From Canada with Love: The Application of the *Charter* to Extraterritorial CSIS Operations

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ABSTRACT

The Supreme Court of Canada has been consistently inconsistent in its approach to the extraterritorial application of the *Charter*. The Court seems to take a very fact-specific approach, as opposed to establishing a hard and fast rule. This paper sets out to consider how the Supreme Court jurisprudence would likely apply to national security investigations, particularly those of the Canadian Security Intelligence Service, that take place abroad. The appropriate application in this context ought not to be limited by *R v Hape* but rather align with the several permissible extensions to Jurisdiction at International Law.

KEYWORDS: *Intelligence, Extraterritorial application of the Charter, Canadian Security Intelligence Service (CSIS) .*

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I. INTRODUCTION

National security topics consumed Canadian headlines in 2024. In March, the Foreign Interference Commission began public hearings.[1] In May, the Royal Canadian Mounted Police (RCMP) arrested three people in connection with the killing of Hardeep Singh Nijjar.[2] Investigators believe this was a targeted assassination, conducted at the behest of the Indian government.[3] In June, Parliament passed Bill C-70, *An Act respecting countering foreign interference*.[4] In July, authorities arrested a father and son for conspiracy to commit murder for the benefit or at the direction of a terrorist group by planning to carry out a violent attack near Toronto.[5] Investigators allege that the father also committed an aggravated assault when he appeared in an ISIS video filmed in Syria.[6] In September, the RCMP arrested another man near the Canada-U.S. border, accusing him of travelling to New York to carry out a terrorist attack.[7] These events illustrate that national security is more than a domestic responsibility. These are but a few examples of national security matters facing Canada today. One common theme permeates throughout: National security transcends borders. Therefore, it is both necessary and prudent that those charged with

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1 The Foreign Interference Commission, "Final Report Released" (last visited 11 March 2026), online: <https://foreigninterferencecommission.ca> [perma.cc/D553-CFVU].

2 The Royal Canadian Mounted Police, News Release, "Statement on the arrests resulting from the investigation into the killing of Hardeep Singh Nijjar" (3 May 2024), online: <https://rcmp.ca/en/news/2024/05/300> [perma.cc/5LSV-Q7Z7].

3 Former Prime Minister Trudeau has publicly attributed the murder to India. See Jessica Murphy, "Three arrested and charged over Sikh activist's killing in Canada", *BBC News* (4 May 2024), online: <https://www.bbc.com/news/world-us-canada-67836968> [perma.cc/6UC4-R38W].

4 Bill, C-70, *An Act respecting countering foreign interference*, 1st Sess, 44th Parl, 2024 (assented to 20 June 2024), SC 2024, c 16.

5 Public Safety Canada, "Parliamentary Committee Notes: Toronto Terror Plot Arrests (Father & Son)" (last modified 13 December 2024), online: <https://www.publicsafety.gc.ca/cnt/trnsprnc/brfng-mtrls/prlmntry-bndrs/20241227/11-en.aspx>.

6 *Ibid.*

7 Colin Freeze & Nicolas Van Praet, "Terror suspect arrested in Quebec enroute to U.S. has no ties to Canada, court records show", *The Globe and Mail* (last modified 18 September 2024), online: <https://www.theglobeandmail.com/canada/article-terror-suspect-arrested-in-quebec-enroute-to-us-has-no-ties-to-canada/> [perma.cc/95LQ-25RT].

Canada's security conduct operations beyond its territorial limits to detect, and interdict, threats before they manifest domestically.

These media reports portray intelligence successes as the worst-case-scenario was prevented, though a critical analysis of each event shows that the Canada's intelligence services face challenges in early-intervention when the threat manifests outside of Canada's borders. Such challenges are intensified by the history of controversy that politically plagues Canada's National Security agencies. The cases of Maher Arar, Omar Khadr and Abousfian Abdelrazik show that national security agencies must not operate unchecked.[8] The *Canadian Charter of Rights and Freedoms*[9] (the *Charter*) typically acts as a safeguard that mitigates controversial actions of state officials. However, it is unclear how constitutional protections will follow, or to whom the protections apply, when national security operations extend beyond Canada's borders. The ambiguity arises from the Supreme Court's holding that the *Charter* cannot apply extraterritorially unless the host-state consents, trial fairness is in jeopardy, or Canada's international law obligations are at stake.[10] This interpretation is the source of criticism found in both scholarly writing that labels extraterritoriality a constitutional grey-zone and the Supreme Court's most recent comment on the matter.[11] Despite the criticism, Canada's top court has avoided overruling itself on the issue.

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8 Arar was a Canadian Engineer falsely associated to Al Qaeda by CSIS intelligence before being detained and transferred to Syria. Khadr was a Canadian interviewed by CSIS while detained in Guantanamo Bay, Cuba. Abdelrazik was a Canadian who was interviewed by CSIS while detained in Sudan. His passport was cancelled before suing to get it reinstated. The commission and litigation that arose from each will be discussed throughout this paper to show how consequences of state action can cross borders making the application of the *Charter* especially complex in national security matters.

9 *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 [*The Charter*].

10 *R v Hape,* 2007 SCC 26 [*Hape*]. Hape involved searches related to a money laundering investigation that took place in Turks and Caicos under the supervision of local police. While not a national security case, the principles of extra territoriality are relevant, though they may differ depending on the statute under which Canadian officials are exercising their authority. As financing of terrorism is similar to money laundering, a national security matter could involve an analogous reasoning surrounding *Charter* considerations.

11 Leah West, "Within or Outside Canada: The Charter's Application to the Extraterritorial Activities of the Canada Security Intelligence Service" (2022) 73:1 UTLJ 5; *R v McGregor,* 2023 SCC 4.

According to the Supreme Court in *R v Hape*, the *Charter's* applicability could vary with severity of the breach, in that more "serious" breaches would justify extraterritorial reach, while "minor" breaches would not.[12] This presents two issues: it creates a hierarchy of rights that does not otherwise exist and limits *Charter* guidance to *ex-post* review of conduct, incapable of preventing infringements before they occur. This paper intends to discuss how the *Canadian Security Intelligence Act* (*CSIS Act*) [13] and the *Charter* can constrain extraterritorial actions taken by the Canadian Security Intelligence Service (CSIS), colloquially known as "The Service". The purpose is not to suggest that those extraterritorial efforts ought to be curtailed, but rather, that the *Charter* must follow wherever parliament lawfully extends its jurisdiction.

This question of appropriate constraint will be answered in three parts. First, this paper will consider the legal framework pertaining to the Service's extraterritorial operations. While the Royal Canadian Mounted Police, the Communications Security Establishment and CSIS all cooperate with each other, this paper will focus on CSIS. Specifically, it will focus on how the *Charter* applies to CSIS operations, and not the lawfulness of the *CSIS Act* itself. Part I will discuss the breadth of the CSIS mandate through a constitutional lens. In doing so, it will distinguish CSIS operations from cooperative law enforcement investigations like the one at issue in *Hape*. The *Hape* majority expressed concern that the extraterritorial application of the *Charter* would violate international law by unlawfully exerting enforcement jurisdiction and interfering with foreign sovereignty.[14] It is difficult to reconcile that reasoning with the current iteration of the *CSIS Act*. Actions "within or outside Canada" are expressly permitted, and do not require the cooperation of a host-state. The *CSIS Act* acknowledges constitutional supremacy, so it cannot follow that extraterritorial actions taken pursuant to the Act can evade *Charter* scrutiny.[15] However, the extraterritorial application of the *Charter* may take a different form depending on the legal status of espionage at international law. The paper will move on to discuss Canada's international legal obligations related to intelligence operations through realist, formalist, functional and relativist

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12 *Hape*, *supra* note 10 at para 52.

13 *Canadian Security Intelligence Act*, RSC 1985, c 23 [*CSIS Act*].

14 *Hape*, *supra* note 10 at para 65.

15 *CSIS Act*, *supra* note 13 s 12.1(3.1).

legal perspectives. In any event, given the controversies mentioned above, CSIS actions have the potential to cause the adverse effects that the *Charter* serves to prevent, ergo a clear framework is required.

After limiting *Hape* to its facts, Part II will discuss how the *Charter* could apply to extraterritorial actions within the CSIS mandate. The arena in which the Service operates requires a delicate balance between the adverse effects of its actions, and the potentially catastrophic consequences of inaction. Failures have a way of finding their way to the surface and allow for *ex-post* constitutional review, while *ex-ante* considerations are more difficult to quantify as the outcome of a noncontroversial operation may never be known. For example, much of the research into the Service's kinetic action is speculative since, as will be discussed below, CSIS has yet to seek judicial authorization to carry out a threat reduction measure. Conversely, the *Charter's* application to detainees abroad has been the subject of considerable litigation. A discussion on the lawfulness of jurisdiction, the expansive powers granted by Bill C-70[16], and cases of unchecked CSIS authority will show that the *Charter* can, and must, act as a leash to control CSIS action abroad. This part will argue that the trend of recent jurisprudence and the covert nature of the CSIS security mandate should limit *Hape's* influence going forward. Future courts should forego the constitutional vacuum and explore the extraterritorial application of the *Charter* through the prescriptive jurisdiction of parliament, or the extended territoriality permitted by the nationality principle and the right of self-defence.

However, Canada must do more than symbolically exert its jurisdiction. Part III will conclude by addressing the viability a constitutional challenge to extraterritorial CSIS action. A constitutional leash cannot effectively constrain CSIS if innocent targets cannot access a constitutional shield. In other words, *Charter* rights must be attainable through an exercise of either prescriptive or enforcement jurisdiction to be effective. This part will introduce two hypothetical targets of a CSIS operation and will seek to apply the *Charter* to a speculative fact scenario. The scenario will show that instead of *Hape,* the personal characteristics of a complainant could be the starting point to seek a *Charter* remedy.[17] *Hape* presents an unduly limited interpretation of international law. A contextual approach may allow future

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16 *Supra* note 4.

