S.C.C. File No. 39543

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT MARTIAL APPEAL COURT)

B E T W E E N :

CORPORAL C.R. McGREGOR

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

- and -

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Interveners

FACTUM OF THE INTERVENER, CANADIAN CONSTITUTION FOUNDATION

(Pursuant to Rules 37 and 42 of the *Rules of the Supreme Court of Canada*, S.O.R./2002-156)

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PART I—OVERVIEW & STATEMENT OF POSITION

1. The parties offer differing views as to whether the *Canadian Charter of Rights and Freedoms* applies extraterritorially in this case. In doing so, they focus on the exceptions to the exclusionary bar created in *R. v. Hape*.[1] The Canadian Constitution Foundation (the "**CCF**") intervenes to offer an alternative approach to addressing the issues in this appeal because the framework outlined by the majority in *Hape* undershoots the purpose of s. 32(1).

2. There is no basis in our Constitution for the proposition that Canadian officials have a free pass while abroad. Constitutional interpretation must begin with and be rooted in the text of the Constitution. Section 32(1) of the *Charter* is clear that executive action is subject to scrutiny for constitutional compliance, without geographical constraint. All the relevant contextual factors, particularly the underlying principle of the rule of law, confirm this interpretation. Yet, the majority in *Hape* read down this constitutional text to create an exclusionary bar when the executive acts abroad.

3. The Court has also created a doctrinally precarious international human rights exception. Given that the *Charter* is the means by which Canada implemented *some* of its international obligations, the framework is legally unsound. Moreover, to the extent that the exception refers to international norms that Canada has not constitutionalized, it appears to permit constitutional amendments without provincial consent. The issues in this case can most coherently be addressed by revisiting *Hape* and creating a framework that provides predictability to those subject to government action and to government actors themselves.

4. As Bastarache J. (joined by Abella and Rothstein JJ.) explained in his concurring reasons in *Hape*, the foreign elements at issue in cases such as the appeal before the Court are relevant in assessing *Charter* compliance, but should not bar the *Charter*'s application. Accounting for Canada's need to act abroad need not lead to endorsing a human rights "no-man's land". It is appropriate to accord the state a margin of appreciation in determining whether the actions of Canadian officials abroad are reasonable or justified, but not to immunize them from *Charter* scrutiny. This standard—which finds support in the jurisprudence of the European Court of Human Rights and in this Court's extradition and deportation case law—offers a more doctrinally sound approach to the issues in this appeal than *Hape* and its progeny do. The Court should say as much.

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[1] *R. v. Hape*, 2007 SCC 26.

PART II—STATEMENT OF ARGUMENT

A. The executive should be subject to the *Charter* abroad

5. This Court has explained that the purpose of constitutional provisions must be ascertained by examining the text in its proper context.[2] In *Hape*, the majority instead turned to international law and adopted an interpretation of s. 32(1) of the *Charter* that undershoots its purpose. The *Hape* majority's approach is incompatible with the constitutional text, the underlying principle of the rule of law, and developments in the Commonwealth. It is also doctrinally untenable. It should be revisited.[3]

6. ***First***, the text of s. 32(1) is clear that executive action is subject to *Charter* scrutiny. It provides that the *Charter* applies "to the Parliament and government of Canada in respect of all matters within the authority of Parliament".[4] This Court has consistently held that the *Charter* applies to the executive, including the police.[5]

7. The text of s. 32 of the *Charter* admits no territorial exception. Despite this, the majority in *Hape* held that, in principle, the *Charter* does not apply extraterritorially. In other words, actions that would be subject to scrutiny for constitutional compliance within Canada are immune from *Charter* scrutiny if they are undertaken by the same state actors abroad. As Bastarache J. explained in *Hape*, this is a "reading down" of s. 32(1) because the constitutional text "defines *who* acts, not *where* they act."[6] This Court has correctly held that the *Charter* does not apply to the actions of foreign officials,[7] but there is no textual basis on which to suggest that the actions of Canadian

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2 *Quebec (Attorney General) v. 9147-0732 Québec inc.*, 2020 SCC 32, ¶13-14, 16-17; *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 at 344.

