SCC-39543

IN THE SUPREME COURT OF CANADA
ON APPEAL FROM A JUDGMENT FROM THE
COURT MARTIAL APPEAL COURT

BETWEEN:

CORPORAL C.R. MCGREGOR

Applicant
(Appellant)

and

HER MAJESTY THE QUEEN

Respondent
(Respondent)

RESPONSE TO THE APPLICATION FOR LEAVE TO APPEAL
(Article 40(1) of the Supreme Court Act and
Rule 27 of the Rules of the Supreme Court of Canada)

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Response to an Application for Leave to Appeal

RESPONDENT'S FACTUM

PART I - OVERVIEW

1. Canadian Armed Forces (CAF) members are not being denied their *Charter* rights when serving abroad. When facing the prospect of disciplinary measures, *Charter* rights are afforded to every CAF member during all stages of the investigation, laying of charges, preferral for court martial and during the trial itself, whether these occur in Canada or in a foreign country. However, these rights are limited by international law and by the principle of sovereignty as expressed by this Court in *Hape*.[1]

2. The arguments raised by the Applicant fail to distinguish between jurisdiction over the person in the conduct of an investigation and enforcement jurisdiction to authorize the search of real property located on foreign soil. As was stated by this Court in *Hape*, s. 32 of the *Charter* does not preclude its application extraterritorially so long as it does not cause an objectionable extraterritorial effect.[2] This case was one that fell squarely within the framework established in *Hape*. A search and seizure conducted abroad, even when connected to a Canadian investigation, cannot be subjected to our *Charter* requirements as it would constitute, in the absence of consent from the foreign State or of a permissible rule of international law, an objectionable encroachment on the territorial State's sovereignty.

3. As a result, this case does not raise a question of national importance deserving of this Court's attention. The issues that it raises were all adequately answered in *Hape*. Whilst the Applicant might have been validly the subject of a Canadian investigation performed by Canadian State actors, much like in *Hape*, this fact alone did not confer jurisdiction to search real property which was not under Canadian Armed Forces (CAF) control and which was located in the sovereign territory of the United States of America.

4. There was no consent by the United States to the application of Canadian law to the search. On the contrary, the very fact that the Alexandria Police sought and obtained a search warrant in accordance with the law of the State of Virginia was an affirmation of sovereignty.[3]

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[1] *R v Hape*, [2007] 2 SCR 292 [*Hape*].
[2] *Ibid* at paras 148, 181 and 183.
[3] *R v McGregor*, 2020 CMAC 8 [*McGregor*] at paras 33-44.

5. In any event, the ensuing search, which was found to have been validly conducted under foreign law, complied in all aspects with our *Charter* standards.[4]

6. The Respondent takes no issue with the facts as described by the Applicant.

PART II - QUESTIONS IN ISSUE

7. The Applicant has raised the following issues:

a. 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?

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

8. The Respondent submits that the only issue at this stage (application for leave to appeal) is whether this case raises a question of national importance deserving of this Court's attention.

[4] *Ibid* at para 11.

PART III - STATEMENT OF ARGUMENT

9. This case does not raise a question of national importance deserving of this Court's attention. The previous decision of this Court in *Hape* answers all of the issues raised and was correctly applied by the trial judge and on appeal by the Court Martial Appeal Court (CMAC).

10. In *Hape*, this Court held that s. 32 of the *Charter* does not preclude its application extraterritorially so long as it does not cause an objectionable extraterritorial effect.[5] In order for the *Charter* to apply extraterritorially, this Court carved out two exceptions to the principle of sovereignty:

a. there is consent from the territorial State; or

b. there is an international rule that permits enforcement jurisdiction by Canada.[6]

11. In the present case, there was no rule of international law allowing Canada to exercise enforcement jurisdiction over the Applicant's private residence located in Alexandria, Virginia and there was no consent by the United States to the application of Canadian law to its search.

