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 DAVID ASPER CENTRE FOR CONSTITUTIONAL RIGHTS

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

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PART I – OVERVIEW

1. Canadian officials act abroad in many ways. They work with foreign law enforcement to investigate transnational crime; they gather intelligence; and, in a case such as the one on appeal, they investigate and prosecute members of the Canadian armed forces stationed outside of Canada.

2. This Court's jurisprudence on the applicability of the *Charter* outside of Canada's borders is unsettled. The Court has held that the *Charter* can apply to the actions of Canadian authorities abroad so long as there is no objectionable extraterritorial effect. The Court then changed course in *Hape* and held that the *Charter* cannot apply unless certain narrow exceptions are satisfied, although it purported to refine rather than overturn its prior jurisprudence. Moreover, the Court has not previously confronted this question in the context of a case such as this — where, by virtue of the accused's status as a member of the armed forces, the Canadian authorities were investigating him for conduct *outside* of Canada for its non-compliance with *Canadian law*.

3. This appeal presents this Honourable Court with the opportunity to reconcile its prior jurisprudence through a unifying approach to the extraterritorial application of the *Charter* — one that is flexible enough to be adapted regardless of the context in which the issue arises, and one that draws on the Court's pre-*Hape* jurisprudence, while ensuring that the principles of comity and sovereignty are given sufficient weight to address the concerns expressed by the majority in *Hape*.

4. The David Asper Centre for Constitutional Rights (the **"Asper Centre"**) submits that this Court should interpret s. 32(1) of the *Charter* broadly and generously as authorizing Canadian courts to assess the conduct of Canadian state actors in deciding whether to grant a remedy under Canadian constitutional law — regardless of where the conduct took place and the nature of the Canadian state activity. Such an interpretation is consistent with the principles of comity and state sovereignty, which can be considered as a critical part of the *Charter* analysis that follows (within the right itself and at the remedial stage). This approach best strikes the balance between the rights of the individual and the interests of the Canadian state in acting beyond Canada's borders.

PART II – QUESTION IN ISSUE

5. The Asper Centre intervenes on the first question raised by the Appellant: when does the *Charter* apply extraterritorially the actions of Canadian authorities abroad?

PART III - ARGUMENT

A. *Pre-Hape Jurisprudence: the Charter Can Apply to Canadian Authorities Abroad*

6. There are four decisions that, taken together, serve as the foundation of the pre-*Hape* jurisprudence: *Harrer, Terry, Schreiber,* and *Cook*. Collectively, they held that the *Charter* does not apply to the actions of foreign authorities acting in foreign jurisdictions, but that the *Charter* can apply to the actions of *Canadian* authorities acting in foreign jurisdictions.

7. *Harrer* and *Terry* both raised the issue of whether statements made by the appellant in the United States (US) to US police were admissible in a Canadian trial. In *Harrer,* the majority held that the *Charter* does not apply to foreign authorities acting on foreign soil.[1] As the majority explained, the *Charter* cannot apply to actions beyond the scope of s. 32(1).[2] Because s. 32(1) states that the *Charter* applies to Canadian authorities in respect of all matters within the authority of Parliament, it could not apply to foreign authorities acting on foreign soil. The Court echoed this conclusion in *Terry,* and emphasized that applying the *Charter* to foreign authorities in foreign jurisdictions would violate "the exclusivity of the foreign state's sovereignty within its territory, where its law alone governs the process of enforcement."[3] This principle is non-controversial.

8. In *Schreiber,* the Court considered the applicability of the *Charter* to the actions of *Canadian* authorities *in Canada* when working together with foreign authorities in a foreign jurisdiction. There, Canadian government officials sent letters of request to Switzerland to obtain evidence.[4] The respondent argued that the Canadian officials had to comply with s. 8 of the *Charter* before sending the letters. The majority disagreed. Because the Canadian officials merely sent the letters and it was the Swiss authorities who carried out the search, s. 8 did not apply.

