SCC file no. 39543

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

BETWEEN

CORPORAL C.R. MCGREGOR

APPELLANT

AND

HER MAJESTY THE QUEEN

RESPONDENT

FACTUM OF THE INTERVENER, THE BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION

(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

OLTHUIS VAN ERT
66 Lisgar St.
Ottawa, ON K2P 0C1

Gib van Ert
Dahlia Shuhaibar

Tel: 613-408-4297
Fax: +1-613-651-0304
Email: gvanert@ovcounsel.com
dshuhaibar@ovcounsel.com

Counsel for the intervener, the BC Civil Liberties Association

ORIGINAL TO: THE REGISTRAR

COPIES TO:

DEFENCE COUNSEL SERVICES
Asticou Centre, Block 2600
101 Colonel By Drive
Ottawa, ON K1A 0K2

Diana Mansour

Tel: 416-576-3139
Email: diana.mansour@live.ca

Counsel for the appellant, Corporal C.R. McGregor

CANADIAN MILITARY PROSECUTION SERVICE
National Defence Headquarters
101 Colonel By Drive
7th Floor, South Tower
Ottawa, ON K1A 0K2

Natasha Thiessen
Patrice Germain

Tel: 613-299-4123
Email: Natasha.Thiessen@forces.gc.ca

Counsel for the respondent, Her Majesty the Queen

MCCARTHY TÉTRAULT LLP
TD Bank Tower, Suite 5300
Toronto, ON M5K 1E6

Adam Goldenberg
Jesse Hartery
Akshay Aurora

Tel: 416-362-1812
Fax: 416-868-0673
Email: agoldenberg@mccarthy.ca
jhartery@mccarthy.ca

Counsel for the Intervener, the Canadian Constitution Foundation

FRIEDMAN MANSOUR LLP
200 Elgin Street, Suite 403
Ottawa, ON K2P 1L5

Leah West
Solomon Friedman

Tel: 613-683-9789
Fax: 888-225-9681
Email: leah@friedmanlaw.ca
solomon@friedmanlaw.ca

Counsel for the Intervener, the Canadian Civil Liberties Association

CROWN LAW OFFICE – CRIMINAL
720 Bay St, 10th Floor
Toronto, ON M7A 2S9

Gavin MacDonald
Stephanie Lewis

Tel: 416-326-4600
Fax: 416-326-4656
Email: Gavin.MacDonald@ontario.ca
stephanie.a.lewis@ontario.ca

Counsel for the Intervener, Attorney General of Ontario

GOWLING WLG (CANADA) LLP
160 Elgin Street, Suite 2600
Ottawa, ON K1P 1C3

Matthew Estabrooks

Tel: 613-786-0211
Fax: 613-788-3573
Email: matthew.estabrooks@gowlingwlg.com

Agent for the Intervener, the Canadian Constitution Foundation

STOCKWOODS LLP
TD North Tower, Suite 4130
Toronto, ON M5K 1H1

Gerald Chan
Alexandra Heine

Tel: 416-593-7200
Fax: 416-593-9345
Email: geraldc@stockwoods.ca
alexandrah@stockwoods.ca

Counsel for the Intervener, the David Asper Centre for Constitutional Rights

NORTON ROSE FULBRIGHT CANADA LLP
45 O'Connor Street, Suite 1500
Ottawa, ON K1P 1A4

Matthew J Halpin

Tel: 613-780-8654
Fax: 613-230-5459
Email:
matthew.halpin@nortonrosefulbright.com

Agent for the Intervener, the David Asper Centre for Constitutional Rights

INDEX

PART I – OVERVIEW

1. This case presents an opportunity to revisit the majority's holding in *Hape* that "extraterritorial application of the *Charter* is impossible."[1] It believed this result was required by international law. The BC Civil Liberties Association (BCCLA) submits that international law does not, in fact, require this result (and may sometimes require the opposite result).

