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The Canadian Charter of Rights and Freedoms and Canadian Officials Abroad

Donald J. Rennie and Ramona Rothschild*

I. INTRODUCTION

Section 32(1) of the *Canadian Charter of Rights and Freedoms*,¹ which defines the Charter's application, does not expressly impose territorial limits on its reach.² As a consequence, it has fallen on the courts to interpret the scope of the Charter's application, and to determine whether and to what extent the Charter applies to government action outside Canada.

The Supreme Court of Canada has ruled on the application of the Charter to the actions of government officials outside Canada on several occasions. It has been firmly established that the Charter does not apply to the actions of foreign authorities in foreign jurisdictions.³ Moreover, in

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¹ Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter "Charter"].

² Section 32(1) provides as follows:

This Charter applies

- (a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and
- (b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

³ *R. v. Harrer*, [1995] S.C.J. No. 81, [1995] 3 S.C.R. 562 (S.C.C.); *R. v. Terry*, [1996] S.C.J. No. 62, [1996] 2 S.C.R. 207 (S.C.C.); *Schreiber v. Canada (Attorney General)*, [1998] S.C.J. No. 42, [1998] 1 S.C.R. 841 (S.C.C.). Note, however, that an individual may have a valid s. 7 claim in Canada even if the potential deprivation of his or her life, liberty or security will be effected abroad, if it is established that Canada's participation is a necessary precondition for the deprivation and if the deprivation is a foreseeable consequence of Canada's participation. See *Suresh v. Canada*

2007, in *R. v. Hape*,⁴ a majority of the Supreme Court of Canada effectively overruled the majority's earlier decision in *R. v. Cook*⁵ and decided that the Charter does not apply to investigations by Canadian state actors in the territory of another state absent the foreign state's consent or some other limited basis recognized in international law. As a result, Canadian officials involved in investigations abroad generally do so under the laws and procedures of the foreign state.

Both *Cook* and *Hape* were decided in the context of criminal prosecutions in Canada, where the issue was whether evidence obtained by Canadian state actors outside the country should be excluded at trial in Canada because it was obtained in a manner that did not conform to Charter standards. In 2008, in *Canada (Justice) v. Khadr*,⁶ the Supreme Court of Canada considered the application of the Charter in a case involving the activities of Canadian officials and their impact abroad upon a Canadian citizen's liberty interest and right to a fair process, where there was no domestic criminal prosecution and where the rights claimant was not even present in Canada.

This paper will identify issues arising from the *Hape* and *Khadr* decisions that have been recently addressed by the Federal Courts. It is divided into two substantive parts. The first describes the *Hape* and *Khadr* decisions. The second describes how, in three recent decisions, the Federal Courts have addressed two issues arising from these decisions: (1) whether there exists a "fundamental human rights exception" to the general rule that the Charter does not apply extra-territorially; and (2) whether non-Canadian citizens outside Canada who are not subjected to a Canadian judicial process are beneficiaries of Charter rights.

(*Minister of Citizenship and Immigration*), [2002] S.C.J. No. 3, [2002] 1 S.C.R. 3, at para. 54 (S.C.C.) [hereinafter "*Suresh*"]. See also *United States v. Burns*, [2001] S.C.J. No. 8, [2001] 1 S.C.R. 283 (S.C.C.) [hereinafter "*Burns*"] and *Canada v. Schmidt*, [1987] S.C.J. No. 24, [1987] 1 S.C.R. 500 (S.C.C.).

⁴ [2007] S.C.J. No. 26, [2007] 2 S.C.R. 292 (S.C.C.) [hereinafter "*Hape*"].

⁵ [1998] S.C.J. No. 68, [1998] 2 S.C.R. 597 (S.C.C.) [hereinafter "*Cook*"]. In *Cook*, the majority (Lamer C.J.C., Cory, Iacobucci, Major and Binnie JJ.) ruled that in rare circumstances the Charter could apply to the acts of Canadian officials outside Canada based on Canada's jurisdiction over its nationals where the application of Charter standards would not conflict with the concurrent territorial jurisdiction of the foreign state, thereby generating an "objectionable extraterritorial effect" (*id.*, at para. 25). Here, they held that the Charter applied to the actions of Canadian detectives in interviewing the accused in the United States.

⁶ [2008] S.C.J. No. 28, [2008] 2 S.C.R. 125 (S.C.C.) [hereinafter "*Khadr*"].

II. THE SUPREME COURT OF CANADA CASES

1. *R. v. Hape*

In *Hape*, the majority of the Supreme Court of Canada⁷ held that the Charter does not apply to investigations carried out by Canadian state actors in the territory of another state absent the foreign state's consent or, more exceptionally, some other basis under international law. Hence, Canadian officials involved in investigations abroad are not bound by Charter requirements in the manner in which investigations are conducted. Rather, the law of the state in which the investigation occurred would apply.

In *Hape*, the appellant was a Canadian businessman who had been convicted in Canada of money laundering. At his trial, the Crown had adduced documentary evidence that the RCMP had gathered from the accused's office in the Turks and Caicos. The accused had sought to have the evidence excluded pursuant to section 24(2) of the Charter,⁸ on the basis that it had been obtained in violation of his right under section 8 to be secure against unreasonable search and seizure.⁹

The RCMP's investigation in the Turks and Caicos had been carried out under the authority and control of the Turks and Caicos police force. No warrant had been obtained authorizing perimeter searches of the accused's investment company in that country. Evidently a warrant was not required to conduct such searches under Turks and Caicos law, but in most circumstances one would have been required under Canadian law.

At issue before the Supreme Court was whether the Charter applied to the searches and seizures carried out by the RCMP officers outside Canada. The Court upheld the convictions, the majority determining that the Charter generally did not apply to searches and seizures carried out by Canadian state actors abroad, and did not apply in the circumstances of this case.

⁷ The majority judgment of McLachlin C.J.C. and LeBel, Deschamps, Fish and Charron JJ. was written by LeBel J.