3 **See:** *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, ¶20.

4 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, s. 32(1).

5 **See, e.g.,** *Godbout v. Longueuil (City)*, [1997] 3 S.C.R. 844, ¶48; *Société des Acadiens et Acadiennes du Nouveau-Brunswick Inc. v. Canada*, 2008 SCC 15, ¶21-23; *Greater Vancouver Transportation Authority v. Canadian Federation of Students — British Columbia Component*, 2009 SCC 31, ¶15-16. **See also:** R. Currie & J. Rikhof, *International & Transnational Criminal Law*, 3rd ed. (Irwin Law, 2020) at 633-634, Book of Authorities ("**BOA**") Tab 10.

6 *Hape* (S.C.C.), *supra* note 1, ¶161. **See also:** ¶186, per Binnie J., concurring.

7 *R. v. Harrer*, [1995] 3 S.C.R. 562; *R. v. Terry*, [1996] 2 S.C.R. 207 at 217. **See also:** *Schreiber v. Canada*, [1998] 1 S.C.R. 841, ¶15, per Lamer C.J.

officials are immune from *Charter* scrutiny. In fact, this Court held the contrary in *R. v. Cook*[8] and *Schreiber v. Canada (Attorney General)*.[9] As a result, *Hape* fails to account for the "primordial significance" ascribed to the constitutional text by this Court's jurisprudence.[10]

8. The primacy of the written text has deep roots in our constitutional history and should be reaffirmed in this case. It was most famously emphasized by Lord Sankey, writing for the Judicial Committee of the Privy Council, in *Edwards v. Canada (Attorney General)*.[11] In that case, the issue was whether the word "persons" in s. 24 of the *Constitution Act, 1867* allowed the Governor General to appoint women to the Senate. Lord Sankey explained that "[n]o doubt in any code where women were expressly excluded from public office the problem would present no difficulty".[12] He noted, however, that the word "persons" in its "original meaning would undoubtedly embrace members of either sex"[13] and that other sections of the Constitution, like ss. 41 and 84, refer to "male persons".[14] Ultimately, he concluded that, if the framers had intended to limit the word "persons" in s. 24 to "male persons", they would "surely have manifested such intention by an express limitation".[15] A few years later, Lord Sankey explained that this approach to constitutional interpretation is vital because the Constitution "embodies a compromise under which the original Provinces agreed to federate".[16] This Court has said the same about constitutional documents adopted since 1867, namely the *Constitution Act, 1982*.[17]

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8 [1998] 2 S.C.R. 597, ¶48, per Cory and Iacobucci JJ., ¶118, 145, per Bastarache J.

9 [1998] 1 S.C.R. 841, ¶16, per Lamer C.J., ¶29, 31-32, 34, per L'Heureux-Dubé J.

10 **See, e.g.,** *Toronto (City) v. Ontario (Attorney General)*, 2021 SCC 34, ¶65, 73, 82; *Quebec (Attorney General)*, *supra* note 2, ¶4, 11; see also ¶139, per Kasirer J., concurring.

11 **See:** B.W. Miller, "Constitutional Supremacy and Judicial Reasoning" (2020), 45 *Queen's L.J.* 353 at 364-67; M. Rothstein, "Checks and Balances in Constitutional Interpretation" (2016), 79 *Sask L.R.* 1 at 1-3; A. Honickman, "The Original Living Tree" (2019), 28 *Constitutional Forum* 29.

12 *Edwards v. Canada (Attorney General)*, [1930] 1 D.L.R. 98 (P.C.) at 104.

13 *Ibid* at 104.

14 *Ibid* at 110-111.

15 *Ibid* at 111.

16 *In re Regulation and Control of Aeronautics in Canada*, [1932] 1 D.L.R. 58 (P.C.) at 65.

