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Notes and Comments

B. Richard Bell*

Territorial Jurisdiction of
Municipal and Regional
Police Personnel in New
Brunswick

In a free and democratic society, it is essential that citizens know beyond any doubt the territorial jurisdiction of police officers who may attempt to deprive them of their liberty. It is equally as important for police officers to know with certainty their territorial jurisdiction.

Recent cases from the Court of Queen's Bench of New Brunswick and the Court of Appeal reflect the uncertainty in this area of the law. Any analysis of this issue must commence with the case of *Regina v. Soucy* (1975) 11 N.B.R. (2d) 75 (C.A.).

In *Soucy*, the accused had been stopped by a Rothesay police officer outside the territorial jurisdiction of the Town of Rothesay. The police officer had reasonable and probable grounds to believe Soucy had committed the offence of driving while impaired by alcohol and gave him a breathalyzer demand. Soucy refused and was charged with the offence of refusal contrary to subsection 235(2) of the *Criminal Code* R.S.C. 1970 c. C-34 as amended.

At trial the accused was convicted. By way of *trial de novo* an acquittal was entered. The Crown then launched an appeal. The Appellant argued that the Rothesay police officer was a "peace officer" as found in section 2 of the *Criminal Code* and was therefore authorized to administer a demand pursuant to section 235 whether functioning within or outside his territorial jurisdiction. Limerick, J.A. for the full Court disagreed and stated at page 81:

"To authorize a peace officer as appointed by the Town of Rothesay for the preservation of peace to make a demand for a breathalyzer test outside the boundaries of the Town, would require further statutory authority which does not exist in this Province".

The Crown appeal was dismissed and Soucy's acquittal upheld.

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Post Soucy Developments

Subsequent to the *Soucy* decision the Legislature of New Brunswick appeared to provide the statutory authority alluded to by Limerick, J.A. in the form of subsections 2(2) and 12(1) of the Police Act, S.N.B. 1977 c.P-9.2 which provided as follows:

2(2) Every member of the Royal Canadian Mounted Police and every member of a police force have all the powers, authority, privileges, rights and immunities of a peace officer and constable in and for the Province of New Brunswick, and are *ex officio* inspectors under the Motor Carrier Act, game wardens under the Game Act, industrial fire wardens under the Forest Fires Act, and fishery guardians under the Fisheries Act, and each member of and above the rank of corporal may exercise the powers conferred by section 9 of the Fire Prevention Act.

12(1) Each police officer appointed under this Act is charged with responsibility for

- a) maintaining law and order,
- b) preventing offences against the law,
- c) enforcing penal provisions of the law,
- d) escorting and conveying persons in custody to or from a court or other place,
- e) serving and executing court process in respect of offences against the law,
- f) maintaining order in the courts, and
- g) performing all other duties and services which may lawfully be executed and performed by him,

and shall discharge his responsibility

h) within the limits of the municipality for which he is appointed, and

i) within the province

i) at the request of the minister, or

ii) when he is investigating a matter that arose wholly or partially within, or is pursuing a person fleeing, from the municipality for which he is appointed, but in such case shall immediately notify the police force responsible for policing the area in which he is acting of the purpose of his investigation or action.

Subsection 2(2) appeared to clothe police officers appointed in and for a municipality with provincial jurisdiction. However, any legislative attempt to do so was nullified by the specific wording of paragraphs 12(1) (h) and (i). These latter provisions restricted the

territorial jurisdiction of police officers to their municipality and only permitted an “extended status” where they were:

- 1) requested by the Minister of Justice to act outside their territorial jurisdiction;
- 2) investigating a matter that arose wholly or partially within their jurisdiction; or
- 3) in hot pursuit of persons fleeing from their territorial jurisdiction.

The first reported case dealing with the jurisdictional provisions of the Police Act was *Regina v. Arsenault* (1980) 31 N.B.R. (2d) 365 (C.A.) which paralleled the *Soucy* case. In *Arsenault* a Rothesay Police Officer, in response to a telephone call, drove to Gondola Point, New Brunswick, a community outside his territorial jurisdiction, where the accused was found in an intoxicated position behind the steering wheel of a parked car. The breathalyzer demand administered by the police officer was refused by the accused.

