Standing on Guard: Territory, Terrorism and the Limits of the Canadian Constitution Post-*Hape*

By

Peter Allan Hay, J.D. candidate, M.A., B.A

For

Professor Errol Mendes
CML4101B
University of Ottawa – Faculty of Law – Common Law Program

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Under Bill C-44, CSIS' mandate was extended so as to include extraterritorial operations and the potential for violating foreign laws. Could such operations also violate the rights of Canadians under the Charter of Rights and Freedoms given the ruling of the Supreme Court in R. v. Hape?[1]

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[1] Professor Errol Mendes, "Class Materials" Document in CML4101B, (University of Ottawa, Faculty of Law, Common Law Program: Fall, 2016).

Part 1: Introduction

Context

In the last fifteen years, the law of international intelligence-gathering has risen to an unprecedented level of constitutional significance. This is the global-digital age: where information, weapons and threats circulate the globe at the tap of a finger. Crime is international. Police and security agencies have been forced to adapt and become international, too. But what are the limits to Canadian police forces' authority in foreign territory? How much power do Canadian agents have on foreign soil? How far can they go in the course of extraterritorial investigations under the guise of national security? Are the fundamental rights and freedoms of Canadians still protected internationally? These are just some of questions that CSIS and other Canadian police agencies face as they stand on guard at the crossroads of criminal, constitutional and public international law.[2] Answering them will take us to the limits of Canada's Constitution and the judiciary itself.

Purpose, Thesis and Brief Reasons

The purpose of this paper is to provide an answer to the question posed by professor Errol Mendes (copied at the top of page 1). Despite the fact that the *Protection of Canada from Terrorists Act* ("*PCTA*")[3] substantially expanded CSIS' mandate, including the potential to violate foreign laws during extraterritorial operations,

[2] See *R v Hape*, 2007 SCC 26 at para 24, [2007] 2 SCR 292, 280 DLR (4th) 385 [*Hape*].
[3] *Protection of Canada from Terrorists Act*, SC 2015, c 9; aka. Bill C-44; aka. *PCTA*.

Canadians' *Charter*[4] rights are still protected in the context of extraterritorial investigations.

The general rule is that the *Charter* cannot apply in foreign territory without the host nation's consent, in deference to the international law principles of sovereignty and the comity of nations.[5] However, there are three main exceptions to the general rule in the context of *Hape* and the *PCTA*. The first two exceptions are express in *Hape*.

First, the *Charter'*s fair trial safeguards can apply to exclude foreign evidence from trial or provide such other remedy as is just.[6] Second, pursuant to the first stage, second leg of the *Hape* test, the Court can apply the *Charter* to extraterritorial state actions if an "exception to the principle of sovereignty" justifies its application.[7] The violation of foreign and international laws qualifies as an exception that can trigger the application of the *Charter* to state-sponsored actions abroad.[8] Finally, deriving not from *Hape* but from the *PCTA* itself, judicial control represents a third exception by which the rights of Canadians can be protected in the context of foreign investigations. CSIS' extraterritorial authority, pursuant to the *PCTA,* depends on warrants issued at a judge's discretion.[9] In that stage of an investigation, judges have the opportunity to balance the fundamental rights and freedoms of Canadian citizens against the national security interests in a given case. Judges would have ample authority to reject warrant applications that impinge excessively on the rights of Canadians. In these three ways, the

[4] *Canadian Charter of Human Rights and Freedoms*, Part I of the *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.
[5] See *Hape, supra* note 2 at paras 41-52.
[6] *Ibid,* at para 113; see also *Charter, supra* note 4 at s 24.
[7] *Ibid,* at para 113.
[8] *Ibid,* at para 100-101.
[9] See *PCTA, supra* note 3 at s 21.

Charter rights of Canadians are still protected extraterritorially despite the expanded CSIS powers in the *PCTA*.