9. The question of whether the *Charter* applies to *Canadian* (as opposed to foreign) authorities acting in foreign jurisdictions was not resolved in *Harrer*, *Terry*, or *Schreiber.* However, it was implicit in the Court's reasoning that the *Charter* could apply to Canadian authorities. The majority in *Harrer* deliberately emphasized that its reasoning should not be

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[1] *R. v. Harrer,* [1995] 3 S.C.R. 562, at para. 10.
[2] *Canadian Charter of Rights and Freedoms*, being Part I of the *Constitution Act, 1982*, Schedule B, Canada Act 1982, 1982, c. 11 (U.K.), s. 32(1),
[3] *R. v. Terry*, [1996] 2 S.C.R. 207, at para. 19.
[4] *Schreiber v. Canada (A.G.)*, [1998] 1 S.C.R. 841.

interpreted to mean that the "ambit of the *Charter* is automatically limited to Canadian territory."[5] The *Harrer* majority added that "had the interrogation about a Canadian offence been made by Canadian peace officers in the United States in circumstances that would constitute a violation of the *Charter* had the interrogation taken place in Canada, an entirely different issue would arise."[6] Similarly, the majority in *Schreiber* suggested that if the search and seizure had been conducted in Switzerland by Canadian authorities, the *Charter* would have applied. Chief Justice Lamer added that "[Canadian] officials are clearly subject to Canadian law, including the *Charter,* within Canada, and in most cases, outside it."[7]

10. In *Cook,* the facts directly raised the question of whether the *Charter* applies to Canadian authorities acting in foreign jurisdictions. There, the accused was interrogated by Canadian police officers in the US with respect to an offence that allegedly committed in Canada. The accused argued that the *Charter* applied to the actions of the Canadian police officers and that the statements he made to them were inadmissible at his Canadian trial, as they had violated his s. 10(*b*) right. The majority agreed. Specifically, it found that the *Charter* could apply where: (1) the impugned actions of Canadian authorities fall within s. 32(1) of the *Charter*; and (2) the application of the *Charter* to those actions does not interference with the sovereignty of the foreign state and does not generate an objectionable extraterritorial effect.[8]

B. Hape and Its Difficulties

11. Nine years after *Cook,* the Court revisited whether the *Charter* applies to the actions of Canadian authorities abroad in *Hape.* The majority judgment altered the analysis. In investigating the accused in Turks and Caicos for money laundering, Canadian authorities conducted warrantless searches of the accused's office and gathered evidence. The accused sought to have that evidence excluded at trial on the basis that the search violated s. 8. A majority of the Court disagreed, finding that the *Charter* does not apply to Canadian authorities acting in foreign jurisdictions, "except by virtue of a permissive rule derived from international custom or from a convention" or with "the

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[5] *R. v. Harrer,* [1995] 3 S.C.R. 562, at para. 10.
[6] *R. v. Harrer,* [1995] 3 S.C.R. 562, at para. 11.
[7] *Schreiber v. Canada (A.G.)*, [1998] 1 S.C.R. 841, at para. 32 (Lamer C.J. concurring).
[8] *R. v. Cook,* [1998] 2 S.C.R. 597, at para. 25.

consent of the host state."[9] The majority arrived at this result by drawing on principles of comity, state sovereignty and territorial jurisdiction to interpret s. 32(1) to mean that an investigation by Canadian authorities abroad is not a matter within the authority of Parliament.[10]

12. Though the majority held that the *Charter* did not apply, it provided two indirect means by which a *Charter* remedy could be granted.[11] First, the majority held that evidence can be excluded if it was obtained in a manner that would render the trial unfair, pursuant to ss. 7 and 11(*d*) of the *Charter* (the **"trial fairness exception"**). The majority justified this on the basis of the court's responsibility to control its own process, and on the distinction between considering ss. 7 and 11(*d*) *ex post facto* and asking whether the actions of Canadian authorities abroad complied with a particular *Charter* right.[12] In the majority's view, considering ss. 7 and 11(*d*) *ex post facto* did not raise the same concerns of comity and sovereignty. Second, the majority held that a s. 24(1) remedy could be granted where Canadian authorities acting abroad violate Canada's international human rights obligations, because of the impact of those activities on *Charter* rights in Canada (the **"international human rights exception"**).[13]