17 See *Canada (Justice) v Khadr,* 2008 SCC 28 [*Khadr 2008*]; *Slahi v Canada (Justice),* 2009 FC 160, aff'd 2009 FCA 259, leave to appeal to SCC refused 2010 CanLII 7376 (SCC).

complainants to successfully argue other principles of international law and jurisdiction permit greater flexibility in the *Charter's* application. Future courts ought to consider *R v Cook*[18], and *R v McGregor*[19] when deciding whether the particular action infringes sovereignty before applying an presumptive exclusion of the *Charter* put forward in *Hape*.[20] For this paper, it is important to recognize that the in *Cook*, Supreme Court found that the *Charter* was applicable to Canadian detectives who were interviewing a suspect in the United States.[21] This approach was seemingly undone by *Hape*. However, *McGregor* seems return to the idea that the *Charter* ought to continue to guide Canadian investigations, however, it stopped short of overruling *Hape* because the conduct was compliant with both the *Charter* and American Search and Seizure practices.[22]

In sum, constitutional black holes cannot be justified in a free and democratic society. The Supreme Court's inconsistent treatment of the *Charter's* extraterritorial application has created a constitutional grey-zone for CSIS operations. The clandestine nature of extraterritorial CSIS operations means that *Hape* is an insufficient guide with respect to *Charter* application. It is contradictory to require CSIS officers to adhere to the *CSIS Act* abroad yet not permit constitutional oversight. Extraterritorial application of the *Charter* is permitted prescriptively where the *CSIS Act* authorizes action, and its enforceability is permitted through the nationality and, in some scenarios, the self-defence principles.[23] Therefore, *Charter* guidance ought to be the starting point until evidence indicates that

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18 *R v Cook*, 1998 CanLII 802 (SCC) [*Cook*]. Cook was wanted for murder. He was held by police in New Orleans where Vancouver Police Service officers travelled to interview him. This was not a national security case, but the court did acknowledge the *Charter* could operate with extraterritorial reach.

19 *R v McGregor*, 2023 SCC 4 [*McGregor*]. McGregor was a member of the Canadian Armed Forces stationed in the greater Washington DC Area. He was invested by the Military Police, who sought warrants in conjunction with local law enforcement for the investigation. The court ultimately found that *Charter* was not engaged nor violated. Though, the analysis surrounding extraterritoriality is relevant for this paper.

20 *Hape*, *supra* note10 at para 113.

21 *Cook*, *supra* note 18 at para 63.

22 *McGregor*, *supra* note 19 at para 23.

23 West, *supra* note 11 at 30.

international law prevents its application or is intended to govern the situation.[24]

II. The Security Intelligence Framework: Within and Outside Canada

Canada's contribution to global security has not been as sensationalized as it's counterparts in the American Central Intelligence Agency or the British Secret Intelligence Service (MI-6). That is not to say that Canada is immune from threats. In 2002, Al Qaeda messaging suggested that Canada was a viable target for terrorist attacks given its alliance with the United States.[25] In fact, intelligence recovered from Bin Laden's Abbottabad compound contained designs for an attack on Canadian soil.[26] Throughout the 2000's, the Canadian government viewed extremist terrorism as the most serious threat to the safety of Canadians.[27] While terrorism is still a concern today, foreign influenced activities, including election meddling, and diaspora manipulation have manifested as threats to Canada. The agency responsible for collecting intelligence regarding these threats is the Canadian Security Intelligence Service. "The Service" was ironically formed in 1984 to assume the Orwellian mandate of detecting threats and advising government accordingly.[28] This part will discuss the Service's enabling legislation with a view of constitutional application.

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24 Compare the post-*Hape* decisions in *R v McGregor, supra* note 19 with *Amnesty International Canada v Canada (Chief of Defense Staff),* 2008 FCA 401 for developments in the area of *Charter* extraterritoriality.

25 Craig Forcese and Kent Roach, *False Security: The Radicalization of Canadian Anti-Terrorism* (Toronto: Irwin Law Inc, 2015) at 83.

26 *Ibid.*

27 Commission of Inquiry into the Actions of Canadian Officials in relation to Maher Arar, *A New Review Mechanism for the RCMP's National Security Activities* (Ottawa: Public Works, 2006) at 131 [Arar Commission].

28 Senate of Canada, *Delicate Balance: A Security Intelligence Service in a Democratic Society: Report of the Special Committee on the Canadian Security Intelligence Service,* (November 1983) (Chair: Peter Michael Pitfield) at para 28 [*Delicate Balance*]. See also Canadian Security Intelligence, "Mandate" (last visited 11 March 2026), online: <https://www.canada.ca/en/security-intelligence-service/corporate/mandate.html>.

A. *The Law and Organizations*

The origins of CSIS predate the Global War of Terror. Allegations of illegal activity associated to the defunct RCMP Security Service during the 1970 October Crisis led to a call for the creation of a civilian spy agency.[29] The special committee on the creation of CSIS recommended that the new agency "collect, by investigation or otherwise, and analyze information and intelligence respecting activities that may, on reasonable grounds be suspected of constituting threats to the security of Canada."[30] Section 2 of the *CSIS Act* defines a "threat to Canada" as espionage, sabotage, violence against people or property (terrorism), covert foreign influenced activities (foreign interference), and attempts to overthrow the constitutional Canadian government.[31] In what appears to be an acknowledgment of section 2 of the *Charter,* the definition includes a caveat that no lawful advocacy, protest or dissent is included in the definition.

The terms national security and terrorism have been inseparable since the attacks on September 11th, 2001. Canada's response included the *Anti-Terrorism Act (ATA).*[32] The *ATA* updated the *Criminal Code* by creating a new part that focused on, and defined, terrorism.[33] It also amended the *Official Secrets Act,* the *Canada Evidence Act,* and the *Proceeds of Crime (Money Laundering) Act* to create a comprehensive framework of terrorism legislation.[34] Despite the sweeping changes, the preamble of the *ATA* states the following:

> The Parliament of Canada, recognizing that terrorism is a matter of national concern that affects the security of the nation, is committed to taking comprehensive measures to protect Canadians against terrorist activity while continuing to respect and promote the values reflected in, and the rights and freedoms guaranteed by, the *Canadian Charter of Rights and Freedoms.*[35]

Prime Minister Chrétien believed that an increase of enforcement authority would conflict with the values of a free and democratic society, so

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29 *Delicate Balance,* supra note 28 at para 6.

30 *Ibid*, *supra,* note 28 para 28.

31 *CSIS Act*, *supra* note 13 at 2

32 *Anti-terrorism Act,* SC 2001, c 41.

33 *Criminal Code,* RSC 1985 c. C-36 at Part II.1 "Terrorism."

34 *Anti-terrorism Act, supra* note 32.

35 *Ibid.*

he stressed the need to balance *Charter* rights with fighting terrorism.[36] The context of these remarks is important. Even in the immediate aftermath of 9/11, the pressing and substantial objective of countering terrorism seemingly did not permit the pre-emptive limitation of *Charter* rights. That, however, changed in 2014.

Parliament again made reactionary amendments to Canada's national security legislation after a pair of ISIS-inspired attacks killed two Canadian soldiers in October 2014.[37] First, Ottawa legislatively addressed the territorial limitation Justice Blanchard of the Federal Court placed on CSIS by holding that he could not issue a warrant authorizing CSIS actions in a foreign country.[38] Bill C-44 expressly expanded the CSIS mandate by permitting intelligence investigations "within or outside" Canada.[39] The *CSIS Act* now specifically allows the Federal Court to issue warrants that authorize the Service to take action that, had it been undertaken without warrant, would be contrary to any law, including the *Charter*.[40] While *Charter* rights are subject to reasonable limits, the warrant provision can be seen as a de facto pre-emptive *Grant* application in that it authorized actions that could infringe *Charter* provided permission is first sought.[41] At the same

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36 Robert Diab, *Guantánamo North: Terrorism and the Administration of Justice in Canada* (Halifax: Fernwood Publishing, 2008) at 26.

37 Government of Canada, News Release, "Death of a Canadian Armed Forces Member" (21 October 2014), online: <https://www.canada.ca/en/news/archive/2014/10/death-canadian-armed-forces-member.html>; Patricia Vasylchuk, "Running toward gunfire at Parliament Hill Part 1", *RCMP Gazette* (20 January 2026), online: <https://rcmp.ca/en/gazette/running-toward-gunfire-parliament-hill-part-1> [perma.cc/42QD-3XGC].

38 *Canadian Security Intelligence Act (Re),* 2008 FC 301 [*Re CSIS*].

39 *CSIS Act*, *supra* note 13, ss 12(2); Bill C-44, *Protection of Canada from Terrorists Act*, 2nd Sess, 41st Parl, 2015 (assented to 23 April 2015) SC 2015, C 9.

40 *CSIS Act, supra* note 13, ss 12.1(3.2) & (3.3), 21.1(3.1), and (3.2).

41 The s 8 test considers whether a search is "authorized by law" and provided the law itself is reasonable, and the manner in which the search was carried out was reasonable, the search will be *Charter*-complaint (*R v Collins,* 1987 CanLII 84 (SCC)). In other words, a warrant reasonably issued pursuant to s 487 of the *Criminal Code* (*supra* note 33*)* does not *limit* a *Charter* right, rather, it makes the search *Charter*-compliant. To *limit* a *Charter* right, the limitation, in the context of state action, must be justified by the application of s 24(2) of the *Charter* (*R v Grant,* 2009 SCC 32; *Charter, supra* note 9 *)* (or conversely, s 1 and *R v Oakes*, 1986 CanLII 46 (SCC)] in the case of legislation). The *CSIS Act,* seemingly pre-emptively justifies a *limitation* of a right without triggering either mechanism (*supra* note 13).

time, Bill C-51 amended the *CSIS Act* to authorize "Threat Reduction Measures" (TRMs).[42] TRMs are physical, or "kinetic," steps to reduce threats to the security of Canada.[43] The amendment clarifies that the scope of the measures stops short of giving the Service law enforcement power.[44]

The latest amendment to the *CSIS Act* came when parliament passed Bill C-70[45] in response to revelations that foreign entities meddled with the previous federal election. Foreign interference is defined as "activities perpetrated by a foreign state, or proxies, that are harmful to Canada's interests and are clandestine or deceptive or involve a threat to any person.[46] This includes harassment and intimidation of Canadian communities to instill fear, silence dissent, and pressure political opponents.[47] The Bill's objective is to "close gaps in CSIS authorities" in line with the global shift toward digital communication and technology.[48] The Bill allegedly aims to balance the protection of Canadian's rights, and freedoms here in this county.[49] The scope of the protection seemingly addresses foreign infringement on democratic rights, and does not address territoriality of the *Charter,* despite acknowledging the Service's extraterritorial mandate. Ultimately, Bill C-70 targets the *interruption* of interference and not the *prosecution* of it.[50] This key distinction means that prosecutions will never arise from CSIS Action alone, which significantly influences the viability of a *Charter* challenge stemming from the Service's extraterritorial action as the measures taken may not be disclosed to the target.

