

UNIFORM LAW CONFERENCE

**Extra-Jurisdictional Authority of Provincially Appointed
Police Officers: Working Paper**

Criminal Section

**Yellowknife, N.W.T.
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INTRODUCTION

The purpose of this paper is to provide an update on the work done by officials over the last year. The paper will set out the difficulties that exist with the current law and will explore several alternative approaches for addressing those difficulties. Other issues related to extra-jurisdictional authority will also be considered. The paper concludes with a recommendation that a legislative draftsman be retained to begin work on model provincial/territorial legislation.

THE PROBLEM TO BE ADDRESSED

The difficulty with the current law as it relates to the extra-jurisdictional authority of police officers is that provincially appointed police officers lose their peace officer status when they travel outside their home jurisdiction. This includes loss of authority to carry a firearm, loss of arrest powers, loss of search and seizure powers, including the ability to apply for a search warrant, and loss of the protections afforded by s. 25 of the *Criminal Code*.

Many law enforcement investigations require police officers to travel beyond their home jurisdiction. Investigations in communities that straddle or are close to provincial boundaries often have an extra-jurisdictional aspect. However, investigations of organized crime are perhaps the most serious situations where the loss of peace officer powers presents difficulties.

The loss of peace officer status hinders efficient police work and can endanger the safety of police officers.

Presently, one method of providing extra-jurisdictional peace officer status is to have police officers sworn in as special constables in the province of destination. This process has obvious shortcomings - it is cumbersome, it is time-consuming and it is not suited to situations where the police officer is unexpectedly required to travel outside his/her home jurisdiction to continue the investigation. Another method that has been used in an attempt to circumvent the loss of peace officer status is for visiting police officers to assemble a joint forces unit that brings in members of the host police force. This is done because the members of the host police force have peace officer status in that jurisdiction. Unfortunately, the same difficulties exist – creating a joint forces unit is cumbersome, time-consuming and is not suited to unplanned travel.

The difficulties with extra-jurisdictional authority of police officers have been recognized for many years:

- At the Uniform Law Conference in 1998, Manitoba presented a resolution to the Criminal Section that provincially appointed police officers should retain their peace officer status when they travel to other jurisdictions on police business. The resolution was approved with 29 in favour, none opposed and no abstentions.
- At its October 2000 meeting, the Criminal Procedure Working Group of CCSO (Coordinating Committee of Senior Officials) also voiced its support for granting extra-territorial authority to police officers.

- The Canadian Association of Chiefs of Police (CACP) has repeatedly called for some mechanism whereby provincially appointed police officers could be given extra-territorial recognition.

In an effort to determine how to best arrive at a solution to the difficulties, the Uniform Law Conference arranged for Professor Philip Stenning of the University of Toronto to prepare a paper that examined options for giving provincially appointed police officers extra-jurisdictional authority.

THE ISSUES IDENTIFIED BY STENNING

Three broad issues were identified:

1. Creating extra-jurisdictional authority

Stenning discusses three proposals:

(a) Designations of extra-jurisdictional peace officer status under the *Criminal Code*

Stenning concludes that extra-territorial jurisdiction cannot be achieved in this way. Basically, policing is a matter of provincial jurisdiction. The federal government cannot confer peace officer status through the *Criminal Code*.

(b) A system modelled after the Australian National Crime Authority (NCA).

In Australia, certain cases having an inter-jurisdictional aspect can be referred to the NCA. The peace officers assigned to the NCA have inter-jurisdictional authority as a result of reciprocal legislation passed by each of the states and the federal territory.

(c) Reciprocal legislation

Each jurisdiction could pass legislation that would grant peace officer status to any person who had peace officer status in another Canadian jurisdiction and who was required to enter the province in furtherance of an ongoing investigation. Stenning recommends that if reciprocal legislation were adopted, it should be identical in each jurisdiction.

Stenning suggests that either of these last two methods could be used to create extra-jurisdictional authority for provincially appointed police officers.

2. Civil Liability

Stenning asked which law enforcement agency should assume vicarious liability if the visiting peace officer is involved in damaging property or injuring someone while carrying out duties outside his/her home province. Although Stenning identifies this issue, he does not suggest options for addressing it.

3. Jurisdiction over public complaints about police conduct.

Each province has established a police oversight body to consider complaints from the public regarding conduct of police officers. If a visiting police officer were the subject of

such a complaint, is it appropriate for the oversight body in the province where the complaint arose or the oversight body in the visiting police officer's home province to have jurisdiction over the complaint? Again, although Stenning identifies this issue, he does not suggest options for addressing it.