13. The *Hape* majority characterized its approach as a balancing methodology. In practice, however, *Hape* has been interpreted to create a bright line rule that is subject to narrow exceptions. These exceptions are difficult to reconcile with the rule, as they purport to provide a limited basis for granting an after-the-fact *Charter* remedy, despite finding that the *Charter* does not apply to the Canadian state conduct at issue. This has prompted one commentator to criticize the international human rights exception as akin to "looking through the wrong end of the telescope."[14] Indeed, the *Hape* majority itself conceded that "[t]he *Charter*'s primary role is to limit the exercise of government and legislative authority in advance, so that breaches are stopped before they occur."[15] The exceptions, however, work in reverse — to the limited extent they apply.

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[9] *R. v. Hape,* 2007 SCC 26, at paras. 65 and 68.
[10] *R. v. Hape,* 2007 SCC 26, at paras. 103-104.
[11] K. Roach, "*R. v. Hape* Creates Charter-Free Zones for Canadian Officials Abroad" (2007) Crim. Law Q., Vol. 53, N. 1., at pp. 1-2.
[12] *R. v. Hape,* 2007 SCC 26, at para. 91.
[13] *R. v. Hape,* 2007 SCC 26, at para. 101.
[14] H. S. Fairley, "International Law Comes of Age: *Hape v. The Queen*" (2008) 87-1 *Canadian Bar Review* 229, at p. 243.
[15] *R. v. Hape,* 2007 SCC 26, at para. 91.

14. Moreover, an after-the-fact remedy will only be available if the affected individual becomes aware of the state conduct and seeks a remedy in a Canadian court (*e.g.,* if prosecuted for a crime).[16] This will not always be the case. In terrorism and intelligence gathering operations, for instance, Canadian authorities are not concerned with prosecuting conduct, but rather "prevention, disruption and rendition."[17] Such matters will rarely become the subject of prosecution.[18] The affected individuals may never receive a remedy, and the exceptions will have done little to advance the *Hape* majority's stated goal of achieving a "just accommodation between the interests of the individual and those of the state in providing a fair and working system of justice."[19]

15. The post-*Hape* jurisprudence highlights the difficulties with the majority's approach. In *Afghan Detainees,* the applicant argued that the *Charter* applied to Canadian Forces through the international human rights exception because there was evidence that they were transferring individuals to Afghan authorities who were then being tortured by those Afghan authorities.[20] The trial judge, however, held that she was prevented from applying that exception because it only applied where there was "an impact on those activities on *Charter* rights in Canada."[21] But she expressed uneasiness with the result. Although her role was not to "second-guess" the *Hape* majority*,* she expressed concerns about the finding that the *Charter* could not apply to the circumstances before her.[22] It was "troubling that while Canada can prosecute members of its military after the fact for mistreating detainees under their control, a constitutional instrument whose primary purpose is, according to the Supreme Court, to limit the exercise of the authority

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[16] Kent Roach, "*R. v. Hape* Creates Charter-Free Zones for Canadian Officials Abroad" (2007) Crim. Law Q., Vol. 53, N. 1., at p. 2; R. J. Currie and J. Rikhof, *International & Transnational Criminal Law* (Toronto: Irwin Law, 2020) 3rd ed., at p. 635.
[17] K. Roach, "*R. v. Hape* Creates Charter-Free Zones for Canadian Officials Abroad" (2007) Crim. Law Q., Vol. 53, N. 1., at p. 2.
[18] K. Roach, "*R. v. Hape* Creates Charter-Free Zones for Canadian Officials Abroad" (2007) Crim. Law Q., Vol. 53, N. 1., at p. 2; N. Rosati, "Canadian National Security in Cyberspace: The Legal Implications of the Communications Security Establishment's Current and Future Role as Canada's Lead Technical Cybersecurity and Cyber Intelligence Agency" (2019) 42 Man. L. J. 189.
[19] *R. v. Hape,* 2007 SCC 26, at para. 100, citing *R. v. Harrer,* [1995] 3 S.C.R. 562, at para. 14.
[20] *Amnesty International Canada v. Canada (Chief of the Defence Staff),* 2008 FC 336, at para. 5, aff'd 2008 FCA 401, leave to appeal to the SCC refused, [2009] SCCA No. 63.
[21] *Amnesty International Canada,* 2008 FC 336, at paras. 325-326.
[22] *Amnesty International Canada,* 2008 FC 336, at para. 336.