Part 2: The *Protection of Canada from Terrorists Act*

The question asked in this paper was generated by the controversy surrounding Bill C-44. Bill C-44 was granted royal assent on April 23rd, 2015 and enacted as *An Act to Amend the Canadian Security Intelligence Service Act and Other Acts*.[10] I refer to the Act according to its short title: the *Protection of Canada from Terrorists Act*, or the "*PCTA*".

There are a number of controversial provisions in the *PCTA*. This paper's focus is on the Act's extraterritorial provisions. The *PCTA* significantly expanded CSIS*'* mandate and authority for extraterritorial operations.

Section 3 of the *PCTA* amended section 12 of the *CSIS Act* in order to remove any territorial restrictions to CSIS*'* ability to collect, analyze and retain information:

> *Duties and Functions of Service:*
> *Collection, analysis and retention*
> 12 (1) The Service shall collect, by investigation or otherwise, to the extent that it is strictly necessary, and analyse and retain information and intelligence respecting activities that may on reasonable grounds be suspected of constituting threats to the security of Canada and, in relation thereto, shall report to and advise the Government of Canada.
> *No territorial limit*
> (2) For greater certainty, the Service may perform its duties and functions under subsection (1) within or outside Canada.[11]

Section 4 of the *PCTA* also removes the territorial restrictions on investigations under section 15 the *CSIS Act*:

[10] *PCTA, supra* note 3.
[11] *Ibid,* at s 3 amending the *Canadian Security Intelligence Service Act*, RSC 1985, c C-23, s 12.

> *Investigations*
> 15 (1) The Service may conduct such investigations as are required for the purpose of providing security assessments pursuant to section 13 or advice pursuant to section 14.
> *No territorial limit*
> (2) For greater certainty, the Service may conduct the investigations referred to in subsection (1) within or outside Canada.[12]

In addition to providing extraterritorial powers, the *PCTA* also provides CSIS with the power to violate foreign and international laws. The *PCTA* amends section 21 of the *CSIS Act* in order to allow judges to issue warrants to CSIS agents "without regard to any other law"[13]:

> *Judicial Control*
> *Application for Warrant*
> 21 (1) If the Director or any employee designated by the Minister for the purpose believes, on reasonable grounds, that a warrant under this section is required to enable the Service to investigate, within or outside Canada, a threat to the security of Canada or to perform its duties and functions under section 16, the Director or employee may, after having obtained the Minister's approval, make an application in accordance with subsection (2) to a judge for a warrant under this section.
> *Activities outside Canada*
> 21 (3.1) Without regard to any other law, including that of any foreign state, a judge may, in a warrant issued under subsection (3), authorize activities outside Canada to enable the Service to investigate a threat to the security of Canada.[14]

The extraterritorial provisions in the *PCTA* are clearly a legislated response to the Federal Court's decision in the *CSIS Act Reference.*[15] In that case, applications for extraterritorial warrants pursuant to sections 12 and 21 of the *CSIS Act* were rejected on the grounds that the *CSIS Act* lacked any clear legislative intent to grant extraterritorial

[12] *Ibid,* at s 4 amending *CSIS Act, supra* note 11 at s 15.
[13] *CSIS Act, supra* note 11 at s 21(3.1).
[14] *Ibid,* at s 8(1)&(2) amending *CSIS Act, supra* note 11 at s 21(1)&(3.1).
[15] *Canadian Security Intelligence Service Act (Re)*, 2008 FC 301, 356 FTR 56 [*CSIS Act (Re)*].

authority to CSIS agents.[16] The *PCTA* is designed to directly fill the extraterritorial void in the *CSIS Act Reference*.

However, there are a number of unresolved issues in relation to CSIS' new extraterritorial powers. For example, it is still not clear (1) whether judges have the constitutional authority to issue warrants without regard to any other law, or in violation of foreign or international laws, (2) whether the *Charter* applies to regulate state actors while operating on foreign soil and (3) by extension, whether the rights of Canadians are protected by the *Charter* beyond Canadian borders.

