



Case in Brief: ***R. v. McGregor***

Judgment of February 17, 2023 | On appeal from the Court Martial Appeal Court of Canada
Neutral citation: 2023 SCC 4

The Supreme Court rules Canadian military investigators did not violate the Charter of Rights and Freedoms while investigating a Canadian soldier's criminal activity abroad.

Retired Corporal (Cpl.) Colin McGregor was posted to the Canadian Defence Liaison Staff at Canada's embassy in Washington, D.C. Given his position in the United States, Cpl. McGregor had diplomatic immunity in respect of his person, property and residence under the *Vienna Convention on Diplomatic Relations*.

In 2017, one of his Canadian Armed Forces colleagues posted to the United States discovered two audio recording devices in her home. She believed Cpl. McGregor had placed them there and reported the discovery to her senior officer. Upon investigating the matter, the Canadian Forces National Investigation Service found there were reasonable grounds to believe Cpl. McGregor had committed the offences of voyeurism and possession of a device to surreptitiously record private communications. Yet, the Investigation Service could not search his residence in Alexandria, Virginia because it was not located on Canadian Armed Forces property. As a result, the lead investigator asked the Canadian Embassy to waive Cpl. McGregor's immunity under the *Vienna Convention*. With immunity waived, the Alexandria Police Department obtained a warrant that authorized the search of Cpl. McGregor's residence, as well as any electronic devices found there.

The American police entered Cpl. McGregor's residence and invited the Investigation Service to conduct the search. Officers seized electronic devices and searched some of them while in the residence. They discovered evidence of the suspected offences as well as others. The electronic devices were removed to Canada and searched further, in line with Canadian warrants.

A military judge dismissed Cpl. McGregor's motion to exclude the evidence for breach of section 8 of the *Canadian Charter of Rights and Freedoms*, which protects people from "unreasonable search or seizure". The military judge convicted him of voyeurism, possession of a device for surreptitious interception of private communications, sexual assault and disgraceful conduct. That decision was affirmed by the Court Martial Appeal Court.

Cpl. McGregor then appealed to the Supreme Court of Canada. Both parties relied on this Court's decision in *R. v. Hape* about whether the *Charter* applies to searches and seizures conducted by Canadian police officers in other countries. Cpl. McGregor took the position that the *Charter* applies in this case to the Investigation Service, whereas the Crown argued the opposite.

A unanimous Supreme Court dismissed the appeal and affirmed his convictions.

The investigation did not violate Cpl. McGregor's rights under section 8 of the *Charter*.

Writing for a majority of the judges, Justice Suzanne Côté found it unnecessary to deal with the issue of extraterritoriality, because she said the Investigation Service did not violate the *Charter*. Working within the constraints of its authority in Virginia, the Investigation Service asked local authorities to obtain and execute a warrant under Virginia law. That warrant authorized the search, seizure and analysis of Cpl. McGregor's electronic devices expressly. The evidence of sexual assault was discovered inadvertently by investigators while triaging the devices at the scene of the search. Its incriminating nature was immediately apparent. Although the warrant did not foresee such evidence, the digital files fell into plain view.

As Justice Côté explained, there are two requirements of the plain view doctrine and in this case they were both met: (1) the investigators had a legitimate prior justification for the intrusion in the form of a warrant; and (2) the incriminating evidence was in plain view in that it was immediately obvious and discovered inadvertently.

In addition, the Investigation Service obtained Canadian warrants before searching the devices any further. For all these reasons, Justice Côté said it is difficult to see how the investigators could have acted differently to attain their legitimate investigative objectives.

Breakdown of the decision: *Majority:* Justice Suzanne [Côté](#) dismissed the appeal (Chief Justice [Wagner](#) and Justices [Moldaver](#), [Kasirer](#) and [Jamal](#) agreed) | *Concurring:* Justices [Karakatsanis](#) and [Martin](#) agreed that the appeal should be dismissed, but addressed the extraterritoriality issue under [R. v. Hape](#) | *Concurring:* Justice [Rowe](#) agreed with the entirety of Justice Côté’s analysis, but disagreed with Justices Karakatsanis and Martin’s approach to [R. v. Hape](#).

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