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42 *CSIS Act, supra* note 13, ss 12.1(1) Bill C-51, *Anti-terrorism Act,* 2015, 2nd Sess, 41st Parl, 2015, (assented to 18 June 2015), SC 2015, c 20.

43 Forcese & Roach, *supra* note 25 at 5.

44 *CSIS Act*, *supra* note 42 at ss 12.1(4).

45 *Supra* note 4.

46 *CSIS Act, supra* note 13 at ss 2.

47 Canada, Department of Public Safety, "Enhancing Foreign Influence Transparency: Exploring Measures to Strengthen Canada's Approach" (10 March 2023), online: <https://www.publicsafety.gc.ca/cnt/rsrcs/pblctns/2023-nhncng-frgn-nfluence/index-en.aspx>.

48 *House of Commons Debates*, 44-1st Session, No 330 (12 June 2024) at 1625 (Hon Greg Fergus) online: <https://www.ourcommons.ca/documentviewer/en/44-1/house/sitting-330/hansard> [**perma.cc/QK2D-LM34**].

49 *Ibid* at 1830.

50 *Supra* note 4 at ss 12.1(4) is clear that "Threat Reduction Measures" do not confer the Service with any law enforcement power.

Both the United States and United Kingdom have distinct foreign and domestic intelligence services (respectively, the FBI v CIA, MI5 v MI6). CSIS is caught in an awkward position where it is oft straddling the two roles. This certainty complicates the operational application of the *Charter* given that the legal framework may vary from one file to the next. It is outside the scope of this paper to advocate for distinct foreign and domestic intelligence services. Rather, the Service's espionage, domestic intelligence, and foreign intelligence sharing roles contribute to the tension caused by the uncertain constitutional framework left in *Hape's* wake.

B. *Intelligence vs. Evidence*

CSIS is a security intelligence service, not a law enforcement organization. Its mandate is to collect threat information to advise other areas of government and take measures to reduce those treats.[51] It is therefore important to distinguish intelligence from evidence. Intelligence can resemble evidence in the form of documents, photos and wiretaps, but it can also include gossip, innuendo and suggestions. It is classified in two broad categories: Human Intelligence – intelligence derived from information provided by human sources, and Signals Intelligence.[52] The latter has two subcategories: communications intelligence – foreign communications passed by radio, wire or other electromagnetic means, and electronics intelligence – foreign electromagnetic radiations such as emissions from a radar system.[53] The collection of human intelligence is often predicated on a promise of confidentiality, whereas signals intelligence is collected by surreptitious means.[54] Disclosure of either type of intelligence could ostensibly damage current and future national security investigations by revealing the "sources and methods" employed by the Service and its allies. Evidence, on the other hand, is intended to be presented in court. Therefore, it must be collected in accordance with the laws of evidence.

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51 *CSIS Act, supra* note 13, ss 12 and 12.1.

52 Craig Forcese, "Spies Without Borders: International Law and Intelligence Collection" (2011) 5 J of National Security L and Pol'y 179 at page 182.

53 *Ibid.*

54 *Diab, supra* note 36 at 11.

The overlap between the two paralysed the prosecution into the Air India bombing.[55] An evidentiary issue arose when the Crown wanted to call witnesses who had acted as informants for CSIS.[56] Notes and wiretaps recordings were also destroyed in accordance with CSIS data retention policies given that the trial did not take place until 2003.[57] This case is illustrative of how constitutional scrutiny may not begin until the intelligence is relied on as evidence because of the potential impacts on trial fairness. The Federal Court has since rejected the notion that the principles of fundamental justice apply differently in non-prosecutorial matters by suggesting that remedies may vary, but the presence of a right will not.[58] However, the proper balance remains elusive. The Bill C-70 *Hansard* includes discussion on the importance of "breaking down the silos between law enforcement and intelligence gathering."[59] The debates acknowledged that a "gulf" between intelligence and evidence remains to this day.[60] The discord is likely exasperated when Intelligence is collected abroad and then sought to be used as evidence in Canada. As *Khadr* suggests, the method of collection may impact trial fairness, thus triggering constitutional protection where it otherwise did not exist.[61]

C. *Espionage and Security Intelligence at International Law:*

A citizen is entitled to remedy where the government takes action that is not in accordance with the law and produces an effect on that citizen.[62] While *Hape* is still good law, the legality of espionage at international law could determine whether *Charter* remedies can arise from extraterritorial intelligence operations. Sections 12 and 16 of the *CSIS Act* differentiates the collection of security intelligence and foreign intelligence.[63] Notwithstanding the distinction, actions under either authority may meet

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55 Forcese & Roach, *supra* note 25 at 49 & 50.

56 *Ibid.*

57 *Ibid.*

58 *Slahi, supra* note 17 at para 34.

59 *House of Commons Debates*, *supra* note 48 at 1650, and 1710

60 *Ibid.*

61 *Khadr* (2008), *supra* note 17 at para 31.

62 *R v Hape*, *supra* note 10, & *Abdelrazik v. Canada* (*Minister of Foreign Affairs*), 2009 FC 580 at para 6.

63 *CSIS Act*, *supra* note 13 at ss 12 & 16.

the definition of espionage – a consciously deceitful collection of information ordered by a government accomplished by humans unauthorized by the target to do the collection.[64]

Craig Forcese suggests that espionage is not easily reduced to legality vs illegality, rather, it needs careful assessment of the location and method of spying.[65] This is because there is no international instrument that expressly permits espionage, and states are more likely to treat it as a violation of domestic than international law.[66] Espionage's legality is thus related to custom being an authoritative source of international law.[67] One approach to the surreptitious collection of intelligence in the territory of other nations is that it may be justified as a practice of self-defence.[68] This perspective has its basis in Article 51 of UN Charter which permits derogation from sovereignty on non-interventionism in the name of self-defence.[69] Therefore, espionage may derive normative legitimacy as an extension of that right.[70] Conversely, peacetime espionage, or preparations for an offensive action, would unlawfully interfere with sovereignty and violate the principle of non-interventionism. As a result, the extraterritorial application of the *Charter* may vary on a case-by-case basis as a lawful extension of jurisdiction or through the *Hape* international human rights exception should the conduct be unlawful.[71] Despite, international law failing to codify the rules of espionage, or what activities trigger the right to self-defence, some degree of imminency ought to be required to rely on self-defence.[72] In fact, Forcese finds difficulty in reconciling spying with self-defence as the acts of spying may take place before the right to self-defence

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64 Christopher Baker, "Tolerance of International Espionage: A Functional Approach" (2003) 19:5 Am U Intl L Rev 1091 at 1093.

65 Forcese, *supra note 52 at* 180.

66 *Ibid* at 186 & 202.

67 Baker, *supra* note 64 at 1094.

68 *Ibid* at 1096.

69 *UN Charter,* 26 June 1945, Can TS 1945 No 7, art 51.

70 Baker, *supra* note 64 at 1096.

71 Forcese, *supra* note 52 at 202 & *Hape*, *supra* note 10 at para 113.

72 Roger Scott, "Territorially Intrusive Intelligence Collection and International Law" (1999) 46:1 AFL Rev 217 at 223 (1999) discusses the legality from an American perspective.

is even triggered.[73] He does, however, acknowledge that spying may be required to make the right of self-defence meaningful.[74] The necessity of espionage is compelling in today's asymmetric threat environment that includes state-sponsored terrorism and foreign interference that is outside the scope of nation-to-nation conflict regulated by international law.

Leah West's approach to the legality of espionage through four perspectives is helpful in framing the issue.[75] First, the realist approach argues that customary and treaty based international law do not expressly prohibit spying.[76] Realists adopt the notion "that which is not prohibited may be permitted."[77] Consequently, realists believe espionage is permissible under customary international law. Canadian courts, however, have adopted a formalist approach. Formalists believe that peacetime intelligence operations violate the legal principles of sovereignty and non-intervention.[78] An *opinio juris* cannot establish an exception without proof of state practice, and tolerance toward practice.[79] In Canada, the practice of espionage is expressly prohibited by the *Criminal Code* and *Security of Information Act.*.[80] It is also classified as a threat to the nation by the *CSIS Act.*[81] Here, the Service's classification as a security intelligence service, not a foreign intelligence agency, is illustrative of the lack of state acceptance of espionage in Canada. The third approach is that of the functionalist. This perspective is consistent with realists in that there are no customary rules that prohibit

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73 Forcese, *supra* note 52 at 199.

74 *Ibid.*

75 West, *supra* note 11 at 37. This article contains extensive discussion and additional sourcing related to the realist, formalist, functional and relativist approaches to the legality of espionage at international law.

76 *Ibid.*

77 *Ibid.*

78 West relies on *Khadr* to argue the *Khadr* exception will be triggered every time Canadian authorities travel overseas.

79 *Ibid* at page 39, and *Spies Without*, *supra* note 52 at 202.