⁸ Section 24(2) of the Charter provides as follows:

Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

⁹ Section 8 of the Charter provides that "[e]veryone has the right to be secure against unreasonable search or seizure."

The majority directed that any inquiry into the extra-territorial application of the Charter “begins and ends” with section 32(1). That provision defines *to whom* and *in what circumstances* the Charter applies. The fact that a state actor is involved is not in itself sufficient; the activity in question must also fall within the “matters within the authority of” Parliament or the provincial legislatures.¹⁰

Guided by the principle of statutory interpretation that legislation will be presumed to conform to international law as well as the principle of comity of nations, the majority of the Supreme Court interpreted section 32(1) with reference to principles of customary international law. Writing for the majority, LeBel J. was careful to draw a distinction between international law and comity, stating that “[i]nternational law is a positive legal order, whereas comity ... is of the nature of a principle of interpretation.”¹¹

The majority asserted that under international law, the authority of a state to exercise jurisdiction over matters arising outside its territory is strictly limited.¹² Of particular significance, by virtue of the territorial sovereignty of states, it is a well-established principle that a state cannot act to enforce, or give effect to, its laws within the territory of another state absent the other state’s consent or, in exceptional cases, some other basis in international law.¹³ Absent such an exception, an investigation in a foreign state is not a matter within the authority of Parliament or the provincial legislatures for the purposes of section 32(1) of the Charter, as these bodies do not have the jurisdiction to authorize the enforcement of

¹⁰ *Hape*, *supra*, note 4, at paras. 93-94.

¹¹ *Id.*, at para. 50.

¹² Justice LeBel distinguished between three different types of jurisdiction. *Prescriptive jurisdiction* is the “power to make rules, issue commands or grant authorizations that are binding upon persons and entities”. *Enforcement jurisdiction* is “the power to use coercive means to ensure that rules are followed, commands are executed or entitlements are upheld”. *Adjudicative jurisdiction* is “the power of a state’s courts to resolve disputes or interpret the law through decisions that carry binding force” (*id.*, at para. 58).

Justice LeBel explained that the primary basis for a state’s jurisdiction is the principle of territoriality. A state has full authority to exercise jurisdiction — prescriptive, enforcement and adjudicative — over matters arising and people residing within its borders. A secondary basis for jurisdiction is the nationality principle. States may assert certain jurisdiction over acts occurring within the territory of a foreign state on the basis that their nationals are involved, in order to attach domestic consequences to events that occurred abroad. However, under international law, a state would not have the authority to enforce its laws over the national outside its borders (*id.*, at paras. 59-60).

¹³ *Id.*, at para. 65.

Canadian laws, including the Charter, over such a matter outside Canada.¹⁴

The majority reasoned that if compliance with its legal requirements cannot be enforced, the Charter cannot be applied. Therefore, as a rule, the Charter does not apply to investigations in foreign countries. Exceptions to the rule may arise where the foreign state has consented to the application of Canadian law or, more exceptionally, where there exists some other basis in international law that would justify the Charter's application. Justice LeBel wrote:

[T]he *Charter* cannot be applied if compliance with its legal requirements cannot be enforced. Enforcement of compliance with the *Charter* means that when state agents act, they must do so in accordance with the requirements of the *Charter* so as to give effect to Canadian law as it applies to the exercise of the state power at issue. However, ... Canadian law cannot be enforced in another state's territory without that state's consent. Since extraterritorial enforcement is not possible, and enforcement is necessary for the *Charter* to apply, extraterritorial application of the *Charter* is impossible.¹⁵

The majority was also guided in its interpretation of section 32(1) by the notion of comity, an interpretive principle which encourages states to cooperate with each other with mutual deference and respect. According to the majority, the principle of comity allows Canadian officers to participate in investigations abroad even where there is no obligation to do so. In addition, the principle of comity encourages a state seeking assistance from another state to respect the way in which the latter state chooses to provide assistance within its territory. Nonetheless, the majority noted that comity may not be required where the assisting state acts in violation of international law. Justice LeBel stated that Canadian

¹⁴ *Id.*, at paras. 57-69, 84-85, 104-105. The majority recognized that Canada has the authority to make laws having extraterritorial operation, and that Canada has enacted legislation with extraterritorial effects. For example, the *Crimes Against Humanity and War Crimes Act*, S.C. 2000, c. 24, provides in s. 6(1) that every person who commits genocide, a crime against humanity or a war crime outside Canada is guilty of an indictable offence. Pursuant to s. 8, such a person may be prosecuted in Canada (a) if at the time of the offence the person was a Canadian citizen or a citizen of a state engaged in armed conflict against Canada, or the victim was a Canadian citizen or a citizen of a state allied with Canada in an armed conflict; or (b) if, after the time the offence was committed, the person is present in Canada. According to LeBel J., "[t]hese provisions exemplify valid extraterritorial prescriptive jurisdiction, and any trial for such offences would constitute a legitimate exercise of extraterritorial adjudicative jurisdiction" (*id.*, at para. 66). However, these provisions do not authorize Canada to enforce the prohibitions in a foreign state's territory by arresting the offender there. *Id.*, at para. 66.

¹⁵ *Id.*, at para. 85.

officials may be prohibited from participating abroad in activities sanctioned by foreign law that would place Canada in violation of its international human rights obligations.¹⁶

The majority held that individuals cannot expect to take Charter rights with them outside Canada's borders. However, they articulated two means of protecting the interests of the individual. First, where the Crown seeks to adduce evidence gathered abroad at a trial in Canada, such evidence may be excluded under section 7 or section 11(d) of the Charter if to admit it would render the trial unfair.¹⁷

Second, participation abroad by Canadian officials in activities 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".¹⁸ In such circumstances, there would be an exception to the principle of comity which would otherwise allow Canadian officers to participate.¹⁹

Based on these considerations, the majority articulated a methodology to determine whether the Charter applies to investigations outside Canada by virtue of section 32(1). First, it must be determined whether the conduct at issue is that of a Canadian state actor. Second, if so, it must be determined whether the activity in question is a matter within the authority of Parliament or the provincial legislatures. Unless there is consent or some other exceptional basis in international law that would justify the application of the Charter to the extraterritorial activities of the state actor, such activities do not fall within the authority of Parliament or the provincial legislatures. According to the majority, in most cases there will be no such exception and the Charter will not apply.²⁰

¹⁶ *Id.*, at paras. 50-52, 101.