of state actors so that breaches of the *Charter* are prevented, will not apply to prevent that mistreatment in the first place."[23]

16. In the case of *RT,* Canadian authorities assisted in arresting and prosecuting the applicant in Belize. [24] At her Canadian trial, the applicant wished to invoke the international human rights exception and requested disclosure regarding the involvement of the Canadian authorities in her Belize arrest. The Crown refused disclosure on the basis that the *Charter* did not apply.[25] In determining whether international human rights exception applied, the trial judge highlighted the inherent tension caused by the *Hape* majority's approach: on one hand, if the *Charter* does not apply to Canadian authorities acting abroad, then the Crown did not have to provide disclosure because the applicant's right to make full answer and defence was not engaged. On the other hand, it was impossible to determine whether a *Charter* remedy could be granted through the exception without that disclosure.[26] In order to avoid an absurdity, the trial judge ordered disclosure.

17. The *Hape* approach has proven to be neither the balancing methodology that the majority contemplated nor the framework best suited to engage with the complex issues arising from these complicated cases involving the intersection of constitutional and international law. A structured and deliberate methodology that is "*just, practical, predictable* and *persuasive*" is preferable for "answering some of the most difficult questions in Canadian constitutional law."[27] The Asper Centre proposes such an approach below.

C. *The Proposed Unifying Approach*

18. Although several aspects of the majority's approach in *Hape* are inconsistent with the Court's pre-*Hape* jurisprudence (specifically, with *Cook*), other aspects of *Hape* can be reconciled with the earlier jurisprudence. As one commentator has pointed out, *Hape* can be read as not having

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[23] *Amnesty International Canada*, 2008 FC 336, at para. 340.
[24] *R. v. R.T.,* 2018 ABPC 2, at para. 4.
[25] *R. v. R.T.,* 2018 ABPC 2, at para. 5.
[26] *R. v. R.T.,* 2018 ABPC 2, at paras. 19-29.
[27] The Honourable Justice M. Rowe and M. Collins, "Methodology and the Constitution" (2021) Windsor Review of Legal and Social Issues 42 Windsor Rev. Le, at pp. 6-10 [emphasis in original].

overturned *Cook,* but merely having distinguished it.[28] The majority itself in *Hape* said its intention was simply to "rethink and refine" the prior jurisprudence, not to overturn it.[29]

19. This case offers the Court an opportunity to reconcile the Court's pre-*Hape* jurisprudence with *Hape* by drawing on the Court's purposive approach to the interpretation of s. 32(1) in *Harrer*, *Terry*, *Schreiber* and *Cook*, and ensuring that comity and sovereignty are given sufficient weight at the *Charter* analysis stage to address the concerns expressed by the majority in *Hape*.[30]

20. Developing such an approach is increasingly important as "[t]ransnational crime is a growing problem in the modern world."[31] There is a pressing need for Canadian authorities to investigate and enforce laws to deter transnational crime, just as there is a pressing need for them to gather intelligence beyond Canada's borders.[32] And, as illustrated by the present case, Canadian authorities must also enforce the criminal law among members of its armed forces stationed abroad. The importance of these activities for Canadian authorities may justify their increased extraterritorial presence, but it also underscores the importance of Canadian authorities bringing their *Charter* values with them wherever they go. The unifying approach must be flexible enough to be tailored to the various types of Canadian state activities that may engage one's *Charter* rights, while also accounting for the protection of those rights.

21. The starting point of the unifying approach is that the *Charter* applies to the actions of Canadian authorities where they fall within "the authority of Parliament or the provincial legislatures", pursuant to s. 32(1). As with any other provision of the *Charter*, s. 32(1) should be given a broad, flexible, and generous interpretation.[33] When s. 32(1) speaks of applying the *Charter,* it can be interpreted as authorizing courts to measure the conduct of Canadian state actors against the standards of the Canadian Constitution — even where that conduct occurs abroad.