A. There was No Rule of International Law Allowing Enforcement Jurisdiction over the Residence

12. Canada's jurisdiction over the Applicant while serving in the United States was limited to the person under the *Code of Service Discipline* (CSD) and under the *Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of their Forces* [*NATO SOFA*]. It did not include enforcement jurisdiction over the Applicant's private residence located on foreign soil. Furthermore, the Applicant's diplomatic immunity under the *Vienna Convention on Diplomatic Relations*[7] acted as a shield against United States enforcement jurisdiction. It did not confer jurisdiction to Canada to search his private residence.

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[5] *Hape, supra* note 1 at paras 148, 181 and 183.
[6] *Ibid* at para 105.
[7] *Vienna Convention on Diplomatic Relations*, April 18, 1961 [*Vienna Convention*].

a) The *Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of their Forces*

13. The *NATO SOFA* does not constitute permissible international law allowing Canada to exercise enforcement jurisdiction over real property located in the territory of the United States of America.

14. The *NATO SOFA* conferred primary jurisdiction to Canada, as the sending State, over the person of the Applicant to investigate allegations of disciplinary and criminal misconduct.[8] This is, however, not all encompassing. Jurisdiction over the person of the Applicant does not entail jurisdiction over the Applicant's private residence located within the territory of the receiving State, in this case the United States. This is why, under article VII(6)(a), the *NATO SOFA* provides for the necessary cooperation of the receiving and sending States in the seizure and handing over of objects connected with an offence being investigated. Contrary to the Applicant's position, article VII(6)(a) does not purport to grant enforcement jurisdiction to the sending State in relation to real property located within the territory of the receiving State for evidence gathering purposes.

15. The *NATO SOFA* cannot be interpreted as an expression of consent by the receiving State to relinquish its sovereignty over its territory. Consent to the exercise of the sending State's jurisdiction is limited to the members of its armed forces and the facilities and installations (camps, establishments or other premises) which it occupies as a result of an agreement with the receiving State.[9] Even then, jurisdiction is concurrent as the receiving State always retains jurisdiction on the basis of sovereignty and territoriality.[10]

16. The *NATO SOFA* therefore does not constitute permissible international law allowing Canada to exercise its jurisdiction in authorizing and conducting independently the search of real property located in the United States. The search of the Applicant's private residence could only

[8] *NATO SOFA* art. VII(1)(a) and (3)(a)(i).
[9] *Ibid* at art. VII(1)(a); art. VII(3)(a)(i) and art. VII(10).
[10] *Ibid* at art. VII(1)(b) and (2)(b).

have been authorized by the laws of the State of Virginia. As such, Canadian law did not and could not have applied to the search in the absence of consent from the territorial State.

b) The *Vienna Convention on Diplomatic Relations*

17. The *Vienna Convention* did not confer jurisdiction to Canada over the Applicant's private residence. It merely acts as a shield to protect the principle by which the conduct of diplomatic relations between States can occur freely and without interference. As such, under articles 30 and 31 of the *Vienna Convention*, the person of the Applicant enjoyed diplomatic immunity along with his personal residence, his papers, correspondence and property.

18. In this case, the Applicant's diplomatic immunity in relation to his residence and his property was waived by Canada as it was required to allow the United States to authorize the search of the residence.[11] The fact that a waiver of diplomatic immunity was required to allow for the search of the Applicant's residence under United States' law is no indication that the *Vienna Convention* constituted a permissible rule of international law granting Canada enforcement jurisdiction over the Applicant's private residence. It also did not amount to consent by the United States to the exercise of Canadian enforcement jurisdiction over it.

B. There was No Consent by the United States to the Application of Canadian Law to the Search of the Residence

19. The United States did not consent to Canada exercising jurisdiction over the Applicant's residence for the purpose of executing a search. Furthermore, Article VII(6)(a) of the *NATO SOFA*, which provides for cooperation between States, does not amount to an expression of consent by the receiving State to the application of the sending State's laws in all things connected with an investigation led by that State.

