SCC File No. 39543

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT MARTIAL APPEAL COURT OF CANADA)

B E T W E E N

CORPORAL C.R. MCGREGOR

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

FACTUM OF THE INTERVENER,
CANADIAN CIVIL LIBERTIES ASSOCIATION
(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

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PART I: OVERVIEW

1. This appeal provides the Court with an opportunity to address the extraterritorial application of the *Charter* in a manner that fills a troubling human rights gap and is consistent with Canada's international legal obligations. The Canadian Civil Liberties Association's (CCLA) submissions are aimed at these twin goals.

2. The interpretation of s. 32 of the *Canadian Charter of Rights and Freedoms* set out in *R v Hape* and applied by the Court Martial Appeal Court (CMAC) in *R v McGregor* is flawed in three respects. [1] First, it creates a significant human rights gap. Second, it is inconsistent with customary international law and international human rights law. Third, it gives foreign states a veto over the reach of the *Charter* when Canadian officials operate abroad.

3. To interpret s. 32 and the extraterritorial application of the *Charter* in a manner more consistent with Canada's international legal obligations, this Court should ask whether:

(1) the conduct in question is attributable to Canada under the law of state responsibility; and

(2) Canadian authorities had effective control over persons or places in the foreign territory when they engaged in that conduct.

If the answer to both questions is yes, international law supports the extension of Canada's human rights obligations abroad.

PART II: QUESTION IN ISSUE

4. The appellant's statement of the question in issue is that the CMAC incorrectly interpreted s. 32 of the *Charter* and exceptions to the principle of sovereignty previously established by this Court in *Hape*. The CCLA agrees, in part, with this position but argues that these exceptions are based on a flawed interpretation of international law. As such, the interpretation of s. 32 set out in *Hape* should be revisited in light of the law of state responsibility and the question of effective control developed under international human rights law.

PART III: ARGUMENT

A. The Principles of Jurisdiction

[1] *Canadian Charter of Rights and Freedoms*, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11 [*Charter*]; *R v Hape*, 2007 SCC 26, 2 SCR 297 [*Hape*]; *R v McGregor*, 2020 CMAC 8 [*McGregor*].

5. In *Hape*, the majority of this Court found that where law enforcement officials conduct criminal investigations in a foreign state, the presumption is that the *Charter* does not apply to searches and seizures conducted abroad. This presumption arose from the majority's conclusion that s. 32 of the *Charter* must be interpreted consistently with international law, namely the principles of sovereignty and jurisdiction.[2]

6. The principles of jurisdiction are customary international law and define "a state's power to exercise authority over individuals, conduct and events, and to discharge public functions that affect them."[3] The source of a state's jurisdiction varies with the type of jurisdiction at issue. Enforcement jurisdiction "is the power to use coercive means to ensure that rules are followed, commands are executed or entitlements are upheld."[4] It "refers to the state's ability to act in such a manner as to give effect to its laws (including the ability of police or other government actors to investigate a matter, which might be referred to as investigative jurisdiction)."[5] This power is distinct from a state's prescriptive jurisdiction, which is its authority to prescribe rules. Prescriptive jurisdiction is often divided into legislative and adjudicative jurisdiction, the latter referring to the power of a state's courts to receive, try and decide cases brought before them.[6]

7. A state may assert both enforcement and prescriptive jurisdiction over persons, conduct and events within its territory.[7] This principle is "a corollary of the sovereignty of a State over its territory."[8] Conversely, as a general rule, it is unlawful for a state to take coercive action in the territory of another without the host nation's consent (be it through a treaty, an ad hoc agreement, or anything in between) or some other permissive rule of international law.[9]

B. The current interpretation of s. 32 creates a human rights gap

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[2] *Hape,* at paras 56, 69.
[3] *Ibid* at para 57.
[4] *Ibid* at para 58.
[5] *Ibid*.
[6] *Ibid.*
[7] John Currie et al, *International Law: Doctrine, Practice, Theory*, 2nd Ed (Toronto: Irwin Law, 2014) at 475.
[8] Christopher Saker,"Jurisdiction" in Malcolm Evans, ed, *International Law*, 5th ed (Oxford: Oxford University Press, 2018) at 296.
[9] James Crawford, *Brownlie's Principles of Public International Law*, 9th ed (Oxford: Oxford University Press, 2019) at 462.