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[28] A. Attaran, "Have Charter, Will Travel? Extraterritoriality in Constitutional Law and Canadian Exceptionalism" (2008) 87 Can Bar Rev 515, at p. 547.
[29] *R. v. Hape,* 2007 SCC 26, at para. 95.
[30] A. Attaran, "Have Charter, Will Travel? Extraterritoriality in Constitutional Law and Canadian Exceptionalism" (2008) 87 Can Bar Rev 515, at p. 547.
[31] *R. v. Hape,* 2007 SCC 26, at para. 98.
[32] L. West, "'Within or Outside Canada': The *Charter*'s Application to the Extraterritorial Activities of the Canadian Security Intelligence Service" (2021) University of Toronto Law Journal.
[33] *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at p. 344.

Viewed in this way, the concern of state sovereignty does not justify foreclosing the applicability of the *Charter* to Canadian authorities abroad as an *a priori* matter.

22. *Hape* is not entirely inconsistent with this approach. In recognizing the trial fairness exception, the *Hape* majority acknowledged that the *Charter* can be applied in this manner to measure the admission of foreign-gathered evidence against the standards of ss. 7 and 11(*d*).[34] If this can be done under ss. 7 and 11(*d*), it should also be possible under other provisions, such ss. 8-10. Under any of these provisions, the courts are being asked to scrutinize the conduct of Canadian authorities abroad and decide whether to grant a *Charter* remedy at home. By not excluding the applicability of the *Charter* at the s. 32(1) stage, the unifying approach can reconcile the parts of *Hape* that preserve a *Charter* remedy (under the trial fairness and international human rights exceptions) with the overarching goal of the *Charter* ("to limit the exercise of government and legislative authority in advance, so that breaches are stopped before they occur").[35]

23. Such an approach will not unduly hamper Canadian authorities acting abroad. Nor does it mean that concerns of comity or state sovereignty will be ignored. Rather, the very nature of the *Charter* as a flexible instrument allows those principles to be taken into account at various stages of the analysis beyond the applicability stage of s. 32(1). As Professor Roach put it, "[i]f courts can tailor *Charter* requirements to the regulatory context, it is difficult to understand why they cannot make adjustments for the foreign context."[36]

24. Specifically, applying the *Charter* to the actions of Canadian authorities abroad does not mean that any deviations (procedural or otherwise) from Canadian constitutional standards will automatically result in a breach of a legal right and a remedy. The *Charter* "permits the incorporation of legitimate justifications… within the right itself."[37] For instance, the scope of s. 8 is internally limited in that it only guarantees the right to be free of *unreasonable* search and

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[34] *R. v. Hape*, 2007 SCC 26, 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."
[35] *R. v. Hape,* 2007 SCC 26, at para. 91.
[36] K. Roach, "*R. v. Hape* Creates Charter-Free Zones for Canadian Officials Abroad" (2007) Crim. Law Q., Vol. 53, N. 1., at p. 2.
[37] *R. v. Hape*, 2007 SCC 26, at para. 173 (per Bastarache J.'s concurring reasons).

seizure;[38] and the scope of s. 9 is internally limited in that it only guarantees the right to be free of *arbitrary* detention or imprisonment.[39] Requiring Canadian authorities to abide by basic *Charter* standards abroad does not mean they must abide by the same procedural requirements that would be mandated in Canada.[40] The *Hape* majority made a similar point in discussing the trial fairness exception: "where commonly accepted laws are complied with, 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."[41]

25. If discrepancies in particular procedural steps can be taken into account in a ss. 7 and 11(*d*) analysis, they can also be taken into account in other provisions of the *Charter*. Take, for example, a case like Corporal McGregor's involving Canadian authorities conducting a warrantless search abroad. The fact that the *Charter* would apply to the actions of the Canadian authorities does not mean it would necessarily impose on them the procedural requirement to obtain a warrant. Just like in Canada, a warrantless search abroad can be reasonable under s. 8 if authorized by law.[42] Requiring Canadian authorities to obtain a warrant abroad could create practical difficulties that may, depending on the case, unduly restrict their ability to engage in law enforcement or intelligent gathering. Given that the *Charter* is a flexible enough instrument "to permit a reasonable margin of appreciation for different procedures"[43], the difficulty of obtaining a warrant in a foreign jurisdiction may be taken into account in assessing whether there was a breach of s. 8.