2. In this case, as in *Hape*, the Court is confronted with the following scenario. An accused on trial in Canada, before a Canadian court, alleges that Canadian officials breached his *Charter* rights and seeks to exclude evidence. Our courts encounter such situations daily. The wrinkle in cases such as Cpl. McGregor's (or Mr. Hape's) is that the officials' conduct occurred outside of Canada. This led the *Hape* majority to conclude that *Charter* scrutiny of such conduct would amount to extraterritorial enforcement jurisdiction contrary to international law.

3. In truth, this scenario involves no extraterritorial enforcement. There is therefore no international law basis to preclude an accused in Canada from invoking *Charter* rights in a Canadian court in respect of actions of Canadian officials—even when those actions occurred abroad. The issue can be seen as a conflict of criminal laws: foreign criminal law or procedures applicable to the officials' conduct abroad, and Canadian laws (including the *Charter*) during the Canadian trial. The inevitable differences between the foreign and Canadian requirements can be accommodated within the typical *Charter* analysis, without disregarding or disrespecting either.

PART II – QUESTIONS IN ISSUE

4. The BCCLA intervenes on the first issue raised by the appellant: whether international law permits an accused to invoke their *Charter* rights in respect of extraterritorial state activity.

PART III – STATEMENT OF ARGUMENT

A. Principles of jurisdiction at international law

5. There are three types of jurisdiction at international law: prescriptive, enforcement, and adjudicative. All three can have extraterritorial aspects. Importantly, the mere fact that an exercise of jurisdiction is extraterritorial does not mean that it is unlawful at international law.

---

[1] *R v Hape*, 2007 SCC 26 [*Hape*] at para 85.

6. Prescriptive jurisdiction refers to a state's ability to pass laws. In other words, "questions of prescriptive jurisdiction relate to the geographical reach of a State's laws."[2] Such laws can be wholly territorial, partially extraterritorial, or fully extraterritorial in reach.[3] Canada's power to make extraterritorial laws is confirmed by the *Statute of Westminster* and the *Interpretation Act*,[4] and Parliament has validly enacted many laws with extraterritorial effect.[5]

7. Enforcement jurisdiction concerns a state's ability to use coercive means to compel compliance, or punish non-compliance, with its laws.[6] Traditional exercises include investigations, seizure of evidence, arrest, or service of a summons.[7] At international law, a state generally cannot enforce its laws in the territory of another state without that state's consent.[8] Importantly, however, some exercises of extraterritorial enforcement jurisdiction *are* lawful.[9] The language in *Cook* of an "objectionable extraterritorial effect"[10] is apt: not all extraterritorial activity is objectionable. For example, a state can engage in enforcement activity in a foreign state with that state's consent. This includes *ad hoc* agreements between Canadian and foreign officials, where the former are "given permission to enter into the foreign state and conduct enforcement activities—either under their own direction, or as part of a joint operation overseen by the foreign police."[11] This occurred in *Hape*.[12] Although not all such cases are literally "cooperative," there is always

---

[2] Cedric Ryngaert, *Jurisdiction in International Law*, 2nd ed (Oxford: Oxford University Press, 2015) at 9.
[3] Robert Currie & Joseph Rikhof, *International and Transnational Criminal Law*, 3rd ed (Toronto: Irwin Law, 2020) at 56.
[4] *Statute of Westminster 1931*, 22 Geo 5, ch 4, s 3; *Interpretation Act*, RSC 1985, c I-21, s 8(3); *Hape* at paras 66, 68; *Reference Re: Offshore Mineral Rights*, [1967] SCR 792 at 816; *R v Klassen*, 2008 BCSC 1762 [*Klassen*] at paras 78–80.
[5] *Hape* at para 66, citing the *Crimes Against Humanity and War Crimes Act*, SC 2000, c 24, ss 6 and 8; *Criminal Code*, RSC 1986, c C-46, s 7.
[6] Ryngaert at 7; John H Currie, *Public International Law*, 2nd ed (Toronto: Irwin Law, 2008) [Currie, *Public International Law*] at 334.
[7] Currie & Rikhof at 57, 97; James Crawford, *Brownlie's Principles of Public International Law*, 9th ed (Oxford: Oxford University Press, 2019) at 440; Currie, *Public International Law* at 334.
[8] Crawford at 440; Currie & Rikhof at 98, 516.
[9] John H Currie, "*Khadr*'s Twist on *Hape*: Tortured Determinations of the Extraterritorial Reach of the Canadian *Charter*" (2008) 46 Can YB Intl L 307 [Currie, "*Khadr*'s Twist"] at 317, footnote 57.
[10] *R v Cook*, [1998] 2 SCR 597 [*Cook*] at paras 27, 39.
[11] Currie & Rikhof at 100, 515–16.
[12] *Hape* at paras 5–11; Currie & Rikhof at 516, footnote 191, and 634.