8. The majority in *Hape* concluded that because Canadian law "cannot be enforced" in another state's territory without the foreign state's consent, the conduct of Canadian officials abroad is not a matter that falls within the authority of Parliament and therefore does not trigger the *Charter*'s application under s. 32 of the *Charter*.[10] This reasoning is flawed, and its application creates a troubling human rights gap.

9. First, this reasoning is flawed because it is incorrect to assert that Canada cannot exercise its enforcement jurisdiction abroad without consent. The question of whether Canada is or has exercised its jurisdiction abroad is one of fact and is separate from whether the exercise of that jurisdiction is consistent with international law. One does not depend on the other. "Factually speaking, Canadian law can be enforced in a foreign territory without the host state's consent, though doing so may violate Canadian law, international law, or both."[11]

10. Second, this reasoning creates a human rights gap. In foreign states where human rights are protected and respected, the consequences of the majority's conclusion in *Hape* may have limited impact on the rights of those subject to an investigation by Canadian officials. However, where officials are only subject to foreign law which has little to no regard for human rights, or in situations where Canada exercises its jurisdiction over individuals abroad without the host state's consent, this reasoning can create a human rights-free zone.

11. For example, the CAF did not deploy to Afghanistan in 2001 or conduct its operations in Kosovo in 1999 with the host state's consent. To defend Canada or Canadian interests, the CAF could once again find itself abroad and in an armed conflict with the territorial state or deployed to either a repressive state or a failed state where there is no functioning government capable of consenting to Canada's presence. Under the current interpretation of s. 32, the starting presumption is that the actions of the CAF during these deployments is not "within the authority of Parliament." Under these circumstances, it would be absurd to require the CAF to seek consent from local authorities to apply Canadian law. Yet, according to the majority's reasons in *Hape,*

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[10] *Ibid* at para 85.

[11] Gib Van Ert, "Canadian Cases in Public International Law in 2007-8" (2008) Can YB Intl L at 551. See also Leah West, "'Within or Outside Canada': The Charter's Application to the Extraterritorial Activities of the Canadian Security Intelligence Service," (2022) UTLJ 1 at 23 (https://doi.org/10.3138/utlj-2021-0105).

without consent, the *Charter* would not even apply to investigations of CAF members by Canadian military police for violations of the *Code of Service Discipline*.

12. Other Canadian officials more routinely exercise Canada's enforcement jurisdiction extraterritorially without the host state's consent. Sections 12 and s 12.1 of the *Canadian Security Intelligence Service* (CSIS) *Act* explicitly grant CSIS the power to carry out security threat investigations and threat reduction measures in foreign states, and the Federal Court may issue warrants authorizing such conduct "notwithstanding any other law."[12] Under the current interpretation of s. 32, the starting presumption is that CSIS's judicially authorized conduct is not "within the authority of Parliament." Moreover, when conducting espionage or threat disruption activities against a target in a foreign state, national security will trump concerns over comity. CSIS would not seek consent from the host state to apply the *Charter* if (a) the host state was the target of the CSIS investigation, or (b) doing so could jeopardize the success of an investigation.

13. The same is true for foreign intelligence investigations, and active and defensive cyber operations carried out by the Communications Security Establishment (CSE). Under the *Communications Security Establishment Act*, Parliament has stipulated that CSE may only target its operations at or within foreign states and need not comply with foreign law.[13] In other words, CSE is authorized by Parliament to violate the human rights laws of a foreign state. But, pursuant to the majority's interpretation of s. 32 in *Hape*, the *Charter* would only apply to CSE's extraterritorial conduct if they asked the target state's permission.

14. In each of these examples, Canadian officials are authorized by Parliament to exercise Canada's enforcement jurisdiction in a foreign state without consent of the host state. In the latter two examples, Parliament has used legislation to explicitly authorize Canadian officials to disregard foreign laws when operating abroad. Yet, under the existing precedent, this type of extraterritorial operation by the CAF, CSIS and CSE does not meet the definition of "within the authority of Parliament" and therefore would not trigger the application of the *Charter.* As a result, individuals subject to Canada's enforcement jurisdiction, including members of the CAF deployed abroad, would not benefit from either local human rights protections or the *Charter*.