Part 3: Jurisprudence

To date, no case law can directly answer these issues. Because the *PCTA* was only recently enacted (2015), there have not yet been any constitutional challenges to the Act's extraterritorial provisions, nor any *Charter* claims against extraterritorial police investigations conducted pursuant to the Act.[17] As a result, we must rely on the leading jurisprudence up to the enactment of the *PCTA*. *Hape* is generally regarded as the leading case on the extraterritorial application of the *Charter*, but it is useful to consider *Hape* in its jurisprudential context.

Pre-Hape Jurisprudence

[16] *Ibid,* at para 37.
[17] There have been three cases in court so far stemming from the *PCTA*'s amendments of the *CSIS Act*: see *Canada (Attorney General) v Almalki,* 2016 FCA 195 (CanLII); *Korody v Canada (Attorney General),* 2015 FC 1398 (CanLII); *Canada (Attorney General) v Nuttall,* 2016 FC 850 (CanLII). However, these cases are concerned with the disclosure of human source information pursuant to sections 18 & 18.1 of the *CSIS Act*; they do not address the constitutional issue of extraterritorial warrants issued in violation of foreign laws.

The *Harrer*[18]*-Terry*[19]*-Cook*[20]*-Hape* line suggests a number of ways by which the *Charter* can be applied extraterritorially. Unfortunately, though, this area of the law is wrought with confusion:

> …[T]he Court's judgments regarding the application of the Charter in cases involving foreign elements are contradictory and confusing. There is no consensus on whether the Charter should apply abroad and on what basis… [The Supreme Court's] judgment in [*Hape*] only helped to confuse things more…[21]

In *Harrer* (1995), evidence obtained in the extraterritorial police investigation was subject to the *Charter's* fair trial safeguards. The court held that the evidence was fair and admissible into trial[22], but future cases will be subject to the same judicial review. The *Charter* did not apply to regulate the state actors' foreign investigations, but it did apply *post facto* to scrutinize the evidence obtained in those investigations. Justice La Forest emphasized the point that his judgment should not "… be interpreted as giving credence to the view that the ambit of the *Charter* is automatically linked to Canadian territory."[23] *Harrer* applied the *Charter's* fair trial safeguards to evidence obtained abroad and, further, expressly left open the possibility that other exceptions could trigger the extraterritorial application of the *Charter*.[24]

In *Terry* (1996), the Court held that the section 24 exclusion did not apply because a *Charter* breach had not been established, but held that the *Charter's* fair trial safeguards under section 11(d) and section 7 could nonetheless apply.[25]

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[18] *R v Harrer,* [1995] 3 SCR 562, 128 DLR (4th) 98, 101 CCC (3d) 193 [*Harrer*].
[19] *R v Terry,* [1996] 2 SCR 207, 135 DLR (4th) 214, 106 CCC (3d) 508 [*Terry*].
[20] *R v Cook*, [1998] 2 SCR 597, 164 DLR (4th) 1, 57 BCLR (3d) 215 [*Cook*].
[21] Maureen Webb, "The Constitutional Question of Our Time: Extraterritorial Application of the Charter and the Afghan Detainees Case" (2011) 28 *National Journal of Constitutional Law* 235 at 245-246.
[22] *Harrer*, *supra* note 18 at paras 19-21.
[23] *Ibid,* at para 10.
[24] *Ibid,* at paras 16-24.
[25] *Terry, supra* note 19 at para 25.

Then came the *Cook* decision in 1998. *Cook* reformulated the legal framework for evaluating the extraterritorial application of the *Charter*. Applying the international law principles of sovereign equality and the comity of nations, Justice Iacobucci's majority in a dramatically divided court held that the *Charter* applies to Canadian agents on foreign territory only when (1) the host nation consents to its application and (2) there is no "objectionable extraterritorial effect."[26] This is a very limited application. But the *Cook* decision was premised on circumstances involving international cooperation between police agents, and it did not expressly consider a scenario where Canadian agents would be acting in violation of foreign or domestic laws without the cooperation of the host state.