26. If the individual is able to establish a *Charter* breach, they must still establish that a remedy is appropriate and just under s. 24. Since the *Charter* allows for a balancing of interests between the individual and state at the remedial stage, the foreign context can again be taken into account *(e.g.,* in determining the seriousness of the state misconduct under the *Grant* test for s. 24(2)).

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[38] *Hunter v. Southam,* [1984] 2 S.C.R. 145, at 159.
[39] *R. v. Simpson* (1993), 79 C.C.C. (3d) 482 (Ont. C.A.), at 488.
[40] The Honourable Justice M. Bastarache, "La Charte canadienne des droits et libertés, reflet d'un phénomène mondial ?" (2007) 48-4 *Les Cahiers de droit*, at 743.
[41] *R. v. Hape*, 2007 SCC 26, at para. 111.
[42] For e.g., in cases where there are exigent circumstances that make it impractical to obtain a warrant, a warrantless search and seizure can be authorized by law (see s. 11(7) of the *Controlled Drugs and Substances Act,* S.C. 1996, c. 19).
[43] *R. v. Hape,* 2007 SCC 26, at para. 172 (per Bastarache J.'s concurring reasons).

27. This flexible and contextual approach to the application of the *Charter* addresses the concerns of sovereignty and comity by taking foreign laws into account. At the same time, it ensures that those concerns are not overstated because, as the majority in *Hape* recognized, "the *Charter* does not authorize state action, but simply operates as a limit on such action."[44] Canadian authorities can always choose not to act if the foreign legal context demands too great a departure from the *Charter* standards that would ordinarily apply.

28. Further, this approach is practical and predictable. It will be more manageable for Canadian authorities acting abroad (and Canadian courts adjudicating their conduct at home) to start from the well-established *Charter* principles with which they are already familiar,[45] and then consider how those principles should be adapted to the foreign legal environment. While this exercise cannot be free of all uncertainty, it will be easier to carry out than for Canadian authorities to identify when their conduct runs afoul of Canada's international human rights obligations or determine when the evidence they have gathered abroad will be inadmissible in a Canadian court under the trial fairness exception (even though s. 8 of the *Charter* did not apply to their search or ss. 9 and 10(*b*) did not apply to their detention/interrogation).

29. The *Hape* majority recognized that there are circumstances where comity must "give way" to competing rights-protection concerns.[46] At the core of *Hape,* therefore, is the recognition of the need to strike the proper balance between individual rights and the interests of the Canadian state when operating in a global world. The Asper Centre submits that this balance is best achieved by taking comity and state sovereignty into account within the *Charter* analysis, instead of foreclosing the *Charter* from applying based on the extraterritorial nature of the Canadian state conduct.

PART IV – SUBMISSIONS RESPECTING COSTS

30. The Asper Centre does not seek costs, and asks that no costs be ordered against it.

PART V – ORDER REQUESTED

31. The Asper Centre takes no position on the outcome of this appeal.

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[44] *R. v. Hape,* 2007 SCC 26, at para. 97.
[45] *Schreiber v. Canada (A.G.)*, [1998] 1 S.C.R. 841, at para. 16.
[46] *R. v. Hape,* 2007 SCC 26, at para. 101.

ALL OF WHICH IS RESPECTFULLY SUBMITTED
Dated at the City of Toronto, this 25th day of April, 2022

Gerald Chan & Alexandra Heine
Counsel for the Asper Centre

PART VI – TABLE OF AUTHORITIES

Authority	Paragraphs where cited
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PART VII – STATUTES AND REGULATIONS

Statute/Regulation	Paragraphs where cited
Canadian Charter of Rights and Freedoms, being Part I of the *Constitution Act, 1982*, Schedule B, Canada Act 1982, 1982, c. 11 (U.K.), s. 32(1)	4, 7, 10, 11, 19, 21, 22, 23
Controlled Drugs and Substances Act, S.C. 1996, c. 19, s. 11(7)	25