File No. 31125

IN THE SUPREME COURT OF CANADA
(On Appeal from the Court of Appeal for Ontario)

B E T W E E N :

LAWRENCE RICHARD HAPE

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

- and -

ATTORNEY GENERAL FOR ONTARIO

Intervener

INTERVENER=S FACTUM
ATTORNEY GENERAL FOR ONTARIO

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PART I
STATEMENT AS TO FACTS

1. The intervener, the Attorney General for Ontario, accepts the facts as set out in paragraphs 1-10 of the Appellant=s Factum and the facts contained within the Respondent=s Factum.

PART II
POINTS IN ISSUE

2. The appellant suggests that the question in issue is whether the *Charter* applies to *A*R.C.M.P. search and seizure activities outside Canada, and whether enlisting the mere companionship of a foreign policeman renders the *Charter* inapplicable*@*. It is submitted that this appeal requires the Court to grapple with a question far more sophisticated than the one put by the appellant. There are, in fact, two questions before the Court:

> **Issue #1:** When a foreign authority cooperates with Canadian police and permits a search in the foreign jurisdiction, over which the foreign authority retains control, does s.8 of the *Charter* extend to the actions of the Canadian police?

The answer to this question is no. Where the foreign authority cooperates with Canadian law officers and remains in control of the search in the foreign jurisdiction, applying s. 8 of the *Charter* necessarily will have an *A*objectionable extraterritorial effect*@*.

> **Issue #2:** If, despite the *A*authority*@* exercised by the foreign jurisdiction, s.8 of the *Charter* extends to the search activities of a Canadian law enforcement officer in that jurisdiction, how should the right to be secure from unreasonable search and seizure be applied?

Section 8 of the *Charter* takes its meaning and application from the context in which it resides. Only after a determination is made about the scope of the right in the foreign jurisdiction can there be any determination as to whether the application of the right would have an *A*objectionable extraterritorial effect*@*.

3. The intervener Attorney General for Ontario takes no position on the s.24(2) issue or the outcome of this appeal.

PART III
BRIEF OF ARGUMENT

I. Overview

4. This Court is asked to provide guidance on the applicability of s.8 of the *Canadian Charter of Rights and Freedoms* to the actions of Canadian police officers searching abroad. The judgment from this appeal will come to rest on an increasingly rich continuum of jurisprudence that has evolved over the past decade, providing insight into when and how the *Charter* applies to evidence gathering in foreign jurisdictions.[1] In coming to a determination on the appropriate reach of the *Charter* in this case, the intervener Attorney General for Ontario invites this Court to bear in mind the fact that many crimes, including money laundering offences, know no territorial boundaries. In fact, their effectiveness often relies on crossing those boundaries in the attempt to evade detection and investigation by law enforcement authorities. If Mr. Hape has his way and is successful in his pursuit of a wholesale s.8 *Charter* application to the search activities of Canadian police officers in a foreign jurisdiction, as if they were seizing evidence located in Canada, the *Charter* could become an instrument to preclude meaningful investigation abroad. It is submitted that this Court should approach the appellant=s cavalier attitude toward extra-jurisdictional s. 8 *Charter* application with caution.

5. This factum addresses two main issues. The intervener agrees with the conclusion reached by the trial judge that, bearing in mind the cooperation of the Turks and Caicos and the authoritative role it played in the searches, that the *Charter* did not apply. Nonetheless, if this Court is inclined to accept the appellant=s invitation to reject the trial judge=s findings of fact or, if this Court decides that the cooperation with the foreign authority in this case did not, *per se,* preclude the application of the *Charter,* it is submitted that s.8 of the *Charter* cannot be applied as if the search occurred in Canada. Section 8 is qualitatively different than s.10(b) of the *Charter*. Unlike s.10(b) of the *Charter* that admits of no similar flexible meaning, s. 8 of the *Charter* only protects against Aunreasonable@ searches and seizures. It is a right that takes its meaning from the context in which it

[1] *R. v. Harrer,* [1995] 3 S.C.R. 562, *R. v. Terry,* [1996] 2 S.C.R. 207, and *R. v. Cook,* [1998] 2 S.C.R. 597 deal with statement taking in a foreign jurisdiction. *R. v. Schreiber,* [1998] 1 S.C.R. 841deals with the gathering of financial records from a foreign jurisdiction.

resides. This means that when Canadian law enforcement officers are searching in a foreign jurisdiction and the *Charter* extends to their actions, it is *first* necessary to determine the nature and scope of the s.8 *Charter* right in the location and jurisdiction searched, *before* there can be any meaningful determination of what *Charter* compliance requires and whether such compliance would have an Aobjectionable extraterritorial effect@.