¹⁷ *Id.*, at paras. 100, 108-112. A court must consider all of the circumstances in which evidence was gathered to determine whether its admission would render a trial unfair. It will not automatically follow that a trial will be unfair if evidence is admitted that was obtained in circumstances that did not meet Charter requirements (*id.*, at paras. 108-109).

¹⁸ *Id.*, at para. 101. See also paras. 51-52, 90.

¹⁹ *Id.*, at paras. 90, 101.

²⁰ *Id.*, at paras. 102-106, 113. In *Hape*, the majority found that the Turks and Caicos had not consented to the enforcement of Canadian law within its territory. In addition, although this matter was not raised on appeal, the majority found that the circumstances did not demonstrate that the admission of the evidence violated the appellant's right to a fair trial.

2. *Canada (Justice) v. Khadr*

In May 2008, the Supreme Court of Canada decided in *Khadr* that Canada was bound by the Charter where Canadian officials had participated overseas in a process that was contrary to Canada's international human rights obligations.²¹ In this case, the respondent, Omar Khadr, was a Canadian citizen who had been detained by U.S. Forces in Guantanamo Bay, Cuba, where he faced terrorism-related charges before a U.S. Military Commission. Before the charges were laid, with the consent of U.S. authorities, Canadian officials had questioned him in Guantanamo Bay with regard to matters connected to the eventual charges, and had shared the product of those interviews with U.S. authorities. After formal charges were laid against him, for the purposes of raising full answer and defence to those charges and relying on *R. v. Stinchcombe*,²² Mr. Khadr sought disclosure in Canada under section 7 of the Charter of all documents relevant to the charges in the possession of the federal Crown, including the records of the interviews. Before the Supreme Court of Canada, relying on *Hape*, the Crown opposed this request, in part on the basis that the Charter did not apply outside Canada and hence did not govern the conduct of Canadian officials at Guantanamo Bay.²³

²¹ See also *Khadr v. Canada (Prime Minister)*, [2009] F.C.J. No. 462, 2009 FC 405 (F.C.), aff'd [2009] F.C.J. No. 893, 2009 FCA 246 (F.C.A.), leave to appeal granted [2009] S.C.C.A. No. 286 (S.C.C.), wherein the Federal Court decided that in the special circumstances of that case — in particular, Mr. Khadr's youth at the relevant time and the direct involvement of Canadian authorities in his mistreatment at Guantanamo Bay by interrogating him despite knowing that he had been subjected to sleep deprivation techniques — Canada had violated Mr. Khadr's s. 7 Charter rights. According to the Court, the principles of fundamental justice obliged Canada to protect Mr. Khadr by taking appropriate steps to ensure that his treatment accorded with international human rights norms (*id.*, at para. 75). To mitigate the effect of the violation, the Court ordered Canada to request Mr. Khadr's repatriation as soon as practicable. The Federal Court of Appeal dismissed the government's appeal. On September 4, 2009, the Supreme Court of Canada granted leave to appeal.

²² [1991] S.C.J. No. 83, [1991] 3 S.C.R. 326 (S.C.C.) [hereinafter "*Stinchcombe*"]. In *Stinchcombe*, the Court recognized that the right to make full answer and defence to criminal charges is entrenched in s. 7 of the Charter as a principle of fundamental justice.

²³ The Federal Court and Federal Court of Appeal both rendered their decisions before *Hape* was released. The Federal Court dismissed Mr. Khadr's request for an order directing the Crown to provide him with disclosure ([2006] F.C.J. No. 640, 2006 FC 509 (F.C.)). The Federal Court of Appeal allowed the appeal, finding a sufficient causal connection between the actions of the government and the charges against Mr. Khadr so as to engage s. 7 of the Charter. The Court of Appeal ordered the Crown to produce unredacted copies of all relevant documents in its possession to the Federal Court for review under s. 38 of the *Canada Evidence Act*, R.S.C. 1985, c. C-5. In light of the fact that the Crown had already provided Mr. Khadr with redacted copies of some of the material in its possession further to requests under the *Access to Information Act*, R.S.C. 1985, c. A-1, and through production in other Federal Court proceedings commenced by Mr. Khadr, it was

Basing its decision on the exception to the principle of comity articulated in *Hape*, the Court unanimously ruled that the Charter applied in the circumstances, as Canadian officials had participated in a process that violated Canada's international human rights obligations. The Court relied on the fact that the regime providing for the detention and trial of Mr. Khadr at the time Canadian officials had interviewed him and shared the product of the interviews with U.S. authorities had been found by the U.S. Supreme Court to violate international human rights obligations to which Canada is a party (as well as U.S. domestic law).²⁴ By sharing the product of their interviews with U.S. authorities, Canadian officials had participated in the process impugned by the U.S. Supreme Court and in so doing, they had participated in a process that was contrary to Canada's international human rights obligations.²⁵ Accordingly, the deference to foreign law that would normally be required by the principle of comity did not apply, and Canada was "bound by the Charter" at the time it shared this information "to the extent that the conduct of Canadian officials involved it in a process that violated Canada's international obligations".²⁶

According to the Court, Mr. Khadr's section 7 right to liberty was engaged by Canada's participation in the process that was contrary to Canada's international human rights obligations. In order to mitigate the effect of that participation, Canada had a duty under section 7 of the Charter to provide him with disclosure of materials in its possession, analogous to the disclosure duty in a domestic prosecution.²⁷ However, the scope of disclosure was limited to materials arising from Canada's participation in the foreign process, as it was that participation that engaged Mr. Khadr's right to liberty.²⁸

left for the Federal Court to decide whether the Crown had complied with its disclosure obligation ([2007] F.C.J. No. 672, 2007 FCA 182 (F.C.A.)).

