File No. 39543

SUPREME COURT OF CANADA

(ON APPEAL FROM A JUDGMENT OF THE COURT MARTIAL APPEAL COURT OF CANADA)

BETWEEN:

CORPORAL C.R. MCGREGOR

APPLICANT
(Appellant)

- and -

HER MAJESTY THE QUEEN

RESPONDENT
(Respondent)

APPLICATION FOR LEAVE TO APPEAL

(Article 40(1) of the *Supreme Court Act* and Rule 25 of the *Rules of the Supreme Court of Canada*)

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APPLICANT'S FACTUM

PART I – OVERVIEW OF POSITION WITH RESPECT TO ISSUES OF PUBLIC IMPORTANCE AND STATEMENT OF FACTS

OVERVIEW

1. Over 65,000 Canadian Armed Forces ("CAF") run the risk of being denied their *Charter* rights by mere fact of their employment as a result of the decision of the Standing Court Martial ("SCM") and the Court Martial Appeal Court ("CMAC") and their interpretation of this Court's previous decision in *R v Hape* ("*Hape*").[1]

2. This issue is of particular importance because it is "one of first impression".[2] This application raises the issue of the extraterritorial application of the *Charter* to Canadian investigations, but in the circumstance where the subject of the investigation is a CAF member who is *required* to be on foreign soil.

3. More particularly, this application raises the question of the consequences of an overly constrictive interpretation of the two exceptions previously carved out by this Court in *Hape* to the extraterritorial application of the *Charter*: 1) consent and 2) permissible international rules.

4. With respect to consent, the SCM and CMAC have interpreted this exception in a manner that concludes that evidence of cooperation between states negates consent by a host nation.

5. With respect to the permissible international rule, the lower courts have interpreted the exception in a way to suggest *unilateral* Canadian jurisdiction is required in order to apply the *Charter* to Canadian state actors in charge of an investigation on foreign soil.

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1 *R v Hape*, [2007] 2 SCR 292 [*Hape*].

2 *R v McGregor*, 2020 CMAC 8 [*McGregor 2020*] at para 1.

6. This Court's intervention is necessary because:

   a. The concept of the extraterritorial application of the *Charter* involves an intricate point of law not often encountered. Courts are in need of a clarification of the interpretation and application of the exceptions to the principle of sovereignty (consent and permissible international rule) that were previously carved out, but not explored, by this court in *Hape*. The three contentious and varying decisions provided by this Court when rendering *Hape* exemplifies the intricacy and complexity of the issue, further warranting intervention and guidance by this Court with respect to its interpretation and application.

   b. The matter is a novel point of law as the extraterritorial application of the *Charter* has not been contemplated by this Court in circumstances involving a CAF member *required* to be on foreign soil and benefiting from protections such as diplomatic immunity.

   c. The matter is of national importance. The consequences of the CMAC's constrictive interpretation of the permissible international rule has rendered the exception pragmatically ineffectual, impacting all members of the CAF and rendering them vulnerable by mere fact of their employment.

   d. The consequence of the CMAC's restrictive interpretation of consent by a host nation again, results in a legal principle that is pragmatically ineffectual, with far-reaching consequences impacting all Canadians who find themselves on foreign soil.

7. The novelty of the issue was acknowledged and expressed by both the SCM and CMAC.

8. The Honourable Military Judge Pelletier was frank when he stated: "As it turns out, the facts in this case are quite unique and indeed very different from those in *Hape*."[3]

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3 *R v McGregor*, 2018 CM 4023 [*McGregor 2018*] at para 3.

9. Simply put, the proposed issue is one that is novel but also of great public interest to the CAF community across the nation as well as all Canadian citizens and it raises vital questions about the interpretation of the law as previously fashioned by this Court.