6. The second matter this factum is designed to address relates to practical issues pertaining to the extraterritorial application of s.8 of the *Charter.* In this day and age, criminal conduct can and does easily transgress national boundaries. The more sophisticated the criminal and the more serious the crime, the more attractive the international scene. This is particularly true in the case of money laundering, where the sophisticated will attempt to disguise the origin of funds by sending them abroad and repatriating them only after the link to crime has been severed. There is a critical need to foster cooperative relationships with other countries in the pursuit of effectively investigating this type of crime that has far reaching effects, well beyond the simple laundering of funds. A chauvinistic approach to s. 8 *Charter* application in foreign jurisdictions could have an adverse impact on the ability to build and foster this much needed and very important international cooperation.

II. The Charter and Cooperative Investigations

7. This Court first acknowledged the reach of the *Charter* beyond the Canadian border in *R. v. Harrer*. While the Court ultimately concluded the *Charter* did not apply to the actions of U.S. authorities taking a statement from Ms. Harrer, LaForest J. was careful to indicate that he did not wish his remarks to be Ainterpreted as giving credence to the view that the ambit of the *Charter* is automatically limited to Canadian territory@.[2] On behalf of the majority, LaForest J. noted that Canadians have a right to expect their own government actors (and those acting as Aagents@ or on behalf of their government), will respect citizens= *Charter* rights abroad.[3]

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[2] *R. v. Harrer, supra,* at para 10

[3] *R. v. Harrer, supra,* at paras. 11-12

8. In *R. v. Terry,* McLachlin J. (as she then was), writing for a unanimous Court, tempered the concept of >agency= posited by LaForest J. in *Harrer*. McLachlin J. confirmed that while the *Charter* can extend to foreign jurisdictions, it only does so through the specific engagement of a s.32(1) government actor abroad. Mr. Terry was arrested on a warrant issued in the United States in connection with a Canadian request for extradition. The United States authorities were asked by the RCMP to interview Mr. Terry. While the U.S. authorities complied with their own legal requirements in giving a *Miranda* warning, the requirements of s.10(b) of the *Charter* were not met.[4] McLachlin J. held that the *Charter* cannot bind a foreign authority, even when they are acting at the specific request of the Canadian police:

> The personal decision of a foreign officer or agency to assist the Canadian police cannot dilute the exclusivity of the foreign state=s sovereignty within its territory, where its law alone governs the process of enforcement. **The gathering of evidence by these foreign officers or agency is subject to the rules of that county and none other. Consequently, any co-operative investigation involving law enforcement agencies of Canada and the United States will be governed by the laws of the jurisdiction in which the activity is undertaken** ....[5] [emphasis added]

Therefore, *Terry* tells us that even where the foreign jurisdiction is acting on behalf of the Canadian police, s.32(1) does not impress the foreign authority with *Charter* responsibilities.

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[4] *Miranda v. Arizona,* 384 U.S. 436 (1966)

[5] *R. v. Terry, supra,* at para. 19

9. In *R. v. Schreiber,* applying the principles articulated in *Harrer* and *Terry,* L=Heureux-Dubé J., for the majority, reinforced the concept that by virtue of s.32 of the *Charter,* it is only applicable to matters falling within the authority of Parliament, the provincial legislatures, and the provincial and federal governments. She concluded that where there is Ano action by one of these entities which infringes a right or freedom guaranteed by the *Charter*, there can be no *Charter* violation@.[6] In the result, the majority concluded that the search of bank records by Swiss authorities, following upon a letter of request by Canadian authorities, was not subject to *Charter* scrutiny, as the letter of request did not constitute the search.

10. In *R. v. Cook* this Court addressed, for the first time, the actions of Canadian law enforcement officers physically located in a foreign jurisdiction. Mr. Cook was a United States citizen who was living in that country. He was being investigated by the Vancouver police for the murder of a taxicab driver in Vancouver, British Columbia. A warrant for his arrest in connection with an extradition request by Canadian authorities was executed. Upon his arrest in the United States, he was given a *Miranda* caution. Two days later, an officer from the City of Vancouver Police interviewed Mr. Cook in the United States. The Canadian officer failed to comply with s.10(b) of the *Charter.* Building on the principles developed in *Terry*, *Harrer* and *Schreiber,* Cory and Iacobucci JJ., for the majority, concluded that Canadian law enforcement officers investigating abroad must comply with *Charter* requirements, **Aprovided that the application of *Charter* standards would not interfere with the sovereign authority of the foreign state@**[7] or create an **Aobjectionable extraterritorial effect@**.[8] The majority concluded that Mr. Cook could have been afforded his s.10(b) right without creating any adverse impact on the foreign authority. The majority foreshadowed the circumstances of this case, where Canadian officers are physically located abroad, working in cooperation with and under the direct authority of the foreign territory:

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[6] *R. v. Schreiber, supra,* at para. 27

[7] *R. v. Cook, supra,* at para. 46

[8] *R. v. Cook, supra,* at paras. 25, 27, 39, 43, 44, 48

> Our conclusion that the *Charter* applies in the present case must be understood within this narrow context, i.e., where no conflict occurs in the concurrent exercise of jurisdiction by Canada on the basis of nationality and by a foreign state on the basis of territoriality. It may well be a different case where, for example, Canadian authorities participate, on foreign territory, in an investigative action undertaken by foreign authorities in accordance with foreign procedures. As McLachlin J. observed in *Terry, supra,* at para. 19 "any *co-operative investigation* involving law enforcement agencies of Canada and the United States will be governed by the laws of the jurisdiction in which the activity is undertaken" (emphasis added). However, such facts are not before the Court in this case and remain to be resolved another day.[9]

That day has arrived.