²⁴ In *Rasul v. Bush*, 542 U.S. 466 (2004) and *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006). See *Khadr, supra*, note 6, at paras. 21-25. Note that these decisions were issued after Canadian officials interviewed Mr. Khadr.

²⁵ *Khadr, id.*, at para. 27. The Court was careful to point out that merely conducting interviews with a Canadian citizen detained abroad under a violative process may not constitute participation, as it may often be essential for Canadian officials to interview citizens being held by violative regimes in order to provide assistance.

²⁶ *Id.*, at para. 26.

²⁷ *Id.*, at paras. 29-32, 34, 37. The Court did not directly apply *Stinchcombe*, but found that the principles of fundamental justice bound the Crown in an analogous way.

²⁸ *Id.*, at paras. 29-31.

The Court concluded that Canada had breached Mr. Khadr's section 7 Charter right by refusing to comply with his request for disclosure.²⁹ The Court did not directly apply *Stinchcombe* by ordering full disclosure, but decided that Mr. Khadr was entitled under section 7 to disclosure from the Crown of the records of the interviews, as well as information given to U.S. authorities as a direct consequence of conducting the interviews, subject to claims for privilege and public interest immunity.³⁰

In and of itself, sharing the product of the interviews was not found to constitute a Charter breach.³¹

III. ISSUES ARISING FROM *HAPE* AND *KHADR*

1. "Fundamental Human Rights Exception"

Following *Hape*, the issue arose concerning whether the majority had articulated a "fundamental human rights exception" to the general rule against the extra-territorial application of the Charter, such that the Charter may be applied in foreign sovereign territory if Canadian state actors abroad are involved in fundamental human rights violations.

Two months before the Supreme Court's *Khadr* decision was released, in *Amnesty International Canada v. Canada (Canadian Forces)*³² the

²⁹ *Id.*, at paras. 33, 36.

³⁰ *Id.*, at paras. 29-32, 37. The Supreme Court's disclosure order was more limited in scope than that of the Federal Court of Appeal. The latter Court ordered that the Crown produce unredacted copies of all documents in its possession which might be relevant to the charges (see *id.*, at paras. 37, 39). See also *Purdy v. Canada (Attorney General)*, [2003] B.C.J. No. 1881, 230 D.L.R. (4th) 361 (B.C.C.A.). In *Purdy*, the British Columbia Court of Appeal decided that a Canadian citizen who had been charged with an offence in the United States was entitled to disclosure under the Charter of material obtained by the RCMP in the course of investigating the offence jointly with the FBI. The Court held that "s. 7 can be invoked if Canada's participation is causally connected to the deprivation of a liberty interest in a foreign state" (*id.*, at para. 17) (emphasis in original). The Court noted that the deprivation of the right to full answer and defence occurred in Canada as a result of the RCMP's refusal to make disclosure, even though the effect of the deprivation would be abroad (*id.*, at para. 20). In addition, the Court held that the disclosure order would not interfere with the sovereignty of the United States, since "disclosure does no more than put the respondent in the position where he can offer the evidence obtained by disclosure to the U.S. court; it does not decide for the court whether to admit the evidence or determine how it should be used" (*id.*, at para. 24).

³¹ *Khadr, id.*, at para. 27.

³² [2008] F.C.J. No. 356, 2008 FC 336 (F.C.), affd [2008] F.C.J. No. 1700, 2008 FCA 401 (F.C.A.), leave to appeal refused [2009] S.C.C.A. No. 63 (S.C.C.) [hereinafter "*Amnesty*"]. The applicants brought an application for judicial review with respect to the transfer or potential transfer to Afghan authorities of individuals detained by the Canadian Forces. They alleged that the arrangements between Canada and Afghanistan did not provide adequate substantive or procedural safeguards to ensure that detainees transferred to Afghanistan would not be exposed to a substantial

Federal Court concluded that the majority decision in *Hape* did not create a “fundamental human rights exception” justifying the extraterritorial application of the Charter, and that the Charter would not apply to restrain the conduct of the Canadian Forces in Afghanistan.³³

In this case, the applicants argued that the Charter would apply to the actions of the Canadian Forces in Afghanistan in transferring detainees into the custody of the Afghan authorities if such transfer exposed the detainees to a substantial risk of torture.³⁴ In essence, their position was that because transferring detainees to a substantial risk of torture would violate Canada’s international human rights obligations, the Charter would apply.

The applicants relied on the majority’s decision in *Hape* for the proposition that the Charter may exceptionally apply in the territory of another state where Canadian officials participate in activities in that state that violate Canada’s international human rights obligations. The applicants believed that the existence of a “fundamental human rights exception” to the rule against the extra-territorial application of the Charter in *Hape* was evidenced by the majority’s affirmation that the principle of comity may give way where the participation of Canadian officers in investigations abroad would place Canada in violation of its international human rights obligations. They also pointed to the majority’s statement that in future cases, such participation might justify a remedy under section 24(1) of the Charter because of the impact of those activities on Charter rights in Canada.³⁵

risk of torture. They sought declarations that ss. 7, 10 and 12 of the Charter applied to individuals detained by the Canadian Forces in Afghanistan, a writ of prohibition preventing the transfer of detainees until such safeguards had been put in place and a writ of *mandamus* compelling the respondents to inquire into the status of detainees already transferred to Afghanistan and to demand their return. The parties agreed to submit two questions to the Court by way of a motion pursuant to Rule 107(1) of the *Federal Courts Rules*, SOR/98-106: (a) Does the *Canadian Charter of Rights and Freedoms* apply during the armed conflict in Afghanistan to the detention of non-Canadians by the Canadian Forces or their transfer to Afghan authorities to be dealt with by those authorities?; and (b) If the answer to the above question is “no”, then would the Charter nonetheless apply if the applicants were ultimately able to establish that the transfer of the detainees in question would expose them to a substantial risk of torture? This paper does not address the issues in relation to question (a).

³³ *Amnesty, id.*, at paras. 303-328 (F.C.).