80 *Criminal Code* provisions like unauthorized use of a computer system (ss 342.1), Intercepting Private Communications (ss 184) and even offenses like Voyeurism (ss 162) and Criminal Harassment (ss 264) can all apply to foreign spies. The *Foreign Interference and Security of Information Act*, RSC 1985 c 0-5 is directly tailored to espionage by making it an offense to communicate safeguarded information (ss 16) and to carrying out Economic Espionage (ss 19).

81 *CSIS Act*, *supra* note 13 at ss 2.

or permit espionage. Functionalists, however, reach a contrary conclusion that the practice is not formally tolerated. Finally, and perhaps more pragmatically, the relativist approach argues that the practice of espionage itself does not violate international law, but the methods employed by those engaged in intelligence collection and covert activities could.[82] The *Hape* majority would likely adopt this view as it is consistent with preventing the extraterritorial application of the *Charter,* while allowing for the human rights exception. For example, the International Covenant on Civil and Political Rights (*ICCPR*) protects both the right of privacy and the right not to be subject to torture or cruel, inhumane and degrading treatment.[83] The *ICCPR* does not, however, define where a person can enjoy a reasonable expectation of privacy, so the rights intrenched are not absolute. Further, human rights obligations are tied to the location of the person whose rights are at issue.[84] Thus, the legality of espionage can be parsed. Collecting signals intelligence may not violate international law because the targets are outside of the state's territory and jurisdiction, but engaging in torture or degrading treatment in the name of intelligence gathering is illegal and would trigger *Charter* protections.[85]

Nevertheless, the scholarship remains divided. Espionage is described as a consistently practiced illegal activity, and conversely, a necessary means to reduce international friction.[86] Unfortunately, there is no international jurisprudence related to extraterritorial espionage in peacetime to resolve the question past mere academic speculation.[87] The scholarly works reviewed for this article tend to support the granular approach of the relativist perspective. States acknowledge the existence of their intelligence agencies. Captured spies are not offered protection under international treaties.[88] Whether the spy will be expelled or prosecuted is solely at the discretion of the offended nation. The discretion leads credence to the idea

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82 West, *supra* note 11, at 40.

83 *International Covenant on Civil and Political Rights,* 16 December 1966, 999 UNTS 171, arts 17 & 7 respectively [ICCPR].

84 *Spies Without Borders, supra* note 52 at 193, 207, 208.

85 West, *supra* note 11 at 40, 41.

86 *Ibid* at 40.

87 Forcese, *supra* note 52 at 180, 199, 202.

88 *Protocol Additional to the Geneva Conventions or 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I),* 8 June 1977, 1125 UNTS 3, art 46 (entered into force 7 December 1978).

that it is not the practice of spying, but specific acts carried out in pursuit of the practice that could raise questions of lawfulness and thus *Charter* applicability. While the ultimate legality of espionage is beyond the scope of this paper, spying as a technique of self-defence is more palatable given the globalized and surreptitious nature of modern national security threats.[89] The area requires more development before the extraterritorial application of the *Charter* turns on that sole issue.

D. *Intelligence Sharing Agreements*

Canada is a net-importer of intelligence. The RCMP reported that they receive 75% more information than it provides.[90] CSIS also disclosed 250 relationships with foreign agencies in approximately 140 countries.[91] The Service's authority to share and receive information comes from section 17 of the *CSIS Act* which authorizes the service, with ministerial approval, to engage in cooperation with the government of a foreign state, or institution of an international organization.[92] The application of the *Charter* to intelligence operations is thus complicated by information originating from, or being transferred to, sources outside of Canada. It is clear from the jurisprudence that foreign agencies on their own territory cannot be bound by protections offered by the *Charter*.[93] Section 17 may extend the constitutional grey-zone that exists beyond Canada's borders as the way intelligence is collected and shared with Canada, or the actions taken in reliance on information provided by Canada may evade *Charter* scrutiny as actions by intelligence partners may not trigger the *Charter's* application pursuant to the *Hape* test.[94] Privacy concerns, and the principles of fundamental justice protected by section 7 are more relevant in the wake of Bill C-70, which now allows CSIS to share information outside of government, including private businesses if the disclosure outweighs privacy considerations.[95]

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89 Baker, *supra* note 64 at 1111.

90 Forcese & Roach, *supra* note 25 at 144.

91 *Ibid.*

92 *CSIS Act*, *supra* note 13 at ss 17.

93 See *R v Harrer,* 1995 CanLII 70 (SCC) and *R v Terry,* 1996 CanLII 199 (SCC).

94 *Hape, supra* note 10 at para 113 requires the actions to be carried out by a Canadian State Actor.

95 *An Act Respecting Countering Foreign Interference*, *supra* note 16. See also the Public Inquiry

It would be prudent for the service to consider the *Charter's* guidance in deciding to share information, especially when the disclosure takes place abroad. In fact, in what now amounts to a premonition, the Special Committee on the creation of CSIS expressed concern that information regarding Canadians and Canadian Residents transmitted to foreign states could have significant impacts on individuals.[96] That concern is echoed by in the literature reviewed for this article. For example, Kent roach suggested that Canada has much less control over the use of information, which puts basic human rights, such as the absolute right against torture at risk when Canada shares information that leads to the detention of a person abroad.[97] A stark example of this risk is the case of Maher Arar - an engineering student erroneously associated to Al-Qaeda by CSIS intelligence.[98] CSIS provided intelligence to the RCMP, which then passed the information along to the United States.[99] American authorities subsequently arrested Arar at the Canada-US border. He spent nine days in custody without access to a lawyer.[100] On day 12, Arar's rendition to Syria, via Jordan, began. He was subject to torture and inhumane treatment, including being blindfolded and beaten.[101] In the wake of this controversy, the federal government authorized the Arar Commission, though, much of the meaningful testimony by CSIS and the RCMP was blocked by government national security privilege.[102] The commission recommended that information should never be provided to a foreign country where there is a

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into Foreign Interference in Federal Election Processes and Democratic Institutions, *Overview Report: Summary of Countering Foreign Interference Act (Bill C-70)* (2024), online (pdf):<https://foreigninterferencecommission.ca/fileadmin/foreign_interference_commission/Documents/Exhibits_and_Presentations/Overview_Reports/COM0000584.EN.pdf> [perma.cc/Z9BY-8FH7].

96 *Delicate Balance, supra* note 28 at para 48.

97 Kent Roach "A Comparative Assessment of Canadian Counter-Terrorism Laws and Practices" in Craig Forcese et al, "Terrorism**,** law and democracy**:** 10 years after 9/11" (Montreal: Canadian Institute for the Administration of Justice, 2012) at 85 [Roach, "Comparative Assessment"].

98 *Arar Commission, supra* note 27. The commission is discussed in *Guantanamo North, supra*, and Forcese & Roach, *supra* note 25.

99 *Ibid.*

100 *Ibid.*

101 Diab, *supra* note 36, *at* 10-11.

102 *Ibid.*

credible risk that it will cause of contribute to torture.[103] Inversely, information received from countries with questionable human rights records should be carefully assessed for accuracy.[104] It is hard to envision a situation in which someone like Arar should not be afforded *Charter* protection both domestically and abroad, yet the Supreme Court left the door open for such a denial in *Suresh v Canada (Minister of Citizenship and Immigration).*[105] The Supreme Court took the position that consequences that befall a person outside of Canada are to be considered in the section 1 analysis of the deportation scheme, and are thus not totally within the realm of the *Charter.*[106] The scope of *Charter* protections may be viewed on a contextual basis considering the nationality of the claimant, the location of the *Charter* infringing conduct, and the role of the government of Canada in the matter as opposed to an absolute right.[107] As a result, it is conceivable that this decision does not place an absolute *Charter* constraint on the decision to share intelligence, in certain circumstances, despite a risk of torture.

E. *The Five-Eyes Alliance*

The complexity of the *Charter's* influence on Canada's national security apparatus cannot be appreciated without considering the Five Eyes. The "Five Eyes" alliance is a cooperative, complex network of linked autonomous intelligence agencies from Canada, the US, UK, Australia and New Zealand, interacting with an affinity strengthened by a profound sense of confidence in each other and a degree of professional trust.[108] There is no formal treaty or international agreement between the partners that can be tested by individual constitutions. The Five Eyes partners do not target one another and allegedly do not seek to use a partner agency to evade national laws.[109] For example, CSIS should not request that the American

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103 Forcese & Roach, *supra* note 25 at 72, citing the *Arar Commission*, *supra* note 27.

104 *Ibid.*

105 *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1.

106 *Ibid* at para 78.

107 *Ibid.*

108 James Cox, "Canada and the Five Eyes Intelligence Community" (2012) Canadian Defence & Foreign Affairs Institute, Strategic Studies Working Group Paper, at 3, online (pdf): <https://rinj.press/wp-content/uploads/2018/12/Canada-and-the-Five-Eyes-Intelligence-Community.pdf> [perma.cc/F3JS-EXRL].

109 *Ibid.*

National Security Agency to listen in on a Canadian Citizen because CSIS lacks the grounds to obtain a judicial authorization. Although, there is no formal way to ensure this doesn't take place.[110] A partner-state's national could, however, be incidentally targeted by one of the Five-Eyes agencies. For example, emails between Cameron Ortis, a former high-ranking civilian RCMP member, and a criminal organization were discovered by an FBI investigation into the later.[111] The emails were shared with Canada and supported charges under the *Security of Information Act* and *Criminal Code.*[112] However, the Crown elected to withdraw one of the most serious charges to avoid disclosing intelligence gathering methods.[113] It is conceivable that foreign agencies will often object to the disclosure of information shared under this alliance. National Security privilege is thus a likely barrier to testing the Five Eyes cooperation against a party-state's constitution.

