SECTION 32 AND THE EXTRATERRITORIAL APPLICATION OF THE CHARTER OF RIGHTS AND FREEDOMS

Section 32 determines the applicability of the Charter. It does not explicitly address the Charter's application outside of Canada but it does stipulate that the Charter applies to the actions of the federal and provincial governments taken within the authority of Parliament and the provincial legislatures. Theoretically, this would allow the Charter to apply to all actions taken by Canadian public employees in the course of their duties, regardless of where they occurred. In practice however, courts have defined the Charter's scope somewhat more narrowly.

Courts have been guided by the principles of international law, the principles and purpose of the Charter, and by practicality in shaping the law in this field. In accordance with the international law principles of territorial sovereignty, non-intervention and comity, Canadian courts try to avoid any interference with the domestic law of other nations, (*R. v. Hape*, 2007, at para 46, 52). Courts will presume that the legislature intends to operate in compliance with Canada's international obligations. This factor however, can militate either in favour of applying the Charter to events in other countries when the Charter and Canada's commitments to human rights under international law align, or, in favour of exempting events which occur abroad from Charter scrutiny out of respect for the domestic law of the nation in which they took place. Another factor considered by the courts is fundamental nature of the principles underlying the

Charter and the consequent desirability of extending its protection to Canadian citizens when possible. A third factor influencing the jurisprudence on the extraterritorial application of the Charter is practicality. For example, in *Hape*, RCMP officers participated in a perimeter search of premises in the Turks and Caicos Islands belonging to the accused. Under Canadian law, a warrant would have been required in order to comply with s.8 of the Charter. In the Turks and Caicos Islands however, such warrants were not required and so no procedure existed to obtain them. Justice Lebel recognized that in these circumstances, requiring the RCMP officers to comply with the Charter would force them to demand that the judicial procedures of the Turks and Caicos be changed which would constitute blatant interference with sovereignty and would be highly impractical (*Hape*, para 86). In balancing these factors the Court has sought to "achieve a just accommodation between the interests of the individual and those of the state in providing a fair and workable system of justice" (*Harrer* para 14).

The application of these factors has led to certain trends in applying s.32. The SCC has generally declined to apply the Charter to actions taken outside of Canada unless the nation in question consents to the application of Canadian law. Where however, an accused is tried in Canada on the basis of evidence garnered in other nations, s.7 and s.11 (d) will apply and that evidence may be excluded if its inclusion would compromise trial fairness (*Terry* and *Harrer*). When Canadian police officers go abroad and participate in an investigation of the accused, they must, at a minimum, comply with the domestic law of the nation in question. If a foreign nation consents to the application of the Charter, it will apply. The Court recognizes however that such consent is unlikely (*Hape* para 105). If the foreign nation has not consented to the application of the Charter and the Crown seeks to introduce evidence in a Canadian trial which was gathered in a manner which would have violated the Charter had it occurred in Canada, the Court will assess

the admissibility of the evidence based on s.7 and s.11(d). The SCC has deemed this consideration to be merely giving "domestic consequences to foreign events" (*Hape* para 96). While the fact that a foreign investigation was conducted in such a way that other Charter rights such as s. 8 would have been violated if it had occurred in Canada is relevant, this will not necessarily establish a violation of ss. 7 or 11(d). In *Hape*, Justice Lebel summarized the framework for determining whether the Charter applies extraterritorially in the following manner at paragraph 113,

> The methodology for determining whether the *Charter* applies to a foreign investigation can be summarized as follows. The first stage is to determine whether the activity in question falls under s. 32(1) such that the *Charter* applies to it. At this stage, two questions reflecting the two components of s. 32(1) must be asked. First, is the conduct at issue that of a Canadian state actor? 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. 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.

In both *R v. Harrer,* 1995 and *R v. Terry,* 1996, statements made by the accused to American police officers were held admissible at trial in Canada, although the accused had not been properly informed of their right to counsel prior to being interrogated. In *R v. Cook* 1998, Canadian detectives had traveled to the US and participated in an interrogation in which the accused was not told of their right to counsel. The SCC held that the evidence gathered in this interrogation was not admissible, even for the limited purpose of impeaching the credibility of the accused. In *Schreiber v. Canada,* 1998*,* a Canadian request made without judicial authorization for Swiss assistance in an investigation which led to the seizure of banking records in Switzerland was held to not be subject to s.8. *R v. Hape,* 2007, involved a joint search of an office building belonging to the accused by police officers from Canada and the Turks and Caicos Islands and the seizure of documents found within. Though it was doubtful that the

warrants obtained for the searches would have met Canadian standards, the SCC held that the evidence gathered could be admitted at trial in Canada. Central to this determination, and in contrast to the situation in *Cook* where evidence was excluded, was the finding that foreign police officers and foreign courts had retained control of the investigation at all times. Canadian police officers had worked under the direction of the local police and had even been prevented from removing evidence from the Turks and Caicos Islands by a local court order. Moreover, the Canadian officers had acted in good faith and believed throughout that their local equivalents had secured proper warrants. A similar analysis of the role played by the Canadian government officials in question occurred in *Khadr v. Prime Minister,* 2010. It was determined that, since the Canadian officials had elicited statements from Khadr after he had been sleep-deprived which could be used by US authorities to aid in his prosecution, Canada was contributing to his continued detention at Guantanamo Bay. As a result, there was a "sufficient causal connection" between the actions of the Canadian government and the deprivation of Khadr's right to liberty and security of the person, (*Khadr* para 21 and *Suresh v. Canada*, 2002, para 54). The Court granted Khadr a declaration that his s.7 rights had been violated, but refused his request for an order requiring the Canadian government to seek his release because to grant such an order would be to infringe upon the prerogative power of the executive branch. Thus, the jurisprudence on extraterritoriality under s.32 is not entirely straightforward, but the factors that emerge as central in *Cook, Hape* and *Khadr* are: whether the Canadian officials acted in good faith by not seeking to exploit the lower procedural protections of the nation in which the investigation was conducted, and what the power relationship was between the Canadian and foreign police officers.

One potential area of focus for the Charter Challenge would involve a hypothetical scenario in which foreign police officers, acting at the request of Canadian police, obtain evidence in a manner which, though legal in their own country, would not be in Canada and this evidence is submitted at a Canadian trial. Though the Court has said that the actions of foreign police officers cannot be the subject of Charter scrutiny, in *Harrer*, it was suggested that this might not be the case if they were acting as "agents of Canadian police furthering a criminal prosecution in Canada." For example, the hypothetical case might be set in Afghanistan. While most of the case law would support the presumption that the Charter could not apply to Afghan police, the students might argue that due to Canada's foreign aid and military involvement in Afghanistan, the power relationship between the Canadian and Afghan police was such that the Canadian officers were in control of the conduct of the investigation. Additionally, it might be suggested that, unlike in *Hape*, the Canadian officers were not acting in good faith but were seeking to take advantage of the less onerous procedural requirements of Afghan law. While a scenario focusing on section 32 may be somewhat problematic because the materials relating to this topic in the Charter Digest on Canlil are rather limited, I think they are sufficient to support good arguments on both sides of a scenario similar to the one I have suggested.