Court Martial Appeal Court of Canada

Cour d'appel de la cour martiale du Canada

Date: 20201231

Docket: CMAC-602

Citation: 2020 CMAC 8

CORAM: **CHIEF JUSTICE BELL**
RENNIE J.A.
PARDU J.A.

BETWEEN:

CORPORAL C.R. MCGREGOR

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Ottawa, Ontario, on June 26, 2020.

Judgment delivered at Ottawa, Ontario, on December 31, 2020.

REASONS FOR JUDGMENT BY: THE COURT

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I. Overview

[1] This appeal is one of first impression. It raises the question of the extraterritorial application of the *Canadian Charter of Rights and Freedoms,* Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c. 11 (Charter) in circumstances where the target of a criminal investigation was a member of the Canadian Armed Forces who was required to be on foreign soil.

[2] While stationed in Washington, D.C. and living in Alexandria, Virginia, the appellant, Cpl. McGregor, became the subject of a criminal investigation by the Canadian Forces National Investigation Service (CFNIS). Under the authority of a search warrant issued by a magistrate of the State of Virginia Court, an officer of the Alexandria police searched Cpl. McGregor's residence and computers. At the subsequent Court Martial, Cpl. McGregor sought to exclude evidence based on an alleged violation of his section 8 Charter right to be free from unreasonable

search or seizure. The Military Judge concluded the Charter did not apply extraterritorially and that allowing this evidence did not breach Cpl. McGregor's common law right to a fair trial.

[3] The Military Judge convicted Cpl. McGregor of two counts of voyeurism, contrary to subsection 162(1) of the *Criminal Code*, RSC 1985, c C-46 (Criminal Code); one count of possession of a device for unlawful interception, contrary to subsection 191(1) of the Criminal Code; one count of sexual assault, contrary to section 271 of the Criminal Code*;* and, one count of disgraceful conduct, contrary to section 93 of the *National Defence Act*, RSC 1985, c N-5 (NDA). Although originally stated in his notice of appeal that he was appealing both the conviction and the sentence, neither Cpl. McGregor nor the Crown addressed the sentencing issues in their written submissions and these issues were abandoned by Cpl. McGregor at the outset of the hearing.

[4] The extraterritorial application of the Charter has been the subject of some debate in Canadian courts. This is understandable, given the diversity of circumstances and legal frameworks in which the question can arise.

[5] In *R. v. Harrer*, [1995] 3 S.C.R. 562, 128 D.L.R. (4th) 98 [*Harrer*]; *R. v. Terry*, [1996] 2 S.C.R. 207, 135 D.L.R. (4th) 214 [*Terry*]; *Schreiber v. Canada*, [1998] 1 S.C.R. 841, 158 D.L.R. (4th) 577 [*Schreiber*], the Supreme Court of Canada concluded the Charter does not apply to the actions of foreign authorities. The test for the admissibility of evidence obtained in a foreign jurisdiction by foreign authorities is not measured against compliance with the Charter but rather by its effect upon trial fairness. That is, would the admission of the evidence be so "grossly

unfair as to repudiate the values underlying our trial system and condone procedures which are anathema to the Canadian conscience" (*Harrer* at para. 51).

[6] The test for the admissibility of evidence gathered by Canadian authorities acting on foreign soil has received differing treatment from the Supreme Court of Canada. In *R. v. Cook*, [1998] 2 S.C.R. 597, 164 D.L.R. (4th) 1 [*Cook*], a case which concerned the admissibility of a statement obtained abroad by Canadian law enforcement officials, the Court concluded the Charter applied provided such application did not have objectionable extraterritorial effect. The Court failed to define "objectionable extraterritorial effect". In *R. v. Hape*, 2007 SCC 26, [2007] 2 S.C.R. 292 [*Hape*], a majority of five, under the pen of Justice LeBel, speaking on behalf of the majority overturned *Cook*. Justice LeBel opined that the very act of applying the Charter to an investigation on foreign soil constitutes objectionable extraterritorial application of Canadian enforcement jurisdiction. We also note that the issue of the extraterritorial application of the Charter was also the subject of a comprehensive analysis in *R. v. Tan*, 2014 BCCA 9, [2014] B.C.J. No 26, under the pen of Justice Bennett speaking on behalf of the court.

[7] Although we agree with the Military Judge that, pursuant to *Hape*, the Charter did not apply to the appellant working abroad, that conclusion does not end the matter. Pursuant to *Hape*, even in situations where the Charter does not apply, the trial judge retains the residual discretion to exclude evidence that would render a Canadian trial unfair (at para. 109). It was therefore incumbent upon the Military Judge to consider the issue of trial fairness prior to admitting the impugned evidence.

[8] Unlike the case of an average citizen abroad, Canadian military personnel bear the burden of the extraterritorial application of Canadian criminal law through the Code of Service Discipline set out in section 163.5 of the NDA. However, they may also benefit from "Status of Forces" agreements such as the *Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces*, 19 June 1951, Can TS 1953 No. 13 (entered into force August 23, 1953) [NATO SOFA]. These agreements stipulate the circumstances under which Canadian or foreign law can apply to military personnel. They also provide, again uniquely to the men and women of the Canadian Armed Forces, for their Canadian prosecution and trial on foreign soil. We note, parenthetically, that in recent years Court Martial trials can and have taken place outside of Canada in a diverse range of countries, including The Federal Republic of Germany, the Republic of Croatia as well as the Islamic Republic of Afghanistan.

[9] In consequence, Canadian military personnel serving abroad, uniquely bear the burden of both Canadian and, in most cases, local criminal law. It is local authorities, usually with the support of CFNIS, which conduct investigations and collect evidence on foreign soil. The substantive and procedural criminal laws of the local jurisdiction govern these investigations and searches, and deviations from Charter rights in the collection of evidence by local authorities may have an impact on the fairness of Court Martial trials.