F. *The Limits of Hape*

Canada's national security framework matters when considering the precedent governing constitutional extraterritoriality. Leah West argues that the *Hape* decision only make sense in the context of transnational or international criminal investigations.[114] Therefore, intelligence operations are so distinguishable from factual matrix of *Hape* that the decision is inapplicable to CSIS activities.[115] The argument is compelling. Despite initially receiving conflicting treatment by the Federal Court, the distinction between national security and law enforcement seems to have been adopted.[116] It is on this basis that the *Hape* majority's formalist approach to cooperative extraterritorial law enforcement and section 32 of the *Charter* could possibly be distinguished when considering CSIS operations. In *McGregor,* Karakatsanis and Martin took a realist stance and argued that

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110 *Ibid.*

111 *R v Cameron Ortis,* 2024 ONSC 831 *Ortis.* The was a jury trial. The sentencing decision was reported and is currently under appeal.

112 *Ibid.*

113 *Ibid.*

114 West, *supra* note 11 at 30.

115 *Ibid.*

116 The argument was rejected in *Re CSIS, supra* note 38, at para 63, but adopted in *X(Re),* 2009 FC 1058 at para 67 and endorsed by *X(Re),* 2014 FCA 249 at para 92.

nothing in section 32 suggests a territorial limit, so the meaning of within the authority of parliament cannot be limited by territorially.[117] They criticized the approach taken in *Hape* as a failure to consider that parliament can legislate with extraterritorial application.[118] Therefore, it is essential to consider that section 32 speaks to the *authority* of parliament, not the *jurisdiction*.[119] The former could potentially be interpreted as broader, so *McGregor*'s suggestion that consideration be given to the *Charter's* purpose – the constraint of state action – is essential.[120] It is easier to reconcile *McGregor's* constitutional leash approach with national security operations because states routinely apply their domestic law to the actions of their officials abroad, without seeking the consent of the territorial state.[121] While *Hape* correctly recognizes the customary international law principles of sovereignty and non-interventionism form part of Canadian common law through adoption, custom can be limited, or ousted by legislation.[122] The *CSIS Act* expresses Parliament's explicit intent to legislate abroad by permitting the Service to take unilateral action "within or outside Canada."[123] It follows that extraterritorial CSIS operations need not rely on cooperation as contemplated in *Hape*, as they are explicitly permitted by, and within the authority of, parliament. Therefore, the two-part test for extraterritorial application set out in *Hape* can always be met when the Service operates abroad because CSIS agents are state actors, and legislation provides for an exception to the customary principle of sovereignty.[124] Leah West concludes that it is thus unprincipled to require CSIS officials to abide by the *CSIS Act* in a foreign jurisdiction, while simultaneously suggesting that international law prevents them from complying with the *Charter*.[125]

While the case is often cited in relation to the *Hape* Human Rights exception, the plight of Omar Khadr presents an example of CSIS operating

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117 *McGregor, supra* note 19 at 51.

118 *Ibid,* at paras 66 – 76.

119 *Ibid,* at paras 51, 52 & 67.

120 *Ibid* at para 54.

121 *Ibid* at para 71.

122 *Hape, supra* note 10 at paras 40, 45, & 46. See also *Bouzari v Iran,* 2004 CanLII 871. (ONCA) at para 65.

123 *CSIS Act, supra* note 13 at ss 12.1.

124 *Hape, supra* note 10 at para 113.

125 West, *supra* note 11 at 36.

unassisted abroad. Even though Khadr was held in an American detention facility, the Supreme Court found a *Charter* remedy for the situation.[126] Canadian courts took particular exception to CSIS interviewing Omar Khadr after he was subject to a sleep-deprivation tactic known as "the frequent flyer program."[127] The Service's exploitation of Khadr's mental state was found to exacerbate his experience in a detention program that the Supreme Court of the United States ruled was a violation of international law.[128] The Supreme Court of Canada held that the *Charter* applies when the conduct of Canadian officials violates Canada's international obligations.[129] In this case, *Charter* protections were triggered by Canada's participation in the denial of *Habeus Corpus.*[130] Returning to the perspectives on the legality of espionage mentioned above, the formalist approach adopted by Canadian courts implies that all CSIS overseas collection efforts and TRMs likely violate Canada's international legal obligations. Therefore, the exception in *Khadr* may usurp the rule in *Hape* whenever CSIS leaves Canadian soil.[131] Ultimately, the Supreme Court held that section 7 imposes a duty on Canada to provide disclosure of materials in its possession arising from its participation in the foreign process that is contrary to international law and jeopardizes the liberty of a Canadian citizen.[132] The test for *Charter* applicability has thus been altered to consider whether the *Charter* applies, and whether the applicant can assert that right.[133] Those factors will now be discussed in turn.

III. EXTRATERRITORIALLY: THE *CHARTER* AND CSIS

One of the Service's premier purposes is to advise the federal government on threat-based intelligence.[134] Throughout history, politicians have distanced themselves from intelligence services in the wake of scandal.

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126 *Khadr v Canada (Prime Minister)* 2010 SCC 3 [*Khadr* 2010].

127 *Ibid* at para 5.

128 *Khadr 2008*, *supra* note 17 para 26; *Khadr* 2010 *supra* note 126 at para 5.

129 *Khadr* 2008, *supra* note 17 at para 27.

130 *Ibid* at paras 25 – 27.

131 West, *supra* note 11 at 42.

132 *Khadr 2008*, *supra* note 17 at para 31.

133 *Slahi*, *supra* note 17, at para 29.

134 *CSIS Act*, *supra* note 13 at ss 12.1.

It stands to reason that intelligence recipients in government will give more credence to information that is obtained in a politically risk-adverse manner so that the official is insulated from any scandalous revelations. Constitutional oversight is one such layer of insulation. This part will consider whether the *Charter* acts a leash to constrain government action aboard. To properly frame the issue, the analysis must first consider jurisdiction – the limits of legal competence of a state to make, apply and enforce rules of conduct upon persons.[135]

The starting point for jurisdiction is said to be territoriality. Generally, the principle of sovereign equality prevents one state from interfering with the territorial jurisdiction of another. There are, however, exceptions that permit states to extend jurisdiction extraterritorially. The permissibility of extending jurisdiction is often based on what the state hopes to achieve or whether the jurisdiction is prescriptive or enforcement. Prescriptive jurisdiction includes the power to make rules, issue commands, or grant authorizations that are binding upon persons and entities. Enforcement jurisdiction, on the other hand, is the power to use coercive means to ensure that rules are followed, commands are executed, or entitlements upheld.[136] While *Hape* framed the issue of extraterritorial application of the *Charter* as an unlawful exercise of enforcement jurisdiction, the concurring judgment in *McGregor* found that requiring Canadian officials to comply with the *Charter* and allowing courts to assess their conduct are examples of prescriptive and adjudicative jurisdiction respectively.[137] The later decision found an absurdity in the premise that Canada is required to ask permission to apply Canadian laws to its own officials, and that there is no norm of customary law that prohibits a state from regulating the actions of its own officials with domestic law.[138] Additionally, the distinction between the two is less helpful when considering whether the *Charter* can apply to actions undertaken pursuant to the *CSIS Act* because Canada tends to overlap prescriptive and enforcement jurisdiction. The result is that Canada only

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135 Steve Coughlan et al, "Global Reach, Local Grasp: Constructing Extraterritorial Jurisdiction in the Age of Globalization" (2006), The Law Commission of Canada at 4, online (pdf): <https://publications.gc.ca/collections/collection_2008/lcc-cdc/JL2-67-2006E.pdf>.

136 *Hape, supra* note 10 *at* para 58.

137 *McGregor, supra* note 19 at para 69.

138 *Ibid* at paras, 71 & 74.

legislates where it can also enforce that legislation.[139] It follows that the *Charter* must apply where Canada can enforce other pieces of legislation.

A. *Domestic Intelligence Service, Foreign Intelligence Role*

CSIS is a domestic security service. There is no Canadian foreign intelligence equivalent to the CIA or MI-6. The Harper Government unequivocally extended the Service's sphere of responsibility to include foreign operations, even when the operations violate foreign and international law.[140] Today, CSIS not only carries out investigations abroad, but also maintains foreign stations.[141] The applicability to the *Charter* to CSIS operations outside of Canada is thus complicated by its mandate as CSIS is permitted to operate beyond the typical limits of Canadian jurisdiction. CSIS operations may produce three types of extraterritorial effect, each with distinct *Charter* considerations. First, the Service may task foreign officials to act on their own territory to assist Canada. The jurisprudence is clear that the *Charter* will not apply in these situations.[142] It follows that actions taken by Five Eyes partners, or any nation authorized to cooperate with CSIS pursuant to section 17 of the *CSIS Act* are unlikely to be constrained by the *Charter*. How Canadian officials use the information can, however, engage section 7 if the information would render a Canadian proceeding unfair.[143] The second scenario involves actions of Canadian officials in Canada that causes an extraterritorial effect. This type of action includes deportation, extradition, and foreign intelligence gathering pursuant to section 16 of the *CSIS Act*.[144] The *Charter* will apply to these cases because the action takes place within Canada, although the *Charter*-infringing scheme may be justified by section 1.[145] The third, and most contentious, type of action involves Canadian officials acting abroad. The Jurisprudence is developing so that extraterritorial actions may be liable

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139 Coughlan et al, *supra* note 135 at 10.

140 West, *supra* note 11 at 35

141 *Ibid.*

142 See *Harrer*, *supra* note 93; *Terry*, *supra* note 93.

143 *Hape*, *supra* note 10 at para 113.