> some element of cooperation in that if Canadian authorities are involved in an investigation anywhere outside Canada, they must be securing some cooperation, even if that means simply the permission of the foreign authorities to be where they are. Otherwise (and particularly if coercive powers are involved), they are likely acting illegally *ab initio*, as it is well established that one state cannot exercise enforcement jurisdiction on the territory of another.[13]

8. Crucially, when Canadian officials engage in enforcement activities in another state, they must abide by that state's laws.[14] This does not mean their conduct cannot later be scrutinized by a Canadian court according to Canadian law. But it does mean that Canadian officials cannot insist that investigative activities in a foreign state be done in accordance with Canadian law.

9. Finally, adjudicative jurisdiction refers to a state's ability to adjudicate disputes.[15] Some commentators consider adjudicative jurisdiction to be subsumed within prescriptive jurisdiction.[16] Courts can also be said to be "enforcing" laws domestically when adjudicating disputes.[17]

B. Domestic court proceedings do not engage extraterritorial enforcement jurisdiction

10. The majority in *Hape* reasoned that a situation like Mr. Hape's involved extraterritorial enforcement jurisdiction contrary to international law, such that he could not invoke his *Charter* rights.[18] In effect, the majority carved out what may be the only circumstance in Canadian criminal law in which an accused cannot invoke all their *Charter* rights in the course of a Canadian trial.[19]

11. Yet, no international law rule prohibits an accused from invoking their *Charter* rights in a Canadian trial in respect of the actions of Canadian officials, even where they occurred abroad. In fact, international human rights law may positively require that Canada extend the *Charter*'s reach

---

[13] Currie & Rikhof at 588, footnote 3.
[14] Currie & Rikhof at 100, 516; *R v Terry*, [1996] 2 SCR 207 [*Terry*] at para 19.
[15] Ryngaert at 9; *Hape* at para 58.
[16] Currie & Rikhof at 56; Leah West, "'Within or Outside Canada'": The *Charter*'s Application to the Extraterritorial Activities of the Canadian Security Intelligence Service" (forthcoming UTLJ 2022) at 13.
[17] Currie & Rikhof at 57; Currie, "*Khadr*'s Twist" at 317.
[18] *Hape* at paras 33, 84, 85, 87, 105.
[19] *Hape* allowed (paras 107–112) that an accused can invoke ss. 7 and 11(d) rights (but no others) as a matter of "trial fairness." This is an anomalous result; further, it is not clear that the trial fairness analysis provides an accused with the same spectrum of remedies available under s. 24.

beyond its territory in some situations. There is a "clear trend towards extraterritoriality being permissible and even obligatory among states which have entered into treaty-based human rights obligations."[20] The International Court of Justice has concluded that the International Covenant on Civil and Political Rights—the model for many *Charter* guarantees—is "applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory."[21] The UN Human Rights Committee has similarly held that a state can be held accountable for violations of the Covenant "which its agents commit upon the territory of another state, whether with the acquiescence of the Government of that State or in opposition to it."[22]

12. The facts of *Hape* did not involve any extraterritorial enforcement. To the extent extraterritorial jurisdiction was engaged, it was a mix of prescriptive and adjudicative jurisdiction:

> The only exercise of enforcement jurisdiction in such a situation occurs in Canada — the location where the court proceeding occurs. A court proceeding in Canada — even one in which the Court applies Canadian rules of law to events that occurred abroad — involves no exercise of "power" or coercive jurisdiction in any other state's territory. The only extraterritorial exercise of jurisdiction in such a case is *prescriptive* rather than enforcement in nature. That is, a court sitting only in Canada (and thus exercising enforcement jurisdiction only in Canada) and applying a Canadian rule of law to events occurring abroad is simply defining the *prescriptive* reach of that rule, not *enforcing* it abroad. This fundamental distinction between extraterritorial exercises of prescriptive and enforcement

---

[20] Robert J Currie & Hugh M Kindred, "Flux and Fragmentation in the International Law of State Jurisdiction: The Synecdochal Example of Canada's Domestic Court Conflicts over Accountability for International Human Rights Violations" in O-K Fauchauld & A Nollkaemper, eds, *The Practice of International and National Courts and the (De-) Fragmentation of International Law* (Oxford: Hart Publishing 2012) at 222, 228; see also Currie & Rikhof at 636–37; John H Currie, "International Human Rights Law in the Supreme Court's *Charter* Jurisprudence: Commitment, Retrenchment *and* Retreat—In No Particular Order" (2010) 50 SCLR (2d) 423 [Currie, "IHRL at the SCC"] at 440–41.

[21] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Authority (Advisory Opinion)*, [2004] ICJ Rep 136 at para 111 (see also paras 108–113).

[22] *Lopez Burgos v Uruguay*,, Comm No R/12/52, UN Doc Supp No 40 (A/36/40) at para 12.3. See also *Celiberti de Casariego v Uruguay*, Comm No R/13/56, UN Doc Supp No 40 (A/36/40) at para 10.3; *Mabel Pereira Montero v Uruguay*, Comm No 106/1981, UN Doc Supp. No 40 (A/38/40) at paras 5, 9.4; UN Human Rights Committee, General Comment No 31, CCPR/C/21/Rev.1/Add.13 (2004), para 10.

> jurisdiction — the former broadly permissible in international law on a number of bases, the matter more tightly circumscribed — is fatally confused by the majority in *Hape*.[23]

13. The confusion in *Hape* may stem from the notion of "applying" the *Charter* extraterritorially. At various points, the question was framed as whether the *Charter* "applies" to the extraterritorial activity of Canadian officials.[24] This is likely due to the wording of s. 32 of the *Charter*, which speaks of its application. The problem is that "applying" the *Charter* is ambiguous.

14. On one view, "applying" the *Charter* means that Canadian officials, when cooperating with foreign officials in a foreign jurisdiction, will insist that *Charter* standards govern the joint activities. This is clearly at odds with the other state's sovereignty. The *Charter* does not, and cannot, govern the activities of foreign officials.[25] Further, as noted above, Canadian officials must, while acting in a foreign state, comply with its laws.

15. The majority in *Hape* appeared to adopt this interpretation of "applying" the *Charter* to extraterritorial state activity. In doing so, it

> conflat[ed] the exercise of Canadian law enforcement powers abroad with Canadian law enforcement's compliance with the *Charter* … Certainly, it is true that when Canadian law enforcement acts to arrest an accused or seize information on the territory of another state[,] it is using coercive power and therefore exercising enforcement jurisdiction. It needs the consent of the host state or some other basis in international law to do so. However, when Canadian law enforcement as an arm of the executive branch of government complies with the *Charter* abroad[,] it is not using coercive power, it is merely controlling itself. When it demurs from taking part in an international operation with other states that would lead it to breach its *Charter* obligations, it is similarly controlling itself. And when Canadian courts judicially review the executive's compliance with the *Charter* in Canadian proceedings, they are exercising adjudicative jurisdiction at home, not enforcement jurisdiction abroad.[26]

---

[23] Currie, "*Khadr*'s Twist" at 317 [emphasis in original].
[24] *Hape* at paras 1, 24, 56.
[25] *R v Harrer*, [1995] 3 SCR 562 [*Harrer*] at paras 12, 15; *Terry* at para 19; *Cook* at para 142 (*per* Bastarache J).
[26] Maureen Webb, "The Constitutional Question of Our Time: Extraterritorial Application of the *Charter* and the *Afghan Detainees* Case" (2011) 28 Natl J Const L 236 at 256 [emphasis added].