The Stenning paper was presented at last year's Uniform Law Conference.

THE WORK OF OFFICIALS

A committee of FPT officials (the committee) was established to review the Stenning paper and to make recommendations for changes to the law based on it. The committee has representation from Nova Scotia, Quebec, Ontario, Manitoba (chair), Saskatchewan, Justice Canada and Solicitor General Canada. The committee met several times by teleconference.

It was apparent from the early stages of the committee's discussions that it would be useful to consult with police agencies. Committee members have contacted various police officials and attended a meeting of the Canadian Association of Chiefs of Police to solicit their views. The views of police agencies are, at times, set out in the discussion that follows. Although the police have expressed a general need for extra-jurisdictional status, the committee believes that specific examples of situations where the lack of peace officer status has presented difficulties would be of great assistance both in justifying the need for legislation and in tailoring a solution that would address police needs. The CACP has agreed to provide the committee with such examples.

It was also apparent that further consultations between provinces, amongst officials within provinces, within the federal government and with police are required before any final positions can be determined. Where recommendations are made in this paper, they should be considered as initial positions rather than final positions.

The Stenning paper served as a starting point for the discussions of the committee. Each of the three main issues identified in the Stenning paper was considered:

1. Creating extra-jurisdictional authority.

The committee quickly narrowed down the available options for creating extra-jurisdictional authority.

(a) Designations of extra-jurisdictional peace officer status under the *Criminal Code*

The idea of using the *Criminal Code* to make designations of extra-jurisdictional police officer status was rejected for the same reasons identified by Stenning.

(b) A system modelled after the Australian National Crime Authority (NCA).

Committee members also rejected a scheme patterned after the National Crime Authority model. A number of shortcomings were identified with the National Crime Authority model:

- It would result in the creation of another national police force. Canada should avoid the establishment of numerous federal police agencies as has been done in the U.S.A.
- The National Crime Authority model requires each jurisdiction to grant extra-territorial authority to the officers who make up the National Crime Authority. Reciprocal legislation is required to accomplish this but provides less benefit than if extra-territorial authority could be made available to all police officers.
- The National Crime Authority model is not suited to unplanned travel. Under the NCA scheme, only certain officers are granted extra-jurisdictional authority. Difficulties will result when an officer who has not been granted extra-jurisdictional authority is required to travel outside his/her province of appointment to pursue an investigation on short notice. There may not be enough time to obtain the necessary appointment.

Of the options identified by Stenning, the committee clearly preferred the use of reciprocal legislation to create extra-jurisdictional peace officer status. The committee also considered the possibility of enhancing/modifying the existing special constable process in order to satisfy the needs of the police.

(c) Reciprocal Legislation

Several sub-issues were identified and discussed concerning the use of reciprocal legislation:

(i) Notice Requirement and the need to impose restrictions on visiting police officers

Issues: Should the visiting police officers be required to provide notice of their presence to someone in the host jurisdiction? Should the host police and/or the host government be able to impose restrictions on the activities of the visiting police officers?

Summary of Discussion: The committee felt that the purpose of the police officer's travel was important in determining whether any type of notice was required. Police officers often travel into another jurisdiction for purely administrative reasons (e.g. to interview a witness, to attend a meeting). In such cases, there seems to be no need to notify the local authorities.

However, where a police officer is required to travel into another jurisdiction for an operational purpose, then a notice requirement may arise. The committee attempted to consider the needs of both the police and provincial governments. The police forces represented at the CACP meeting felt that a visiting police officer should always notify the host police force if the visiting officer is entering the host's territory for an operational purpose. However, the police want a flexible notice provision. They indicated that the amount of information disclosed by the visiting police should be determined by an evaluation of the need to ensure officer safety, the need to ensure public safety, the nature of the investigation and the need to ensure that the police forces are not interfering with each other's investigations. It was recognized that while a police agency

may be prepared to share some operational information with another police agency, it will be less willing to share information about planned police activities with government.

Committee members felt that provincial governments also required notice whenever visiting police officers entered the province for an operational purpose. Provincial ministers responsible for policing are accountable for police activities that occur within their respective provinces. If something goes wrong while visiting police officers are in the province, it would not be sufficient for the minister to claim that he/she did not know the visiting police were present or that he/she had no control over their actions. While it would be inappropriate for the provincial minister to become directly involved in approving specific police operations, the minister does require some system to be in place that makes the visiting police accountable to the minister.