20. It is evident from the facts of this case that the United States rightly recognized that Canada had primary jurisdiction to investigate an offence committed by a member of its armed

[11] *McGregor*, *supra* note 3 at paras 35-36.

forces against another CAF member under the *NATO SOFA*.[12] It further agreed to assist the Canadian Forces National Investigation Service (CFNIS) when presented with a request for assistance to execute a search of the Applicant's residence, which is envisioned under article VII(6)(a) of the *NATO SOFA*. However, recognition that the search was to be conducted in furtherance of a Canadian investigation does not amount to consent that the search itself, wholly conducted within the territory of the United States, is to be governed by Canadian law.

21. The Applicant is wrong in holding that failure by the Alexandria Police or by the US State Department to expressly assert that they remained in "charge" in the same manner as Turks and Caicos in *Hape* amounted to consent. Consent to the application of extraterritorial law cannot be implied. Not only was consent to the application of Canadian law to the search of the Applicant's private residence never given, but by obtaining a search warrant under State of Virginia law after forming their own reasonable and probable grounds, the Alexandria Police in effect was asserting US jurisdiction over it.

22. The mere fact that the investigation was Canadian-led and that the search was conducted on site by Canadian State actors is not enough. In *Hape*, the search was also executed by Canadian State actors (RCMP officers) and yet, this Court held that the *Charter* could not have applied in the absence of consent as Canada did not have enforcement jurisdiction in Turks and Caicos.

23. In this case, cooperation between Canada and the United States in an investigation for which Canada was exercising primary jurisdiction over a member of its armed forces did not amount to consent to the application of Canadian law in all things connected with it. When CFNIS investigators were required to search the Applicant's private residence, they simply could not do so on the basis of a Canadian search warrant.[13]

24. The search was duly authorized under Virginia State law after the officers of the Alexandria Police independently formed their own reasonable and probable grounds that

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[12] *NATO SOFA* art. VII(1)(a); art. VII(3)(a)(i).
[13] *McGregor*, *supra* note 3 at para 34.

offences under Virginia State law had been committed.[14] Once the search was authorized, the CFNIS investigators were required to attend a briefing conducted by the Alexandria Police. The execution of the search then proceeded only after the Alexandria Police secured the site and allowed the CFNIS investigators to enter the residence. Officers of the Alexandria Police remained on site and one of their forensic investigators assisted the CFNIS investigators in performing the triage function of the electronic devices on the premises. The Alexandria Police subsequently filed a report to the magistrate who authorized the search regarding the items seized.[15] All these facts unequivocally point in the direction of the US asserting jurisdiction over the search of the residence as it was authorized and conducted under US law. Canadian law, as such, did not and could not have applied.

C. Conclusion

25. This case raises no issue of national importance deserving of this Court's attention. Both the trial judge and the CMAC correctly applied the framework laid out by this Court in *Hape*. There were no rules of international law conferring jurisdiction to Canada over the Applicant's residence and the United States did not consent to the application of Canadian law to the search. The Applicant fails to recognize the distinction between jurisdiction over the person to investigate and enforcement jurisdiction flowing from the principle of sovereignty and territoriality necessary to search real property.

PART IV – SUBMISSIONS CONCERNING COSTS

26. The Respondent does not seek costs and asks that no costs be awarded.

[14] *Ibid* at paras 35 and 43.
[15] *Ibid* at para 40.

PART V – ORDER SOUGHT

27. The Respondent requests this Court to dismiss the application for leave to appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated at Gatineau, Quebec this 24th day of March 2021.

POITRAS, STEPHAN 876

Digitally signed by POITRAS, STEPHAN 876
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PART VI – TABLE OF AUTHORITIES

Legislation

Agreement Between the Parties to the North Atlantic Treaty regarding the Status of their Forces (*NATO SOFA)*

(English) art. VII(1)(a); VII(1)(b) and (2)(b); art. VII(3)(a)(i); art. VII(10).
(French) art. VII(1)(a); VII(1)(b) and (2)(b); art. VII(3)(a)(i); art. VII(10).

Vienna Convention on Diplomatic Relations, April 18, 1961

(English) *Vienna Convention*
(French) *Convention de Vienne*

Jurisprudence

Supreme Court of Canada

R v Hape, [2007] 2 SCR 292

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