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My Vote for R. v. Hape as a Significant Legal Case of the Decade

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Cases Considered:

R. v. Hape, 2007 SCC 26

When the *R. v. Hape* case was released at the Supreme Court of Canada, there was some negative reaction in the legal community, but its real significance did not become apparent until recently. In particular, it has become very significant in the litigation aimed at bringing Omar Khadr to Canada from Guantánamo Bay.

There are several aspects of the *Hape* case that have been the subject of criticism (e.g., the holding that the *Canadian Charter of Rights and Freedoms* ("*Charter*") does not apply to the actions of the police outside of Canada, and the discussion of the role of international law in interpreting the *Charter;* see, for example: John Currie, "Weaving a Tangled Web: *Hape* and the Obfuscation of Canadian Reception Law" (2007) 45 Can. Yearbook Int'l Law 55). However, my view of the significance of the *Hape* case is based on the exception to the rule regarding the extraterritorial application of the *Charter* that is carved out by the Supreme Court of Canada, and its application in the recent *Khadr* cases (*Canada v. Khadr*, 2008 SCC 28; *Canada (Prime Minister) v. Khadr*, 2009 FCA 246). *Hape* is also significant for drawing attention to the role of international law in interpreting Canadian common-law and the Constitution, and was cited in a recent Alberta case in this regard (see *Trang v. Alberta (Edmonton Remand Centre)*, 2010 ABQB 6).

Mr. Hape was being investigated by the RCMP for suspicion of money laundering. A 1998 investigation led to a "sting" operation in which an undercover RCMP officer provided large sums of money to Hape for laundering through an investment company owned by Hape in the Turks and Caicos Islands. The RCMP wanted to create a paper trail that would confirm their suspicions about Hape. They sought permission from the Turks and Caicos police authorities to conduct part of their investigation in the Turks and Caicos Islands. The RCMP were permitted to carry out covert, warrantless searches of the premises of Hape's investment company under the supervision of one member of the Turks and Caicos police department. The searches occurred in 1998 and 1999, and many documents were seized and scanned by the RCMP, culminating in the laying of money laundering charges against Hape.

Before his trial in Canada, Hape applied for exclusion of the seized documents from evidence because they had been obtained contrary to the protection against search and seizure under s. 8 of the *Charter*. The trial judge, finding that the RCMP were carrying out the searches under the authority of the Turks and Caicos police, ruled that the application of the *Charter* to those searches and seizures would provide an "objectional extraterritorial effect", which had been discussed in the case of *R. v. Cook*, [1998] 2 S.C.R. 597. The trial judge found that the *Charter* could not be applied in the circumstances, dismissed the application and later found Hape guilty of two counts of money laundering. The Court of Appeal of Ontario dismissed Hape's appeal, concluding that the trial judge was correct in finding that the RCMP had been acting under foreign authority and that the application of Cook to resolve the *Charter* issue was correct. Mr. Hape appealed to the SCC.

The SCC was asked to deal with the issue of whether s. 8 of the *Charter* could be applied to searches and seizures conducted by the RCMP outside of Canada. All nine members of the Court agreed that the appeal should be dismissed, but they provided three different sets of reasons. Justice Binnie relied on the SCC's prior ruling in *R. v. Cook*, *supra*, and held that the application of *Charter* s. 8 in the *Hape* case would produce an objectionable extraterritorial effect and should not, therefore, be supported. Justice Bastarache (writing also for Justices Abella and Rothstein) found that *Charter* s. 8 applied in principle to the extraterritorial search and seizure. However, Justice Bastarache applied a rebuttable presumption that the police had complied with the *Charter* pursuant to valid foreign law and procedures, and concluded that Hape had not shown a breach in this case. Justice LeBel (concurred with by Chief Justice McLachlin and Justices Deschamps, Fish and Charron) effectively overrruled *Cook, supra,* holding that it conflicted with Canada's international legal obligations. In light of the principles of sovereign equality of states, non-intervention and enforcement jurisdiction, and the comity of nations, Justice LeBel held that the application of the *Charter*, without foreign consent, to the activities of Canadian officials abroad would amount to the impermissible extraterritorial enforcement of the *Charter*. In the end, the SCC held that the *Charter* was inapplicable to the foreign activities of the RCMP, and Hape's appeal was dismissed.