17 *Re: Resolution to amend the Constitution*, [1981] 1 S.C.R. 753 at 891-893, 897, 905-909; *Reference re Senate Reform*, 2014 SCC 32, ¶1, 34-41, 46-48; *Toronto (City)* (S.C.C.), *supra* note 10, ¶81-82. **See also:** S. Grammond, "The Supreme Court of Canada's Revival of the Compact Theory of Confederation" (2016), 53 *Osgoode Hall L.J.* 799 at 803-806, 811-818.

9. ***Second***, *Hape* is incompatible with the constitutional principle of the rule of law because it permits unconstrained executive action abroad.[18] Constitutional texts must, of course, be understood in their proper linguistic, philosophic and historical context.[19] Underlying or unwritten principles, as "part of the context or backdrop to the Constitution's written terms", may therefore assist in giving "meaning and effect to the constitutional text."[20]

10. As this Court explained in the *Secession Reference*, one key aspect of the rule of law is "executive accountability to legal authority", which serves to protect "individuals from arbitrary action".[21] This means that "all government action must comply with the law, including the Constitution."[22] Refusing to apply the justiciable constraints outlined in the *Charter* when there is no textual basis to do so defies the very purpose for which the *Charter* was adopted in 1982: to subject government action to constitutional limits. Courts, as a central element of Canada's constitutional architecture, have a duty to scrutinize executive action – wherever it occurs – for constitutional compliance.[23]

11. ***Third***, the exclusionary bar created in *Hape* is inconsistent with developments in other Commonwealth jurisdictions. The bar in English law that shielded cases with foreign elements from "municipal legal control"[24] has been abandoned in the U.K. and Australia.[25] Canadian courts

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18 K. Sun, "International Comity and the Construction of the *Charter*'s Limits: *Hape* Revisited" (2019), 45 *Queen's L.J.* 115 at 146.

19 **See, e.g.,** *Quebec (Attorney General)* (S.C.C.), *supra* note 2, ¶13, 16-17, 41; *R. v. Stillman*, 2019 SCC 40, ¶21; *Ontario (Attorney General) v. OPSEU*, [1987] 2 SCR 2 at 40, per Beetz J.; E. Brouillet, A.-G. Gagnon & G. Laforest, "Introduction", in E. Brouillet, A.-G. Gagnon & G. Laforest, eds., *La conférence de Québec de 1864 : comprendre l'émergence de la fédération canadienne* (Presses de l'Université Laval, 2016) at 9, BOA Tab 5.

20 *Toronto (City)* (S.C.C.), *supra* note 10, ¶50, 55, 65.

21 *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, ¶70. **See also:** *Hupacasath First Nation v. Canada (Foreign Affairs and International Trade Canada)*, 2015 FCA 4, ¶66.

22 *Secession Reference* (S.C.C.), *supra* note 21, ¶72.

23 *Ibid*, ¶46-47, 81; *Operation Dismantle v. The Queen*, [1985] 1 S.C.R. 441, ¶67.

24 C. McLachlan, *Foreign Relations Law* (Cambridge University Press, 2014), ¶1.32, BOA Tab 4.

25 Sun, *supra* note 18 at 147, 155. **See:** *Habib v. Commonwealth of Australia*, [2010] FCAFC 12, ¶37; *Moti v. The Queen*, [2011] HCA 50, ¶53; *Belhaj v. Straw*, [2017] UKSC 3, ¶29-31, 76, 82, 99, 102, per Lord Mance, ¶132, 148-149, 167, per Lord Neuberger, and ¶174, per Lady Hale and Lord Clarke.

have similarly moved in this direction.[26]

12. Significantly, these jurisprudential developments extend to "responsibility for human rights violations in the external exercise of public power".[27] In *Al-Skeini v. The United Kingdom*,[28] the European Court of Human Rights held that the European Convention on Human Rights applies extraterritorially.[29] This reasoning was then adopted by the U.K. Supreme Court with respect to the *Human Rights Act 1998* (U.K.)[30] in *Smith v. The Ministry of Defence*.[31]