RELEVANT FACTS

The Applicant and Investigation

10. For the purpose of this leave application, the Applicant relies on the following facts:

11. The Applicant was a member of the CAF, Regular Force, at the relevant time.

12. As a CAF member, the Applicant was subject to the *Code of Service Discipline* ("CSD").

13. Unlike the average Canadian citizen abroad, CAF members bear the burden of the extraterritorial application of Canadian criminal law through the *CSD* as set out in s. 67 of the *National Defence Act* ("NDA").[4]

14. The *NDA* also allows for a Canadian prosecution and trial to be conducted on foreign soil, unlike the average Canadian citizen facing Canadian criminal charges.[5]

15. As part of his employment, the Applicant was required to be on foreign soil, as he was posted to the Canadian Embassy in Washington, DC, and was living in Alexandria Virginia.

16. The Applicant also held the status of being a "diplomatic agent" pursuant to Art 31(1) of the *Vienna Convention on Diplomatic Relations* ("Vienna Convention").[6]

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4 *National Defence Act*, RSC 1985 c N-5 at s 67 [*NDA*].
5 *McGregor 2020*, *supra* note 2 at para 8; *NDA*, *supra* note 4 at s. 68.
6 *McGregor 2020*, *supra* note 2 at para 12.

17. As a "diplomatic agent" the Applicant benefited from immunity of his person, property and residence from the Host State, the United States of America ("US").[7]

18. The Applicant was also subject to the *Agreement Between the Parties to the North Atlantic Treaty regarding the Status of their Forces* ("*NATO SOFA*").

19. The Applicant became the subject of an investigation for alleged offences committed against another CAF member.[8]

20. Sgt. (then Master Corporal) Partridge was assigned as lead investigator. Sgt. Partridge was a member of the Canadian Forces National Investigation Service ("CFNIS").[9]

21. During its investigation, the CFNIS determined a search warrant of the Applicant's residence was necessary; consequently, they explored the possibility of a Commanding Officer's warrant pursuant to s. 273.3 of the *NDA.* Section 273.3 permits a Commanding Officer, who is satisfied by information on oath, to issue a warrant authorizing any officer or non-commissioned member to conduct a search.

22. However, as presently written, section 273.3 limits a Commanding Officer's warrant to Canadian Forces property and not private residences.[10]

23. Due to the insufficient mechanism available, the CFNIS explored other options, including seeking the assistance of local US authorities.

24. The CFNIS met with members of the local Alexandria Police Department ("APD") who agreed to *assist* the CFNIS in obtaining a search warrant.[11]

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7 *McGregor 2020, supra* note 2 at para 12.
8 *McGregor 2020, supra* note 2 at para 13.
9 *McGregor 2018, supra* note 3 at paras 4-5.
10 *Id.* at para 5(d).
11 *Id.* at para 5(e).

25. In order for a search warrant to be issued, diplomatic immunity of the Applicant's residence needed to be waived. Upon request from the CFNIS, the Canadian embassy, by way of a diplomatic note, waived the inviolability of the Applicant's residence "to the limited extent necessary" to allow the court of Virginia to issue a warrant.[12]

26. A diplomatic note was issued by the Embassy to the US State Department to advise the Americans of the CFNIS's activities and the partial waiver of immunity.[13]

27. The APD obtained a warrant.

28. The APD breached the door, secured the premises and then invited the CFNIS members into the residence to execute the search.

29. Sgt. Partridge testified that with respect to the search itself, from the point of breach, "this had become a CFNIS investigation" based on the understanding that Canada had jurisdiction pursuant to the *NATO SOFA*.[14]

30. The seized items continuously remained in care and control of the CFNIS and were ultimately taken back to Canada.[15]

31. The Applicant was later arrested while in Washington by the CFNIS where he was informed of his s. 10(b) *Charter* rights.[16]

Vienna Convention on Diplomatic Relations

32. Relevant portions of the *Vienna Convention on Diplomatic Relations* are as follows:

    a. The convention identifies that the establishment of diplomatic relations between the parties takes place by mutual consent.[17]