[12] RSC 1985, c. C-23, s 12, 12.1, 21.1, 22.1.
[13] SC 2019, c. 13, s. 76, s. 22, 27 (1), 29(1).

C. The interpretation of "within the authority of Parliament" set out in Hape and applied by the CMAC is inconsistent with customary international law on state responsibility

15. Interpreting the phrase "within the authority of Parliament" to conform with the law of state responsibility is more consistent with customary international law than the current approach enunciated in *Hape*. It is also more consistent with this Court's s. 32 jurisprudence which has always interpreted this phrase as a reference to Parliament's powers under s. 91 of the Constitution.[14]

16. The law of state responsibility is the body of customary international law used to determine if an act or omission is attributable to a state.[15] The starting point for attribution is that "the conduct of any state organ shall be considered an act of that state."[16] This rule applies to entities or officials belonging to the executive, legislative or judicial branches of government operating at the federal, provincial or municipal level.[17] A person's or entity's status under domestic law is the primary basis for ascertaining if they are an organ of the state.[18]

17. When Canadian officials conduct a law enforcement investigation abroad they do so under the authorities granted to them by the common law or by Parliament through legislation. Pursuant to customary international law, the international community will look to those domestic authorities to attribute their actions to the Canadian state. Consequently, in almost every case, investigative activities by Canadian officials abroad will constitute an exercise of Canada's enforcement jurisdiction that the international community, based on the law of state responsibility, will attribute to the Government of Canada.

18. A rare exception to this general rule is when a state organ, like a law enforcement or military unit, is "placed at the disposal" of another state and exercises "elements of the governmental authority of the State at whose disposal it is placed."[19] To attribute the home unit's conduct to the

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[14] Robert J Currie and Joseph Rikhof, International & Transnational Criminal Law, 3d ed, (Toronto: Irwin Law, 2020) at 634; Leah West "Canada Stands Alone: A Comparative Analysis of The Extraterritorial Reach of Human Rights Obligations" 55:3 UBC L Rev [forthcoming in 2022] (https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4064145 at 16) [West, Canada Alone].
[15] *Responsibility of States for Internationally Wrongful Acts,* GA Res 56/83, UN GAOR, 56th Sess, UN Doc A/RES/56/83 (2001) [*Draft Articles*].
[16] *Ibid,* art 4.
[17] *Ibid*.
[18] *Ibid*, commentary to art 4 at para 6.
[19] *Ibid,* art 6.

hosting state, the loaned organ must act exclusively for the host state's purposes and under that state's authority.[20] "[O]rdinary situations of inter-State cooperation or collaboration" are insufficient to shift responsibility away from the organ's home state.[21] Merely offering assistance to another state or partnering with an organ of a foreign state is not sufficient to shift attribution from the home state to the host state.[22] Meaning, when Canadian law enforcement or CAF members travel abroad and partner with foreign officials to further a Canadian criminal investigation, their investigative activities remain attributable to Canada. Similarly, the actions of the host state in support of a Canadian investigation remain attributable to the local government.

19. Importantly, in all cases, whether certain conduct is attributable to a state has nothing to do with its lawfulness under international law; this is a separate and distinct question.[23] An exercise of Canada's enforcement jurisdiction that violates a foreign state's sovereignty or the principles of jurisdiction is still attributable to Canada under the law of state responsibility. The international community will determine whether certain conduct is attributable to the Government of Canada primarily based on Canada's domestic legislation, not on whether Canada's actions complied with the principles of jurisdiction. Thus, it is inconsistent with customary international law to hold that host state consent is determinative of whether the extraterritorial conduct of Canadian officials falls within the authority of Parliament.

D. International Law does not prohibit the imposition of additional constraints on Canadian officials operating abroad

i) The current consent exception limits Canada's sovereign rights

20. When Canadian officials operate abroad they are bound by the laws of the foreign state and Canada's international legal obligations. Those obligations, including the principles of sovereign equality and non-intervention, do not prevent Canada from placing additional constraints on its officials when they operate abroad. In fact, the opposite is true.