144 See *Re CSIS Act*, 2020 FC 697 for a discussion on collecting information outside Canada from within Canada.

145 See *Suresh*, *supra* note 105 at para 78. The Supreme court left the door open for a justification of a section 7 violation in certain circumstances.

to scrutiny before Canadian Courts, even if the claimant is not a Canadian Citizen.[146]

The exercise of the Service's extraterritorial authority may not always fit squarely into one of the above categories. For example, in 2009, CSIS obtained a warrant to intercept communications outside of Canada, called a Domestic Interception of Foreign Telecommunications and Search (DIFTS) Warrant.[147] CSIS justified the warrant on the basis that any action taken by the Service in execution of the warrant would take place within Canada, thus placing the operation with the second category mentioned above. However, much to the dismay of the Federal Court, CSIS engaged the assistance of Five Eyes partners in execution of the warrant.[148] The manner of execution would likely deny the targets any protection offered by the *Charter* in line with category one.[149]

Robert Diab echoed the accountability concerns raised by the Federal Court. He argues that the complex networks of interrelated domestic and foreign agencies, and government's ability to insist on secrecy in a broader range of circumstances has created an accountability gap.[150] To address this concern, Diab recommends that public entities be subject to some degree of control by a higher entity, including a duty of explaining and justifying their actions to another impartial oversight agency should courts prove to be inadequate.[151] Diab further argues that through the promotion of equality under the law, Albert Dicey's theories on the Rule of Law oppose the arbitrary power of intelligence agencies.[152] This line of reasoning was adopted by the concurring judgment in *McGregor* when it found that the executive cannot act outside of the constitution and still act within the rule of law. When it is invited to play at the international scene, said the court, Canada must come as it is: a constitutional government.[153] The rule of law

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146 Robert Currie "A Tale of Two Brothers: The Impact of the Khadr Case on Canadian Anti-Terrorism Law" in Craig Forcese & François Crépeau, eds, *Terrorism, law and democracy: 10 years after 9/11* (Montreal: Canadian Institute for the Administration of Justice, 2012) at 328.

147 *X(re),* 2014 FCA 249 at para 5.

148 *Ibid* at para 102.

149 *Ibid*; Forcese & Roach, *supra* note 25, at 73.

150 Diab, *supra* note 36, at 81.

151 *Ibid,* at 82.

152 *Ibid.*

153 *McGregor, supra* note 19 at para 54.

is a fundamental and organizing principle of the Canadian Constitution. [154] Dicey, and the Rule of Law would thus be satisfied with using the *Charter* as a measuring stick by which to determine how far the Service can go when acting abroad. In other words, constitutional law should operate as a leash to constrain the scope of CSIS action anywhere.

But the extent to which the *Charter* applies outside Canada remains unclear. The issue boils down to whether an application of the *Charter* would be an exercise of territorial jurisdiction, which is not controversial, or extraterritorial jurisdiction which is more controversial and requires consideration of applicable international rules and how they apply in the Canadian Context.[155] The majority in *Hape* found three elements that interfere with the *Charter's* applicability to apply when Canadian state officials leave the country. First, the majority held that the *Charter* is silent on territorial reach.[156] Next, it found that principles of international law inhibit states from exercising "enforcement jurisdiction" abroad.[157] Finally, the majority assumed that the application of the *Charter* abroad amounted to extraterritorial enforcement jurisdiction.[158] The conclusion was that the *Charter* was territorially limited to Canda.[159] The proverbial line in the sand of territoriality has, however, since blurred. In *Khadr,* and *Slahi,* Canadian courts have held that the *Charter* applies to Canadian officials participating in interviews of detainees at Guantánamo Bay, although the ability of a claimant to assert a right may turn on factors other than extraterritoriality to be discussed in Part III.[160]

The law must consider recognized exceptions to the strict territoriality of jurisdiction. First, the nationality principle, or Canada's jurisdiction over its nationals, could allow for the *Charter's* application abroad. The Supreme court in *R v Cook* held that nationality is a valid basis of jurisdictional authority.[161] The court went on to describe nationality as broader than citizenship, and includes anyone with "a right to the protection of the state

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154 *Abdelrazik, supra* note 62 at para 6.

155 Currie, *supra* note 146 at 327.

156 *Hape supra* note 10 at para 33.

157 *Ibid* at para 65.

158 *Ibid* at para 69.

159 *Ibid* at para 85.

160 *Slahi, supra* note 17, at para 36; *Khadr* (2008), *supra* note 17.

161 *Cook, supra* note 18 at para 28.

and who owes allegiance to it."[162] State protection could apply to either a Canadian national targeted by an investigation abroad who seeks to rely on *Charter* rights, or CSIS officers who require the *Charter* to delineate the extent of their *CSIS Act* authority. While *Hape* considered, but dismissed, nationality on the basis of section 32, the facts are distinguishable as it was decided in the context of a cooperative investigation with no allegiance to Canada at stake.[163] Alternatively, the protective principle, or the assertion of jurisdiction over extraterritorial acts that are prejudicial to state security, territorial integrity, or political independence could also justify extending the *Charter* to CSIS operations.[164] This principle is analogous to the right of self-defence and is especially relevant when CSIS operates to counter foreign interference abroad. If the *CSIS Act* is properly extended into the jurisdictional space, the *Charter* must follow to prevent the Service from overreach that triggers a security, territorial or political consequence. Finally, the passive personality principle, which allows a state to assert jurisdiction over acts that injure their nationals, regardless of location, could apply.[165] Canadian nationals abroad could thus attempt to rely on the later principle to obtain a *Charter* remedy if CSIS action contributed to suffering, torture, or other mistreatment by an entity outside of Canada. *Khadr* allows a court to connect state action to an injury obtained from the deprivation of human rights based on mere participation in the process, even if the participation was not the cause of the injury.

The reasoning from *Hape* must be approached with caution given these identified exceptions to the territoriality principle. In the 2023 *McGregor* decision, the Supreme Court criticized *Hape* by identifying three main problems with the majority's analysis.[166] The court cautioned that the *Hape* majority applied improper interpretive principles, including those of jurisdiction, international law and statutory interpretation, it mischaracterized the extraterritorial application of the *Charter* as an unlawful exercise of enforcement jurisdiction and the three exceptions were inadequate.[167] However, the Court held that it did not need to rule on

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162 *Ibid* at para 42.

163 *Hape, supra* note 10 at para 104.

164 Coughlan et al , *supra* note 135 at 7.

165 *Ibid.*

166 *McGregor, supra* note 19 at paras 67, 69 & 73.

167 *Ibid at* para 66.

extraterritoriality because no *Charter* breach had been established.[168] The criticism is, however, indicative that the framework for constitutional extraterritoriality ought to be reconsidered.

Today, the starting point remains that the leash of constitutional constraint extends to the edge of Canadian territory, unless an exception to strict territoriality is met. The *Charter* may apply when the other nation consents to it. However, the *Hape* majority recognized that foreign states will rarely consent to the application of the *Charter.*[169] This remark is especially relevant to the covert nature of CSIS operations. Covert action can be defined as "activities conducted in support of national objectives abroad which are planned and executed so that the role of the sponsor is not apparent or acknowledged publicly."[170] By definition, Canada would not be associated to a covert action, so consent is therefore impractical. The Federal Court seemingly found covert action lawful by holding that a "state's authority to investigate threats to its national security, by whatever means the state considers appropriate, can never be dependent on first securing the consent of another state, be it the state implicated in the threat or the state in which an individual who is implicated in the threat may be situated."[171] It follows that the Service's attempts at countering foreign interference, or any intelligence investigation into state-sponsored action like the killing of Hardeep Singh Nijjar mentioned in the introduction, are unlikely to be done in consultation with the offending state where its agents are the perpetrators.

The Supreme Court has also held that requiring Canadian officials to comply with the *Charter* will not always interfere with the sovereignty of the foreign state.[172] In fact, it is difficult to see the sovereignty violation unless a foreign procedure is derogated from in the name of the *Charter*. It does not follow that the *Charter* cannot apply at all where strict adherence to the *Charter* is impractical on account of procedural laws of the host-state binding Canadian officials. The majority in *McGregor* went a step further to find that requiring Canadian authorities to also abide by the *Charter* does not

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168 *Ibid* at para 23.

169 *Hape*, *supra* note 10 at para 106.

170 West, *supra* note 11 at 31.

171 *Re CSIS*, *supra* note 38 at para 25.

172 *Cook*, *supra* note 18 at para 43.

preclude the need to respect foreign law prerequisites.[173] There is also no principle of law preventing Canadian Courts from scrutinizing the extraterritorial actions of Canadian officials through a *Charter* lens, though the analytical framework must account for the operation being in a foreign country.[174] Conversely, a strict application of the rule in *Hape* sacrifices a basic aspect of Canadian sovereignty – the requirement of Canadian officials to respect *Charter* values when they act in an official capacity abroad.[175] The Court in *McGregor* shifted course to find the *Charter* can apply to Canadian authorities acting abroad by applying an interpretation that is purposive, generous and aimed at securing the full benefit of the *Charter's* protections for individuals. The court went on to find that section 32 states to whom the *Charter* applies and is silent on any limitations based on where its application is taking place.[176]

The trajectory of the jurisprudence has been shaped by the type of right impacted. A Canadian court's willingness to apply the *Charter* abroad could turn on the seriousness of the alleged breach. The *Hape* majority inadvertently supercharged sections 7 and 11 by considering human rights and trial fairness. Determining the applicability of the *Charter* by the type of right impacted implies a supremacy of rights that does not otherwise exist. It may also create a human rights gap. For example, warrantless communications intercepts or intrusive electronic surveillance may not violate international human rights obligations but would infringe the *Charter* had the activity been carried out domestically.[177] If the protection against unreasonable search and seizure was the only right at stake in this "middle ground" it would not trigger the *Hape* exception, thus creating a gap between what the *Charter* and international human rights expect. However, the same conduct may trigger *Charter* protection if the information then contributed to trial unfairness, thus placing the protection of section 7 rights ahead of those in section 8.[178] The Supreme Court in *McGregor* found that such categorical application is illogical. The

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173 *McGregor*, *supra* note 19 at para 70.

174 Currie, *supra* note 146 at 336.

175 Kent Roach, "*R v Hape* Creates Charter-Free Zones for Canadian Officials Abroad" (2007) 53;1 Crim LQ at 1 [Roach, "Charter Free Zone"].

176 *McGregor*, *supra* note 19 at para 50 – 51.

177 West, *supra* note 11 at 34.

178 *Hape*, *supra* note 10 at paras 109 – 111.

Charter, says the concurring judgment, should be a floor, not a ceiling. It must be capable of providing protections at least as great as those offered by international law.[179] The mechanism to consider the seriousness of the *Charter* infringing conduct exists in sections 1 or 24.[180] It does not make up the applicability analysis contemplated by section 32. It stands to reason that the more significant the breach, the more difficult it will be to justify its limit, but the justification should take place after the *Charter* was found to apply.