At trial, *Arsenault* was acquitted on the basis that the police officer had no jurisdiction outside the municipality for which he was appointed. The Crown appealed contending that subsection 2(2) of the Police Act permitted municipal police officers to function as peace officers anywhere within the Province. The Court of Appeal disagreed, followed *Soucy* and upheld the acquittal.

As a result of *Arsenault*, it became clear that police officers appointed for a municipality have no status outside their municipal boundaries unless such status is clearly derived from the “extended jurisdiction” provisions of the Police Act.

Those provisions were amended by the Statutes of New Brunswick 1981 c.59, s.9¹. Sub-paragraphs 12(1) (h) (i) (ii) (iii) now provide that a police officer appointed for a municipality or region shall discharge his responsibilities:

- “(i) within the limits of the municipality or region for which he was appointed,
- (ii) at the request of or with the written authorization of the Minister, throughout the Province or such area of the Province as the Minister designates, and
- (iii) when he is investigating a matter that arose wholly or partially within, or is pursuing a person fleeing from, the

1. The amending legislation also provided for the establishment of regional police forces within New Brunswick. Therefore, any references to municipal police officers and their jurisdiction is equally applicable to regional police personnel.

municipality or region for which he was appointed, throughout the Province.”

Upon reading the above paragraphs several questions arise:

1. Under what circumstances is one investigating a matter that arose wholly or partially within his jurisdiction?,
2. When does a matter cease to be under investigation?, and
3. Is it constitutionally valid to clothe a member of the Executive branch of government within the power to extend the territorial jurisdiction of police officers?

Is A Matter Under Investigation?

In *Regina v. Crain* (1981) 35 N.B.R. (2d) 464 (Q.B.D.) Mr. Justice Stevenson addressed the issue of whether a matter was being investigated that had arisen wholly or partially within the territorial jurisdiction of the police officer or whether a case of hot pursuit had been established.

In *Crain* the accused was a passenger in a vehicle which sped away from the police and left the municipality for which the pursuing police officer had been appointed. The police officer eventually stopped the vehicle outside the municipal limits. Crain and the driver attempted to run away. Crain was apprehended and taken into custody pursuant to the provisions of the Intoxicated Persons Detention Act.² He resisted the efforts of the police and was charged with the offence of resisting a police officer in the lawful execution of his duty.

At trial, Mr. Justice Stevenson concluded the municipal police officer had no jurisdiction to take Crain into custody because he was not investigating the intoxication of Crain when the chase commenced, nor was he pursuing Crain. At page 468 His Lordship states:

“Constable Osmond was not investigating any intoxication of the respondent in a public place within the town. And his pursuit was really pursuit of the driver of the car in which the respondent was a passenger and who may have remained in the car involuntarily when the chase began”.

In *Crain*, Stevenson, J. was dealing with the Police Act prior to the recent amendments. However, his comments with respect to jurisdiction are equally applicable to the present legislation.

2. R.S.N.B., 1973, c. I-14.

The result of *Crain* is clear. While provisions of the Police Act might broaden a police officer's "territorial jurisdiction", his power to function as a peace officer outside the municipality is restricted to the subject matter that originally caused him to leave the municipal limits. The extended jurisdiction is defined by subject matter rather than geographical limits. That is, one may find himself geographically situated such that he has peace officer status vis-a-vis offence "X" but not offence "Y" which is unfolding before him.

When Does An Investigation Cease?

The recent case of *Meryl Geoffrey Stewart v. Her Majesty The Queen* (1982) 39 N.B.R. 444 (C.A.) addresses the issue of whether a matter is or is not still under investigation.

As a result of an investigation by the police into an alleged property damage within the City of Saint John a warrant in the first instance was issued pursuant to Part XIV of the *Criminal Code* for the arrest of Stewart.