[10] Courts must necessarily be cognisant of the broader legal architecture governing the status of members of Canadian Armed Forces abroad, as well as of differences in substantive and procedural criminal law in countries where members are also subject to Canadian law. Therefore, for military personnel, a trial fairness analysis should begin with a determination of whether

there were any Charter breaches before determining if those breaches, or some other affront to trial fairness, warrant the rejection of evidence.

[11] In this instance, given the similarities in the substantive and procedural laws, which exist in both the United States of America and Canada that serve to protect accused persons against unreasonable search and seizure, we would not interfere with the conclusion of the trial judge. The actions and procedures followed by both the Canadian and American Officials acting in the US would have complied with the Charter had it applied to them. Barring some other affront to trial fairness, their actions could in no way negatively impact the fairness of Cpl. McGregor's subsequent trial. We would dismiss the appeal.

II. Facts

[12] Between August 2015 and March 2017, Cpl. McGregor, then a non-commissioned member of the regular force of the Canadian Armed Forces, was posted to the Canadian Defence Liaison Staff at the Canadian Embassy in Washington, D.C. When posted to Washington, he held the status of a "diplomatic agent" pursuant to article 31(1) of the *Vienna Convention on Diplomatic Relations*, 18 April 1961, 500 UNTS 95 (entered into force June 24, 1964) [Vienna Convention]. In that capacity, he benefitted from immunity of his person, property, and residence.

[13] On January 28, 2017, another member of the Canadian Armed Forces posted in Washington discovered an audio recording device in her residence. She made a complaint and the CFNIS commenced an investigation. The lead investigator, Lt. Rioux, concluded there were

reasonable and probable grounds to believe Cpl. McGregor had committed the offences of interference and voyeurism. The investigator also concluded he could not obtain a search warrant under Canadian law for Cpl. McGregor's Virginia residence. He was correct. A Commanding Officer may only issue a warrant in relation to property under the control of the Canadian Armed Forces pursuant to article 106.05 of the *Queen's Regulations and Orders for the Canadian Forces* [QR&O].

[14] As a result, Lt. Rioux sought the assistance of the Alexandria Police Force for purposes of obtaining a search warrant to permit entry into and a search of, Cpl. McGregor's residence and any electronic devices found therein. The Alexandria Police agreed to assist but advised they could not apply for a warrant due to Cpl. McGregor's diplomatic immunity. As a result, Canada, via diplomatic note WSHDC-4086, dated February 14, 2017, from the Embassy of Canada to the American Secretary of State, waived Cpl. McGregor's immunity with respect to his residence pursuant to article 30 of the Vienna Convention. However, Cpl. McGregor retained his personal inviolability and his immunity from arrest.

[15] The waiver in hand, the Alexandria Police obtained a warrant from the Virginia State Court. The operative parts of that warrant are set out below:

> You are hereby commanded in the name of the Commonwealth to forthwith search the following place, person or thing either in the day or night […] for the following property, objects and/or persons: Camera, video recorder, other electronic audio/photo/video recording devices, computer, cell phone, other internet access devices, internet services devices, external electronic storage devices, and analysis of the seized items. Photographing of the premise and/or seized items.

[16] On February 16, 2017, three members of the CFNIS and the Alexandria Police executed a search warrant at Cpl. McGregor's residence. The Alexandria Police breached the door, secured the premises, and then invited the CFNIS to conduct the search. Two forensic investigators, one from CFNIS and one from the Alexandria Police, performed a triage by searching most of the electronic devices in order to determine which items to seize. Not all the devices were triaged at the scene due to the time constraints set out in the warrant. Any devices the investigators were unable to triage on-site were seized along with the previously triaged devices containing evidence the investigators reasonably believed was the subject of the warrant.

[17] A CFNIS investigator arrested Cpl. McGregor while he was still in Washington and informed him of his section 10(b) Charter right to counsel. That arrest on foreign soil was authorized by, and compliant with, the extraterritorial jurisdiction afforded to the investigator under subsection 155(1) of the NDA. The Alexandria Police, as required by the initial warrant, and similar to the return on warrant required of Canadian authorities under the Criminal Code, returned to the Virginia State Court to account for the items seized. The CFNIS then removed the seized electronic devices to Canada, where they obtained Canadian warrants from the Court Martial for purposes of conducting further analysis of those devices.

III. The Court Martial Decision

[18] Cpl. McGregor brought a section 24(2) Charter motion before the Military Judge to exclude the evidence obtained as a result of the search and seizure of electronic devices found in his residence in Virginia. He contended his right to be free from unreasonable search or seizure, as guaranteed by section 8 of the Charter, had been violated. Relying upon *R. v. Vu*, 2013 SCC

60, [2013] 3 S.C.R. 657 [*Vu*], he claimed a separate warrant should have been obtained to search the electronic devices. Applying *Hape*, the Military Judge concluded the Charter did not apply because the CFNIS could not obtain its own warrant to search the premises. It followed, according to the Military Judge, that the "legal umbrella" under which CFNIS conducted its investigation was Virginian law. The Military Judge relied on paragraph 104 of *Hape* to conclude: "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."

[19] The Military Judge went on to conclude that even had the Charter applied he would not have found a violation of Cpl. McGregor's Charter rights. He found as matters of fact that: (i) the search was executed pursuant to Virginia state law; (ii) the grounds relied upon to obtain the warrant in the United States would have been sufficient in Canada; and (iii) the search was conducted reasonably as there was authority in American law for the triage process performed at the residence prior to seizing the electronic equipment. Demonstrative of the reasonableness of the search, the Military Judge noted that any device found to contain evidence of a crime that was not the subject of the warrant was set aside for seizure, search and further analysis in Canada.

[20] Finally, even if there had been a violation of Cpl. McGregor's section 8 Charter rights, the Military Judge concluded the evidence should not be excluded, as excluding the evidence would bring the administration of justice into disrepute. The CFNIS acted in good faith and took care to limit the impact of the search. The breach, namely the absence of a second warrant as

required by *Vu*, was not at the most serious end of the spectrum. Further, the evidence in question was reliable, otherwise discoverable in Canada under Canadian law, and extremely important to the prosecution of serious allegations.