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12 *McGregor 2018*, *supra* note 3 at paras 4(e) and 5(f).
13 *Id.* at para 4(c).
14 *Id.* at para 5(h).
15 *Id.* at para 5(j).
16 *McGregor 2020*, *supra* note 2 at para 17.
17 *Vienna Convention on Diplomatic Relations*, April 18, 1961, at art. 2, **Application for leave to appeal, hereinafter "A.L.A.", p. 92.**

b. "The premises of the mission shall be inviolable. The agents of the receiving State may not enter them, except with the consent of the head of the mission."[18]

c. The premise of the mission is immune from search.[19]

d. "The private residence of a diplomatic agent shall enjoy the same inviolability and protection as the premises of the mission."[20]

e. A diplomatic agent benefits from immunity from the jurisdiction of the receiving State.[21]

f. Immunity from jurisdiction may be waived by the sending State.[22]

Agreement Between the Parties to the North Atlantic Treaty regarding the Status of their Forces

33. Relevant portions of Art. VII of the *NATO SOFA*:

> 1(a) "the military authorities of the sending State shall have the right to exercise within the receiving State all criminal and disciplinary jurisdiction conferred on them by the law of the sending State over all persons subject to the military law of that State."[23]
>
> 3(a) Military authorities of the sending State have the primary right of jurisdiction over a member.[24]
>
> 6(a) "The authorities of the receiving and sending States shall assist each other in the carrying out of all necessary investigations into offences, and in the collection and production of evidence, including the seizure and, in proper cases, the handing over of objects connected with an offence."[25]

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18 *Id.*, at art. 22(1).
19 *Id.*, at art. 22(3).
20 *Id.*, at art. 30(1).
21 *Id.*, at art. 31(1).
22 *Id.*, at art. 32(1).
23 *NATO SOFA*, at art VII s. 1(a), **A.L.A., p. 109.**
24 *Id.*, at art. VII s. 3(a).
25 *Id.*, at art. VII s. 6(a).

PART II – QUESTIONS IN ISSUE

34. Does the exception of customary or international law necessitate *unilateral* Canadian authority in the context of a CAF member required to be on foreign soil?

35. Does cooperation between states preclude the exception of consent to the principle of sovereignty?

PART III – STATEMENT OF ARGUMENT

FRAMEWORK FROM *R v HAPE*

36. As previously asserted by this court, s. 32 of the *Charter* does not restrict the application of the *Charter* to within Canadian territorial borders. It can apply extraterritorially so long as it does not cause an objectionable extraterritorial effect.[26] In other words, the *Charter* can apply to Canadian state actors abroad as long as such application does not infringe on a state's sovereign equality.[27]

37. In *Hape* the court dealt with a Canadian civilian abroad being subject to a Turks and Caicos-led investigation in which Canadian state actors played an assisting role. In addition, throughout the investigation, Turks and Caicos authorities asserted their jurisdiction, making it clear they were in control of the investigation.

38. In rendering its decision, this Court carved out two distinct exceptions, to allow for the application of the *Charter* outside of Canada to Canadian state actors.

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26 *Hape, supra* note 1 at paras 148, 181 and 183.
27 *Id.* at paras 40-42.

39. In order for there to be an exception to the principle of sovereignty to permit the application of the *Charter,* there must either be:

    a. consent from the host nation; or

    b. an international rule that permits enforcement jurisdiction by Canada.[28]

40. The interpretation of said exceptions are at issue in this Application.

(A) THE EXCEPTION OF PERMISSIBLE INTERNATIONAL LAW DOES NOT NECESSITATE UNILATERAL CANADIAN AUTHORITY

41. The scope of military jurisdiction over criminal disciplinary offences is a question that has attracted public interest in the last several years and is what renders this of significant importance.

42. This Court's decision in *Hape* provided for an exception to justify the extraterritorial application of the *Charter*, permissible international rules, which circumvent an objectionable extraterritorial effect on a state's sovereign equality. However, this exception has not been previously contemplated in the context of a CAF member rendering this legal issue unique and significant to all CAF members across the nation.

43. The Applicant respectfully submits that pursuant to the exception, the *NATO SOFA* and *Vienna Convention* permit enforcement of Canadian jurisdiction abroad and with it, the *Charter*. These international agreements stipulate the circumstances under which Canadian or foreign law apply to CAF members and who has primary jurisdiction.