The police had been unable to execute the warrant within the territorial limits of the City. On September 3rd, 1981, Detective Desmond of the Saint John Police Department was instructed by his superior to seek the accompaniment of the Royal Canadian Mounted Police and effect the arrest of the accused who was then staying at Bloomfield Ridge, a point outside the city limits.

Mr. Justice LaForest, J.A., set forth the following facts which had been agreed upon by both parties:

"Detective Desmond, accompanied by an R.C.M.P. officer, found the Appellant at Bloomfield Ridge in the territorial area covered by the R.C.M.P.

Detective Desmond put his hand on the Appellant, told him he was under arrest, to which the Appellant replied: "You got me". When Detective Desmond took his hand off the Appellant, the Appellant ran away".³

It should be noted that Detective Desmond did not have the warrant with him.

At trial Stewart was convicted of escaping lawful custody. On appeal the appeal was allowed and an acquittal entered. The issue was whether or not the accused had been in "lawful" custody at the

3. (1982) 39 N.B.R. 444 @ 445 (C.A.).

time of his escape. If Detective Desmond was without jurisdiction to effect the arrest there could have been no lawful custody.

Had Detective Desmond had the warrant with him it is submitted he could have effected the arrest of the accused pursuant to sub-section 456.3(2) of the *Criminal Code* which provides as follows:

“A warrant in accordance with this Part may be executed by a person who is one of the peace officers to whom it is directed, whether or not the place in which the warrant is to be executed is within the territory for which the person is a peace officer”.

Because Desmond did not have the warrant in his possession the Crown sought to rely upon the argument that he was investigating a matter that arose wholly or partially within his jurisdiction and was therefore clothed with the jurisdiction necessary to effect the arrest.

The issue before their Lordships then became whether or not the investigation was completed prior to the arrest or whether the arrest of the accused was a step in the course of the investigation.

LaForest, J.A., expressed no reservations in reaching the conclusion that:

“Detective Desmond was not engaged in an investigation; he set out to arrest a person for an offence in respect of which an investigation had already been conducted.”⁴

There is no question that an investigation had already been conducted. However, and with respect, it is suggested the question should not have been whether the investigation had been conducted but whether it had been *concluded*.

Because a charge had been laid and a warrant issued it is submitted one could properly say the police investigation was concluded. In fact, it is suggested that the laying of a charge and implementation of the judicial process would be a proper benchmark for determining that an investigation has been concluded.

Of very serious concern is the *obiter* of Mr. Justice LaForest wherein he states:

“In fact, though I do not have to decide this, it is by no means certain that the powers given to a peace officer under Section 12(1)(h) (iii) of the Police Act to make an investigation outside his territorial jurisdiction necessarily includes the power of arrest.

4. *Ibid.*, @ 447.

For courts will not interpret a statute as giving the power to arrest without warrant unless that power is given in unambiguous language.’⁵

The power to arrest given a police officer in criminal matters flows from the *Criminal Code*. We may only look to the Police Act to determine the extent of a person’s jurisdiction as a peace officer. In the event one is satisfied that such jurisdiction exists, is it not correct to assume it must include the power to arrest?

If the matter is still under investigation, it seems clear that police officers have an extended jurisdictional status (although that status may be restricted as evidenced in *Crain*) pursuant to the Police Act. To suggest that a person is considered a police officer for investigational purposes but such status does not continue for purposes of arrest suggests only one thing — “the investigation is concluded immediately prior to the arrest”.

With respect, the words “investigating a matter” must be given a more expansive interpretation. It will be up to future Courts to consider whether an investigation for purposes of the Police Act ends immediately prior to arrest, upon the laying of an information, or whether each case will be determined on its own merits. It is this writer’s view there are numerous situations where an arrest without warrant would be a necessary ingredient to the investigative process.

Extended Jurisdiction by the Minister of Justice

Finally, in considering the whole issue of municipal police jurisdiction within New Brunswick, one must consider the extended jurisdiction granted to municipal police officers upon the request or with the written authorization of the Minister of Justice.