13. While not binding on this Court, these sources help show that *Hape* rests on a flawed understanding of international law. In *Hape*, the majority held that the principle of state sovereignty *required* reading down the text of s. 32(1) of the *Charter*.[32] However, it is well established that "international law simply does not require the consent of the territorial state when another state is merely applying its law *to its own officials or nationals who are acting extraterritorially*."[33] In fact, the interpretation of the *International Covenant on Civil and Political Rights* offered by the U.N. Human Rights Committee – which "pre-date[s] the *Charter*"[34] – suggests that Canada is obliged to apply the *Charter* extraterritorially.[35]

14. ***Finally***, this Court's jurisprudence on the extraterritorial application of the *Charter* is doctrinally problematic.[36] The Court has created an exception to its exclusionary bar for "violations of international law and fundamental human rights".[37] Yet, the rights enshrined in the

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[26] *Operation Dismantle* (S.C.C.), *supra* note 23; *Hupacasath First Nation* (F.C.A.), *supra* note 21, ¶59-70, per Stratas J.A. **See also:** Sun, *supra* note 18 at 146.

[27] McLachlan, *supra* note 24, at ¶8.131, BOA Tab 4.

[28] *Al-Skeini v. The United Kingdom*, Application No. 55721/07.

[29] McLachlan, *supra* note 24, ¶8.105, BOA Tab 4.

[30] *Human Rights Act 1998* (U.K.), 1998, c. 42.

[31] [2013] UKSC 41, ¶31, 36-38, 49. See also *Smith v. R.*, [2020] NZCA 499, ¶92.

[32] *Hape* (S.C.C.), *supra* note 1, ¶40-46, 85.

[33] M. Milanovic, *Extraterritorial Application of Human Rights Treaties* (Oxford University Press, 2011) at 64, BOA Tab 9, *emphasis added*. **See also:** McLachlan, *supra* note 24, at ¶8.71, BOA Tab 4.

[34] *Quebec (Attorney General)* (S.C.C.), *supra* note 2, ¶41.

[35] Currie & Rikhof, *supra* note 5 at 636, BOA Tab 10; Milanovic, *supra* note 33 at 61, 175-179, BOA Tab 9, notably citing *Lopez Burgos v. Uruguay*, Communication No. R.12/52, U.N. Doc. Supp. No. 40 (A/36/40) at 176 (1981), ¶12.1-12.3.

[36] **See** the discussion in Sun, *supra* note 18 at 119-122, 145.

[37] *Canada (Justice) v. Khadr*, 2008 SCC 28, ¶18. **See also:** *Canada (Prime Minister) v. Khadr*, 2010 SCC 3, ¶14-18.

Charter "are the means by which Canada's international human rights law obligations are implemented".[38] In other words, a breach of the *Charter* is, by definition, a breach of the human rights obligations Canada has *chosen* to implement. The result is that, since the decisions in the *Khadr* cases, "all we are left with is that the *Charter* does not apply extraterritorially, except when it does".[39] This hardly creates a predictable legal standard.

15. Similarly, while the *Charter* implemented *some* of Canada's international obligations, the text of the Constitution may *differ* from international law. For instance, Canada certainly cannot be understood to have constitutionalized international norms adopted *after* 1982. The current approach, which focuses on violations of "international law", appears to suggest that international standards which did not "form part of the historical context of a *Charter* right" could bind both federal and provincial officials.[40] This is contrary to this Court's direction in *Quebec (Attorney General) v. 9147-0732 Québec inc.*[41] and decades of jurisprudence reaching back to the *Labour Conventions Reference*.[42]

16. This jurisprudence therefore stands in tension with Canada's federal architecture, despite this Court's insistence that this structure cannot be circumvented "either directly or indirectly"[43] and that it "demands respect" for the sovereignty of both orders of government.[44] The *Charter*, as adopted, was the compromise reached in 1982. These are the constitutional constraints the framers agreed to comply with. Accordingly, the provinces cannot have international norms unilaterally imposed on them by the judiciary or by one legislature acting alone, without a constitutional amendment. It is time for this area of law to be aligned with the scheme of the Constitution.

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38 Currie & Rikhof, *supra* note 5 at 636-637, BOA Tab 10.

