* note 1, s 28(5).

<sup>119</sup> See e.g. *Police Act*, RSBC 1996, c 367, ss 46–66.1; *Police Act*, RSA 2000, c P-17, ss 43–52; *Police Act*, 1990, SS 1990-91, c P-15.01, ss 37–74; *Police Services Act*, RSO 1990, c P.15, ss 56–80.

<sup>120</sup> *Committee*, *supra* note 3 at 16.

developments and, as such, were met with widespread support by politicians, the public, and the media alike. In these beneficial respects, the *Act* will serve as a tribute to the tragedy which served as its impetus: the untimely death of Crystal Taman.

There remain, however, a number of disagreements on the finer details of the *Act*, including the mandatory nature of municipal police boards and the lack of real and/or perceived independence of the unit. In the coming years, it will certainly be interesting to see how smaller municipalities function with police boards in place and gauge public perception of the independence of the unit.<sup>121</sup> In any event, these two disagreements are not major causes for concern because the *Act* provides that the Minister of Justice must undertake a comprehensive review of its provisions within five years from when it comes into force and provide a report to the House.<sup>122</sup> Presumably, any difficulties arising from these provisions, as well as others unforeseen, will be satisfactorily resolved at that time.

On a final note, Bill 16 shed an overall positive light on the legislative process in Manitoba and in particular the Standing Committee on Justice. Although there is certainly room for improvement at the committee stage, most notably in respect of ensuring transparency of process and public participation, this part of the process led to two important amendments which, it may reasonably be argued, would not have occurred in its absence. In addition, at least one of the points raised by presenters which did not lead to amendments resulted in the government putting a position on the record, giving rise to democratic accountability for a contentious portion of the bill. To conclude, the Third Session of the Thirty-Ninth Legislature saw a publicly significant bill pass in a way which painted the legislative process in a fairly positive light.

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<sup>121</sup> It is recognized that the latter will be highly dependent on whom the civilian director selects as independent investigators for the unit.

<sup>122</sup> *Act*, *supra* note 1, s 90.