[21] Following Cpl. McGregor's convictions, the Military Judge sentenced him to imprisonment for a period of 36 months and dismissed him with disgrace from Her Majesty's service.

IV. The positions of the appellant and respondent

[22] Cpl. McGregor contends that the NATO SOFA and article 31of the Vienna Convention permit the enforcement of the CFNIS's jurisdiction abroad, and with it, the Charter.

[23] He asserts that sections 1(a) and 3(a) of Article VII of the NATO SOFA subjected him to Canada's jurisdiction while abroad, and article 31(1) of the Vienna Convention provided him diplomatic immunity, thereby affording both him and his residence protection that only Canadian authority could waive. He contends that Canada's waiver of his immunity related to his residence only and had no impact upon Canada's jurisdiction to his electronics under the NATO SOFA.

[24] Further, in acquiring a search warrant, the American authorities were merely assisting the Canadian actors in their investigation as required by Article VII, section 6(a) of the NATO SOFA, which provides:

> 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. The handing over of such objects may, however, be made subject to their return within the time specified by the authority delivering them.

[25] Cpl. McGregor contends the Military Judge erred in failing to apply the Charter to the conduct of the Canadian investigators while engaged in the search and seizure at his home. He submits that the waiver of diplomatic immunity leading to the issuance of the search warrant did not extend to a waiver of immunity from search of electronic devices, as the waiver of immunity of property of a diplomatic agent did not specifically extend to electronic information. He argues, relying on *Vu*, that the Canadian investigators were required to obtain a separate warrant and waiver of diplomatic immunity authorizing the search of his electronic devices and that because they did not do so, he was the victim of a warrantless, unauthorized, search. He says the trial judge gave undue weight to the scope of the American warrant authorizing the search and should have instead relied on *Vu*.

[26] Secondly, Cpl. McGregor argues that the manner of the search was unreasonable. He submits that once the investigators discovered evidence of child pornography and sexual assault, not covered by the warrant, they were obliged to stop searching and obtain further judicial authorization to conduct the search.

[27] The respondent contends the principle of the territorial sovereignty precludes the application of the Charter abroad and that one of the exceptions to that principle – acquiescence by the foreign state – is not established on the evidence. Acquiescing to Canada's criminal and disciplinary jurisdiction over Cpl. McGregor under the NATO SOFA, which manifested itself in

the circumstances of this case in both the investigation and arrest of the appellant, does not constitute foreign consent to the application of Canadian law to the search of a residence located on American soil.

[28] The respondent points to the fact the Alexandria Police sought judicial authorization from the Virginia State Court for a warrant and to the fact they were required to make a report to the magistrate regarding the items seized, as evidence of American affirmation of sovereignty. The United States did not consent to the application of Canadian law to the search of the residence.

[29] Second, the respondent asserts there is a distinction between jurisdiction over the person and jurisdiction over the person's private residence. By virtue of being a member of the Armed Forces, Cpl. McGregor was subject to the Code of Service Discipline at all times, regardless of where he was in the world; see, subsection 60(1) of the NDA. However, the NATO SOFA recognizes that certain matters remain under the jurisdiction of the receiving state. As a result, the United States retains sovereignty and jurisdiction over its territory, including Cpl. McGregor's residence. The respondent contends article 31 of the Vienna Convention offers protection from American jurisdiction – it does not confer additional jurisdiction to the sending state. The residence, according to the Respondent, did not become part of Canadian investigative jurisdiction when Canada partially waived Cpl. McGregor's immunity. The respondent says the conduct of the Alexandria Police in obtaining the warrant under Virginia law was not an acquiescence to Canadian law, rather, it simply demonstrated the collaboration mandated by Article VII(6)(a) of the NATO SOFA for investigating and gathering evidence within the receiving state's jurisdiction.

[30] The relevant statutory provisions and international conventions and agreements are found in Articles 22(1), 22(3), 30(1), 31(1), 32(1), and 32(2) of the Vienna Convention; sections 1(a), 3(a), and 6(a) of Article VII of the NATO SOFA; sections 8, 24(2) and 32(1) of the Charter; and, section 106.05 of the QR&O, all of which are set out in the within the schedule.

V. Analysis

A. *Extraterritorial Application of the Charter – Basic Principles*

[31] The execution of a search warrant of real property is a quintessential exercise of a state's sovereign authority. *Hape* teaches that searches "can only be authorized by the territorial state" and that the principles of sovereign equality, non-intervention, and comity preclude the application of Canadian law and standards to searches and seizures conducted in another state's territory. The Court elaborated on the administrative and procedural challenges arising in the application of the Charter to a search conducted abroad:

> It is also evident from a practical standpoint that the *Charter* cannot apply to searches and seizures in other countries. How exactly would *Charter* standards operate in such circumstances? Lamer C.J. suggested in *Schreiber* that it would be sufficient for *Charter* purposes for those conducting a search and seizure to comply with the domestic law of the foreign state, since an individual's reasonable expectation of privacy would be commensurate to the degree of protection provided by the law of the country in which she or he is located. If the only requirement were that the Canadian officers and their foreign counterparts comply with the foreign law, it is unclear what purpose would be served by applying the *Charter*, as it would carry no added protection in respect of a search and seizure. Moreover, in some cases, compliance with the foreign law would be directly contrary to the express wording of the *Charter* provisions guaranteeing the rights in question.
>
> Conversely, it is in practice impossible to apply the full force of the *Charter* to searches and seizures in foreign territory. One example of this, as I mentioned earlier, is where the *Charter* would

> require a warrant but the foreign law provides no procedure for obtaining or issuing such a warrant. The judicial authorities of a foreign state cannot be required under Canadian law to invent *ad hoc* procedures for the purposes of a co-operative investigation. Should that be a reason for prohibiting a search and seizure from taking place even though it is authorized by the law of the jurisdiction where it would occur? Further, it would be unrealistic, in a co-operative investigation, to require the various officers involved to follow different procedural and legal requirements. Searches and seizures require careful and detailed planning; where the investigation is a joint effort, it is bound to be unsuccessful if the participants are following two different sets of rules. This would be the result if the *Charter* applied to the Canadian officers only, and it clearly cannot apply to the foreign authorities: *Harrer* and *Terry*. (*Hape*, paras. 88 and 89)

[32] *Hape* does provide that the Charter could apply to the conduct of a Canadian state actor by way of exception to the principle of sovereignty where the host nation consents or where an international rule of law permits the exercise of enforcement jurisdiction in a foreign country. We turn to that issue.