39 Currie & Rikhof, *supra* note 5 at 623, BOA Tab 10. **See also:** Milanovic, *supra* note 33 at 64, BOA Tab 9; J. Currie, "*Khadr*'s Twist on *Hape*: Tortured Determinations of the Extraterritorial Reach of the Canadian *Charter*" (2008), 46 *Can. Yearbook Int'l Law* 307, BOA Tab 7.

40 *Quebec (Attorney General)* (S.C.C.), *supra* note 2, ¶41.

41 *Ibid*, ¶20-23, 28, 34, 47. **See also:** *Hape* (S.C.C.), *supra* note 1, ¶173, per Bastarache J., concurring; *Cook* (S.C.C.), *supra* note 8, ¶146-148, per Bastarache J., concurring.

42 *Attorney-General for Canada v. Attorney-General for Ontario*, [1937] A.C. 326 (P.C.).

43 *Resolution to amend the Constitution* (S.C.C.), *supra* note 17 at 821, reaffirmed in *Toronto (City)* (S.C.C.), *supra* note 10, ¶50, 52, per Wagner C.J. and Brown J., and ¶172, per Abella J., dissenting. **See also:** *Secession Reference* (S.C.C.), *supra* note 21, ¶57.

44 *Reference re Securities Act*, 2011 SCC 66, ¶61, 71. **See also:** *Liquidators of the Maritime Bank of Canada v. Receiver-General of New Brunswick*, [1892] A.C. 437 (P.C.) at 441-42, BOA Tab 1; *Secession Reference* (S.C.C.), *supra* note 21, ¶56.

B. Determining whether the actions of the executive are reasonable or justified calls for a margin of appreciation

17. This Court's jurisprudence on the extraterritorial application of the *Charter* revolves around the following concerns: cases with foreign elements must account for the fact that Canadian officials are dealing with different state objectives and a different set of laws or procedures that they cannot change. The risk is that a decontextualized *Charter* analysis may require Canadian officials to refrain from acting abroad at all. It may also prevent them from effectively combatting external threats.[45] These concerns were forcefully highlighted by L'Heureux-Dubé J. (joined by McLachlin J.) in her dissenting opinion in *Cook*.[46]

18. While these concerns led the majority in *Hape* to read down s. 32(1) of the *Charter* by creating an exclusionary bar when the executive acts abroad, another approach is possible. As Bastarache J. explained in *Hape*, the *Charter* permits the incorporation of legitimate tailoring, sometimes within the right itself, as with s. 8, or pursuant to s. 1.[47] It is possible to recognize the importance of subjecting state actors to constitutional constraints, while having appropriate regard for the relevant context when they act abroad.

19. This Court has held that compliance with the *Charter* must be assessed contextually, not mechanically.[48] Since combatting external threats, transnational cooperation, and the need to respect the legitimate choices of other countries have been recognized as compelling government objectives, the limitations analysis calls for a margin of appreciation to be applied in cases involving foreign elements. Put simply, what is "reasonable" abroad may be different from what is "reasonable" on Canadian soil given the circumstances, and the analysis of what is "justified in ***a*** free and democratic society" must account for the practices of other democratic societies and Canada's need to act abroad.[49] Indeed, this Court has previously adopted similar methods to

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45 *Operation Dismantle* (S.C.C.), *supra* note 23, ¶100-104; *Smith* (U.K.S.C.), *supra* note 31, ¶66.

46 *Cook* (S.C.C.), *supra* note 8, ¶95-96.

47 *Hape* (S.C.C.), *supra* note 1, ¶125, 163, 173, per Bastarache J., concurring. **See also:** B.W. Miller, "Justification and Rights Limitations", in G. Huscroft, ed., *Expounding the Constitution: Essays in Constitutional Theory* (Cambridge University Press, 2008), at 96, BOA Tab 3; Currie & Rikhof, *supra* note 5 at 638, BOA Tab 10.

48 *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326 at 1352; *Operation Dismantle* (S.C.C.), *supra* note 23, ¶100-104; *Hape* (S.C.C.), *supra* note 1, ¶125, 169, 171, per Bastarache J. **See also:** *R. v. K.R.J.*, 2016 SCC 31, ¶134-136, per Brown J., dissenting in part.

