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Editorial

***R. v. Hape* Creates Charter-Free Zones for Canadian Officials Abroad**

The Supreme Court's 5:4 decision in *R. v. Hape*, 2007 SCC 26, to overrule *R. v. Cook*, [1998] 2 S.C.R. 597, and to hold that the Charter no longer applies to Canadian officials when they act abroad, creates a dangerous and unnecessary precedent.

It is one thing to hold that the Charter cannot be applied to the actions of foreign officials when they act in foreign countries. Such an extraterritorial application of the Charter would infringe the sovereignty of another state. It is another matter entirely to hold, as the majority has, that without the consent of the foreign country, the Charter cannot be applied in a Canadian court against Canadian officials with respect to the actions of those Canadian officials in the foreign country.

Although the majority justified its holding on the presumption that Canada intends to respect international law principles of respect for other nations' sovereignty and comity between nations, its decision seems to sacrifice a basic aspect of Canadian sovereignty itself: namely expectations that Canadian officials respect Charter values when they act in their official capacity at home or abroad.

The majority candidly recognized that foreign countries will rarely consent to the application of the Charter to the actions of Canadian officials in their territory (*ibid.*, at para. 106), but this did not stop them from creating a novel and sweeping rule requiring such consent. Although it is presented under the fashionable idea of balancing, the new rule is in fact quite categorical. Whether the Charter applies depends on whether foreign nations consent to its application, as opposed to reasoned judgments made by Canadian courts as contemplated under *R. v. Cook*.

To be fair, the majority's ruling provides two indirect means by which Canadian officials can be restrained when they act abroad. The first means,

consistent with previous cases, is that an accused could argue that it would infringe “certain basic standards . . . adhered to in all free and democratic societies” (*ibid.*, at para 111) to admit evidence obtained by Canadian officials abroad in Canadian proceedings. On the facts of *Hape*, the entire court agreed that this exception did not apply to the admission of documentary evidence seized from warrantless searches in Turks and Caicos.

This exception requires an uncertain degree of fundamental unfairness to apply. Canadian courts would not accept a confession coerced by Canadian officials in a foreign land because it would affect the fairness of the Canadian trial. Nevertheless, they should not accept coerced confessions in any event because of reliability concerns.

This exception also requires a contingent decision to prosecute the matter in Canadian courts and to offer evidence that was obtained in a fundamentally unfair manner. In many cases, prosecutions may not be brought in Canada. In terrorism investigations especially, officials may be more interested in prevention, disruption and rendition than prosecutions. Finally, the exclusion of evidence obtained in a fundamentally unfair manner does not assist the truly innocent victim of improper conduct abroad.

The second exception offered by the majority to its new rule that the Charter does not apply to Canadian officials abroad is also problematic. Justice LeBel contemplates (*ibid.*, at para. 101) that

the principle of comity may give way where the participation of Canadian officers in investigative activities sanctioned by foreign law would place Canada in violation of its international obligations in respect of human rights. In such circumstances, the permissive rule might no longer apply and Canadian officers might be prohibited from participating. I would leave open the possibility that, in a future case, participation by Canadian officers in activities in another country that would violate Canada’s international human rights obligations might justify a remedy under s. 24(1) of the *Charter* because of the impact of those activities on *Charter* rights in Canada.

It is difficult to know what to make of this exception. It would seem that Canada’s international human rights obligations, rather than the Charter, would do the work of restraining Canadian officials. This raises problems of enforcement. If Canadian officials were ever to participate in an extra-territorial decision in Afghanistan that resulted in torture or the imposition of the death penalty, enforcement would be left to the rather gentle remedial processes contemplated under the U.N. Convention Against Torture or the International Covenant on Civil and Political Rights.

It is difficult to understand how a violation of international human rights law will ever produce a remedy under s. 24(1) of the Charter. By its clear terms, s. 24(1) only provides remedies for violations of the Charter, and according to the majority the Charter does not apply to the actions of Canadian officials in foreign lands. Only in truly extraordinary circumstances such as participation in a genocide would Canadian actions abroad affect Charter rights in Canada. Unless this exception is read broadly to revive *Cook* and allow indirect enforcement of Charter restraints on Canadian officials when they act abroad, it seems like an illusory one.

Subject to the limited exception relating to the admission of evidence obtained in a fundamentally unfair manner and the contradictory exception for enforcement of international human rights through s. 24(1) of the Charter, the majority's decision creates a dangerous precedent that once Canadian police officers, security intelligence officers and soldiers leave Canadian air space, they can wave the restraints of the Charter goodbye.

This precedent is also unnecessary. Bastarache J. with three other judges has proposed a variation on *R. v. Cook* that would start from the rebuttable presumption that extra-territorial activities done by Canadian officials in accordance with foreign laws would be consistent with the basic principles of the Charter. In this case, the perimeter search appeared to be authorized by the law in Turks and Caicos even though a warrant would be required in Canada. The fact that a Canadian search warrant cannot be obtained to apply in Turks and Caicos is an important factor in the contextual analysis.

In addition, the focus in *R. v. Cook* on whether the application of the Charter would interfere with the sovereignty of the foreign nation or have objectionable effects remains sound. In cases where Canadian officials act independently, the Charter should surely apply. In cases where they act in co-operation with foreign officials, the situation is more complex and calls for judgment.

The search should be for an approach that preserves the fundamental values, purposes and restraints of the Charter while recognizing that Canadian officials are operating in the particular context of a foreign country. If courts can tailor Charter requirements to the regulatory context, it is difficult to understand why they cannot make adjustments for the foreign context.

The majority's approach is radical. It does not build on or attempt to distinguish prior precedents in this area but rather rejects them, as a critic working outside of the system might do. This is not the way that judges should develop the law. If it is necessary to overrule prior precedents, there are tests and procedures with which to do so. They have not been applied by the majority and there was no warning that *Cook* would be overruled.

The majority's approach ignores precedents in which the Charter has been applied to the actions of Canadian officials abroad. One is the decision

in *Khadr v. Canada*, [2006] 2 F.C.R. 505, to issue an interlocutory Charter injunction restraining CSIS and DFAIT officials from questioning Omar Khadr at Guantanamo Bay because of concerns that the conditions of confinement violated the Charter and because the officials would not undertake not to share any information they obtained with the Americans. The Federal Court of Appeal subsequently held that *Stinchcombe* disclosure requirements would apply to the fruits of the interrogation: *Khadr v. Canada (Minister of Justice)*, 2007 FCA 182.

The majority's judgment is characterized by much abstract discussion of the relationship between international and domestic law and the principles of comity and extraterritorial legislation. There is no real sense that the majority has considered, as Justice Binnie urged them to do, how often or the different contexts in which Canadian officials act abroad. Moreover, there is no discussion of the basic values and aspirations of the Charter or what the Charter means to Canada's image of itself, especially when it presents itself to the world.

The unworldly nature of the majority's judgment provoked Justice Binnie to cite Hamlet's warning: "There are more things in heaven and earth, Horatio, Than are dreamt of in your philosophy." It's not Shakespeare, but I would add that while most Canadians would not expect an imperialistic imposition of the Charter on foreign officials, they would expect that the basic values of the Charter would apply to our officials when they act abroad. There should not be Charter-free zones for Canadian officials. Anywhere.

K.R.