16. In short, when an accused, in the course of a Canadian trial, in a Canadian court, raises a *Charter* argument in respect of Canadian officials' conduct, the only enforcement being done is by the court—wholly within this country, with no extraterritorial element.

17. For the purpose of s. 32, "applying" the *Charter* must mean that extraterritorial conduct of Canadian officials will be scrutinized by Canadian courts according to Canadian law. The *Hape* majority recognized that doing so would not be contrary to international law as it would simply be an exercise of adjudicative jurisdiction.[27] Such scrutiny imposes no obligation on the foreign state. All it does is subject Canadian officials to Canadian constitutional standards. The only possible consequence is that the Canadian court will find an infringement of the *Charter* and, where warranted, order a remedy under s. 24 of the *Charter*. Whether evidence is admitted, or some other remedy is considered, in the course of a Canadian trial involves no extraterritorial effect.[28]

C. A conflict of criminal laws

18. Framing the question as "applying" the *Charter* extraterritorially tends to confuse matters. As Professors Currie and Rikhof note, the *Hape* majority "confuses the question of jurisdiction with the question of what law applies to the investigation."[29]

19. A situation like Mr. Hape's or Cpl. McGregor's is better seen as a conflict of criminal laws: Canadian officials must comply with foreign law while acting abroad, yet Canadian law governs domestic proceedings here. The two laws will not be the same and may conflict. If so, the question is how to resolve that conflict—an operational problem, not an extraterritoriality problem.

20. The true sovereignty or comity concern (which motivated the majority's reasoning in *Hape*) is that Canada cannot insist that another state follow our laws or adjust its processes to conform to them. This concern is answered by affirming that Canadian officials must comply with foreign law when abroad and that the conduct of foreign officials is not subject to *Charter* standards.[30]

---

[27] *Hape* at para 91, where the majority accepted that "foreign sovereignty is not engaged by a criminal process in Canada that excludes evidence by scrutinizing the manner in which it was obtained for compliance with the *Charter*," noting that such an exercise would "merely constitute an exercise of extraterritorial adjudicative jurisdiction." See also *Klassen* at paras 85–86.

[28] *Hape* at para 96; *Cook* at para 144 (*per* Bastarache J); Currie & Rikhof at 606.

[29] Currie & Rikhof at 683; see also Currie & Kindred at 225.

[30] *Terry* at para 19; *Harrer* at para 15.

21. The *Hape* majority was properly concerned about effects on foreign sovereignty. But it was overly preoccupied with the fact that the Canadian officials' conduct occurred abroad. Its focus should have been on the Canadian accused seeking to invoke his *Charter* rights in a Canadian trial before a Canadian court. The state activity is extraterritorial; the invocation of rights is not—nor are the consequences if a breach of the *Charter* is found.

D. Addressing the conflict of criminal laws

22. When evaluating extraterritorial conduct by Canadian officials against the *Charter*, a court should proceed as it normally would: determine if there is an infringement and, if so, whether a remedy under s. 24 is appropriate.[31] In the course of this routine exercise, the Canadian court will simply need to be alive to the fact that the conduct occurred outside Canada.[32]

23. A s. 8 allegation provides an example. Having found that the conduct in question was a search, the court would then consider if the search was authorized by law in the foreign jurisdiction. Assuming it was, the court would then assess whether that law was reasonable, and whether the manner of search was reasonable, in light of s. 8 standards as developed in Canadian jurisprudence. This would be an unusual, but not unheard of, exercise for the court. Although a Canadian court will not be quick to scrutinize or criticize foreign laws, it "should not hesitate to make determinations about the validity of 'foreign' laws where such determinations are incidental to the resolution of legal controversies properly before the courts."[33]

---

[31] Currie & Rikhof at 638. While the discussion that follows focuses on exclusion of evidence under s. 24(2), the foreign law would similarly influence analyses under s. 24(1).