44. However, the lower courts interpreted *Hape* in a manner that renders the aforementioned exception pragmatically ineffectual. Thus, this Court's intervention is required in order to

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28 *Hape, supra* note 1 at para 105.

provide guidance and clarification on its previous decision as the consequences of the CMAC's interpretation are far-reaching and alarming.

45. The facts relevant to the permissible international rule exception are as follows:

a. Unlike a civilian, a CAF member is subject to Canada's extraterritorial reach by way of the *CSD* and *NDA*, which establishes Canadian criminal and disciplinary jurisdiction over the soldier while inside or outside of Canada;

b. The *Vienna Convention* forms the basis of the Applicant's status of diplomatic immunity;

c. Article 31(1) of the *Vienna Convention* provides that a diplomat benefits from inviolability of the person from the jurisdiction of the receiving state;

d. Inviolability extends to a diplomat's property and residence;

e. Diplomatic immunity of the member can only be waived by Canada;

f. The Applicant was also subject to the *NATO SOFA* which established Canadian jurisdiction over the Applicant;[29]

g. The *NATO SOFA* also requires cooperation and assistance from a host nation in an investigation of a member including the seizure and collection of evidence;[30]

h. With respect to the Applicant's circumstances, the investigation was a Canadian-led investigation;

i. The State actors were the CFNIS;

j. When a search of the Applicant's residence was conducted, the CFNIS executed the search once inside; and

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29 *NDA, supra* note 4 at Art VII at ss. 1(a) and 3(a).

30 *Id.* at Art VII at s. 6(a).

k. The evidence collected remained in the possession of the CFNIS and was ultimately taken back to Canada.

46. In its previous decision in *Hape*, this court stated:

> Criminal investigations implicate enforcement jurisdiction, which pursuant to the principles of international law discussed above, cannot be exercised in another country absent the consent of the foreign state or the application of another rule of international law under which it can so be exercised.[31] [emphasis added]

47. Given that this Court, with the facts presented in *Hape,* was not prepared to consider how the permissible international rule exception would be applied to a civilian, let alone a CAF member, the SCM and CMAC were left without sufficient guidance, which resulted in an over-restrictive interpretation of the law.

48. The CMAC in assessing the exception concluded that unilateral Canadian authority was required in order to satisfy the exception.[32] In its decision, it indicated that CAF members may be subject to Canadian jurisdiction but that it "does not amount to a waiver of American territorial sovereignty over the person and their real property in the US" and the issuing of the US warrant was an "exercise of American sovereign authority".[33]

49. The CMAC failed to consider the impacts of Art VII s. 6(a) of the *NATO SOFA*, or at least is silent in this regard.

50. The CMAC ultimately ruled that the exception of permissible international rules did not apply to the actions of the CFNIS as the *Vienna Convention* and *NATO SOFA* did "not give Canadian authorities the unilateral right to investigate the real property located in that foreign

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31 *Hape, supra* note 1 at para 105.
32 *McGregor 2020, supra* note 2 at para 50.
33 *McGregor 2020, supra* note 2 at paras 47 and 52.

territory."[34] In providing its decision in *Hape* this court did not suggest unilateral authority was required, yet the CMAC referred to the *Hape* decision as a basis for its judgment.[35]

51. In the alternative, the SCM recognized such a restrictive interpretation was legally and pragmatically problematic but felt constrained by its interpretation of this Court's judgment.