B. *Evidence of Acquiescence*

[33] We begin our analysis with a review of the evidence pertinent to the question whether the Charter applied to the search, specifically, whether it indicates that the American government acquiesced to the application of Canadian law on its territory.

[34] As noted above, Canadian investigators became involved following a complaint by a member of the Canadian Armed Forces alleging Cpl. McGregor had engaged in surreptitious electronic surveillance of her at her home. The investigators recognized a Canadian search warrant could not be issued in respect of real property in the United States.

[35] The Canadian investigators met with American police in Alexandria, Virginia. A local detective was assigned to the case and American police conducted their own interviews with the complainant. American police advised the Canadian investigators that without a waiver of diplomatic immunity they could not act.

[36] On February 14, 2017, the Canadian embassy in Washington forwarded a Diplomatic Note to the American government waiving Cpl. McGregor's diplomatic immunity with respect to his property. That note read in part:

> Corporal McGregor is a Member of the Canadian Defense Liaison Staff (CDLS) at the Embassy and allegations of a criminal nature have been made against him by another member of the CDLS. The CFNIS has jurisdiction to investigate his actions by reason of his membership in the Canadian Armed Forces and the investigation relates to allegations in the nature of breaking and entering, mischief, interception, harassment and voyeurism. The purpose of the investigation is to determine whether criminal charges would be brought against Corporal McGregor through the Canadian military justice system.
>
> CFNIS is cooperating with local authorities in Virginia and would like to seek a search warrant to enter Corporal McGregor's staff quarters in the company of local police to obtain evidence for the purposes of their investigation. To this end, the Embassy has to honour to waive the inviolability of Corporal McGregor's private residence, as well as his papers, correspondence and property under article 30 of the *Vienna Convention on Diplomatic Relations,* for the exclusive purpose of executing a search warrant obtained for the purposes of the CFNIS investigation. Similarly, the Embassy has the honour to waive Corporal McGregor's immunity from the civil and criminal jurisdiction of the United States of America to the limited extent necessary to allow the court of jurisdiction to issue the warrant required for this exclusive purpose. The Embassy expressly retains any other applicable immunities, including his personal inviolability and his immunity from arrest or detention.

[37] The affidavit filed in support of the application for the search warrant described the investigative steps taken by Alexandria Police to interview the complainant and obtain confirmatory evidence. The Court issued the warrant as requested, to search for the following property at Cpl. McGregor's residence:

> Camera, video recorder, other electronic audio/photo/video recording devices, computer, cell phone, other internet access devices, internet services devices, external electronic storage devices, and analysis of the seized items. Photographing of the premise and/or seized items.

[38] In addition to the narrative of the offences as described by the complainant, the search warrant specified that it was sought in relation to the offences of "interception, disclosure etc. of wire electronic or oral communication unlawful."

[39] The warrant was executed on February 16, 2017 following a preparatory meeting at the Alexandria Police offices. The trial judge described the unfolding of the events in his reasons: "[M]embers of the Alexandria Police knocked, breached the unanswered door and secured the premises before inviting the three (3) CFNIS members in the residence." The Canadian officer with computer expertise assigned to examine the devices, Lieutenant Rioux, was:

> […] set up in the kitchen, assisted by a US officer, and was receiving various items of computer equipment brought by the personnel conducting the search. Using their equipment, he and the US officer assisting him performed on-site preview or triage of the storage devices obtained, for the purpose, as he explained of not over seizing so that there would not be undue inconvenience to the person targeted by the search and no excessive seizure of material that would require detailed forensic analysis afterwards. To perform the screening, he used his knowledge of what was targeted in the warrant as well as his knowledge of the case. For instance, a file or folder named after a complainant would attract his attention. He also looked for images as he was investigating voyeurism. Once an item of interest was discovered in the preview or triage,

> the physical support on which the file was found was placed aside for seizure. Items which did not reveal any file of interest were not seized. At one point in the day, however, the decision was made to leave the premises. He did not have the opportunity to preview some items brought to him so those were seized without being triaged. Lieutenant(N) Rioux testified that a file containing video images of what could constitute a sexual assault were discovered during the triage as well as a video of cartoon characters apparently under 18 involved in sexual activities.

[40] The items were bagged, placed in containers, and kept under control of the Canadian investigators, although Sergeant Partridge, the lead CFNIS investigator, brought the items seized to the Alexandria Police Department so that the Virginia Police could complete the post-search inventory required to be filed with the Virginia Court.

[41] Upon Sergeant Partridge's return to Canada, a Canadian warrant was sought and obtained to permit analysis of the seized electronic devices. That warrant was not challenged before the Military Judge and is not the subject of this appeal.

[42] In addition to the explicit authorization set out in the warrant to conduct an analysis of the seized electronic devices, Virginia state law provides that any search warrant authorizing such a search is deemed to include authorization to search and seize electronic information contained in those devices.

[43] All participants in the search recognized the necessity of the search warrant issued by a Virginia Court. The American officers conducted their own investigation, including an interview with the complainant prior to applying for the search warrant. They breached the door and allowed the Canadian officers entry. The American officers filed a report with the local Court to

report on the fruits of the seizure. The Canadian Embassy specifically adverted to the need to apply for an American search warrant. The search of real property pursuant to a warrant was an exercise of sovereign American authority.

[44] We therefore conclude that the exception of acquiescence is not established on these facts.