Set out below you will find the text of an authorization granted to members of the St. Stephen Police Force:

**AUTHORIZATION BY THE ATTORNEY GENERAL OF NEW
BRUNSWICK’
PURSUANT TO SECTION 12 OF THE NEW BRUNSWICK
POLICE ACT’**

Pursuant to Section 12, Subsection (1) (h) (ii) of the Police Act CH. P-9.2 Acts of New Brunswick 1977, I HEREBY AUTHORIZE Chief Norman Penney, Deputy Chief Thomas E. Gladney, Cpl. Ivan Cormier, Cpl. Kenneth Holmes, Cpl. Gary

5. Ibid., @ 448.

Sturgeon, Cst. Grady M. Curtis, Cst. Donald W. Marshall, Cst. William S. Watters, Cst. Lewis W. Boutilier, Cst. Harold R. Douthright, Cst. John F. MacCready, of the St. Stephen Police Department, to discharge their police responsibilities within a 50-mile radius of the municipality of St. Stephen.

This authorization shall remain in effect until 30 June 1982 unless sooner revoked.

Dated at the City of Fredericton this 29th day of December A.D. 1981.

RODMAN E. LOGAN, Q.C.
ATTORNEY GENERAL OF NEW BRUNSWICK

Such authorizations are typical of those given to many municipal police officers within New Brunswick. They are not published in the Royal Gazette or local newspapers, nor are they advertised via other modes of communication.

The Canadian Charter of Rights and Freedoms as found in the *Constitution Act, 1982*,⁶ recognizes the principle of the rule of law and in section 7, assures that:

“Everyone has the right to life, liberty, and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice”.

Although it is beyond the scope of this paper to discuss the rule of law, simply stated, it reflects the belief that no one is above the law and everyone is subject to the law.

One must question whether it is consistent with this principle to permit the Minister of Justice to extend, at his sole discretion and without notice, the territorial jurisdiction of municipally appointed police officers.

A municipal police officer attains his status as a police officer upon appointment by the municipal council. A member of the New Brunswick Highway Patrol attains his status as a provincial police officer upon appointment by the Deputy Attorney General. Members of the Royal Canadian Mounted Police attain federal jurisdiction by virtue of the *Royal Canadian Mounted Police Act*.⁷ The legislature has properly extended the status of municipal police officers within the text of the Police Act for specific purposes. In the latter case the extended status is there for all citizens to read and is a

6. Canada Act, 1982, (U.K.), c.11.

7. R.S.C., 1970, c.R-9, s.s.17(3).

matter of public record. However, the procedure which is outlined in paragraph 12 (1) (h) (ii) may be undertaken without regard to any particular factor or without the provisions of any sort of public notice! Such power within the executive Branch of government is not, in my view, consistent with the rule of law.

One must also consider whether a citizen arrested by a municipal police officer, acting on the basis of an authorization of the Minister is being dealt with in accordance with the principles of fundamental justice.

It is a long established right of citizens within our democracy to physically resist any unlawful interference with their freedom.⁸ The citizen arrested by a municipally appointed police officer who is acting on the basis of the Minister's authorization has no way of knowing whether the interference is or is not lawful; and therefore has no way of knowing whether he may lawfully resist the efforts of the police. Would a denial of one's liberty in such circumstances be contrary to the principle of fundamental justice?

Needless to say, if the right to fundamental justice commences only upon implementation of the judicial process then this argument is not valid. However, it does raise an interesting question concerning the validity of the powers that have been given to the Executive Branch of government.

Conclusion

In view of recent court decisions and the ambiguity contained within the Police Act it is fair to say that municipal and regional police personnel do not know the full extent or limits of their territorial jurisdiction.

It is imperative that the Legislature of the Province of New Brunswick either grant municipal police officers province-wide status or ensure that all citizens are able to know with certainty the territorial jurisdiction of municipal and regional police officers.

Regardless of the steps that are taken, police actions undertaken on the basis of letters of authorization from the Minister deserve serious examination and challenge by defense counsel.

8. See for example, *Colet v. Regina* (1981) 19 C.R. (3d) 84, (S.C.C.).