52. The Honourable Military Judge Pelletier reasoned as follows:

> The reasons of LeBel J. are also challenging for me as the basic factual situation of both the alleged offender in this case and the details of the alleged offences are such that statements made by LeBel J. in his reasons as it pertains to the exercise by a state of enforcement jurisdiction outside of its borders become, in my respectful view, inaccurate when viewed in the light of the military police enforcing the *NDA* and its Code of Service Discipline in respect of a member of the CAF serving in the USA and suspected of having committed an offence on a complainant who is also a member of the CAF…Parliament can and has also exercised prescriptive jurisdiction to impose extraterritorial obligations on persons subject to the Code of Service Discipline. It has also empowered courts such as this one to exercise adjudicative jurisdiction anywhere in the world in relation to offences committed by persons subject to the Code of Service Discipline. Such exercise of jurisdiction are acceptable limits on the sovereignty of the state on whose territory an alleged offence is committed because they are based on international conventions such as the *Vienna Convention on Diplomatic Relations* or the *NATO SOFA* with whom the host nation has consented and from which it benefits when engaging in its own diplomatic and military activities abroad as a sending state.[36]
>
> However, there was a problem with the initial plans of CFNIS investigators on the facts of this case and it is the realization that Parliament had not made available to them all of the tools they needed to conduct an essential investigatory step: the search of Corporal McGregor's residence, in which they had grounds to believe they would find the evidence they needed to prove the crimes they were investigating.[37]

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34 *McGregor 2020*, *supra* note 2 at para 50.
35 *McGregor 2020*, *supra* note 2 at para 51.
36 *McGregor 2018*, *supra* note 3 at para 11.
37 *Id.* at para 14.

53. Despite "strong reasons supporting the application of the *Charter* to activities of CFNIS,"[38] given a gap in Canadian legislation in an inability to obtain a Canadian warrant, the court felt constrained by its interpretation of *Hape* to conclude that the exception of permissible international rule did not apply.

54. Again, the inference being that in order for the exception to the principle of sovereignty to apply, there must be unilateral Canadian jurisdiction in every facet of an investigation.

55. As a result of an interpretation of this Court's judgment, the SCM and CMAC have established an approach so restrictive it renders the exception pragmatically ineffectual.

56. This restrictive approach appears contrary to the intention of this Court when it stated:

> It is clear that a balance must be struck to 'achieve a just accommodation between the interests of the individual and those of the state in providing a fair and workable system of justice.'[39]

57. *Hape* does not require unilateral authority in order for the exception to be satisfied. It merely requires that there are permissible international rules or customs that allow for enforcement jurisdiction, which again, includes investigative jurisdiction.

58. To suggest that *unilateral* Canadian jurisdiction or authority is necessary, creates an impossibly high onus on an accused, an onus that was not stipulated by this Court in *Hape.*

59. The approach taken by the lower courts is impractical and it does not take into account the unique facts of the case and leaves courts like the SCM without discretion even when it acknowledges the legally problematic nature of the conclusion. Such a restrictive approach forecloses any realistic possibility of the application of the *Charter*.

60. This legally problematic interpretation by the Courts have serious implications.

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38 *McGregor 2018, supra* note 3 at para 16.

39 *Hape, supra* note 1 at para 100.

61. The consequences are far-reaching as the impacts go beyond the Applicant and touch the tens of thousands of CAF members across the entire nation. It necessitates a conclusion that despite dedicating their lives to serving Her Majesty and this country, they are more vulnerable by virtue of their employment requiring them to be on foreign soil.

62. To allow such an impossibly constrictive interpretation of the exception would undermine the value of the *Charter* protection and create the perception that the courts are indifferent to our CAF members and their status as citizens. CAF members are unique in that they are posted to locations outside of Canada, where we will subject them to the *CSD* and *NDA* yet the law is interpreted in a way that the international agreements we allege protect them are practically ineffectual. The consequences require this Court's guidance.

63. This could not have been what this Court envisioned in rendering its judgment in *Hape*. If the exception of permissible international rule were not to apply to the facts of the Applicant's case, then in what circumstances could it be applicable?

64. This case is novel enough to warrant intervention by this court.

65. As the Honourable Military Judge Pelletier stated, "…as it turns out, the facts in this case are quite unique and indeed very different from those in *Hape*."[40]

66. In *Hape* this Court did not have the benefit of being faced with a Canadian-led investigation, but rather were faced with a significantly distinguishable fact pattern involving a foreign authority-led investigation in which Canadian state actors assisted; and more significantly, *Hape* did not deal with a CAF member who was subject to a number of international agreements between the subject States. These factors render this case incomparably unique.