Justice LeBel set out three exceptions to the general rule that the *Charter* does not apply extraterritorially. First, the *Charter* will apply if a foreign state has consented to its application. Second, if evidence obtained in a foreign investigation were used in a proceeding within Canada and thereby produces an unfair trial contrary to *Charter* sections 7 and 11(d), the *Charter* would apply. Finally, according to Justice LeBel, "comity cannot be invoked to allow Canadian authorities to participate in activities that violate Canada's international obligations" (para. 101). Of particular significance is the third exception to this rule as it was later relied upon by Omar Khadr's counsel. The exception is found in two paragraphs of the majority judgment:

> 101 Moreover, there is an argument that comity cannot be invoked to allow
> Canadian authorities to participate in activities that violate Canada's international obligations. As a general rule, Canadian officers can participate in investigations abroad, but must do so under the laws of the foreign state. The permissive rule that allows Canadian officers to participate even when there is no obligation to do so derives from

> the principle of comity; the rule that foreign law governs derives from the principles of sovereign equality and non-intervention. But the principle of comity may give way where the participation of Canadian officers in investigative activities sanctioned by foreign law would place Canada in violation of its international obligations in respect of human rights. In such circumstances, the permissive rule might no longer apply and Canadian officers might be prohibited from participating. I would leave open the possibility that, in a future case, participation by Canadian officers in activities in another country that would violate Canada's international human rights obligations might justify a remedy under s. 24(1) of the *Charter* because of the impact of those activities on *Charter* rights in Canada. (emphasis added)
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> …..
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> 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.

This "faint hope" exception appears to be very modest. In fact, in light of the substantial critical focus on Hape's discussion of the role of international law in Canadian common law and constitutional law and the extraterritorial application of the *Charter*, it is easy to perhaps overlook the exception's significance. In particular, there have been two recent cases involving Omar Khadr, in which this exception has been crucial.

In *Canada v. Khadr*, 2008 SCC 28, the SCC addressed the applicability of the *Charter* to the actions of the Canadian Security Intelligence Service (CSIS) and other Canadian officials when they interrogated Omar Khadr at Guantánamo Bay in 2003 and passed on the results of these interrogations to American military officials. Relying on *Charter* s. 7 and the principles in *R. v. Stinchcombe*, [1991] 3 S.C.R. 326, Khadr claimed a right to disclosure of the information, as it might be relevant to the United States Military Commission hearings he was facing. The SCC determined that the *Charter* did apply to the conduct of the Canadian officials and CSIS officers in this case, noting that the *Hape* principle regarding extraterritorial application of the *Charter* is generally applicable, but is subject to the exception if "Canada was participating in a process that was violative of Canada's binding obligations under international law" (*Khadr*, at para. 19).

John Currie asserts that the *Khadr* case actually represents the SCC formulating *another* exception because of the harsh and incorrect principle set down in *Hape* (see "*Khadr*'s Twist on

Hape: Tortured Determinations of the Extraterritorial Reach of the Canadian Charter" (2008) 46 Can. Yearbook Int'l Law 307). In addition, *Khadr* has been criticized for being too brief and not explaining properly the role of international human rights principles in Canada. The exception in *Khadr* has also been noted as being available in very few circumstances (see: Benjamin Berger, "The Reach of Rights in the Security State: Reflections on *Khadr v. Canada (Minister of Justice*) 56 C.R. (6^{th}) 268).

In a second case, *Prime Minister of Canada et al v. Omar Khadr*, heard by the SCC in November, 2009, Mr. Khadr used the CSIS interrogation described above and the exception in *Hape* to argue that his rights under *Charter* s. 7 were violated and applied for the remedy of ordering the Crown to request the United States to return him to Canada. He also relied on the first *Khadr* case to support the argument that by knowingly interviewing a minor without benefit of counsel or consular assistance, who had been subjected to sleep deprivation and other types of torture in order to induce him to talk, officials breached Canada's international obligations. Thus, the exception in *Hape* once again has become critical. The SCC will be releasing its decision in the second *Khadr* case on January 29, 2010.

Perhaps my view that this exception in *Hape* is significant is based on gratitude that Omar Khadr's counsel were able to use the principle to argue for justice for their client. And, since many scholars rely on analysis and logic to assess legal decisions, I should not be labelling *Hape* as a "significant" case. Perhaps much of what has been said in the *Hape* case will need refining and will even need to be recast, revised and overturned. Nevertheless, its elevation of the discussion (flawed as it may be) of the role of international law in the interpretation of Canada's constitutional and common law, is significant. Finally, the insignificant-appearing exception may serve as a tool that can be used to obtain justice for Omar Khadr— justice that is long overdue.