C. *The effect of the NATO Status of Forces Agreement*

[45] Member states of the North Atlantic Treaty Organization (NATO), including Canada and the United States, have entered the NATO SOFA. The agreement provides for regimes of exclusive, concurrent and primary jurisdiction, both criminal and disciplinary, that apply in instances of offences committed by members of the sending state's forces in the territory of the host state. In this case, as the offences were committed solely against another member of the Canadian Armed Forces, according to the agreement, Canada had primary criminal and disciplinary jurisdiction over Cpl. McGregor's person.

[46] Article VII provides that the sending state, here Canada, has the right to exercise all criminal and disciplinary jurisdiction over all persons (emphasis added) subject to Canada's military law,

> Article VII
>
> 1. Subject to the provisions of this Article,
>
> 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 (emphasis added) subject to the military law of that State.

[47] This recognition of Canadian sovereign authority over the person of members of the Canadian Armed Forces does not amount to a waiver of American territorial sovereignty over the person or their real property in the United States. As already noted, Canadian legislative authority extends to regulation of the conduct of members of the Canadian Armed Forces throughout the world. The extent to which that Canadian legislative authority can be exercised in a foreign state is in turn limited by the principles of comity and a respect for the sovereignty of the other country, and generally requires the consent of the foreign state. As noted in *Hape*:

> Neither Parliament nor the provincial legislatures have the power to authorize the enforcement of Canada's laws over matters in the exclusive territorial jurisdiction of another state. Canada can no more dictate what procedures are followed in a criminal investigation abroad than it can impose a taxation scheme in another state's territory. 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. (at para. 105)

[48] Where members of the Canadian Armed Forces are physically present in another country there is no reason to believe they, or their property, would be immune from criminal prosecution or investigation in that country absent either an agreement by which the host state undertakes to not prosecute or investigate or a situation where the person is covered by diplomatic immunity, which can be waived.

[49] Here there is no such immunity from criminal prosecution or investigation. On the contrary, Article II of the NATO SOFA explicitly recognizes that members of the sending state have a duty to respect the laws of the receiving state. Article VI further provides that the authorities of the receiving State shall have jurisdiction over the members with respect to offences committed within the territory of the receiving State and punishable by the law of that State. Combined, this is explicit recognition that a receiving state, here, the United States, may prosecute and investigate members of the Canadian Armed Forces and their property present in their country, absent some agreement for diplomatic immunity.

[50] In instances where the right to exercise jurisdiction is concurrent, Article VII 3 gives the military authorities of the sending State the primary right to exercise their jurisdiction and prosecute a member of their force. An example of this concurrent jurisdiction exists in relation to offences committed by a member of a sending State's force solely against the person or property of another member of that sending State. In the event the sending State elects not to prosecute, the host country may do so in respect of offences committed on the latter's territory. Again, this Article solely gives Canadian authorities the primary right to prosecute the member themselves. It does not give Canadian authorities the unilateral right to investigate the real property located in that foreign territory.

[51] In this case, as Cpl. McGregor's offences were committed solely against another member of the Canadian Armed Forces. According to the NATO SOFA, Canada had primary criminal and disciplinary jurisdiction over his person, but not his real property. There is nothing in the NATO SOFA that would rebut the presumption articulated in *Hape* as it relates to his property.

[52] In light of the NATO SOFA and the guidance of *Hape*, the Military Judge did not err in concluding that the Charter did not apply to the conduct of the Canadian investigators in respect of the search of Cpl. McGregor's residence. The issuance and execution of the search warrant in Virginia was an exercise of American sovereign authority, as contemplated. The treaties at play in relation to Canadian military personnel serving abroad do not detract from this conclusion. Where Canadian members are deployed to other countries, it is the responsibility of the Canadian government to negotiate agreements which protect the members from the enforcement of foreign criminal jurisdiction, to the extent that it may be considered necessary.

[53] However, our conclusion that the Charter did not have extra-territorial application in Virginia does not end the inquiry. In our respectful view, it was incumbent upon the Military Judge to not only look to whether the Charter applies, but to also determine, prior to admitting the evidence in a Canadian trial, whether the admission of the impugned evidence would affect the appellant's right to a fair trial.

D. *The requirement of trial fairness*

[54] Trial fairness considerations flow from, and are informed by both the common law and sections 7 and 11(d) of the Charter. That such an inquiry is a necessary second step in the analysis flows not only from the jurisprudence, but logically extends from the various international instruments signed by Canada and the provisions of the NDA. Our reasoning is as follows.

[55] First, it is well established that evidence obtained abroad, whether by Canadian officials or others, may be excluded from a trial in Canada. In *Terry*, Justice McLachlin, speaking on behalf of the court, reaffirmed and expanded on this position, concluding that evidence gathered abroad may be excluded from a Canadian trial if it was gathered in a way that undermines trial fairness as guaranteed by section 11(d) of the Charter or in a manner that violates the principles of fundamental justice under section 7 (*Hape* at para. 72). Evidence gathered abroad by Canadian or foreign investigators can be excluded if it was gathered in an abusive manner (see *e.g.*, *United States v. Shulman*, 2001 SCC 21, [2001] 1 S.C.R. 616 at para. 56; *United States v. Khadr*, 2010 ONSC 4338, [2010] O.J. No 3301 at paras. 162-163).

[56] The majority in *Hape* reached its conclusion that the Charter did not apply extraterritorially by appearing to take comfort in the concept of trial fairness as an important second step in the analysis, which allows for the assessment of improper investigative techniques or improper collection of evidence. LeBel J., for the majority, opined:

> […] When a trial judge is considering a possible breach of the *Charter* by state actors, the ability of the state actors to comply with their *Charter* obligations must be relevant. The fact that the *Charter* could not be complied with during the investigation because the relevant state action was being carried out in a foreign jurisdiction strongly intimates that the *Charter* does not apply in the circumstances. In any event, if the concern is really about the *ex post facto* review of investigations, that function is performed by ss. 7 and 11(d) of the *Charter*, pursuant to which evidence may be excluded to preserve trial fairness. […] (para. 91)
>
> […]
>
> Despite the fact that the right to a fair trial is available only at the domestic level, after the investigation, it does provide an incentive for Canadian police officers to encourage foreign police to maintain high standards in the course of a cooperative investigation so as to avoid having the evidence excluded or a stay entered: *Terry*, at para. 26. In a similar vein, L'Heureux-Dubé, J.