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40 *McGregor 2018, supra* note 3 at para 3.

67. This case necessitates this Court's intervention in order to provide clarity and guidance on its previous decision and is necessary to illuminate the protections afforded to our posted CAF members who find themselves on foreign soil.

68. Our judicial system is grounded in the rule of law and the rule of law suffers when we ignore and permit constitutional failures.

(B) COOPERATION BETWEEN STATES DOES NOT PRECLUDE CONSENT

69. The second exception this Court crafted to justify the extraterritorial application of the *Charter*, which avoids an objectionable effect on sovereignty, included consent of the Host nation.

70. Again, the SCM and CMAC interpreted this Court's decision with respect to consent in a manner that renders the principle pragmatically ineffectual. Thus, this Court's intervention is required in order to provide clarification on its previous decision as the consequences of the courts' interpretation are far reaching across the nation.

71. For the purpose of this application, the SCM and CMAC were faced with the following indicia of consent:

a. The Applicant became the subject of an investigation;

b. Sgt. Partridge, a CFNIS member and Canadian state actor, was assigned as the lead investigator;

c. Sgt. Partridge made decisions on how the investigation progressed;

d. The CFNIS sought the assistance of the APD for the sole purpose of obtaining a search warrant to permit the CFNIS entry into the residence;

e. By way of a diplomatic note from the Canadian Embassy, the US State Department was informed about the CFNIS's activities in their jurisdiction with respect to the investigation;

f. The APD breached the door, secured the premises and then invited the CFNIS members into the residence to execute the search; and

g. The CFNIS executed the search itself and the evidence remained in the possession of the CFNIS and was taken back to Canada.

72. With respect to consent, in *Hape*, this Court stated that "any attempt to dictate how the activities are to be performed in a foreign state's territory without that state's consent would infringe the principle of non-intervention."[41] Furthermore:

> In some cases, the evidence may establish that the foreign state consented to the exercise of Canadian enforcement jurisdiction within its territory. The *Charter* can apply to the activities of Canadian officers in foreign investigations where the host state consents. In such a case, the investigation would be a matter within the authority of Parliament and would fall within the scope of s. 32(1). Consent clearly is neither demonstrated nor argued on the facts of the instant appeal, so it is unnecessary to consider when and how it might be established.[42]

73. Given that this Court was not in a position to address how consent may be established as it was not confronted with said facts in *Hape*, the lower courts were left without sufficient guidance leaving each to interpret the principle of consent as it saw fit, which has resulted in an overly restrictive interpretation.

74. The CMAC, in assessing consent, concluded that because the investigation necessitated the assistance and cooperation with US authorities by way of a search warrant, the search was "an exercise of sovereign American authority" and thus consent was not present.[43]

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41 *Hape*, *supra* note 1 at para 105.
42 *Id.* at para 106.
43 *McGregor 2020*, *supra* note 2 at para 43.

75. The CMAC, in rendering its decision did not go into an analysis as to why cooperation in a Canadian-led investigation negated consent or how it factored into its reasoning. The CMAC's silence in this regard raises uncertainty as to how it reached its conclusion.

76. The SCM in assessing consent acknowledged:

> The evidence is to the effect that they fully intended to perform all investigative activities on their own and produce a report that could well result in prosecution before a military tribunal in application of the *NDA*. The police officers testified that they were effectively in charge of the investigation with the full consent of their US counterparts. At no point was a prosecution in the USA envisaged. At all times, the CFNIS investigators intended to and believed they were bound to act in respect of the *Charter*.[44]

77. Yet, the Court felt bound to conclude that the consent exception was not applicable and in doing so referenced *Hape*:

> As explained by LeBel J. at paragraph 104 of his reasons, "Canada does not have authority over all matters respecting what the officer may or may not do in the foreign state. Where Canada's authority is limited, so too is the application of the *Charter*."[45]

78. Again, the inference being that any level of cooperation between states renders the exception of consent inapplicable.