With those considerations in mind, the committee proposes that the visiting police should contact the local police agency responsible within the geographical region of the host province where the out-of-province investigation will be conducted. Sufficient details of the visiting police operation would have to be provided to satisfy the host police that the visiting officers should be granted peace officer status. This would normally include information such as:

- names of the visiting officers
- where they will be working
- what days they will be in the jurisdiction
- the officer from the home jurisdiction who is responsible for supervising the visiting officers
- description of nature of the investigation, including an assessment of the risks involved (e.g. the likelihood of firearms being discharged)

The host police agency would then contact the host government official responsible for peace officer appointments and indicate that it was satisfied that the visiting officers should be granted peace officer status. The government official would make the necessary peace officer designations. The government official would not be given details of the police operation but would be given the other information noted above. The same information provided to the provincial official would also be provided to any other police agencies that had jurisdiction within that geographic region.

Committee members felt that when the province grants peace officer status to a visiting police officer, that officer should be subject to the same level of supervision and control that applies to local police officers. This level of supervision is achieved by requiring the local police agency to consider and approve the anticipated operation of the visiting police officers.

The local police will likely express concern that they will become civilly liable if they are required to approve the operations of visiting police officers. This concern might be adequately addressed by the indemnity agreement proposal set out in the discussion of civil liability that follows.

Result of Discussion: Further discussions will be required on the means by which visiting police will provide notice to both the host police force and the host province. The committee would welcome input from the Conference on this issue.

(ii) *Need to codify the common law regarding hot pursuit*

Issue: In a hot pursuit situation, a visiting police officer has peace officer status at common law. The question is whether the common law should be preserved in reciprocal legislation.

Summary of Discussion: Committee members thought that if the legislation did not deal with hot pursuit, then there might be uncertainty as to whether legislators intended to alter the law on hot pursuit. It was also noted that the police had expressed an interest in retaining the common law concept of hot pursuit.

Result of Discussion: The working group agreed that the concept of hot pursuit should be preserved in the legislation.

(iii) *Section 25.1 C.C.*

Issue: Under s. 25.1 of the *Criminal Code*, a designated police officer may be justified in committing certain otherwise illegal acts in the course of an investigation of a federal offence. However, this designation does not provide a justification for a police officer who loses his peace officer status when he /she travels outside his/her province of appointment. Should the working group attempt to deal with this issue?

Summary of Discussion: The committee may not be the appropriate body to address this issue. The mandate of the committee is to consider means by which provincially appointed police officers can be given extra-jurisdictional peace officer status, not how to extend the powers granted under s. 25.1. Moreover, officials within federal Justice are more familiar with this issue and are in a better position to craft a solution to it.

Result of Discussion: It was agreed that rather having the committee deal with this issue, the federal Department of Justice would take the lead in consulting with the provinces and police agencies in addressing this issue.

(d) Enhancing/modifying the existing special constable process

Issue: Police officials have indicated that the main difficulty with the current special constable process occurs when the need to travel outside of the police officer's home jurisdiction arises unexpectedly. In these situations it can be difficult to obtain a special constable appointment on short notice. This is particularly the case on weekends when the provincial official responsible for these appointments may not be readily available. During consultations with police, it was suggested that there should be a special constable designation available in exigent circumstances. Features of this special appointment could include:

- an appointment of short duration, perhaps 48 hours;
- available only in exigent circumstances, (Exigent circumstances would be defined but would be along the lines of the developing body of law as found in the *Feeney* Bill, Bill C-24 and Bill C-36.);
- based on the approval (including oral approval) between the chief of police from the home province and the chief of police responsible within the geographical region of the host province where the out-of-province investigation is intended to be conducted;
- a *post facto* reporting structure;
- a restriction as to the type of investigation (e.g. “the *immediate* investigation of a serious criminal or terrorist offence”);

Summary of Discussion: This suggestion might address the police need to obtain special constable appointments on short notice. However, committee members recognized that this proposal would involve the provincial minister responsible for policing delegating the power to make a special constable appointments to a police official. Further inquiries will be required to determine whether Ministers will be prepared to do this.

Result of Discussion: Committee members thought that this was a worthwhile suggestion that required further consideration.