[9] *R. v. Cook, supra, per* Cory and Iacobucci JJ. at para. 54. Note that L=Heureux-Dubé J., in dissent, (concurred in by McLachlin J. (as she then was)) at para. 92 held that A**even if the action being challenged is attributable to a government listed in s.32, that action will not trigger *Charter* application if it is carried out outside Canada in cooperation with another jurisdiction** [emphasis added]@. The dissenting opinion went on to express the view that whenever Canadian officials are working under the sovereignty of a foreign legal system, that the Ainvestigation is necessarily cooperative@. (see paras. 94-95)

11. While the RCMP officers were clearly s.32(1) actors searching in another jurisdiction, there was a clear finding of fact that they were bound by the procedures and authority of the Turks and Caicos. Mr. Justice Juriansz (as he then was) found that the RCMP were involved in a Aco-operative investigation@ and at all times operated Aunder the authority@ of the Turks and Caicos.[10] The intervener agrees with and adopts the submissions of the respondent as they relate to the import of these findings of fact to the outcome of this appeal.[11] Where there is a cooperative exercise with a foreign jurisdiction and the foreign territory provides the authority for the search, the *Charter* does not and cannot apply. To extend the *Charter* in these circumstances would have a clear objectionable effect on the sovereign territory because it would require the other jurisdiction to import Canadian law and procedure in order to bring it in line with the *Charter.* This is precisely the objectionable effect that the majority and dissent cautioned against in *R. v. Cook.* It is also why, in *R. v. Terry,* a unanimous Court eschewed *Charter* application even where the U.S. authorities were specifically asked to act on the behalf of Canadian law enforcement. As noted by McLachlin J. (as she then was) in her concurring judgment in *R. v. Harrer:*

> While certain basic standards are common to free and democratic societies, particular procedural requirements may vary. It is reasonable to expect of police forces abroad that they meet basic standards of fairness. It is not reasonable to expect them to comply with details of Canadian law. To insist on conformity to Canadian law would be to insist on external

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[10] Appellant=s Record, Reasons for Judgment of the Ontario Superior Court of Justice, January 17, 2002, pp. 6-7, paras. 25-26. For insight into how the Canadian officers perceived the role of the Turks and Caicos , see: Appellant=s Record, Officer G. Letch, p. 179, l. 1- p. 181, l. 9; p. 185, l. 18-p. 186, l. 11; Sgt. McDonagh, p. 281, ll. 13-15, p. 284, l.14-p. 285, l. 6. Respondent=s Record, Sgt. McDonagh, p. 102, ll. 8-17, p. 104, ll. 3-9.

Officer Boyle testified:

> [Lessumun] had the authority as the police on the island, and we had to follow whatever direction he was going to take. ... he was adamant that he was in charge of the operation in the Turks and Caicos; and that there was going to be no >steam-rolling,@ I think was his term, that we were going to be dictating to him how he was going to be conducting himself; and that we would be working under his authority. ... We had no control over Officer Lessemun. ... We were ... at his discretion as to what we were allowed to do on that island. We were asking for his assistance as a Turks and Caicos police officer. ... I had no authority. None of our officers, myself or the RCMP officers, had any authority to conduct any investigations or searches on the island. (See Appellant=s Record, Officer Boyle, p. 233, l. 17-p. 234, l.30; p. 237, l. 27-p. 238, l. 28; Respondent=s Record, Officer Boyle, p. 140a, l.6-p.141, l.8, p. 143, ll. 3-p.144, l.16)

[11] Respondent=s Factum, paras. 20-30

> application of the *Charter* in preference to the local law. It would render prosecution of offences with international aspects difficult if not impossible.[12]

12. Nonetheless, if this Court is inclined to either accept the appellant=s invitation to re-characterize the relationship between the Canadian authorities and the Turks and Caicos, or should this Court decide that the type of cooperation found by the trial judge is not dispositive of the issue pertaining to *Charter* application, the intervener advances the following submissions.