49 *Canadian Charter of Rights and Freedoms*, *supra* note 4, ss. 1 and 8, *emphasis added*.

accommodate pluralism.[50] The question is how far Canadian officials should be allowed to go in pursuit of these legitimate objectives.

20. Bastarache J.'s approach in *Hape* is apposite. The analysis of whether the actions of Canadian officials abroad are consistent with the *Charter* should be broken down as follows: (1) are they acting pursuant to valid laws or procedures?; (2) if so, is their conduct substantively different from the principles emanating from the *Charter*?; and (3) if so, is a substantive difference reasonable or justified?

21. If their conduct is consistent with the principles emanating from the *Charter* or does not engage its guarantees, the analysis ends. However, if it can be shown that their conduct abroad is substantively different from the principles emanating from the *Charter*, the question is whether that conduct is nonetheless reasonable or justified in the circumstances. As Bastarache J. explained in *Hape*, this calls for a "margin of appreciation" and there should be a "favourable presumption for laws and procedures of democratic countries".[51] This is the application of the horizontal analogue to subsidiarity, discussed below.[52] If the Court concludes that a substantive difference is not reasonable or justified, it can describe conduct that would be *Charter* compliant in the circumstances. For instance, in *Hape*, the majority was concerned with a situation in which a warrant is "unavailable" pursuant to foreign laws or procedures.[53] If the power to search without a warrant were held to fall outside the margin of appreciation, the answer would be to describe conduct that, short of a warrant, would comply with the *Charter*.[54]

22. The third step of the proposed approach reflects the methodology found in the jurisprudence of the European Court of Human Rights. That court has developed the margin of appreciation doctrine as an application of the principle of subsidiarity, which serves to qualify the intensity of its review, in order to recognize that "there may be a range of different but justified interpretations of international human rights law depending on the domestic context".[55] It is meant

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50 **See, e.g.,** *R. v. Advance Cutting & Coring Ltd.*, 2001 SCC 70, ¶274-276; *Quebec (Attorney General) v. A*, 2013 SCC 5, ¶440, 449, per McLachlin C.J., concurring.

51 *Hape* (S.C.C.), *supra* note 1, ¶172-173.

52 Sun, *supra* note 18 at 150; R. Spano, "Universality or Diversity of Human Rights?" (2014), 14 *Human Rights Law Review* 487 at 492.

53 *Hape* (S.C.C.), *supra* note 1, ¶86-89.

54 **See, e.g.,** *R. v. Fearon*, 2014 SCC 77, ¶66-68, 74-84; *Hape* (S.C.C.), *supra* note 1, ¶171, 178.

55 S. Besson, "Subsidiarity in International Human Rights Law – What is Subsidiary about Human Rights?" (2016), 61 *Am. J. of Jurisprudence* 69 at 78, 81, BOA Tab 11. **See also:**

to "account for the legitimate diversity in the local specification of norms".[56] The European Court of Human Rights has emphasized that there are a "variety of legal systems" and it is not the role of courts to "standardise them".[57]

23. As a result, states will have a wide margin of appreciation where there is no democratic "consensus" and in cases that "pertain to morally or politically sensitive rights".[58] However, to the extent that the conduct is inconsistent with the maintenance of a democratic society and human dignity, it will not hesitate to intervene.[59] Accordingly, the purpose of the margin of appreciation is to respect pluralism, while ensuring a minimal level of protection.[60] Canadian courts would therefore be justified in intervening when the conduct of Canadian officials abroad does not respect this minimal level of protection.

24. This approach is similar to the one adopted by this Court in deportation and extradition cases, in which it has indicated that "international cooperation" and "respect for differences in other jurisdictions" are "pressing and substantial domestic objectives".[61] As a result, deporting or extraditing an individual will only be unconstitutional if they face conduct that "shocks the

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Handyside v. The United Kingdom, Application No. 5493/72, ¶48; A. Legg, *The Margin of Appreciation in International Human Rights Law* (Oxford University Press, 2012) at 40-50, 61, BOA Tab 2.