The *Charter*'s fair trial safeguards were consistently considered against evidence obtained in foreign investigations up to (and including) *Hape*. Further, the leading cases dealing with the extraterritorial application of the *Charter* "left open the possibility… that [the *Charter*] might apply to Canadian agents acting in other territory…" under other circumstances.[27]

R v Hape

At the time of the *Hape* decision, *Cook* was the leading case on the extraterritorial application of the *Charter*. In *Cook*, McLachlin J (as she then was) sided with the dissent, written by Justice L'Heureux-Dubé.[28] But in *Hape*, McLachlin CJC would side with majority. *Hape* overruled the *Cook* test and

[26] *Cook, supra* note 20 at para 43.
[27] Webb, *supra* note 21 at 241.
[28] *Cook, supra* note 20 at para 80.

established a new test for the extraterritorial application of the *Charter*.[29] The *Hape* test echoes McLachlin's dissent in *Cook.*

The court's decision in *Hape* was unanimous in the result, but contained three very different sets of concurring reasons (5:3:1). Justice LeBel delivered the plurality opinion (with McLachlin CJC, Deschamps, Fish and Charron JJ in agreement)[30], while Justice Bastarache (with Abella and Rothstein in agreement)[31] and Justice Binnie[32] both delivered minority opinions.

Hape Test and the General Rule

The general rule is still that the *Charter* cannot apply in foreign jurisdiction without the host nation's consent, following the principles of sovereignty and the comity of nations.[33] However, in certain exceptional circumstances, the *Charter* can apply to investigations conducted abroad.

Hape establishes the following two-stage test for determining whether the *Charter* applies to a foreign investigation:

1) Determine whether the activity in question falls under section 32(1) such that the *Charter* applies to it.[34] At this stage, two questions reflecting the two components of section 32(1) must be asked.
    1. First, is the conduct at issue that of a Canadian state actor?
    2. Second, if the answer is yes, it may be necessary, depending on the facts of the case, to determine whether there is an exception to the principle of sovereignty that would justify the application of the *Charter* to the extraterritorial activities of the state actor. In most cases, there will be no such exception and the *Charter* will not apply.

[29] *Hape, supra* note 2 at para 113.
[30] *Ibid,* at para 1.
[31] *Ibid,* at para 123.
[32] *Ibid,* at para 181.
[33] *Ibid,* at para 85, 40-56.
[34] *Charter, supra* note 4 at s 32(1).

2) The inquiry would then move to the second stage, at which the court must determine whether evidence obtained through the foreign investigation ought to be excluded at trial because its admission would render the trial unfair.[35]

Despite the language of "impossibility" that sometimes appears in these cases[36], it is not impossible for the *Charter* to apply extraterritorially. There are two exceptions expressly considered in the *Hape* test by which the *Charter* can apply extraterritorially, and there is a third option inherent to the *PCTA* itself.

Hape Exceptions to the General Rule

The *Hape* test expressly sets out two main exceptions by which the circumstances of a foreign investigation can trigger the extraterritorial application of the *Charter*.[37] The first exception is via the second stage of the *Hape* test, where the Court can exclude evidence obtained abroad according to the *Charter*'s fair trial safeguards. I refer to this as the *fair trial exception.* The second exception is via the first stage, second leg of the *Hape* test, where courts will consider whether an exception to the principle of sovereignty justifies the application of the *Charter.* I refer to this second exception as the *sovereignty exception.*

Part 4: Exceptions Triggering Charter Application

Option #1: The Fair Trial Exception

[35] *Hape, supra* note 2 at para 113. In this presentation of the *Hape* test, I have cited the text directly from *Hape* but designed my own numbered format for each stage and each leg.
[36] See for example *ibid,* at para 85, 89; see also *Terry, supra* note 19 at para 26.
[37] *Hape, supra* note 2 at para 113.