III. The Contextual Backdrop for Section 8 Charter Application Abroad

13. The appellant says that the result in *R. v. Cook* can and should be directly applied to this case. In fact, the appellant sets out a passage from *Cook* and says the words Asearch and seizure@ should be simply substituted for the words Ataking of the appellant=s statement@.[13] Not so fast. Even if this Court concludes that s.8 of the *Charter* applies to the search in this case, determining the scope of that application is not as simple as the appellant suggests. In fact, Juriansz J. (as he then was) hinted at this when he held:

> It may well be that the consideration of the potential extraterritorial application of s.8 of the *Charter* raises different issues than those discussed in the section 10(b) cases. However, this application must be decided on the basis of existing jurisprudence.[14]

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[12] *R. v. Harrer, supra,* at para. 55

[13] Appellant=s Factum, para. 15

[14] Appellant=s Record, Reasons for Judgment of the Ontario Superior Court of Justice, January 17, 2002, p. 5, para. 18

14. To state the obvious, s.8 of the *Charter* only protects against an Aunreasonable search and seizure@. This Court has repeatedly held that before an accused can find any solace in s.8, she must first establish that she has a Areasonable expectation of privacy@ in the place searched[15] because s.8 is designed to protect Apeople, not places@.[16] There is no search within the meaning of s.8 of the *Charter* unless the accused=s Areasonable@ privacy interest is impacted by the police actions.[17] In *R. v. Schreiber,* as noted in the Respondent=s Factum, Lamer C.J. commented on the fact that the preliminary question to be answered in any search is whether the individual has a Areasonable expectation of privacy in his bank records .... If he cannot show that he had such a reasonable expectation, his s.8 protection is not triggered at all.@[18] In coming to a determination of what constitutes a Areasonable expectation of privacy@, regard must be given to the Atotality of the circumstances@ in a particular case.[19] As noted by Binnie J. in *R. v. Tessling,* this assessment requires Aparticular emphasis on (1) the existence of a subjective expectation of privacy; and (2) the objective reasonableness of the expectation.@[20] For purposes of s. 8, privacy is a truly Aprotean concept@[21] and it is sometimes a difficult task to determine when and where the line should be drawn. One thing is certain: where the line is drawn in Canada could be very different than where the line is drawn in a foreign jurisdiction.

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[15] *Hunter v. Southam,* [1984] 2 S.C.R. 145 *per* Dickson J. (as he then was) at p. 158-59

[16] *Hunter v. Southam, supra, per* Dickson J. (as he then was) at pp. 158-59; *R. v. Edwards,* [1996] 1 S.C.R. 128 *per* Cory J. at para. 29; *R. v. Tessling,* [2004] 3 S.C.R. 432 *per* Binnie J. at para. 16

[17] *R. v. Tessling, supra, per* Binnie J. at para. 18*; R. v. Evans,* [1996] 1 S.C.R. 8 *per* LaForest J. at para. 11; *R. v. Wise*, [1992] 1 S.C.R. 527 *per* Cory J. at p. 533

[18] *R. v. Schreiber, supra, per* Lamer C.J. at para. 19. It is noted that Lamer C.J., while concurring in the result, was writing for himself on this issue.

[19] *R. v. Edwards, supra, per* Cory J. at para. 31

[20] *R. v. Tessling, supra, per* Binnie J. at para. 19

[21] *R. v. Tessling, supra, per* Binnie J. at para. 25

15. Even where an individual is found to enjoy a reasonable privacy interest, a determination must be made as to the scope of the *Charter* protection. As Cory J. observed in *R. v. Edwards:* AThere are two distinct questions which must be answered in any s. 8 challenge. The first is whether the accused had a reasonable expectation of privacy. The second is whether the search was an unreasonable intrusion on that right to privacy.@[22] An equally contextual approach is required to determine how the state can and should accommodate the constitutional interest engaged. Some privacy interests are deserving of less rigorous *Charter* protection than others. As noted in *Comité paritaire de l=industrie de la chemise v. Potash,* A[t]his Court has pointed out on several occasions that the scope of a constitutional guarantee, like the balancing of the collective and individual rights underlying it, varies with the context.@[23] By way of example, in some contexts, searches can be justified on the basis of reasonable grounds to suspect, while, in others, reasonable grounds to believe are the required minimum constitutional standard.[24]

16. Mr. Hape asks this Court to apply the *Charter* exactly as if the search happened in Canada. In a bald statement, he says: Athe searches and seizures carried out by the R.C.M.P. clearly failed to meet Charter standards@.[25] However, he never articulates what his privacy interest was in the Turks and Caicos and how the searches were out of sync with that interest. His argument proceeds as if Canadian officers pack s.8 in their suitcases when they leave this jurisdiction and unpack it, unchanged, in the foreign jurisdiction. This *may* be the nature of s.10(b) of the *Charter,* but it is *not* the nature of s.8 of the *Charter,* which is informed by the legal, procedural and practical framework of the foreign jurisdiction. As noted by McLachlin J. (as she then was) in *R. v. Terry:*

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[22] *R. v. Edwards, supra, per* Cory J. at para. 33

[23] *Comité paritaire de l=industrie de la chemise v. Potash,* [1994] 2 S.C.R. 406 *per* LaForest J. at para. 11. See also, *R. v. McKinlay Transport Ltd.,* [1990] 1 S.C.R. 627 *per* Wilson J. at p. 645

[24] *R. v. Monney,* [1999] 1 S.C.R. 652 *per* Iacobucci J. at para. 49. See also, *R. v. Briggs* (2001), 157 C.C.C. (3d) 38 (Ont. C.A.) *per* Weiler J.A. at para. 32; leave denied [2002] S.C.C.A. No. 31

[25] Appellant=s Factum, para. 17

> People should reasonably expect to be governed by the laws of the state in which they currently abide, not those of the state in which they formerly resided or continue to maintain a principal residence.[26]

The *dicta* of Lamer C.J. in *R. v. Schreiber* is directly apposite:

> ... a Canadian residing in a foreign country should expect his or her privacy to be governed by the laws of that country and, as such, a reasonable expectation of privacy will generally correspond to the degree of protection those laws provide. This, if anything, is more true for the person who decides to conduct financial affairs and keep records in a foreign state. ...