³⁴ The Supreme Court of Canada has concluded that international law generally rejects extradition to the death penalty for abolitionist states (see *Burns, supra*, note 3) and deportation to a real risk of torture (see *Suresh, supra*, note 3). In both *Burns* and *Suresh*, the Supreme Court was dealing with removals of persons from Canada to a foreign state; in the *Amnesty* litigation, *id.*, the individuals in question were outside Canada so the issue was one of extraterritorial transfer, not removal.

³⁵ *Amnesty, supra*, note 32, at paras. 305-307 (F.C.).

The Federal Court decided that no such exception to the territorial application of the Charter had been articulated in *Hape*. The Court reasoned that the application of the Charter cannot be dependent on whether a fundamental human right has been infringed. The Court wrote:

Surely Canadian law, including the *Canadian Charter of Rights and Freedoms*, either applies in relation to the detention of individuals by the Canadian Forces in Afghanistan, or it does not. It cannot be that the Charter will not apply where the breach of a detainee's purported Charter rights is of a minor or technical nature, but will apply where the breach puts the detainee's fundamental human rights at risk.

That is, it cannot be that it is the nature or quality of the Charter breach that creates extraterritorial jurisdiction, where it does not otherwise exist. That would be a completely unprincipled approach to the exercise of extraterritorial jurisdiction.³⁶

The Court stated that to find that the Charter applied as a result of the seriousness of the impugned actions or their effects would be to conflate the question of the existence of Charter jurisdiction with the question of whether a fundamental right had been infringed.³⁷ The Court also noted that if the application of the Charter were dependent on the nature of the breach, this would lead to "tremendous uncertainty" for Canadian state actors carrying out activities in foreign countries,³⁸ presumably because they would not be governed by a legally predictable set of rules.

In addition, the Federal Court found that the majority's reasons in *Hape* did not support the recognition of a "fundamental human rights exception". According to the Court, the majority in *Hape* had stated that Canadian officials operating outside Canada cannot act in a way that violates Canada's international human rights obligations. However, it did not follow from the fact that international human rights law obligations may operate to constrain the activities of Canadian state actors abroad that the Charter would apply to such activities. The Federal Court also asserted that its interpretation of *Hape* was supported by the concurring decisions of Bastarache and Binnie JJ., both of whom saw the majority as substituting international human rights law for Charter guarantees.³⁹

The Court also considered the majority's statement in *Hape* that participation by Canadian officials operating overseas in activities that

³⁶ *Id.*, at paras. 310-311.

³⁷ *Id.*, at paras. 312-313.

³⁸ *Id.*, at paras. 312-314.

³⁹ *Id.*, at paras. 315-324.

would breach Canada's international human rights obligations might justify a remedy under section 24(1) of the Charter because of the impact of those activities on Charter rights in Canada. The Court found that such a situation did not arise in this case, as it was difficult to perceive of an impact on Charter rights in Canada.⁴⁰

Based in part on the foregoing considerations, the Federal Court concluded that individuals held in Canadian Forces detention facilities in Afghanistan did not enjoy rights under the Charter, but rather enjoyed rights conferred on them by the Afghan constitution and by international law.⁴¹

By the time this matter was before the Federal Court of Appeal, the Supreme Court's *Khadr* decision had been released. The appellants argued that the Supreme Court in *Khadr* had "confirmed that *Hape* did indeed find that the *Charter* applied extraterritorially in respect of fundamental human rights violations at international law".⁴² The Federal Court of Appeal rejected this argument, and affirmed the lower court's decision. In so doing, the appellate court expressed agreement with the Federal Court's reasons, and asserted that "*Khadr* has not changed the principles applicable to the concepts of territoriality and of comity set out by the Supreme Court of Canada in *Hape*."⁴³

According to the Federal Court of Appeal, the Supreme Court in *Khadr* had confirmed that comity, or deference for a foreign process, should give way where participation in activities in a foreign state would place Canada in violation of its international human rights obligations. However, it did not follow that the Charter would then apply in the territory of that foreign state as a consequence of such a violation.⁴⁴

The Federal Court of Appeal also pointed out that the disclosure order granted by the Supreme Court in *Khadr* "remained territorial", in

⁴⁰ *Id.*, at paras. 325-326.

⁴¹ *Id.*, at para. 327.

⁴² *Id.*, at para. 8 (F.C.A.) (quoting para. 37 of the appellants' memorandum).

⁴³ *Id.*, at para. 9. But see *Khadr v. Canada (Prime Minister)*, *supra*, note 21, wherein the Federal Court accepted that the Supreme Court in *Hape* and *Khadr* had concluded that an exception to the general rule that the Charter does not apply extraterritorially arises where the activities of Canadian officials operating outside Canada violate Canada's international human rights obligations. The Court stated at para. 30:

The Court [in *Khadr*] referred to its prior decision in *R. v. Hape*, 2007 SCC 26 where it had concluded that the *Charter* generally does not apply to Canadian investigators operating outside of Canada. But *Hape* had also identified an exception to that general rule where the activities of Canadian agents violated Canada's international obligations, particularly its human rights commitments.

⁴⁴ *Amnesty, id.*, at paras. 19-20.

that it only encompassed Canadian documents.⁴⁵ It characterized *Khadr* as “a case where a Canadian citizen obtained disclosure of documents held in Canada and produced by Canadian officials for a breach of his rights under section 7 of the Charter by Canadian officials participating in a foreign process that violated Canada’s international human rights obligations.”⁴⁶ According to the Court of Appeal, the factual underpinning of *Khadr* was “miles apart” from the situation in *Amnesty*, where “foreigners, with no attachment whatsoever to Canada or its laws, are held in CF detention facilities in Afghanistan”.⁴⁷ The Supreme Court of Canada denied the appellants leave to appeal.

2. Beneficiaries of Charter Rights

A second issue arising from the Supreme Court’s jurisprudence on the extraterritorial application of the Charter is the extent to which a non-Canadian citizen outside Canada who is not subjected to a Canadian judicial process is entitled to claim Charter rights.⁴⁸

⁴⁵ *Id.*, at para. 11.