The *Charter* has a number of provisions in place to guarantee fair proceedings for the accused.[38] There is a range of substantive legal and procedural rights.[39] In particular, section 11 provides a number of legal rights related to criminal proceedings, one of which is, notably in relation to the sovereignty exception described below, expressly linked to international law and "the general principles recognized by the community of nations."[40] Section 24 provides remedies against unfair trials, like the exclusion of evidence and "such remedy as the court considers appropriate and just in the circumstances".[41]

The second stage of the *Hape* test expressly provides that evidence obtained in a foreign investigation will be excluded from trial where "its admission would render the trial unfair."[42] Courts can exclude evidence obtained abroad on the grounds that it was obtained in an investigation that violated foreign or international law, even if that investigation was conducted pursuant to a warrant issued under the *CSIS Act.* In such a case, the court would likely weigh the seriousness of the illegal action against the national security circumstances of a given case. Further*,* in *Terry* we have seen the Court expressly leave open the possibility that the safeguards in section 11 can be applied even in the absence of a breach required for section 24.

There is plenty of support for the conclusion that state-sponsored violation of foreign laws could trigger the application of the *Charter* following the *Hape* test and the *Charter*'s fair trial safeguards. In fact, this is one point on which the leading cases on the

[38] *Charter, supra* note 4; see also *R v Seaboyer, R v Gayme* [1991] 2 SCR 577, 4 OR (3d) 383, 83 DLR (4th) 193.
[39] For example, the *Charter* (*supra* note 4) protects the right to life, liberty and security of the person (section 7), the right to be secure against unreasonable search or seizure (section 8), the right not to be arbitrarily detained or imprisoned (section 9), procedural and *habeas corpus* rights upon arrest or detention (section 10), a range of procedural rights in criminal or penal matters (section 11), the right against cruel or unusual punishment (section 12) and substantive equality rights (section 15).
[40] *Ibid,* at s 11(g).
[41] *Ibid,* at s 24(1),(2).
[42] *Hape, supra* note 2 at para 113.

extraterritorial application of the *Charter* all agree. The history of the jurisprudence has no qualm with the rule that all evidence obtained abroad is still subject to the *Charter's* fair trial safeguards. The Supreme Court maintained the fair trial safeguards as domestic consequences to foreign investigations through *Harrer*, *Terry, Cook, Hape, Khadr* (x2)[43], *Amnesty*[44]*, Harkat*[45], *Charkaoui*[46] and others. *Hape* expressly follows and upholds this rule, referring to it as "extraterritorial adjudicative jurisdiction"—attaching domestic consequences to foreign investigations.[47] Through the fair trial exception, the *Hape* decision acknowledges that the *Charter* can apply domestically as a *post facto* consequence to state sponsored actions abroad.

In *Hape*, evidence obtained abroad was admitted into trial on the grounds that the RCMP agents reasonably believed they were following the law of Turks and Caicos.[48] The court relied heavily on the fact that the agents were operating under the authority of Turks and Caicos, and reasonably believed they were following the law there at all times.[49] However, a case where the Canadian state actors knew (or ought to have known) they were violating foreign laws would be quickly distinguished from *Hape* on this point, even if the agents were authorized by a warrant pursuant to the *CSIS Act*. Crucially, the violation of foreign laws itself can trigger the application of the *Charter's* fair trial safeguards in court.

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[43] *Canada (Justice) v Khadr*, 2008 SCC 28, [2008] 2 SCR 125, 293 DLR (4th) 629; *Canada (Prime Minister) v Khadr*, 2010 SCC 3, [2010] 1 SCR 44, 315 DLR (4th) 1.
[44] *Amnesty International Canada v Canada (Chief of Defence Staff)*, 2008 FC 336, [2008] 4 FCR 546, 292 DLR (4th) 127; *Amnesty International Canada v Canada (Chief of Defence Staff),* 2008 FCA 401, [2009] 4 FCR 149, 305 DLR (4th) 741.
[45] *Canada (Citizenship and Immigration) v Harkat,* 2014 SCC 37, [2014] 2 SCR 33, [2014] SCJ No 37 (QL).
[46] *Charkaoui v Canada (Citizenship and Immigration),* 2007 SCC 9, [2007] 1 SCR 350, 276 DLR (4th) 594.
[47] *Hape, supra* note 2 at para 96.
[48] *Ibid,* at paras 120-121.
[49] *Ibid,* at paras 116-121.