21. The principles of jurisdiction permit the extension of Canadian rules and obligations on Canadian officials operating anywhere in the world and the adjudication of that conduct in Canadian courts. The nationality principle, the passive personality principle and the protective

[20] *Ibid*, commentary to art 6 at para 2.
[21] *Ibid*.
[22] *Ibid*, commentary to art 6 at para 5.
[23] *Ibid*, art 2.

personality principle, are lawful bases to extend Canada's legislative and adjudicative jurisdiction over the conduct of Canadian officials operating abroad.[24] As the majority explained in *Hape*, these jurisdictional rules arise from the sovereign equality of all states.[25]

22. The majority in *Hape* conflated the regulation and judicial review of Canadian conduct (an exercise of prescriptive jurisdiction) with the enforcement of Canadian law (enforcement jurisdiction). This error is evident from its assertion that the *Charter "*cannot be enforced in the territory of a foreign state."[26] The *Charter* is not law that is "enforced" by Canadian officials on others through the coercive exercise of state power. Rather, it creates a set of limits and obligations on Parliament, the government, and entities controlled by the government when enforcing Canadian law and providing governmental services.[27] It is well within Canada's sovereign authority to regulate limits for its officials when they carry out governmental functions abroad. The CMAC relied on this Court's guidance in *Hape* to conclude that unless a state consents to the application of Canadian law within its territory, the conduct of Canadian officials abroad will not trigger s. 32 of the *Charter*.[28] It is only with consent that the extraterritorial conduct of Canadian officials falls "within the authority of Parliament."

23. The consent exception identified in *Hape* and applied by the CMAC strips Canada of its sovereign right to constrain the actions of its officials wherever they are in the world. Furthermore, it gives a foreign state a veto over the constraints that the Canadian Constitution may impose on Canadian officials when they operate within its territory. There is no basis for this veto power under international law.

ii) The practices of foreign and international courts and human rights bodies demonstrate that human rights instruments can constrain extraterritorial state conduct

24. If, as the majority in *Hape* suggests, the principle of jurisdiction prohibits the application of a state's human rights obligations over the conduct of its officials when they operate abroad, we would expect that foreign and international courts and bodies tasked with adjudicating the

[24] *R v Cook*, [1998] 2 SCR 597, 1998 CanLII 802 (SCC), at para 42; Currie et al, at 490: Brownlie at 442, "nationality may be extended by reliance on residence."
[25] *Hape* at para 57.
[26] *Ibid* at para 69.
[27] *Godbout v Longueuil (City),* 1997 CanLII 335 (SCC), [1997] 3 SCR 844 at para 48.
[28] *McGregor* at para 33.

extraterritorial reach of a state's human rights obligations consistently with the prohibitive rules of customary international law would come to a similar conclusion. They do not.

25. In 2004, the UN Human Rights Committee issued interpretive guidance on the application of the International Covenant on Civil and Political Rights ("ICCPR"). The Committee found that states must "respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party."[29] It also clarified that this principle applies "regardless of the circumstances in which such power or effective control was obtained."[30] In other words, the exercise of a state's power or control need not be consistent with international law for its obligations under the ICCPR to attach. That same year, the International Court of Justice found that a state's obligations under the ICCPR are "applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory."[31]

26. In the context of international human rights instruments, the term "jurisdiction" is used as a synonym for authority, power and control over people or territory.[32] Whether a person outside a state's territory falls within a state's jurisdiction "is a separate question from the legality of state action under the international law of jurisdiction. Application of human rights treaties like the ICCPR is definitely not restricted to situations where the exercise of jurisdiction is legal under the international law of jurisdiction."[33] Regrettably, the extraterritorial application of Canada's obligations under the ICCPR was never considered by this Court in *Hape*.

27. The European Court of Human Rights (ECtHR) has also found that a state's human rights obligations may apply abroad. In *Al-Skeini and Others v The United Kingdom*, the Court affirmed that the European Convention on Human Rights (ECHR) may be triggered by acts of state

[29] UNHRC, General Comment 31, UN GAOR, 59th Sess, Supp no 40, vol 1 at 175, 177, UN Doc A/59/40 (2004) at para 10.
[30] *Ibid*.
[31] *Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,* Advisory Opinion [2004] ICJ Rep 136 at para 111; *Case Concerning Armed Activities on the Territory of the Congo,* [2005] ICJ Rep 168 at para 216.
[32] Marko Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principle and Policy* (Oxford, Oxford University Press, 2011) at 39.
[33] *Ibid.*