⁴⁶ *Id.*, at para. 13.

⁴⁷ *Id.*, at para. 14.

⁴⁸ The issue of whether non-citizens residing outside Canada are able to claim rights under the Charter has also arisen in the immigration law context. Recent jurisprudence in this area suggests that non-citizens residing outside Canada are not entitled to the protection of the Charter. See *Deol v. Canada (Minister of Citizenship and Immigration)*, [2001] F.C.J. No. 1034, 2001 FCT 694 (F.C.T.D.), affd on other grounds [2002] F.C.J. No. 949, 2002 FCA 271 (F.C.A.), leave to appeal refused [2002] S.C.C.A. No. 358 (S.C.C.); *Lee v. Canada (Minister of Citizenship and Immigration)*, [1997] F.C.J. No. 242, 126 F.T.R. 229 (F.C.T.D.); *Ruparel v. Canada (Minister of Employment and Immigration)*, [1990] F.C.J. No. 701, [1990] 3 F.C. 615 (F.C.T.D.); and the discussion in L. Waldman, *Immigration Law and Practice*, 2d ed., vol. 1 (Markham, ON: LexisNexis Canada, 2005), at §2.13. Note, however, that in *Crease v. Canada*, [1994] 3 F.C. 480, [1994] F.C.J. No. 711 (F.C.T.D.), the Federal Court (Trial Division) found that the plaintiff, a Venezuelan citizen residing outside Canada, had standing to bring a claim relying on s. 15(1) of the Charter. In this case, the plaintiff sought to challenge a provision of the *Citizenship Act*, R.S.C. 1985, c. C-29, which precluded him from being granted Canadian citizenship in part because his mother was not a citizen at the time of his birth in Venezuela. Although his mother had been born in Canada, at the time of the plaintiff’s birth in 1943 anyone born in Canada was considered to be a British subject; the term “Canadian citizen” did not come into effect until 1947. The Court determined that the plaintiff had standing to bring a Charter challenge because the impugned law, as a domestic law, was subject to Charter scrutiny, and because the plaintiff had a “direct connection to Canada” by birth to a Canadian-born mother. The Court also believed that it would be “untenable” to deny him standing to bring the Charter challenge on the basis that he was not a citizen, as his challenge was to the very provision which prevented him from being granted citizenship. Ultimately, however, the Court dismissed the action on the basis that to apply the Charter in this case would result in an impermissible retroactive application of the Charter, and that the plaintiff’s Charter rights had not been infringed. See also *Chazi c. Québec (Procureur général)*, [2008] J.Q. no. 8692 (Que. C.A.), leave to appeal refused [2008] S.C.C.A. No. 461 (S.C.C.), wherein the Quebec Court of Appeal

In her dissenting reasons in *Cook*, L’Heureux-Dubé J. (McLachlin J., as she then was, concurring) asserted that determining whether a person claiming a Charter right is the holder of such a right should precede an analysis of the Charter’s application under section 32(1). She wrote:

As a preliminary note I point out that my colleagues’ reasons, like the arguments of the parties, proceed on the assumption that the appellant held *Charter* rights, even though he was neither present in Canada, nor a Canadian citizen, at the time of the alleged violation of these rights. In my opinion, this analysis misses a crucial first step — a determination of whether the person claiming a *Charter* right is indeed the holder of a right under the Canadian constitution. The question of whether the claimant holds a right, in my view, must logically be determined prior to the question of whether there is state action involved that may have infringed that right.⁴⁹

The accused in *Cook* was an American citizen who had been interrogated by Canadian detectives in the United States and prosecuted in Canada for a murder that occurred in Canada. At his criminal trial in Canada, he sought to have a statement obtained by the Canadian police in the United States excluded on the basis that it had been obtained in violation of his section 10(b) Charter right to counsel, which is guaranteed to “everyone”, on arrest or detention.⁵⁰ Neither party had put forward arguments on the question of whether the appellant was the beneficiary of this right, and the question was conceded by the Crown. Without deciding the issue, L’Heureux-Dubé J. cautioned against an interpretation of the term “everyone” that did not take into account the purposes of the Charter. She wrote:

The term “everyone” seems quite broad. Nevertheless, interpreting it must take into account the purposes of the *Charter*. I am not convinced that passage of the *Charter* necessarily gave rights to everyone in the world, of every nationality, wherever they may be, even if certain rights contain the word “everyone”. Rather, I think that it is arguable that “everyone” was used to distinguish the rights granted to everyone on the territory of Canada from those granted only to citizens of Canada and those granted to persons charged with an offence.⁵¹

reviewed the jurisprudence in this area but decided that it was not necessary to decide in that case whether the appellants could claim the protection of s. 15(1) of the Charter (*id.*, at paras. 63-92).

⁴⁹ *Cook*, *supra*, note 5, at para. 85.

⁵⁰ Section 10(b) provides that: “Everyone has the right on arrest or detention ... to retain and instruct counsel without delay and to be informed of that right.”

⁵¹ *Cook*, *supra*, note 5, at para. 86.

Justice L’Heureux-Dubé’s concerns have been acknowledged by other Supreme Court of Canada Justices. The majority in *Hape* noted her assertion that a determination of whether someone is a rights holder should precede an analysis of whether there is state action.⁵² In addition, the majority in *Cook* did consider whether finding that the Charter applied in that case would result in Charter rights that are guaranteed to “everyone” being conferred too broadly. Writing for the majority, Cory and Iacobucci JJ. stressed that their holding that the Charter applied to the actions of the Canadian detectives was based on the particular facts of that case. They wrote:

We caution that the holding in this case marks an exception to the general rule in public international law ... that a state cannot enforce its laws beyond its territory. The exception arises on the basis of very particular facts before us. Specifically, the impugned actions were undertaken by Canadian governmental authorities in connection with the investigation of a murder committed in Canada for a process to be undertaken in Canada. The appellant, the rights claimant herein, was being compulsorily brought before the Canadian justice system. This situation is far different from the myriad of circumstances in which persons outside Canada are trying to claim the benefits of the *Charter simpliciter*.⁵³