[32] See *Cook* at para 151, *per* Bastarache J (foreign context can be taken into account under s. 24(2)) and *Harrer* at paras 15–17 (although Canadian law required a second right-to-counsel warning in the circumstances, there could be cases where one warning would be fair).

[33] *Nevsun Resources Ltd v Araya*, 2020 SCC 5 [*Nevsun*] at para 48. See also paras 45–54. Notably, our courts already take account of foreign laws, including when they are alleged to have been violated, in the context of "trial fairness" analyses under ss 7 and 11(d): see, e.g., *Harrer* at paras 16–17; *Hape* at para 111; *R v Guilbride*, 2003 BCPC 44; *R v Proulx*, 2005 BCSC 184 at paras 26–36; *R v Rogers*, 2011 ONSC 5007 at paras 136–37.

24. If the court finds an infringement of the *Charter* right, it then turns to remedy under s. 24. In cases involving an extraterritorial element, this stage of the analysis calls for judicial consideration of international comity, i.e., "the deference and respect due by other states to the actions of a state legitimately taken within its territory."[34] Comity calls for flexibility from Canadian courts; the mere fact that what was done abroad was done differently than it would have been done here is not grounds for granting relief under s. 24, particularly where the foreign procedure, while different than our own, nevertheless meets international human rights standards. Parochialism is irreconcilable with comity. That said, there may be cases where what is done abroad is so divergent from fundamental norms that relief should be granted. Comity is an important consideration, but the Court in *Hape* was right to hold that "deference ends where clear violations of international law and fundamental human rights begin."[35]

25. When exclusion of evidence (s. 24(2)) is at issue, the court would apply the *Grant* factors[36] as usual, while being alive to comity. That consideration is perhaps most relevant to the first *Grant* factor: the seriousness of the *Charter*-infringing state conduct.[37] It may be, for example, that an infringement is less serious because Canadian officials followed a foreign law that, while different from our own, does not deviate substantially from Canadian standards.[38] Conversely, the court may find an infringement to be serious where the differences between foreign and Canadian standards are too great (or based on other considerations set out in *Grant*[39]).

26. Admittedly, this approach involves some degree of uncertainty for those Canadian officials acting abroad. In difficult cases, they will not be sure whether their participation in an investigation

---

[34] *Morguard Investments Ltd v De Savoye*, [1990] 3 SCR 1077 at 1095, cited in *Hape* at para 47.
[35] *Hape* at para 52; *Nevsun* at para 50.
[36] *R v Grant*, 2009 SCC 32 [*Grant*] at para 71.
[37] *Grant* at para 71.
[38] In the context of a "trial fairness" analysis, La Forest J observed in *Harrer* that "I do not think one can automatically assume that the evidence was unfairly obtained or that its admission would be unfair … simply because it was obtained in a manner that in this country would violate a *Charter* guarantee … [I]t is recognized that different balances may be achieved in different countries, all of which are fair": para 14. See also *Hape* at para 111 ("no unfairness results from variances in particular procedural requirements or from the fact that another country chooses to do things in a somewhat different way than Canada").
[39] *Grant* at paras 72–75.

or other activities according to foreign law and procedures will survive eventual judicial scrutiny at home. But that predicament is no different from the one faced by Canadian officials acting within Canada (for example, when police are trying a new investigative technique and it is unclear whether it will survive *Charter* scrutiny). Furthermore, not all cases will be close calls. Canadian officials could never expect our courts to condone their participation in clear human rights breaches abroad. Where Canadian officials apprehend that their participation in a course of conduct abroad will implicate them in a *Charter* violation, they can be expected to refrain from participating. If they fail to refrain, the accused in an eventual Canadian criminal proceeding should be free to invoke their *Charter* rights, and the courts should be empowered to vindicate those rights.