[26] *R. v. Terry, supra, per* McLachlin J. (as she then was) at para. 24

> a person who has property or records in a foreign state runs a risk that a search will be carried out in accordance with the laws of that state.[27]

Therefore, Athe place where the records were located and the manner in which they were obtained are equally important factors@[28] in determining the scope of protection offered by s.8 of the *Charter.* The onus is on the accused to establish why, in the foreign context, he had a privacy interest and, if he had one, what it was about the officers= actions in the foreign jurisdiction that contravened that *Charter* interest.[29]

17. It is only after the nature and scope of the right in the foreign jurisdiction is understood, that there can be any meaningful assessment of whether the application of the right will result in an Aobjectionable extraterritorial effect@. For instance, let=s assume, for the sake of argument, that Mr. Hape had a reasonable expectation of privacy in the subject location and records and that his privacy interests were such that they demanded prior judicial authorization to issue on the basis of credibly based probability.[30] Query how this could be accommodated?

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[27] *R. v. Schreiber, supra, per* Lamer C.J. at paras. 23-24. See also: *R. v. Harrer, supra, per* McLachlin J. (as she then was) at para. 50

[28] *R. v. Schreiber, supra, per* Lamer C.J. at para. 22

[29] *R. v. Schreiber, supra, per* Lamer C.J. at paras. 22-25

[30] The standard required by *Hunter v. Southam, supra.*

18. The RCMP could not get a Canadian search warrant to execute in the Turks and Caicos. They had to rely on local authorities (which they did) to get the correct legal process in place.[31] If the *Charter* applied exactly as it would in Canada, then it would require the Turks and Caicos authorities to apply for the warrants on the basis of sworn evidence that there were reasonable grounds to believe that an offence had been committed and the searches would yield evidence with respect to the offence. Were the Canadians to give the Turks and Caicos authorities a crash course on s.8 and ask them to apply those requirements in getting process issued? It is difficult to imagine a more Aobjectionable extraterritorial effect@.

19. Take another example. In this case, Officer Boyle testified that it was his understanding from Officer Lessemun, that under the law in the Turks and Caicos, it was permissible to attend on the perimeter of property and make observations, but not to enter into the actual building on a property, without authorization.[32] With this understanding, on February 7 and 8, 1998, the Canadian officers, with an officer from the Turks and Caicos, surreptitiously attended on the property of Arawak House to make observations of the security system. In Canada, assuming a reasonable expectation of privacy in the subject property, this type of perimeter search would require prior judicial authorization.[33] What were the RCMP to do? Tell the authorities in the Turks and Caicos to get an authorization for something that didn=t require prior judicial authorization in the Turks and Caicos? Again, it is difficult to imagine a more objectionable interference with the sovereignty of the foreign jurisdiction.

20. These examples highlight the need to approach extraterritorial s.8 *Charter* application with caution. Because of its contextual nature, there exists a great potential for an objectionable effect on

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[31] Various officers testified that they were satisfied that Officer Lessumun had met all procedural requirements in the Turks and Caicos. See, Appellant=s Record, Sgt. McDonagh, p. 83a, ll. 1-30; p. 274, ll. 13-20; Officer Lewis, p. 149, ll. 3-10; Officer Boyle, p. 219, l.23-p. 221, l.7; Officer Bland, p. 226, ll. 23-26. See also: Respondent=s Record: Officer Lewis, p. 38, ll. 1-30; Sgt. Boyle, p. 112, l.1-p. 114, l.30; Officer Clark, p. 148, ll. 1-30; Officer Lewis, p. 39, ll. 1-20; Sgt. Alderson, p. 37, ll. 5-15.

[32] Appellant=s Record, Officer Boyle, p. 204, ll. 6-17; p. 210, ll. 18-26. Respondent=s Record, Officer Boyle, p. 124, ll. 6-17

[33] *R. v. Kokesch*, [1990] 3 S.C.R. 3

the foreign jurisdiction. Importantly, the scope of the s. 8 right in the foreign jurisdiction must be fully delineated before there can be any meaningful understanding of the effect that the application of this *Charter* right would have on the foreign jurisdiction.