Option #2: The Sovereignty Exception

The second exception by which the *Charter* can apply extraterritorially is expressly provided in the second leg of the first stage of the *Hape* test, where courts will consider "whether there is an exception to the principle of sovereignty that would justify the application of the *Charter* to the extraterritorial activities of the state actor."[50]

Webb refers to this exception as the "fundamental human rights exception to a general rule that the Charter does not apply extraterritorially."[51] However, I refer to it as the sovereignty exception because the Supreme Court's language in *Hape* is broader than just human rights obligations. *Hape* sets out the rule that "[d]eference to the foreign domestic law ends where clear *violations of international law and fundamental human rights begin*" (emphasis added).[52] Crucially, this rule encompasses both violations of international law *and* fundamental human rights obligations. It is widely held that international human rights standards are vague, weak and often unenforceable.[53] Forcese describes them as "anemic."[54] The limitations of international human rights standards can be avoided based on the language in *Hape,* since the sovereign exception can be applied more broadly to violations of international law generally, rather than being restricted to only international human rights obligations.

It is clear that extraterritorial spying would automatically violate international law if conducted without the foreign nation's consent. As Forcese argues: "It might

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[50] *Ibid,* at para 113.
[51] See Webb, *supra* note 21 at 248, 292.
[52] *Hape, supra* note 2 at para 52.
[53] See Kent Roach, "*R v Hape* Creates Charter-Free Zones for Canadian Officials Abroad" (2007) 53 *Criminal Law Quarterly* 1; see also Kent Roach, "Security and Liberty in Balance: A Canadian Response to Terrorism" (2014) 61 *Criminal Law Quarterly* 375; see also Forcese, *supra* note 54.
[54] Craig Forcese, "The Judicialization of Extraterritorial Spying: Gaps and Gap-Fillers in the World of CSIS Foreign Operations" (2014) 61 Criminal Law Quarterly 441 at 444.

reasonably follow that a violation of a foreign state's sovereignty is another breach of Canada's international obligations that triggers the extension of the Charter extraterritorially."[55] Elsewhere he states that "[t]he extraterritorial spying at issue (done without consent of the territorial state) would violate international law, specifically sovereignty."[56] *Hape* confirms this point: "The principle of comity does not offer a rationale for condoning another state's breach of international law."[57] According to the *Hape* test, then, the violation of foreign or international laws in the course of an investigation will count as an exception to the principle of sovereignty and trigger the extraterritorial application of the *Charter*.

The *Khadr* cases expressly reaffirm the sovereign exception set out in *Hape*: "The Court in *Khadr* reiterated the rule from *Hape* that 'deference to foreign laws according to the comity principle ends where clear violations of international law and fundamental human rights begin.'"[58] *Khadr* elaborates the point that the violation of foreign laws qualifies as an exception to the principle sovereignty that will trigger the application of the *Charter*:

> The principles of international law and comity of nations, which normally require that Canadian officials operating abroad comply with local law and which might otherwise preclude application of the *Charter* to Canadian officials acting abroad, do not extend to participation in processes that violate Canada's binding international human rights obligations.[59]

Again, though, the rule is not restricted to only international human rights obligations: "In other words, the principle of comity cannot justify the government's participation in

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[55] Craig Forcese, "One Warrant to Rule Them All: Re-Conceiving the Judicialization of Extra-territorial Intelligence Collection" (2015) University of Ottawa Working Paper No 2015-41 at 14.
[56] Forcese, *supra* note 54 at 442.
[57] *Hape supra* note 2 at para 51.
[58] Webb, *supra* note 21 at 249; see also *Khadr* (2008), *supra* note 43 at para 18*;* see also *Hape, supra* note 2 at para 52.
[59] *Khadr* (2008), *supra* note 43 at para 2-3, 21, 25-26; see also Forcese, *supra* note 55 at 14.