56 Sun, *supra* note 18 at 151-152. **See also:** H.P. Glenn, *Legal Traditions of the World*, 5th ed., (Oxford University Press, 2014) at 380, BOA Tab 6.

57 *Taxquet v. Belgium*, Application No. 926/05, ¶83-84.

58 Besson, *supra* note 55 at 81, BOA Tab 11. **See also:** *A, B and C v. Ireland*, Application No. 25579/05, ¶232-241; *S. and Marper v. The United Kingdom*, Application Nos. 30562/04 and 30566/04, ¶102; Legg, *supra* note 55 at 83-88 and 116-130, BOA Tab 2; M. Delmas-Marty & M.-L. Izorche, "Marge national d'appréciation et internationalisation du droit : réflexions sur la validité formelle d'un droit commun pluraliste" (2001), 46 *McGill L.J.* 923 at 952.

59 *Baczkowski and Others v. Poland*, Application No. 1543/06, ¶61-64; *Pretty v. The United Kingdom*, Application No. 2346/02, ¶38-41, 49-50. **See also:** J. Gerards, "Pluralism, Deference and the Margin of Appreciation Doctrine" (2011), 17 *European L.J.* 80 at 112, BOA Tab 8; Legg, *supra* note 55 at 90-92, 204-210, BOA Tab 2.

60 Besson, *supra* note 55 at 82, BOA Tab 11; J. Gerards, "Margin of Appreciation and Incrementalism in the Case Law of the European Court of Human Rights" (2018), 18 *Human Rights Law Review* 495 at 499-500; F. Mégret, "International Criminal Justice, Legal Pluralism, and the Margin of Appreciation: Lessons from the European Convention on Human Rights" (2020), 33 *Harvard Human Rights J.* 67 at 73-79, 106.

61 *India v. Badesha*, 2017 SCC 44, ¶35-36. **See also:** Sun, *supra* note 18 at 153.

conscience" of Canadians,[62] such as "a substantial risk of torture".[63] In *United States v. Burns*, the Court noted that it was relevant to look to the practice among "democratic states" in determining whether a given practice rises to that level.[64] Private international law jurisprudence can also provide useful insight in cases like this because it indicates that public policy "prevents the enforcement of a foreign judgment which is contrary to the Canadian concept of justice", which involves determining whether it would "shock the conscience" of Canadians.[65] In other words, courts can draw from this case law to determine whether certain conduct respects a minimal level of protection. This serves to show that the proposed approach is not unknown to Canadian courts.

25. If this approach were adopted here, the Court would first have to determine whether the officials in this case were acting pursuant to valid laws or procedures. Beyond the debate on the scope of the waiver of diplomatic immunity, this is not in dispute.[66] The Court would then have to determine whether the search was conducted in a manner that is substantively different from the principles emanating from the *Charter*. The military judge concluded that it was, while the Court of Appeal disagreed.[67] If this Court comes to the same conclusion as the military judge, it must then determine whether the search is nonetheless reasonable or justified in the circumstances by applying the margin of appreciation outlined above, as it has previously done in cases like *Burns*.

PART III—SUBMISSIONS CONCERNING COSTS

26. The CCF requests that no costs be awarded either for or against it.

PART IV—ORDER REQUESTED

27. The CCF takes no position on the disposition of the appeal.

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62 *United States v. Burns*, 2001 SCC 7, ¶64-69. **See also:** *Canada (Attorney General) v. Barnaby*, 2015 SCC 31; *Schmidt v. The Queen*, [1987] 1 S.C.R. 500 at 522-23.

63 *Badesha* (S.C.C.), *supra* note 61, ¶38, 53.

64 *Burns* (S.C.C.), *supra* note 62, ¶90-92.

65 *Beals v. Saldanha*, 2003 SCC 72, ¶71-77.

66 *R. v. McGregor*, 2020 CMAC 8, ¶13-15, 25.

67 *Ibid*, ¶20, 65-66.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 22nd day of April, 2022.



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PART V—TABLE OF AUTHORITIES

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