IV. The Need to Nurture and Protect International Cooperation in the Pursuit of Justice

21. This Court has long recognized the criminal community=s efforts to use international borders to thwart effective detection, investigation and prosecution of their endeavours.[34] This Court has expressed, in no uncertain terms, the need for the law to develop in a manner that does not encourage the use of international borders as a means to evade the law. In *R. v. Libman*, the Court grappled with jurisdictional questions surrounding the prosecution of offences that occur, at least in part, beyond the Canadian border. In arriving at the *A*real and substantial link@ to Canada test, LaForest J. made the following comments relevant to this appeal:

> It would be a sad commentary on our law if it was limited to underlining society's values by the prosecution of minor offenders while permitting more seasoned practitioners to operate on a world-wide scale from a Canadian base by the simple manipulation of a technicality of the law's own making. What would be underlined in the public's mind by allowing criminals to go free simply because their operations have grown to international proportions, I shall not attempt to expound.[35]

In other words, the law cannot be permitted to develop in a manner that permits sophisticated criminals to operate on an international level, immune from the reach of the law. This concern is front and centre in this appeal. It is submitted that an aggressive approach to s.8 *Charter* application abroad, without appropriate respect for and deference to the laws and procedures of foreign jurisdictions, could serve to undermine cooperative international relationships and, ultimately, inhibit the ability to meaningfully investigate large-scale, international money laundering schemes (and other offences).

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[34] Robert Hubbard et al., *Money Laundering & Proceeds of Crime,* (Irwin Law, Toronto, 2004) at p. 2

[35] *R. v. Libman,* [1985] 2 S.C.R. 178 *per* LaForest J. at para. 72

22. Money laundering is a significant challenge on an international level. While it is impossible to say with any certainty the extent of money laundering on an international scale, estimates range between two and five per cent of the world=s gross domestic product. As noted by the Managing Director of the International Monetary Fund (IMF) in 1998: *A*While we cannot guarantee the accuracy of our figures ... the estimates of the present scale of money laundering transactions are almost beyond imagination - 2 to 5% of global GDP would probably be a consensus range*@*.[36] While the figures are uncertain, one thing is clear: whatever the precise amount, it is staggering.[37]

23. Money laundering is never a stand alone offence. The funds need to be laundered for a reason. They often come from drug trafficking, large scale frauds, human trafficking, terrorist funding and the like.[38] Indeed, in this case, the undercover officer dealing with Mr. Hape told him that the funds he needed laundered were from heroin trafficking and the trial judge found as a fact that the appellant believed this to be the case.[39] After being laundered, funds often support criminal organizations. To effectively penetrate criminal organizations, this Court has recognized the very practical need to strip them of their proceeds. As LeBel J. observed in *R. v. Laroche*:

> The legislative objective of Part XII.2 plainly goes beyond mere punishment of crime: an analysis of the provisions of that Part shows that Parliament intended to neutralize criminal

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[36] William C. Gilmore, *Dirty Money: The Evolution of International Measures to Counter Money Laundering and the Financing of Terrorism*, (Strasbourg: Council of Europe Publications, 2004) at p. 21.

[37] In Canada, a 1999 federal study revealed that *A*illegal movements of funds were estimated to amount to between CDN $5 and CDN $17 billion each year*@*. See Toby Graham, *Butterworths International Guide to Money Laundering Law and Practice,* 2nd ed. (Toronto: Butterworths, 2003) at p. 223. See also, Department of Finance news release dated December 15, 1999, available as of September 10, 2006 at: http://www.fin.gc.ca/news99/data/99-109_1e.html. In Jeffrey Robinson=s book, *The Laundrymen* (London: Pocket Books, 1995), quoted in Peter Alldridge, *Money Laundering Law: Forfeiture, Confiscation, Civil Recovery, Criminal Laundering and Taxation of the Proceeds of Crime*, (Oxford: Hart Publishing, 2003) at p. 4, he maintains that the total sums involved in money laundering make it the world=s third largest industry.

[38] Financial Action Task Force, *Money Laundering & Terrorist Financing Typologies, 2004-2005,* available as of September 10, 2006 at http://www.fatf-gafi.org/dataoecd/16/8/35003256.pdf , at pp. 3-6, 65-68, 71, 84-86, 88-92; Daniel P. Murphy, *Canada=s AML\CFT Response and Financial Action Task Force,* Second Annual Symposium on Money Laundering, Toronto, February 11, 2006, pp. 2-3; David Samuel-Strausz Vernon, *A*A Partnership With Evil: Money Laundering, Terrorist Financing and Canadian Financial Institutions*@*, *Banking & Finance Law Review*, Oct. 2004; 20,1; ABI/INFORM Global at pp. 102-107.