27. This approach is both more practical and more in keeping with Canadian law than the "human rights exception" established in *Hape* and *Khadr* (i.e., that the *Charter* can be applied where Canada's international human rights law obligations were engaged by the police's extraterritorial activities). Importantly, police are very familiar with the *Charter* and very unlikely to be familiar with international human rights obligations.[40] While a full discussion of the "human rights exception" is beyond the scope of this factum, the BCCLA notes that it is problematic in four respects: (1) it disregards the fact that the *Charter* implements many Canadian international human rights obligations;[41] (2) it leads to an unprincipled approach in which courts decide if the *Charter* applies based on the severity of the breach;[42] (3) it is at odds with the settled reception law principle that treaties (by far the most important source of international human rights law) do not take direct effect in Canadian law without legislative implementation;[43] and (4) it is unclear how a breach of international human rights law can lead to a remedy under s. 24 of the *Charter*.[44] A conclusion that the *Charter* can be invoked by accused in a situation like Mr. Hape's or Cpl. McGregor's obviates the need to carve out an "international human rights exception."

---

[40] See *Hape* at para 173 (*per* Bastarache J).
[41] Currie & Rikhof at 636; Currie, "IHRL at the SCC" at 449–50; Currie, "*Khadr*'s Twist" at 321; Currie & Kindred at 222, 226.
[42] *Amnesty International Canada v Canada (Chief of the Defence Staff)*, 2008 FC 336 at paras 310–14.
[43] *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at paras 69–71.
[44] *Hape* at para 188 (*per* Binnie J); Currie & Rikhof at 635; Kent Roach, "*R v Hape* Creates *Charter*-Free Zones for Canadian Officials Abroad" (2007) 53:1 Crim LQ 1 at 3; Webb at 247.

E. The *Hape* precedent

28. We have argued here that the majority in *Hape* misdirected itself on the international legal question of whether an accused person in a Canadian criminal proceeding may, consistently with international law, invoke *Charter* rights in respect of extraterritorial state activity. As Binnie J. noted in *Hape*, the Court did not have the benefit of submissions on the international law issues.[45]

29. The central holding of *Hape* was that the territorial reach of s. 32 of the *Charter* should be interpreted consistently with the international law of state jurisdiction.[46] The BCCLA takes no issue with that conclusion, and indeed relies on it. The position the BCCLA advances here is consistent with *Hape* on this central point. It submits, however, that with the benefit of submissions on the substantive requirements of international jurisdiction law, the majority in *Hape* would have found no reason to deny criminally accused persons resort to the full panoply of *Charter* rights.

30. The *Hape* decision remains important and helpful on other points, too. The majority's discussions of the common law and customary international law,[47] state sovereignty and sovereign equality,[48] comity,[49] and the presumption of conformity[50] remain good law and need not be disturbed.

PART IV – COSTS

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

PART V – ORDER SOUGHT

32. The BCCLA takes no position on the outcome of the appeal.

---

[45] *Hape* at paras 184, 187.
[46] *Hape* at paras 32–34.
[47] *Hape* at paras 35–39. See also *Nevsun* at paras 90–94.
[48] *Hape* at paras 40–46.
[49] *Hape* at paras 47–52.
[50] *Hape* at paras 53–56; See also: *Németh v Canada (Justice)*, 2010 SCC 56 at para 34; *R v Appulonappa*, 2015 SCC 59 at para 40; *B010 v Canada (Citizenship and Immigration)*, 2015 SCC 58 at para 48; *India v Badesha*, 2017 SCC 44 at para 38; *Office of the Children's Lawyer v Balev*, 2018 SCC 16 at paras 31–32; *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 114, 182.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 25th of April 2022.