The extraterritorial application of section 8 is also unclear.[181] The drafters of the *CSIS Act* envisioned judicial control of the use of intrusive investigative techniques, which supports the idea that section 8 should always guide CSIS operations.[182] CSIS even argued before the Federal Court that the *Hape* decision did not imply or preclude the application of the *Charter* when CSIS officials act abroad to collect intelligence in violation of the target's reasonable expectation of privacy.[183] However, a reasonable expectation of privacy is predicated on a judge finding that the extraterritorial target had *Charter* protections to begin with. A recent Federal Court decision found that a person with no nexus to Canada cannot avail of section 8, therefore CSIS did not need a warrant to conduct an investigative technique on that class of person.[184] That said, law enforcement agencies cannot avail of information obtained by CSIS on the "suspicion" standard for use in a criminal matter that would otherwise require the investigators to obtain a warrant at the "belief" standard.[185]

The *Charter* may also be engaged when CSIS decisions are the catalyst for future mistreatment by other nations. The Security Intelligence Review Committee (SIRC), the former federal oversight body for CSIS, found that the Service infringed 5 different *Charter* rights in the rendition of Mohammed Jabarah.[186] Mr. Jabarah, a Canadian Citizen of Iraqi dissent, was arrested in Oman by local officials before being transferred to Canadian

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179 *McGregor*, *supra* note 19 at paras 68 & 75.

180 *Charter*, *supra* note 9, ss 1 & 24(2).

181 *Ibid*, s 8.

182 *Delicate Balance*, *supra* note 28 at para 109.

183 West, *supra* note 11 at 34.

184 *Canadian Security Intelligence Service Act (CA) (Re)*, 2022 FC 1444.

185 See *R v Cole*, 2012 SCC 53 at para 69, and *R v Colarusso*, 1994 CanLII 134 (SCC) at para 93.

186 Forcese & Roach, *supra* note 25 at 73.

custody where CSIS orchestrated his rendition to Canada, via London England.[187] Authorities interrogated Mr. Jabarah for four days and then convinced him to "voluntarily" go to the United States after landing in Canada.[188] The SIRC found that the actions of CSIS interfered with Jabarah's right to enter and stay in Canada, the right against arbitrary detention, the right to fundamental justice, the right of Habeas Corpus and the right to counsel.[189] The Service took the position that "it was not a police service," so it was not obligated to respect some of those rights.[190] Mr. Jabarah entered a guilty plea in a Manhattan federal court and received a life sentence.[191] The case was not litigated on either side of the border, so it remains unclear whether a court would agree with the SIRC's findings or parse each action along territorial lines.

B. *Threat Reduction Measures:*

The largest part of the CSIS mandate involves the passive collection of intelligence. However, the Harper government provided the Service with an action arm in the form of TRMs, discussed in Part I.[192] TRMs take three forms: messaging (pushing information, directly or indirectly to a subject, either a threat actor or a person impacting by the threat, in an attempt to influence their behaviour to reduce the threat), Leveraging (disclosing information to a third party to enable the third party to take action at their discretion and pursuant to their own authorities, against the identified threat-related activities with the intent to impede the subject from engaging in threat-related activities hence helping to reduce the threat), and interference (direct actions by CSIS officials to affect the ability of the subject to do something with the intended outcome of impeding the subject from engaging in threat-related activities).[193]

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187 *Ibid.*

188 *Ibid.*

189 *Ibid.*

190 *Ibid.*

191 *Ibid.*

192 West, *supra* note 11 at 35.

193 Foreign Interference Commission, "Threat Reduction Measure Conducted in 2019" (last visited 11 March 2026), online (pdf): : <https://foreigninterferencecommission.ca/fileadmin/foreign_interference_commission/Documents/Exhibits_and_Presentations/Exhibits/CAN.SUM.000011.pdf> [perma.cc/2GWJ-L5P2].

Scholars speculate that TRMs include interdicting and searching the luggage of a suspected foreign fighter, surreptitiously draining the bank account of a suspected terrorist money launderer, planting disinformation online to lessen the influence of a dissident, and a host of others.[194] Based on the definitions and academic speculation it is easy to imagine measures that may limit the *Charter* rights guaranteed by sections 2, 6, 7 and 8.[195] In any event, it is a certainty that they go beyond "mail opening" as was an action discussed during the drafting of the *CSIS Act* as requiring a warrant.[196]

The *CSIS Act* further provides that the *Charter* is part of the supreme law of Canada and all measures taken by the Service shall comply with it.[197] Though, the Service is permitted to take measures that would limit a right or freedom guaranteed by the *Charter* if a Federal Court judge issues a warrant to authorize those measures.[198] Regardless of where a TRM takes place, it seems like an oxymoron to compel CSIS to comply with the *Charter* in one subsection, then authorize operating outside of it in the next. Parliament's decision to permit the Federal Court to pre-emptively approve *Charter* infringing conduct appears contrary to the *Hape's* guidance that the *Charter* serves to limit the legislative and executive powers.[199]

It is important to understand that the purpose of a warrant is typically to render an investigative technique *Charter*-compliant, not *Charter*-infringing. Section 8, for example, protects against *unreasonable* search and seizure.[200] Prior judicial authorization does not allow for a breach of section 8, rather, a search and seizure properly carried out by warrant is presumptively reasonable.[201] The test for whether CSIS requires a warrant

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194 *Ibid* at 1; see also, Forcese & Roach *supra* note 25 at figure 8.1 and 8.2 at 250 -254.

195 Section 2 protects the freedom of assembly, and expression, section 6 protects the right to enter, remain in and leave Canada, section 7 protects the right to life, liberty and security of the person, while section 8 is the protection against unreasonable search and seizure (see *Charter, supra* note 9, ss 2,6,7 &8). CSIS, in its annual report, states that TRMs fall into 3 broad categories: Messaging, leveraging, and interference. The actions undertaken are purely speculative. See Forcese & Roach, *supra* note 25 at 250 – 254.

196 *Delicate Balance, supra* note 28 at para 56.

197 *CSIS Act*, *supra* note 13 ss 12.1(3,1).

198 Forcese & Roach, *supra* note 25 at 5.

199 *Hape, supra* note 10 at para 32.

200 *Charter, supra* note 9, s 8.

201 *R v Collins,* 1987 CanLII 84 (SCC).

to conduct a desire operation is written directly into the enabling legislation.[202] The *CSIS Act* provides that a Federal Court warrant is to be sought where CSIS believes, on reasonable grounds, that a warrant is required to enable the service to investigate a threat to the security of Canada.[203] Therefore, the Service has considerable discretion in deciding whether to seek a warrant. The danger of constitutional ambiguity is that it could allow the Service to create a *de facto* distinction between different classes of people based on its internal view of *Charter* applicability. The drafters of the *CSIS Act* proposed that there be more stringent conditions to obtain a warrant when CSIS was targeting Canadian Citizens, however, this distinction was ultimately declined.[204] The denial indicates that parliament intended for the Service to treat the rights of citizens and non-citizens equally. However, if the Service decides, as the Federal Court did, that non-citizens do not have the protection of section 8 at all, then they may never seek a warrant where the target of an investigation is outside of Canada and is not a Canadian national.[205]

The National Security Intelligence Review Agency (NSIRA) also expressed concern regarding prior judicial authorization. In the heavily redacted 2021 annual review, the NSIRA confirmed that CSIS proposed and received ministerial approval to conduct TRMs.[206] The number of requests versus approvals was, however, redacted. The NSIRA found that CSIS used an overly narrow assessment when determining whether a warrant was required, and did not adequately consider the impacts resulting from third party actions.[207] The focus on the adverse impacts could be an acknowledgement of *Hape* and *Khadr's* guidance on extraterritorial *Charter* application because the NSIRA acknowledged that a redacted type of TRM "likely raised issues associated with the extraterritorial application of the *Charter*.[208] Based on the Canadian formalist approach to espionage, any

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202 *CSIS Act*, *supra* note 13 at s 21.

203 Forcese & Roach, *supra* note 25 at 128.

204 *Delicate Balance*, *supra* note 28 at paras 56 & 63.

205 *Re CSIS*, *supra* note 144 para 170.

206 National Security Intelligence Review Agency, *Review of CSIS Threat Reduction Activities: A Focus on Information Disclosure to External Parties (NSRA 2021-04)*, (Ottawa: NSIRA, 2021).

207 *Ibid* at para 82.

208 *Ibid* at para 59.

TRM conducted outside of Canada is likely to interfere with Canada's international law obligations. Adherence to *Hape's* guidance suggests that CSIS ought to seek judicial authorization for each TRM conducted aboard. However, the service is likely to conduct these measures independently. It follows that the *Charter* application frameworks discussed in *McGregor* and *Khadr* are preferable to that of *Hape* when CSIS acts alone. Consideration ought to be given to whether the conduct would infringe the *Charter* had the act be undertaken in Canada, and whether the action will contribute, directly or indirectly, to a gross mistreatment of the target. In absence of a cooperative operation, the *Charter* should apply wherever Canadian officials act.[209] As West concludes, TRMs are not a legal grey hole, but rather subject to judicial, and constitutional, scrutiny.[210]

Judicial review of the TRM authority has been elusive. From the inception of the power to 2023, CSIS had not sought judicial authorization to use a TRM, including fourteen non-warranted TRMS in 2023.[211] In 2024, the CSIS public report acknowledged that it sought judicial authorization for two TRMs – the first indication that the Service has proceeded by way of warrant. Thirteen non-warranted TRMs were still used in that year. Given that TRMs are investigative activities relating to national security, they may never be disclosed to the target in the absence of a criminal prosecution. Therefore, if the *Charter* is found to end at the territorial edge of Canada, or if it is powerless to protect non-citizens, a judicial interpretation of TRM activities may never materialize. The Arar Commission cautioned that the rights and freedoms of individuals in Canada must be considered when taking measures to protect Canadian security.[212] The territorial distinction offered by the commission is noteworthy when considering the scope of protection offered to targets located abroad.