activities of a foreign state or its agents that are contrary to Canada's international obligations."[60] Therefore, by participating in investigations that violate foreign or international law, Canadian state actors will trigger the application of the *Charter.*

The *Khadr* cases therefore directly address the concerns raised by Roach[61] by declaring that "the Court would not allow the creation of Charter-free regions."[62] The same conclusion is phrased differently in *Amnesty*, where the Federal Court emphasized that "…detainees were not thereby left in a legal black hole and that the conduct of the Canadian Forces abroad remained governed both by prior statutory law and, more importantly, by international law, especially humanitarian law."[63]

In *Hape,* the principle of comity prevented the extraterritorial application of the *Charter* in deference to foreign laws for the sake of cooperation with foreign authorities. However, in case where Canadian agents violate foreign laws, that justification is removed and the principle of comity would apply in the opposite direction triggering the application of the *Charter* following the first stage, second leg of the *Hape* test.

Option #3: Judicial Control

The third way that *Charter* rights can be protected in extraterritorial police investigations is via judicial control over the warrant application process. Judicial control over extraterritorial warrants, especially those issued "without regard to any other law"[64], is inherent to the *PCTA*'s amendment of the *CSIS Act.* The judicial decision to approve or

[60] Maria L Banda, "On the Water's Edge? A Comparative Study of the Influence of International Law and the Extraterritorial Reach of Domestic Laws in the War on Terror Jurisprudence" (2010) 41:2 *Georgetown Journal of International Law* 525 at 540.
[61] Roach, *supra* note 53.
[62] Banda, *supra* note 60 at 543.
[63] Banda, *supra* note 60 at 539; see also *Amnesty, supra* note 44.
[64] *CSIS Act, supra* note 11 at s 21(3.1); see also *PCTA, supra* note 3 at s 8(2).

reject such a warrant necessarily considers the balance between the fundamental rights and freedoms of Canadians and the national security interests at stake in a given case.[65] The power ultimately rests with the judiciary. Forcese refers to the expanded powers given to judges in the *PCTA* as the "judicialization of extraterritorial spying".[66] In this analysis, judges will consider the *Charter* rights of the accused and will deny a warrant if the violation to fundamental justice and basic human rights outweigh the police interests in investigation.[67] Judicial discretion in the warrant process, then, is another way by which the *Charter* comes into play as a check against extraterritorial police authority.

Further to this point, since any individual accused of a crime can in their defense challenge the constitutionality of the laws under which they are charged[68], cases involving foreign investigations and extraterritorial warrants issued under the *CSIS Act* will likely boil down to the constitutionality of (1) the *PCTA* itself, and (2) warrants issued under section 21 of the *CSIS Act* in violation of foreign law. As Forcese states, "[i]t follows that if the intercept was conducted under the *CSIS Act*, the logic of *Wakeling*[69] would remain, and the constitutional conclusions should be identical. The question would then be whether the *CSIS Act* meets constitutional requirements."[70]

Concerning the constitutionality of the *PCTA*, there seems to be a significant consensus that judges do not have the authority to issue an extra-jurisdictional warrant that supports the violate of foreign or international law. Consider Justice Mosley's judgments in *X (Re)*: "If the location of the intercept must be construed as occurring

[65] See *X (Re)*, 2013 FC 1275; see also *X (Re),* 2014 FCA 249; see also *Hunter et al v Southam Inc*, [1984] 2 SCR 145, 41 CR (3d) 97, 14 CCC (3d) 97; see also *R v Collins,* [1987] 1 SCR 265, 56 CR (3d) 193, 33 CCC (3d) 1.
[66] Forcese, *supra* note 54.
[67] See *Hape, supra* note 2 at para 100.
[68] See *ibid,* at para 108.
[69] *Wakeling v United States of America*, 2014 SCC 72, [2014] 3 SCR 549.
[70] Forcese, *supra* note 54 at 446.