"performed or producing effects outside their territories."[34] The Grand Chamber identified three instances when the ECHR applies abroad; this is not a closed list. [35] First, the ECHR applies where a state's diplomatic or consular agent, present on foreign territory in accordance with the provisions of international law, exerts authority and control over others.[36] Second, the ECHR applies when, through the consent, invitation or acquiescence of the territorial government, the foreign state exercises all or some of the public powers usually exercised by the territorial government.[37] Third, it applies where a state's agents use force against an individual, bringing that person under the power and control of the state and, as such, its jurisdiction.[38] In this third instance, the extraterritorial application of the ECHR is not dependent on the legality of the state's activities under international law.[39]

28. The UK Supreme Court has also found that the *Human Rights Act of 1998,* which incorporates the UK's obligations under the ECHR into UK law, constrains the extraterritorial conduct of state officials "whenever a state through its agents exercises authority and control over an individual."[40] The Court also found that "agents of a state remain under its jurisdiction when abroad"[41] and that the UK exercises authority and control over members of the UK armed forces through the chain of command wherever they are deployed.[42] Consequently, it was not "possible to separate them, in their capacity as state agents, from those whom they affect when they are exercising authority and control on the state's behalf." [43] Therefore, those who fall under the authority and control of the UK military abroad benefit from the ECHR's protection.

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[34] *Al Skeini and Others v United Kingdom*, No 55721/07,]2011] ECHR 99 at para 129.
[35] *Ibid*.
[36] *Ibid* at para 134.
[37] *Ibid* at para 135-138. In other words, the state exerts authority and control over an area beyond its borders, thereby activating the foreign state's obligations to secure within it the rights and freedoms set out in the Convention.

[38] *Ibid* at para 136. This includes bringing someone into the custody of state agents.
[39] Michal Gondek, "The Reach of Human Rights in a Globalizing World: Extraterritorial Application of Human Rights Treaties" (Oxford: Intersentia, 2009) at 56.

[40] *Smith and others v Ministry of Defence*; *Ellis v Ministry of Defence*; *Allbutt and others v Ministry of Defence*, [2013] UKSC 41.
at para 49.

[41] *Ibid* at para 51.
[42] *Ibid* at para 52.
[43] *Ibid*.

29. Other foreign courts have reached similar conclusions. For example, appellate courts in New Zealand accept that the *New Zealand Bill of Rights Act 1990* may apply extraterritorially, and that persons subject to New Zealand's jurisdiction in a foreign state may seek a remedy for violations of the state's obligations in the courts of New Zealand. [44] The Constitutional Court of South Africa also found that the country's *Bill of Rights* may constrain state actors when they act abroad.[45] Most recently, the Federal Constitutional Court of Germany unanimously held that the German state authority is comprehensively bound by the *Basic Law* whenever the German state acts, irrespective of the manner, location, or persons affected.[46]

30. The decisions of these foreign Courts are not binding on this Court. However, like Canada, each state automatically incorporates customary international law into its domestic law and accepts that domestic law should be interpreted to comply with customary international law unless explicitly incompatible.[47] The fact that none has found that enforcing their state's domestic human rights obligations on their own officials when they act abroad would violate customary international is relevant and persuasive.[48] Instead, the pertinent question is whether extraterritorial conduct is attributable to Canadian authorities exercising jurisdiction in a foreign territory.

PART IV: SUBMISSIONS ON COSTS

31. The CCLA does not seek costs and asks that no costs be awarded against it.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, THIS 24th DAY OF APRIL,

Counsel for the Intervenor, Canadian Civil Liberties Association

Leah West & Solomon Friedman
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[44] *Young v Attorney-General* [2018] 3 NZLR 827 at paras 28-30 [leave to appeal to NZSC dismissed]; *Smith v R*, [2020] NZCA 499 at 92; *Afghan National v Minister for Immigration*, [2021] NZHC 3154, at 39.
[45] *Kaunda v President of the Republic of South Africa*, [2004] ZACC 5; 2005 4 SA 235, paras 42-44, 228-229.
[46] *Federal Intelligence Service- Foreign surveillance*, 1 BVR 2835/17 (19 May 2020), paras 91, 93-94, 101, 104.
[47] West, Canada Alone at 20.
[48] *Quebec (Attorney General) v 9147-0732 Québec inc.,* 2020 SCC 32, at paras 35, 43.

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