In these circumstances, the majority believed that it was “reasonable to permit the appellant, who ... [was] being made to adhere to Canadian criminal law and procedure, to claim Canadian constitutional rights relating to the interview conducted by the Canadian detectives in New Orleans”.⁵⁴

More recently, the issue of whether non-Canadian citizens outside Canada are entitled to claim Charter rights was addressed in *Amnesty*. The Federal Court of Appeal in *Amnesty* disposed of the appeal in part on the basis that the detainees did not have rights guaranteed to “everyone” under the Charter. With regard to this issue, the Court stated that “[e]ven though section 7 of the Charter applies to ‘Everyone ...’ (compare with the words ‘Every citizen ...’ in section 6 of the Charter) all the circumstances in a given situation must be examined before it can be said that the Charter applies.”⁵⁵ The Court concluded that in the

⁵² *Hape*, *supra*, note 4, at para. 81.

⁵³ *Cook*, *supra*, note 5, at para. 53.

⁵⁴ *Id.*, at para. 51.

⁵⁵ *Amnesty*, *supra*, note 32, at para. 20 (F.C.A.).

circumstances, the detainees, as foreigners in another country with no attachment to Canada or its laws, could not claim Charter rights.⁵⁶

This issue was also recently addressed by the Federal Court in *Slahi v. Canada (Minister of Justice)*.⁵⁷ Like Omar Khadr, the applicants in this case — Mohamedou Ould Slahi and Ahcene Zemiri — were detainees in Guantanamo Bay. Canadian officials had interviewed them in Guantanamo Bay and had passed on information from those interviews to U.S. authorities. Slahi and Zemiri sought disclosure from the federal Crown of records of the interviews and records of information shared with the United States for the purposes of *habeas corpus* petitions initiated by them in the U.S. District Court. After the Crown refused to comply with their requests, they brought an application for judicial review in the Federal Court in Canada, alleging that their section 7 Charter rights had been violated and seeking an order under section 24(1) of the Charter directing disclosure.

The Federal Court declined to accept the Crown's attempts to distinguish *Khadr* on the basis, among other things, that the applicants sought disclosure for the purposes of their U.S. *habeas corpus* proceedings in the U.S. District Court, rather than for prosecution in the military commission regime impugned by the U.S. Supreme Court as described in *Khadr*, and that there was an effective documentary discovery process in the U.S. District Court.

The Federal Court found this case to be virtually identical to *Khadr*, in that Canadian officials had participated in a process at Guantanamo Bay that violated Canada's international human rights law obligations. Nonetheless, the Court dismissed the application, distinguishing *Khadr* on the basis that as non-Canadian citizens outside Canada with no sufficient connection to Canada, the applicants were not entitled to avail themselves of the rights guaranteed by section 7 of the Charter.

In its analysis, the Court pointed to the dissenting comments of L'Heureux-Dubé J. in *Cook*, wherein she expressed doubt that the use of the term "everyone" in certain provisions of the Charter "gave rights to everyone in the world, of every nationality, wherever they may be".⁵⁸ The Court was also guided by what it saw as the purpose of the Charter,

⁵⁶ *Id.*, at paras. 14-21. The Federal Court also found that the detainees did not possess rights under the Charter (*Amnesty, id.*, at para. 327 (F.C.)).

⁵⁷ [2009] F.C.J. No. 141, 2009 FC 160 (F.C.), affd 2009 FCA 259 (F.C.A.) [hereinafter "*Slahi & Zemiri*"]. At the time of writing, leave to appeal had not been sought from the Supreme Court of Canada.

⁵⁸ *Id.*, at para. 43 (F.C.), citing *Cook, supra*, note 5.

namely to enshrine and protect the fundamental rights of Canadian citizens and those within Canadian territory. The Court stated as follows:

It must be remembered that the Charter, an integral part of Canada's supreme law, is a Canadian instrument enacted to enshrine and protect the fundamental rights of Canadians and those finding themselves within Canada's territory. Its extraterritorial reach is exceptional and limited, as is mandated by respect for the principles of sovereignty and judicial comity.⁵⁹

The Court also remarked that the Supreme Court in *Khadr* had noted on several occasions that Mr. Khadr was a Canadian citizen. Most significant for the Court was the fact that the Supreme Court had created a link between Canada's duty under section 7 to provide disclosure and the fact that the liberty interests of a Canadian citizen were engaged. The Court stated:

In its reasons, the Supreme Court noted several times that Mr. Khadr was a Canadian citizen. Perhaps the most compelling of these passages is at paragraph 31 where the Supreme Court stated:

... Thus, s. 7 imposes a duty on Canada to provide disclosure of materials in its possession arising from its participation in the foreign process that is contrary to international law and jeopardizes the liberty of a Canadian citizen. [My emphasis.]⁶⁰

The Court in *Slahi & Zemiri* reviewed Supreme Court of Canada case law pertaining, for the most part, to the extraterritorial application of the Charter, and found that the jurisprudence illustrated that the protection of section 7 may be available to three categories of individuals: (1) non-Canadians who are physically present in Canada;⁶¹ (2) non-Canadians who are subject to a criminal trial in Canada;⁶² and (3) Canadian citizens outside Canada, in exceptional circumstances.⁶³ The

⁵⁹ *Id.*, at para. 48.

⁶⁰ *Id.*, at para. 45.

⁶¹ See, e.g., *Singh v. Canada (Minister of Employment and Immigration)*, [1985] S.C.J. No. 11, [1985] 1 S.C.R. 177 (S.C.C.). In *Singh*, the issue was whether individuals physically present in Canada who had been denied refugee status were entitled to the protection of s. 7 of the Charter. Writing for Dickson C.J.C. and Lamer J. with respect to the Charter issue, Wilson J. accepted that the term "everyone" in s. 7 of the Charter "includes every human being who is physically present in Canada and by virtue of such presence amenable to Canadian law" (*id.*, at para. 35).