> commented in *Cook*, at para. 103, that to the extent that it is possible to do so in the circumstances, Canadian police should strive to conduct investigations outside Canada in accordance with the letter and spirit of the *Charter*, even when its guarantees do not apply directly. (para. 112)
>
> [Emphasis added]

[57] The right to be treated in accordance with the principles of fundamental justice when life liberty and security of the person are at stake under section 7 of the Charter has been given an expanded meaning; it is not limited to the enumerated categories found in sections 8 to 14 of the Charter. That said, those violations in and of themselves constitute specific deprivations of the right to life, liberty and security of the person in breach of the principles of fundamental justice (see, Marie Henein, *2021 Martin's Annual Criminal Code*, Judicial Edition (Thompson Reuters Canada Ltd, 2020) at 1913). Concerns about fundamental justice in relation to the means by which police obtain self-incriminating evidence, as expressed in *R. v. Hart*, 2014 SCC 52, [2014] 2 S.C.R. 544 apply to other perceived enumerated Charter breaches.

[58] Second, section 32(1) of the Charter requires a state actor's activity to fall within the authority of Parliament or the legislature in each province. There is no dispute that the enactment of the NDA is a matter within the authority of Parliament. There is no dispute that the jurisdiction to investigate and prosecute servicemen and women in the Canadian Armed Forces is authorized under the NDA, and there is also no dispute that the authority of Canada to investigate and prosecute servicemen and women is extraterritorial in nature. Pursuant to sections 68 and 235(1) of the NDA, Courts Martial and appeals to this Court may both be held outside Canada. In my view, these factors all demonstrate that the investigation and ultimate

prosecution of Cpl. McGregor were both clearly within the authority of Parliament, engaging sections 7 and 11(d) as they relate to trial fairness.

[59] Third, unlike the situation in *Hape*, the servicemen and women of the Canadian Armed Forces do not choose to go to a foreign country. They are stationed at various locations throughout the world according to orders received. Also, unlike the situation in *Hape*, and unique to their status, Canadian servicemen and women can be prosecuted in Canada for offences committed anywhere in the world. Given Canada's right to apply its domestic criminal law to Canadian servicemen and women serving abroad, we are of the view there is a concomitant responsibility to measure trial fairness of military personnel with Canadian norms, such as those expressed in the Charter, in mind. The mirroring of Charter rights in the consideration of trial fairness reinforces the values of consistency and predictability in the trials of members of the Canadian Armed Forces, regardless of where they may be stationed or where the offence took place. This is a reasonable approach that constitutes a minor extension of the principle espoused by L'Heureux-Dubé J. in *Cook* and approved by the majority in *Hape*.

[60] These observations inexorably lead to the conclusion that the admissibility of the evidence gathered in the United States by both American and Canadian authorities must be measured by assessing its impact on trial fairness in situations of domestic trials of Canadian servicemen and women. If admission of the evidence would render the trial unfair, the evidence must be excluded. For example, if an American vigilante beat a confession out of a member of the Canadian military, without any participation by Canadian agents, this could not reasonably

be characterized as a breach of the Canadian Charter of Rights but admission of the evidence would certainly render the trial unfair, and it would be excluded.

[61] That said, we do not consider it advisable or necessary to define the ambit of what constitutes trial fairness, as determining whether the requirements of trial fairness have been met is a highly factually-infused exercise. It is sufficient to say that trial fairness may be informed, amongst others, by considerations analogous to the *Grant* factors, such as the seriousness of the conduct of the local investigators, the degree of deviation from Canadian norms and the Charter, the impact of the admission of the evidence on the accused and the public interest in the trial of the offence (*R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353 [*Grant*] at para. 71).

[62] Cpl. McGregor contends the search was not authorized by law, nor was it conducted in a reasonable manner. First, he says the search was outside the scope of the waiver of immunity, which pertained only to the appellant's residence. He asserts the waiver of immunity did not extend to permit a search of his electronic devices. Furthermore, even if the waiver applied to his electronic devices, he says the CFNIS required a separate warrant authorizing the search of those devices. On this, he relies upon *Vu*. Alternatively, Cpl. McGregor contends that even if the CFNIS acted within the authority of the immunity waiver and was authorized to search his devices, the search was conducted in an unreasonable manner because the police did not confine their search to searching for evidence of the crimes that formed the basis of the warrant. Citing *R. v. Jones*, 2011 ONCA 632, 107 O.R. (3d) 241 at para. 42, Cpl. McGregor contends the CFNIS expanded the search from one for evidence of voyeurism and unlawful interception to one for evidence of sexual assault and child pornography.

[63] We disagree with Cpl. McGregor's assertions.

[64] First, the warrant was authorized by law as it was conducted pursuant to authorization from a State of Virginia Magistrate and after the waiver of Cpl. McGregor's diplomatic immunity with respect to his residence and property. The warrant also authorized the search and seizure of the electronic devices found in Cpl. McGregor's residence. The operative portions of the warrant have already been set out in these reasons. However, for ease of reference we repeat them here:

> You are hereby commanded in the name of the Commonwealth to forthwith search the following place, person or thing either in the day or night […] for the following property, objects and/or persons: Camera, video recorder, other electronic audio/photo/video recording devices, computer, cell phone, other internet access devices, internet services devices, external electronic storage devices, and analysis of the seized items. Photographing of the premise and/or seized items.

[65] In Canada, a single warrant may authorize both the seizure as well as the search of electronic devices (*R. v. Crawley*, 2018 ONCJ 394, [2018] O.J. 3080; *R. v. KZ*, 2014 ABQB 235, [2014] A.J. No. 413; *R. v. Villaroman*, 2018 ABCA 220, [2018] A.J. No. 760). This approach is consistent with *Vu*. We are of the opinion that, in this case, the investigators had prior judicial authorization to search the electronic devices. The search was not warrantless.