[39] Appellant=s Record, Reasons for Judgment of the Superior Court of Justice, June 10, 2002, pp. 12, 28.

organizations by taking the proceeds of their illegal activities away from them. Part XII.2 intends to give effect to the old adage that crime does not pay ....[40]

[40] *R. v. Laroche,* [2002] 3 S.C.R. 708 *per* LeBel J. at para. 25. See also: *R. v. Wilson* (1993), 86 C.C.C. (3d) 464 (Ont. C.A.) *per* Doherty J.A. at p. 469. See also, David Samuel-Strausz Vernon, "A Partnership With Evil: Money Laundering, Terrorist Financing and Canadian Financial Institutions", *supra*, at p. 101; Stephen Schneider, "Money Laundering in Canada: A Quantitative Analysis of Royal Canadian Mounted Police Cases", *Journal of Financial Crime*, Vol. 11, No. 3, 2004 at pp. 281-283

24. In order to combat money laundering and its many related offences, international cooperation is critical, as funds are often shipped off-shore to break the link to the criminal conduct, only to return once the link is obscured.[41] As noted in the first report of the Financial Action Task Force (FATF), a recognized international forum on money laundering issues:

> Money laundering channels, at least those on a broad scale, generally involve international operations. This enables money launderers to use differences in national laws, regulations and enforcement practices.
>
> For instance, a money laundering operation could involve the following stages: money from illegal activities e.g. drugs cash proceeds would be exported from regulated countries to unregulated ones; then the cash can be placed through the domestic formal financial system of these Aregulatory havens@; the subsequent stage could then be a return of these funds to regulated countries with safe layering and integration opportunities, particularly through wire transfers.[42]

25. International cooperation is an essential element in the fight against large scale money laundering. It brings to mind the words of LaForest J. in *Unites States of America v. Cotroni*:[43]

> The investigation, prosecution and suppression of crime for the protection of the citizen and the maintenance of peace and public order is an important goal of all organized societies. The pursuit of that goal cannot realistically be confined within national boundaries. That has long been the case, but it is increasingly evident today. Modern communications have shrunk the world and made McLuhan's global village a reality. **The only respect paid by the international criminal community to national boundaries is when these can serve as a means to frustrate the efforts of law enforcement and judicial authorities. The trafficking in drugs, with which we are here concerned, is an international enterprise**

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[41] Stephen Schneider, AMoney Laundering in Canada: A Quantitative Analysis of Royal Canadian Mounted Police Cases@, *supra,* at p. 289

[42] Financial Action Task Force, *Money Laundering Report, 1990-1991*, pp. 11-12. Available as of September 10, 2006 at http://www.fatf-gafi.org/dataoecd/20/18/33643115.pdf

[43] *United States of America v. Cotroni*, [1989] 1 S.C.R. 1469 *per* LaForest J. at pp. 1485-86

> **and requires effective tools of international cooperation for its investigation, prosecution and suppression.** [emphasis added]

26. In *R. v. Schreiber,* L=Heureux-Dubé J., for the majority, observed: *A*The reality of international criminal investigation and procedure is that it necessitates co-operation between states*@*.[44] As noted in *Money Laundering and Proceeds of Crime*:

> While movement of fugitives and most commodities is at least limited by the realities of physics *B* and in many cases border controls *B* the movement of funds from country to country is not hampered by such limitations. It is no exaggeration to say that funds can move through several countries within a matter of minutes. International co-operation is necessary to deal with any crime but particularly so for money-laundering and proceeds-of-crime offences.[45]

27. In *R. v. Libman,* LaForest J. referred to the obligation to fulfill our role on the international scene: *A*In a shrinking world, we are all our brother's keepers.*@* Lord Salmon in *Director of Public Prosecutions v. Doot*, cited with approval in *R. v. Libman,* noted: *A*Today, crime is an international problem *B* perhaps not least crimes connected with the illicit drug traffic *B* and there is a great deal of cooperation between the nations to bring criminals to justice.*@*[46]

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[44] *R. v. Schreiber, supra,* at para. 29. See also *R. v. Cook, supra, per* L=Heureux-Dubé J., in dissent, at para. 90

[45] Robert Hubbard et al., *Money Laundering and Proceeds of Crime, supra,* at p. 3, p. 225

[46] [1973] A.C. 807 at p. 834

28. Canada has demonstrated a consistent commitment to cooperating with the international community in an effort to address concerns related to transnational money laundering. The *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*[47] (PC(ML)TF Act) continued many pre-existing requirements for Acustomer identification, record keeping and retention obligations@.[48] Importantly, the stated Aobject@ of the legislation, found in s.3(c) is, among other things: Ato assist in fulfilling Canada=s international commitments to participate in the fight against transnational crime, particularly money laundering, and the fight against terrorist activity@.[49]

29. The stated object of the *PC(ML)TF Act* is consistent with Canada=s international commitment to combating money laundering. This is underlined by the international cooperative schemes that have developed and to which Canada is a signatory. For instance, the 1988 *United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances,*[50] to which Canada became a signatory in 1990, stated its purpose as promoting Aco-operation among the Parties so that they may address more effectively the various aspects of illicit traffic in narcotic drugs ...@.[51] All signatories are called upon to carry out their obligations under the Convention, Ain a manner consistent with the principles of sovereign equality and territorial integrity of States ...@.[52] Article 3 lists the offences covered by the convention, including money laundering.[53]

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[47] S.C. 2000, c.17; S.C. 2001, c.41, s.47

[48] Daniel P. Murphy, ACanada=s Laws on Money Laundering and Proceeds of Crime: The International Context@, *Journal of Money Laundering Control*, Vol. 7: No. 1, 2003, pp. 50-60

[49] *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, s. 3

[50] CTS 1990/42 (ratified by Canada on November 11, 1990). Accessible as of September 10, 2006 at: http://www.unodc.org/pdf/convention_1988_en.pdf .