⁶² See, e.g., *Cook*, *supra*, note 5. As was stated above, in *Cook* the accused was an American citizen who had been questioned by Canadian police outside the country for the purposes of his criminal trial in Canada.

⁶³ See, e.g., *R. v. A.*, [1990] S.C.J. No. 43, [1990] 1 S.C.R. 995 (S.C.C.); *Khadr*, *supra*, note 6. In *R. v. A.*, the appellants were Canadian citizens, one of whom had been subpoenaed to testify in

Court concluded from its review that in order for section 7 Charter rights to be asserted, the circumstances must connect the claimant with Canada, either through presence in Canada, a criminal trial in Canada or Canadian citizenship.⁶⁴

In this case, the Court found that there was no such requisite connection. Neither applicant was present in Canada, subject to a criminal trial in Canada, or a Canadian citizen. The Court found that Mr. Slahi had resided in Montreal for approximately two months, between November 26, 1999 and January 21, 2000, after having been granted landed immigrant status.⁶⁵ Mr. Zemiri had been a resident from 1994 to June 2001, but he had never obtained permanent resident status in Canada.⁶⁶ The Court found that these circumstances were not sufficient to establish a nexus to Canada such that the applicants' section 7 rights could be engaged. Nonetheless, the Court declined to award costs in this matter, "in view of the uncertain state of the law on the question of the extraterritorial application of the Charter to non-Canadians".⁶⁷ An appeal to the Federal Court of Appeal was dismissed with costs, substantially for the reasons given by the Federal Court.

IV. CONCLUSION

This paper has identified two issues arising from the *Hape* and *Khadr* decisions that the Federal Courts have addressed. There are several additional questions arising from these decisions that future

a criminal trial in Canada. As a result of a perceived threat to their security arising from the testimony, particularly to the security of two of them who were outside the country, the appellants applied to quash the subpoena or for a remedy under s. 24(1) of the Charter. The Superior Court dismissed the matter, in part on the basis that because two of the applicants were outside the country, a s. 24(1) remedy was not available to them. When the matter came before the Supreme Court, the majority directed a new hearing before the Superior Court. They noted that the appellants were all Canadian citizens, that the RCMP had undertaken in Canada to provide them with protection, that one of the appellants was required to testify in Canada, and that the two appellants outside Canada had left in part due to assurances given by the RCMP. The majority stated (at para. 6) that:

[i]n those circumstances the judge was in error both in failing to consider the safety of the appellants and in finding that in the special circumstances of this case remedies were not available to persons who were out of the country.

.....

In the circumstances, the presiding judge might consider exercising either the inherent jurisdiction of the court or the application of an appropriate *Charter* remedy.

⁶⁴ *Slahi & Zemiri*, *supra*, note 57, at para. 47 (F.C.).

⁶⁵ *Id.*, at para. 8.

⁶⁶ *Id.*, at para. 13.

⁶⁷ *Id.*, at para. 55.

courts in Canada may be required to consider. For example, to what extent would a Canadian court pronounce on another country's adherence to international law? The Supreme Court did not have to address this issue in *Khadr*, in light of the decisions of the U.S. Supreme Court holding that detainees at Guantanamo Bay had illegally been denied access to *habeas corpus* and that the procedures under which they were to be prosecuted violated the *Geneva Conventions*. In *Khadr*, the Court noted that issues may arise about whether it is appropriate for a Canadian court to pronounce on the legality of a process within the territory of another country.⁶⁸

Questions may also arise concerning the nature of conduct sufficient to constitute "participation" in activities that violate international human rights obligations. In *Khadr*, the Supreme Court was careful to define Canada's participation as sharing the product of the interviews with U.S. authorities, as opposed to actually conducting the interviews of Mr. Khadr. The Court wrote that "[m]erely conducting interviews with a Canadian citizen held abroad under a violative process may not constitute participation in that process," as "[i]ndeed, it may often be essential that Canadian officials interview citizens being held by violative regimes to provide assistance to them."⁶⁹

In addition, courts may be called on to define exceptions, besides consent, to the territorial jurisdiction of states as recognized by international law, and to pronounce on how they would affect the extraterritorial application of the Charter.⁷⁰ For example, a future court may be required to pronounce on whether extra-territorial jurisdiction in

⁶⁸ *Khadr*, *supra*, note 6, at para. 21.

⁶⁹ *Id.*, at para. 27.

⁷⁰ In *Amnesty*, *supra*, note 32, the Federal Courts determined that "effective military control of the person" was not an exceptional basis recognized at international law that would allow for the extra-territorial application of the Charter. Note that the U.S. Supreme Court, the House of Lords and the European Court of Human Rights have all held, in determining the extraterritorial application of different human rights instruments, that a state exercises jurisdiction outside its own territory only under very limited, exceptional circumstances recognized at international law (see *Boumediene v. Bush*, 128 S. Ct. 2229, at 2257-2259 (2008); *Munaf v. Geren*, 128 S. Ct. 2207, at 2220-2222, 2225 (2008); *Al-Skeini v. Secretary of State for Defence*, [2007] UKHL 26, at paras. 49, 97, 109; *Bankovic v. Belgium* (2001), 11 BHRC 435 (GC), at paras. 59-60, 71, 73). The European Court of Human Rights has indicated that those exceptional circumstances are: (a) consent: the government of the state with *de jure* sovereignty over the territory consents to the application of the laws of a foreign state; (b) effective control of territory: a state occupies territory of another state, exercising all or some of the public powers normally exercised by the government; or (c) specific situations where customary international law and treaty provisions have recognized the extraterritorial exercise of jurisdiction, such as within embassies or on board aircraft and vessels registered in or flying the flag of that state. See *Bankovic v. Belgium*, *id.*, at paras. 59-60, 71, 73.

respect of embassies and consulates exists in international law, and whether the Charter applies within a Canadian embassy or consulate.

It is important to recognize that it does not follow from a determination that the Charter does not apply extra-territorially that no laws will apply to the conduct of Canadian officials outside Canada. Moreover, as the decisions in *Amnesty* demonstrate, there is a framework of international law which has as its object the protection of human rights.