abroad, the Court, applying the principles set out in Justice Blanchard's decision, would have no jurisdiction to issue a warrant authorizing such activities."[71] Consider again *CSIS Act (Re):* "… Federal Courts had no authority to authorize activities inconsistent with and likely to breach international law".[72] Elsewhere, Craig Forcese similarly declares that there is a lack of constitutional authority to authorize warrants in violation of foreign laws: "Under this construal, the CSIS Act simply cannot constitutionally authorize intrusive foreign surveillance in violation of foreign law."[73] The judiciary serves as the bottleneck of CSIS' entire extraterritorial operation. Through the judicial control provisions of the *CSIS Act*, judges can deny warrants for investigations that unjustifiably infringe on *Charter* rights. Judicial control represents a third option by which the rights and freedoms of Canadian citizens are protected on foreign soil.

There are no *Charter*-free zones. It's not as if CSIS agents acting abroad are unanswerable to any law. They are ultimately accountable for their actions in court according to the *Hape* test, even if it is only a *post facto* application, in addition to the fact that their actions will be governed by the laws of the nation in which they are operating.

Part 5: Conclusion

The situation—i.e. the concern that Canadians' basic rights and freedoms are not protected beyond Canadian borders—is not as dire as it may seem on the face of the

[71] *X (Re),* 2009 FC 1058 at para 49, [2010] 1 FCR 460, 356 FTR 32.
[72] *CSIS Act (Re), supra* note 15 at para 39, 52.
[73] Forcese, *supra* note 55 at 12-13; see also Forcese, *supra* note 54 at 446-448. Forcese describes at length the "accountability gap" in the *PCTA*. The accountability gap problem is that the *PCTA* is virtually silent on the issue of when a warrant is required in extraterritorial investigations. This accountability gap can support a constitutional challenge to the *PCTA* in the reasonability and proportionality stages of the *Oakes* test.

PCTA, the *CSIS Act*, and *Hape*. Some people think that based on the decision in *Hape*, CSIS has *carte blanche* authority in foreign investigations. Despite the general rule that the *Charter* does not apply beyond Canadian jurisdictional boundaries, there are three main exceptions that can trigger the extraterritorial application of the *Charter*. First, courts can apply the *Charter*'s fair trial safeguards following the second stage of the *Hape* test. If a foreign investigation was conducted in a way that would render a part of the trial unjust, courts have a discretionary authority to exclude evidence or provide such other remedies as they hold just in the circumstances.[74] Second, courts can apply the sovereignty exception following the first stage, second leg of the *Hape* test. The violation of foreign or international laws in the course of a foreign investigation triggers the application of the *Charter* as an exception to the principle of sovereignty (which normally prevents the application of the *Charter*). Third, judges can deny applications for extraterritorial warrants pursuant to the *CSIS Act* on the grounds that the fundamental rights and freedoms of Canadians are unjustifiably infringed.

Finally, it should be noted that the list of three options presented in this paper that can trigger the application is neither exhaustive nor permanent. This area of the law is rapidly and constantly changing, and it is not clear how long CSIS' extraterritorial authority will remain in effect in its current form. Ultimately, courts and legislatures must both adapt to a changing global setting and continue to seek the proper balance between fundamental rights and freedoms, on the one hand, and the need for flexibility in international police operations in cases where there are serious national security interests (and lives) at stake. So long as Canadian agents act in cooperation with and under the authority of foreign officials agents while on foreign soil, the *Charter* will likely not

[74] *Charter*, *supra* note 4 at s 24.

apply in deference to foreign and international laws. However, if CSIS agents violate foreign or international law in the course of an extraterritorial investigation, even pursuant to a warrant issued under the *CSIS Act*, they will likely trigger the application of the *Charter*.

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