_____

Gib van Ert

_____

Dahlia Shuhaibar

PART VI – TABLE OF AUTHORITIES

A. Case Law

Case	Paragraph(s)
Amnesty International Canada v Canada (Chief of the Defence Staff), 2008 FC 336.	27
B010 v Canada (Citizenship and Immigration), 2015 SCC 58.	30
Baker v Canada (Minister of Citizenship and Immigration), [1999] 2 SCR 817.	27
Canada (Minister of Citizenship and Immigration) v Vavilov, 2019 SCC 65.	30
Celiberti de Casariego v Uruguay, Comm No R/13/56, UN Doc Supp No 40 (A/36/40).	11
India v Badesha, 2017 SCC 44.	30
Legal Consequences of the Construction of a Wall in the Occupied Palestinian Authority (Advisory Opinion), [2004] ICJ Rep 136.	11
Lopez Burgos v Uruguay, Comm No R/12/52, UN Doc Supp No 40 (A/36/40).	11
Mabel Pereira Montero v Uruguay, Comm No 106/1981, UN Doc Supp. No 40 (A/38/40).	11
Morguard Investments Ltd v De Savoye, [1990] 3 SCR 1077.	24
Németh v Canada (Justice), 2010 SCC 56.	30
Nevsun Resources Ltd v Araya, 2020 SCC 5.	23, 24, 30
Office of the Children's Lawyer v Balev, 2018 SCC 16.	30
R v Appulonappa, 2015 SCC 59.	30
R v Cook, [1998] 2 SCR 597.	7, 14, 17, 22
R v Grant, 2009 SCC 32.	25
R v Guilbride, 2003 BCPC 44.	23
R v Hape, 2007 SCC 26.	1, 6, 7, 9, 10, 13, 17, 23, 24, 25, 27, 28, 29, 30

R v Harrer, [1995] 3 SCR 562.	14, 20, 22, 23, 25
R v Klassen, 2008 BCSC 1762.	6, 17
R v Proulx, 2005 BCSC 184.	23
R v Rogers, 2011 ONSC 5007.	23
R v Terry, [1996] 2 SCR 207.	8, 14, 20
Reference Re: Offshore Mineral Rights, [1967] SCR 792.	6

B. Legislation

Legislation	**Paragraph(s)**
Crimes Against Humanity and War Crimes Act, SC 2000, c 24, ss 6 and 8.	6
Criminal Code, RSC 1986, c C-46, s 7.	6
Interpretation Act, RSC 1985, c I-21, s 8(3).	6
Statute of Westminster 1931, 22 Geo 5, ch 4, s 3.	6

C. Secondary Sources

Source	**Paragraph(s)**
Cedric Ryngaert, *Jurisdiction in International Law*, 2nd ed (Oxford: Oxford University Press, 2015).	6, 7, 9
James Crawford, *Brownlie's Principles of Public International Law*, 9th ed (Oxford: Oxford University Press, 2019).	7
John H Currie, "International Human Rights Law in the Supreme Court's *Charter* Jurisprudence: Commitment, Retrenchment *and* Retreat—In No Particular Order" (2010) 50 SCLR (2d) 423.	11, 27
John H Currie, "*Khadr*'s Twist on *Hape*: Tortured Determinations of the Extraterritorial Reach of the Canadian *Charter*" (2008) 46 Can YB Intl L 307.	7, 9, 12, 27
John H Currie, *Public International Law*, 2nd ed (Toronto: Irwin Law, 2008).	7
Kent Roach, "*R v Hape* Creates *Charter*-Free Zones for Canadian Officials Abroad" (2007) 53:1 Crim LQ 1.	27
Leah West, "'Within or Outside Canada'": The *Charter*'s Application to the Extraterritorial Activities of the Canadian Security Intelligence Service" (forthcoming UTLJ 2022).	9

Maureen Webb, "The Constitutional Question of Our Time: Extraterritorial Application of the *Charter* and the *Afghan Detainees* Case" (2011) 28 Natl J Const L 236.	15, 27
Robert Currie & Joseph Rikhof, *International and Transnational Criminal Law*, 3rd ed (Toronto: Irwin Law, 2020).	6, 7, 8, 9, 11, 17, 18, 22, 27
Robert J Currie & Hugh M Kindred, "Flux and Fragmentation in the International Law of State Jurisdiction: The Synecdochal Example of Canada's Domestic Court Conflicts over Accountability for International Human Rights Violations" in O-K Fauchauld & A Nollkaemper, eds, *The Practice of International and National Courts and the (De-) Fragmentation of International Law* (Oxford: Hart Publishing 2012).	11, 18, 27
UN Human Rights Committee, General Comment No 31, CCPR/C/21/Rev.1/Add.13 (2004).	11