[66] With respect to the allegation the search was conducted in an unreasonable manner, we would note that the triage searches were specifically aimed at quickly identifying evidence of interception and voyeurism. The CFNIS did not change the scope of their search after discovering evidence of additional crimes. This distinguishes the present case from *Jones*, where

a warrant issued to search for evidence of fraud was used to gather evidence of child pornography and sexual assault. In *Jones,* the investigators changed the scope of their search without obtaining a second warrant. In the present case, upon discovering evidence of other crimes, those devices were immediately set aside and no further search of their contents was undertaken until a Canadian warrant could be obtained. We are of the view the search was conducted reasonably and would have been in compliance with Charter standards had the search been wholly conducted in Canada under Canadian warrants.

[67] In the event we are incorrect and Canadian state actors violated Cpl. McGregor's section 8 Charter right, we would nevertheless agree with the Military Judge's decision to admit the impugned evidence. In *Grant*, the Court set out the test for determining whether evidence ought to be excluded under section 24(2) of the Charter. Trial courts are to consider the seriousness of the Charter-infringing state conduct; the impact of the breach on the Charter-protected interests of the accused; and society's interest in the adjudication of the case on its merits.

[68] We are of the view all three *Grant* factors militate in favour of the admission of the evidence. First, the CFNIS agents acted in good faith and were not wilfully blind to, nor did they blatantly disregard, Cpl. McGregor's Charter rights. Investigators believed they had lawful authority to search the electronic devices on-site and that they had acquired it through the proper means. Second, the impact of the breach on Cpl. McGregor's rights was minimal as the breach, if any, was merely technical. The Virginia search warrant was functionally equivalent to a Canadian one. Furthermore, the search would not have been carried out any differently had it occurred in Canada. The evidence of sexual assault and child pornography were discoverable and

surely would have been found during the authorized search of the devices on Canadian soil. Third, society's interest remains high in seeing this case adjudicated on its merits given the serious nature of the offences.

VI. Conclusion

[69] For all of the above reasons, we would dismiss the appeal and maintain Cpl. McGregor's convictions.

"B. Richard Bell"
Chief Justice

"Donad J. Rennie"
J.A.

"Gladys I. Pardu"
J.A.

ANNEX

Vienna Convention on Diplomatic Relations	**Convention de Vienne sur les relations diplomatiques**
Article 22	**Article 22**
1. 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.	1. Les locaux de la mission sont inviolables. Il n'est pas permis aux agents de l'État accréditaire d'y pénétrer, sauf avec le consentement du chef de la mission.
3. The premises of the mission, their furnishings and other property thereon and the means of transport of the mission shall be immune from search, requisition, attachment or execution.	3. Les locaux de la mission, leur ameublement et les autres objets qui s'y trouvent, ainsi que les moyens de transport de la mission, ne peuvent faire l'objet d'aucune perquisition, réquisition, saisie ou mesure d'exécution.
Article 30	**Article 30**
1. The private residence of a diplomatic agent shall enjoy the same inviolability and protection as the premises of the mission.	1. La demeure privée de l'agent diplomatique jouit de la même inviolabilité et de la même protection que les locaux de la mission.
Article 31	**Article 31**
1. A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State. He shall also enjoy immunity from its civil and administrative jurisdiction, except in the case of:	1. L'agent diplomatique jouit de l'immunité de la juridiction pénale de l'État accréditaire. Il jouit également de l'immunité de sa juridiction civile et administrative, sauf s'il s'agit :
(a) A real action relating to private immovable property situated in the territory of the receiving State, unless he	a) d'une action réelle concernant un immeuble privé situé sur le territoire de l'État accréditaire, à moins

holds it on behalf of the sending State for the purposes of the mission;

que l’agent diplomatique ne le possède pour le compte de l’État accréditant aux fins de la mission;

(b) An action relating to succession in which the diplomatic agent is involved as executor, administrator, heir or legatee as a private person and not on behalf of the sending State;

b) d’une action concernant une succession, dans laquelle l’agent diplomatique figure comme exécuteur testamentaire, administrateur, héritier ou légataire, à titre privé et non pas au nom de l’État accréditant;

(c) An action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions.

c) d’une action concernant une activité professionnelle ou commerciale, quelle que soit, exercée par l’agent diplomatique dans l’État accréditaire en dehors de ses fonctions officielles.

Article 32

1. The immunity from jurisdiction of diplomatic agents and of persons enjoying immunity under article 37 may be waived by the sending State.

Article 32

1. L’État accréditant peut renoncer à l’immunité de juridiction des agents diplomatiques et des personnes qui bénéficient de l’immunité en vertu de l’article 37.

2. Waiver must always be express.

2. La renonciation doit toujours être expresse.

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

Convention entre les États parties au Traité de l’Atlantique Nord sur le statut de leurs forces

Article VII

1. Subject to the provisions of this Article,

Article VII

1. Sous réserve des dispositions du présent article :

a. the military authorities of the sending State shall

a. Les autorités militaires de l'État d'origine ont le droit

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;

d'exercer sur le territoire de l'État de séjour les pouvoirs de juridiction pénale et disciplinaire que leur confère la législation de l'État d'origine sur toutes personnes sujettes à la loi militaire de cet État;

3. In case where the right to exercise jurisdiction is concurrent the following rules shall apply:

3. Dans les cas de juridiction concurrente, les règles suivantes sont applicables :

a. The military authorities of the sending State shall have the primary right to exercise jurisdiction over a member of a force or of a civilian component in relation to

a. Les autorités militaires de l'État d'origine ont le droit d'exercer par priorité leur juridiction sur le membre d'une force ou d'un élément civil en ce qui concerne :

i. offences solely against the property or security of that State, or offences solely against the person or property of another member of the force or civilian component of that State or of a dependent;

i. les infractions portant atteinte uniquement à la sûreté ou à la propriété de cet État ou les infractions portant atteinte uniquement à la personne ou à la propriété d'un membre de la force, ou d'un élément civil de cet État ainsi que d'une personne à charge;

ii. offences arising out of any act or omission done in the performance of official duty.

ii. les infractions résultant de tout acte ou négligence accomplis dans l'exécution du service.