2. Civil liability

Issue: The issue identified by Stenning was: which law enforcement agency should assume vicarious liability if the visiting peace officer is involved in damaging property or injuring someone while carrying out duties outside his/her home province.

Summary of Discussion: The committee recognized that neither federal nor provincial legislation could prevent a plaintiff from suing. In fact, a plaintiff would likely sue everyone who might conceivably be liable: the police officers involved, the visiting police force, the host police force, the provincial government, the municipality, etc. The court will make a determination of whether there is liability and, where there is, the court will assess damages. Neither reciprocal legislation nor legislation allowing for the appointment of special constables will prevent any of that from occurring.

What the legislation could control is indemnification of those who are found liable. The committee suggests that the police force leading the investigation should indemnify others that assist with that investigation. It was noted that police officials at the recent CACP meeting were supportive of this approach.

Result of Discussion: The working group endorsed some type of indemnity arrangement.

3. Jurisdiction over public complaints about police conduct

Issue: If a visiting peace officer is the subject of a citizen's complaint, which police oversight body should have jurisdiction: the oversight body in the jurisdiction where the complaint arose or the oversight body in the province where the officer is employed?

Summary of Discussion: Committee members noted that there would be difficulty under existing legislation with enforcement of a sanction imposed by an oversight body on a visiting police officer. Each province currently has a means whereby a local police agency can be compelled to comply with the sanction recommended by the oversight body. However, if the police oversight body's ruling concerns a peace officer from another jurisdiction, there is currently no means to require the out-of-province police agency to comply. This issue could be addressed through reciprocal legislation that required police agencies within the province to recognize and enforce orders made by an oversight body from another province.

However, a potentially more serious difficulty exists. Members of the committee noted that different groups would likely take opposing views on which oversight body should have jurisdiction. Provincial ministers responsible for policing are accountable for policing activities within their province. Each minister would likely insist that police officers working within the province should be subject to that province's police oversight body. Similarly, victims would have an expectation that the oversight body in the jurisdiction where the complaint arose would have jurisdiction regardless of where the officer complained about happened to be employed. On the other hand, police associations and some police officials would likely take the position that since police oversight is closely connected to the employer-employee relationship, it should be the oversight body in the jurisdiction where the officer is employed that should have jurisdiction.

It may be that in order to accommodate the divergent positions that will likely be taken on this issue, some scheme that incorporates aspects of each of these positions is required. For instance, the committee considered an approach whereby the police oversight body in the host province (the province where the incident occurs) would investigate the complaint. An investigator from the officer's home jurisdiction (the province where the officer is employed) could be included on the team that investigates the complaint. The host jurisdiction's oversight body would conduct the hearing into the complaint according to the procedure set out in the host province's legislation. The host oversight body would make findings of fact, reach a decision on whether a disciplinary default was committed and would "recommend" a sanction where a disciplinary default was found. The file would then be sent to the officer's home jurisdiction for the actual imposition of the sanction. The home jurisdiction would be bound by the findings of fact made by the host jurisdiction. A re-trial would not be possible. However, the home jurisdiction would be able to impose the sanction that it considered appropriate. The sanction imposed would be based on the precedents developed in the home jurisdiction but would be influenced by the recommendation from the host jurisdiction.

This proposal attempts to reach a compromise that will satisfy both victim and police association concerns. It addresses victim concerns by allowing the hearing to take place locally and allowing the host oversight body to determine guilt or innocence. The proposal also attempts to satisfy police association concerns that their officers should not be disciplined by a foreign oversight body. The home jurisdiction would be involved in the investigation and the home jurisdiction's oversight body would determine the sanction imposed.

Result of Discussion: Members of the committee were supportive of this proposal. However, it is recognized that further discussions and consultation will be needed before the police oversight issues can be resolved. The Conference may be able to provide some direction on this issue.

RECOMMENDATION

It is recommended:

- that the Uniform Law Conference of Canada receive the report of the Joint Criminal Law and Civil Law Committee on Extra-Jurisdictional Authority of Police Officers;
- that the Chair of the Criminal Section and the Chair of the Civil Section request that the Chair of the Drafting Section of the Uniform Law Conference of Canada assign a drafter to the committee to assist in their deliberations;
- that the Uniform Law Conference of Canada direct that model provincial/territorial legislation be prepared by the committee to address the issues identified in the working paper; and,
- that the Draft Act and commentaries prepared by the joint committee be presented in both official languages to the August 2003 meeting of the Uniform Law Conference of Canada.