[51] Article 2, para. 1

[52] Article 2, para. 2

[53] Article 3, para. 1(b)(i)-(ii)

30. Another international convention to which Canada is a signatory is the *International Convention for the Suppression of the Financing of Terrorism.*[54] Article 12 maintains that state parties shall Aafford one another the greatest measure of assistance in connection with criminal investigations or criminal or extradition proceedings@ in respect of offences under the act and may not refuse a request for mutual legal assistance on the basis of bank secrecy.[55] Article 18 acknowledges the need for parties to cooperate in the prevention of offences set out in article 2 of the convention (terrorist related activities), by Aadapting their domestic legislation, if necessary, to prevent and counter preparations in their respective territories for the commission of those offences ...@.[56] Article 18 also requires parties to take all Afeasible measures to detect or monitor the physical cross-border transportation of cash ...@ and Acooperate in the prevention of offences ... by exchanging accurate and verified information in accordance with their domestic law ...@.[57]

31. In the *United Nations Convention Against Transnational Organized Crime,*[58] to which Canada is a signatory, has as its purpose in article 1 to: Apromote cooperation to prevent and combat transnational organized crime more effectively@. Article 18 requires parties to Aafford one another the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings in relation to the offences covered by this Convention .... Mutual legal assistance shall be afforded to the fullest extent possible under relevant laws, treaties, agreements and arrangements of the requested State Party with respect to investigations, prosecutions ...@.[59] Article 6 calls for the criminalization of the laundering of the proceeds of crime.[60]

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[54] CTS 2002. Canada became a signatory on December 9, 1999 and the Convention came into force on April 10, 2002. Available as of September 10, 2006 at: http://www.treaty-accord.gc.ca/Details.asp?Treaty_ID=103850 .

[55] Article 12, paras. 1-2

[56] Article 18, para. 1

[57] Article 18, para. 2

[58] Available as of September 10, 2006 at: http://www.unodc.org/palermo/convmain.html . Canada ratified the Convention on May 13, 2002 and it came into force on September 29, 2003.

[59] Article 18, paras. 1-2

[60] The possession of the proceeds of crime was made a criminal offence in 1975, when the *Criminal Code* was amended by SC 1974-75-76, c.93, s.29, now s.354(1), to include a money laundering offence. Later, Part XII.2 of the

32. Canada is clearly committed to cooperating on an international level in the effort to combat money laundering offences. The type of cooperation encouraged in the various conventions to which Canada is

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Criminal Code was enacted, to regulate the entire area of money laundering, creating the offence that now resides in s.462.31 of the *Code.*

a signatory assists in understanding and construing the appropriate reach of s. 8 of the *Charter*.[61] Applying s. 8 of the *Charter* in the manner suggested by the appellant fails to appreciate the spirit of these international agreements and the cooperative approach they attempt to foster. That approach relies heavily on mutual respect for the laws and procedures of foreign jurisdictions. As noted by LaForest J. in *R. v. Harrer,* while commenting on the circumstances that could result in the exclusion of evidence gathered abroad, courts should Anot be overly fastidious or adopt a chauvinistic attitude in assessing practices followed in other countries@.[62] Applying s. 8 of the *Charter* in a rigid fashion, thereby affecting on the integrity of the foreign jurisdiction, runs the risk of interfering with the critical need for international assistance and cooperation. This would be a most undesirable result.

[61] In the past, this Court has considered Canada=s international obligations, including conventions to which it is a signatory, in determining the constitutionality of state action: *R. v. Butler*, [1992] 1 S.C.R. 452 at p. 498; *Canada (H.R.C.) V. Taylor*, [1990] 3 S.C.R. 892 at pp. 916-20, 924; *R. v. Suresh*, [2002] 1 S.C.R. 3 *per* The Court at paras. 46-47.

[62] *R. v. Harrer, supra, per* LaForest J. At para. 18

PART IV
COSTS SUBMISSIONS

33. The Attorney General for Ontario makes no submissions with respect to costs.

PART V
ORDER REQUESTED

34. It is respectfully requested that the appeal be dismissed.

ALL OF WHICH is respectfully submitted by

Michal Fairburn
Counsel for the Attorney General for Ontario

PART VI
AUTHORITIES

Para(s)

PART VII
STATUTORY PROVISIONS

Proceeds of Crime (Money Laundering) and Terrorist Financing Act, S.C. 2000, c.17; S.C. 2001, c.41, ss. 3, 47