79. With the utmost respect, the SCM and CMAC conflated the fact that there was cooperation between the two States to conclude that jurisdiction belonged to the US, while failing to consider the American's actions in light of the consent exception.

80. In addition, the courts were virtually silent with respect to how cooperation resulted in an objectionable extraterritorial effect on the sovereignty of the US, the basis for the *Hape* test.

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44 *McGregor 2018*, *supra* note 3 at para 13.

45 *Id.* at para 15.

81. This interpretation by the SCM and CMAC have serious implications in that it creates an impossibly high standard which, in practice, forecloses the application of the *Charter*.

82. This could not have been what this Court envisioned in *Hape*.

83. It ought to be noted that in rendering its decision, this Court did not state that the exception to the principle of sovereignty must be interpreted so strictly to conclude that cooperation equates to a lack of consent to Canadian enforcement jurisdiction.

84. This Court intentionally carved out the two exceptions for the very reason that it would not create an objectionable extraterritorial effect and thus permit the application of the *Charter* outside of Canada.

85. And in this case, an ability to issue a warrant is arguably a gap in the *NDA* and Canadian legislation. Had the Commanding Officer warrant permitted the search of the CAF member's residence, the CFNIS would have pursued same.

86. If courts applied the impossibly narrow interpretation of the SCM and CMAC, we would be hard pressed to find a case in which the exception of consent is made out in a case involving a search, rendering s. 8 of the *Charter* meaningless outside of Canada.

87. Some level of cooperation with foreign police forces is inevitable and to equate cooperation with a loss of jurisdiction conflates the concept of cooperation and does not root the conclusion in an analysis as to whether there is an objectionable extraterritorial effect.

88. For example, the CFNIS will routinely use a civilian Justice of the Peace for their issuance of a warrant, this cooperation with civilian authorities cannot be inferred to result in a loss of military jurisdiction over a matter. Cooperation can be interpreted as indicia of consent.

89. Given the significance of our *Charter* and the rights it was crafted to constitutionally guarantee, is respectfully submitted that it would be inappropriate to adopt an interpretation of this Court's decision that renders the *Hape* test pragmatically inapplicable.

90. The impacts of the decision of the SCM and CMAC are of national importance as it goes beyond the Applicant and effects all Canadians who find themselves on foreign soil.

91. In addition, this issue, as acknowledged by the SCM and CMAC, is novel in the sense that it was not contemplated or canvassed in detail by this Court in *Hape*, given the fact pattern before it *vis-à-vis* a Canadian-led investigation.

92. With respect, the law must be interpreted in a way that renders it meaningful and in accordance with its purpose.[46]

93. The interpretation of the CMAC and SCM forecloses the possibility of the application of the *Charter* and thus, the CAF and the nation require intervention by this Court in order to provide practical guidance to its previous decision in *Hape*.

94. In short, the CMAC have adopted an impossibly restrictive interpretation of this Court's decision without considering the consequences. This Court's intervention is required to provide clarification and guidance with respect to the exceptions it previously established. Canadian soldiers are posted abroad at any given time and the current interpretation renders them and all Canadian citizens vulnerable.

PART IV – SUBMISSIONS CONCERNING COSTS

95. The Applicant does not seek costs for this application and ask that no costs be awarded against it.

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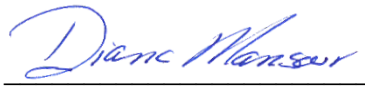
[46] *R v Big M Drug Mart Ltd*, [1985] 1 SCR 295 at p. 344; *Fraser v Ontario (Attorney General)*, 2011 SCC 20 at para 75.

PART V – ORDER SOUGHT

96. It is respectfully requested that leave be granted.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated at the Region of York, in the Province of Ontario this 3 day of March 2021.



Captain Diana Mansour
Defence Counsel Services
Counsel for the Applicant

PART VI –TABLE OF AUTHORITIES

Législation **Paragraph(s)**

Jurisprudence