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. The handing over of such objects may, however, be made subject to their return within the time specified by the authority delivering them.

6.a. Les autorités des États de séjour et d'origine se prêtent mutuellement assistance pour la conduite des enquêtes, pour la recherche de preuves, y compris la saisie, et s'il y a lieu, la remise des pièces à conviction et des objets de l'infraction. La remise des pièces et objets saisis peut toutefois être subordonnée à leur restitution dans un délai déterminé par l'autorité qui procède à cette remise.

***Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11**

***Charte canadienne des droits et liberté, partie I de la Loi constitutionnelle de 1982*, constituant l'annexe B de la *Loi de 1982 sur le Canada* (R.-U.), 1982, c 11**

8. Everyone has the right to be secure against unreasonable search or seizure.

8. Chacun a droit à la protection contre les fouilles, les perquisitions ou les saisies abusives,

24.(2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

24.(2) Lorsque, dans une instance visée au paragraphe (1), le tribunal a conclu que des éléments de preuve ont été obtenus dans des conditions qui portent atteinte aux droits ou libertés garantis par la présente charte, ces éléments de preuve sont écartés s'il est établi, eu égard aux circonstances, que leur utilisation est susceptible de déconsidérer l'administration de la justice.

32. (1) This Charter applies

(*a*) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and

(*b*) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

32.(1) La présente charte s'applique :

(a) au Parlement et au gouvernement du Canada, pour tous les domaines relevant du Parlement, y compris ceux qui concernent le territoire du Yukon et les territoires du Nord-Ouest;

(b) à la législature et au gouvernement de chaque province, pour tous les domaines relevant de cette législature.

QR&O: Volume II – Chapter 106 Investigation Of Service Offences

106.05 – ISSUANCE OF A SEARCH WARRANT BY A COMMANDING OFFICER

(1) Section 273.3 of the *National Defence Act* provides:

“273.3 Subject to sections 273.4 and 273.5, a commanding officer who is satisfied by information on oath that there is in any quarters, locker, storage space or personal or movable property referred to in section 273.2

ORFC : Volume II - Chapitre 106 - Enquête sur les infractions d’ordre militaire

106.05 – DÉLIVRANCE D'UN MANDAT DE PERQUISITION PAR UN COMMANDANT

(1) L'article 273.3 de *la Loi sur la défense nationale* prescrit :

« 273.3 Sous réserve des articles 273.4 et 273.5, le commandant qui conclut, sur la foi d'une dénonciation faite sous serment, à la présence dans les logements, cases, espaces de rangement ou biens meubles ou personnels visés à l'article 273.2 de tout objet répondant à l'un des critères ci-dessous peut signer un mandat autorisant l'officier ou le militaire du rang qui y est nommé, aidé au besoin d'autres officiers ou

militaires du rang se trouvant sous son autorité, ou un agent de la paix, à perquisitionner dans ces lieux ou biens, afin de trouver, saisir et lui apporter l'objet :

(*a*) anything on or in respect of which any offence against this Act has been or is believed on reasonable grounds to have been committed,

a) soit parce que celui-ci a ou qu'il y a des motifs raisonnables de croire qu'il aurait servi ou donné lieu à une infraction à la présente loi;

(*b*) anything that there are reasonable grounds to believe will afford evidence with respect to the commission of an offence against this Act, or

b) soit parce qu'il y a des motifs raisonnables de croire qu'il servira à prouver la perpétration d'une telle infraction;

(*c*) anything that there are reasonable grounds to believe is intended to be used for the purpose of committing any offence against the person for which a person may be arrested without warrant,

c) soit parce qu'il y a des motifs raisonnables de croire qu'il est destiné à servir à la perpétration d'une infraction contre une personne, infraction qui peut donner lieu à une arrestation sans mandat. »

may issue a warrant authorizing any officer or non-commissioned member named in the warrant, assisted by such other officers and non-commissioned members as are necessary, or a peace officer, to search the quarters, locker, storage space or personal or movable property for any such thing, and to seize and carry it before that commanding officer."

(2) Section 273.4 of the *National Defence Act* provides;

"273.4 The commanding officer who carries out or directly supervises the investigation of any matter may issue a warrant pursuant to section 273.3 in relation to that investigation only if that commanding officer believes on reasonable grounds that

(*a*) the conditions for the issuance of the warrant exist; and

(*b*) no other commanding officer is readily available to determine whether the warrant should be issued."

(3) Section 273.5 of the *National Defence Act* provides:

"273.5 Section 273.3 does not apply to a commanding officer of a military police unit."

(2) L'article 273.4 de la *Loi sur la défense nationale* prescrit :

« 273.4 Le commandant qui mène ou supervise directement une investigation ne peut, relativement à celle-ci, délivrer de mandat en application de l'article 273.3 que s'il a des motifs raisonnables de croire :

a) à l'existence des conditions préalables à sa délivrance;

b) qu'il n'y a aucun autre commandant en mesure de décider sans délai de l'opportunité de le délivrer. »

(3) L'article 273.5 de la *Loi sur la défense nationale* prescrit :

« 273.5 Les dispositions de l'article 273.3 ne s'appliquent pas au commandant d'une unité de la police militaire. »

COURT MARTIAL APPEAL COURT OF CANADA

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	CMAC-602
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DATED:	DECEMBER 31, 2020

APPEARANCES:

Captain Diana Mansour	FOR THE APPELLANT
Major Stephan Poitras	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Defence Counsel Services Ottawa, Ontario	FOR THE APPELLANT
Canadian Military Prosecution Service Ottawa, Ontario	FOR THE RESPONDENT