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209 Roach, "Charter Free Zones", *supra* note 175 at 3.

210 West, *supra* note 11 at 44.

211 *Ibid*, at 2; Canada, Department of Public Safety, Democratic Institutions and Intergovernmental Affairs, *CSIS Public Report 2023* (Ottawa: Department of Public Safety, Democratic Institutions and Intergovernmental Affairs, 2024).

212 *Arar Commission*, *supra* note 27 at 445.

IV. CHALLENGING BIG BROTHER:

The Arar Commission acknowledged that information sharing takes place in secret and is thus outside the reach of judicial review.[213] Therefore, the viability of a *Charter* claim has two parts: first, the *Charter* must apply. Second, the aggrieved person must have standing to bring that claim, including the knowledge that such a claim exists. This distinction is obvious in section 6, which provides that the right to remain in Canada only applies to citizens.[214] The term "everyone" in Section 7 is less clear.[215] Robert Currie phrased the question as whether everyone means "everyone who had *Charter* rights to start out and ran into trouble with Canadian officials abroad," or "everyone who interacts with Canadian officials."[216] In this part, the paper will consider whether a constitutional shield is necessary to assert a right. It will address potential avenues and barriers to challenging CSIS action using the *Charter* by comparing two fictitious targets from the same scenario.

Imagine that the "Proud Boys," a neo-fascist organization in the United States wanted to spread their anti-immigration rhetoric to Canada in anticipation of the 51st state joining the union.[217] A representative of the Proud Boys (the American) targeted Newfoundland as place to start a new chapter. The American thought that Newfoundland's Irish Diaspora would be anti-Crown, and willing to take action to distance themselves from Ottawa. The American targeted a Newfoundlander with a history of posting pro-IRA rhetoric on an online chatroom (the Canadian). Eventually, the American radicalized the Canadian to view Islam and Judaism as the biggest threats to Catholicism since "the Troubles" and convinced him that becoming the 51st state would be the best safeguard. The two discussed carrying out "something drastic" to move the secession along and agreed to meet on the French island of Saint-Pierre to avoid the jurisdiction of their

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213 Forcese & Roach, *supra* note 25 at 146.

214 *Charter, supra* note 9 s 6.

215 *Ibid,* s 7.

216 Currie, *supra* note 146 at 329.

217 The Proud Boys are a listed terrorist entity in Canada. Description comes from Public Safety Canada, "List of Terrorist Entities" (last updated 4 December 2025), online: <https://www.publicsafety.gc.ca/cnt/ntnl-scrt/cntr-trrrsm/lstd-ntts/crrnt-lstd-ntts-en.aspx#510> [perma.cc/X9PX-47N8].This scenario is otherwise created for the purpose of illustration and has not, to the author's knowledge, manifested in reality. Any similarity to actual events is purely coincidental.

respective law enforcement agencies. While waiting for the ferry to take him across bay, the Canadian overindulged at a local bar and began bragging that the IRA was going to look like boy scouts after he was finished. The bartender wanted to remain anonymous, so he altered the local CBSA officer instead of the RCMP. CBSA then called CSIS.

CSIS had already received information from the NSA that an unknown American and Canadian were discussing an attack using explosives, and a January 6th style takeover of a state and provincial legislature. Based on this information, CSIS moved a surveillance team into place to follow the Canadian in Saint Pierre. Surveillance officers surreptitiously planted recording devices in and around the Canadian's hotel room. CSIS identified the American through this surveillance. CSIS then conducted a series of non-warranted TRM's because there was insufficient disclosable information to provide the RCMP to support a criminal charge, yet the parties were believed to be threats to Canada. No warrants were considered given the location of the actions taken. CSIS released a series of posts in the online forums, whose servers were hosted in Russia, that were used by the targets. The posts intended to cause a rift between the co-conspirators and anyone else the American was in contact with by labeling him pro-monarchy and pro-immigration. The surveillance device captured the American offering to transfer another installment of funds to the Canadian's overseas bank account for supplies. It also overheard the Canadian provide his foreign banking information. CSIS then used its TRM authority to drain both the Canadian's bank account, and the account associated with a prior large transfer, believed to belong to the American, to prevent procurement of supplies for an attack. CSIS used another TRM to stage a break and enter at both targets' hotel rooms for the purpose of confiscating their passports. Other rooms were targeted to cover the real targets, though nothing taken. CSIS shared its information with the FBI through the Five Eyes process. The intelligence was used to support the arrest of both parties to face conspiracy charges in US Federal Court.

Several *Charter* rights would be at stake had the actions taken place in Canada. The installation of recording devices would likely be considered a search, and the manipulation of the bank accounts would likely be a seizure within the meaning of section 8. The online posting could potentially meet the definition of cruel and unusual treatment within the meaning of section 12, or interfere with freedom of expression and association protected by section 2. Such messaging could also interfere with a person's life or liberty

should their associates take retaliatory actions. The passport manipulation would engage sections 6 and 8. However, the *Charter's* application of the actions taken against either party is far from certain based on the territoriality of the action, and the nationality of the parties. The Federal Court held that claimants must prove a connection to Canada by establishing presence, a criminal proceeding within Canada, or citizenship. Failure to establish a nexus will likely be fatal to a *Charter* challenge.[218]

A. *The Question of Complainants*

Accepting that the CSIS officers were state actors that were acting within the authority of Parliament, the analysis must then consider whether the claimants could assert *Charter* rights in the situation. Given that there is no Canadian trial to engage the *Charter* through the principle of natural justice, the parties would need to bring an action in the Federal Court. The Canadian would stress that he was a citizen, so he could expect the government of Canada to consider the *Charter* in any dealings with him. Citizenship was the common thread mentioned in both *Khadr* cases in which "everyone," for the purposes of section 7, was held to include every Canadian citizen whose liberty is at stake by virtue of Canada's violations of international law.[219] In other matters, Canadian courts have shown a reluctance to extend *Charter* protections to non-citizens, even implying that citizenship is a requirement for the extraterritorial assertion of a right.[220] For example, the Federal Court in *Slahi* focused on citizenship, or lack thereof, by declining to extend *Charter* protection to a non-citizen Guantánamo detainee.[221] The court limited the protection of section 7 to "everyone" present in Canada, or facing proceedings in Canada.[222] The Federal Court of Appeal remarked that the drafters of the *Charter* had domestic application in mind, so certain rights apply to everyone within Canada.[223] Therefore, the Federal Court has placed meaningful limits on

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218 *Slahi, supra* note 17 at paras 47 & 48.

219 Currie, *supra* note 146 at 322; *Khadr (2008), supra* note 17 at para 13; *Slahi, supra* note 17 at para 45.

220 Simon Wallace et al. "The Biggest Problem With You": Racial Profiling and Canada's Program of Extraterritorial Migrant Interdiction" (2023) 61:3 Osgoode Hall LJ 951 at 983.

221 *Slahi, supra* note 17 at para 48.

222 *Ibid* at paras 47&48.

223 *Slahi* FCA, *supra* note 17 at para 5.

who can bring a *Charter* claim. The Court seemingly decided that the claimant requires a constitutional shield before the *Charter* can apply. Justice Heureux-Dubé, writing for the dissent in *Cook*, noted "first, an applicant must prove they had a right [...] The *Charter* doesn't give rights to everyone in the world wherever they may be.[224] It would thus be reasonable for Citizens to expect certain rights with respect to Canadian state action wherever they go by virtue of the nationality principle. It is on this point that subsequent decisions have distanced themselves from *Hape.* In the *Amnesty* case, the court was vexed by the notion that Canadian Soldiers could be charged under Canadian law for actions in Afghanistan, yet the *Charter* could not constrain those actions.[225] In *McGregor,* the court commented that military members are subject to Canadian criminal law abroad, and that the *Charter* expressly distinguishes the presence of certain rights based on citizenship.[226]

The case of Abousfian Abdelrazik supports the notion that citizens do not give up constitutional protections because they travel abroad. Abdelrazik was placed on a terrorist watch-list prior to travelling from Canada to Sudan to care for an ailing relative.[227] He was arrested and placed in a Khartoum jail. In a tactic that bears a resemblance to *Khadr,* CSIS agents interviewed Abdelrazik in that foreign jail.[228] Abdelrazik's Canadian passport was cancelled, and he was denied a new one, effectively banishing him from Canada.[229] Despite Abdelrazik's detention and subsequent CSIS interaction taking place in Sudan, the Federal Court found that section 6 of the *Charter* was infringed.[230] Abdelrazik's plight ought to serve as a guide for future attempts by the Service to interfere with the travel of Canadian Citizens. In situations where a citizen is believed to be travelling abroad to join the fight of a listed terrorist entity, and Canada wishes to prevent that persons return, it is likely that CSIS will require judicial authorization to conduct a TRM as section 6 will be engaged. Therefore, in the scenario

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224 *Cook, supra* note 18 at para 86.

225 *Amnesty, supra* note 24 at 16.

226 *McGregor, supra* note 19 at paras 19 and 53.

227 Forcese & Roach, *supra* note 25 at 77-79, see also Abdelrazik, *supra* note 62

228 *Ibid.*

229 *Ibid.*

230 *Ibid.*

above, the interference with travel caused by the seizure of the Canadian's passport will likely trigger *Charter* protection.

It remains to be seen what, if any, notice will be given to the target that could allow them to challenge the constitutionality of the CSIS action. Even wiretap warrants issued pursuant to Part IV of the *Criminal Code* require notice be given after a prescribed amount of time.[231] There is no such requirement in the *CSIS Act*. Assuming that the Service's involvement was somehow detected, the American's claim would turn on whether non-citizens can assert rights.[232] While International law permits states to distinguish between nationals and non-nationals in certain circumstances, citizenship may not be determinative.[233] The hypothetical American target could obtain *Charter* protection by meeting the *Libman* test. This two-part test requires the establishment of a real and substantial link between the subject matter of the claim and Canada, and that international comity would not be offended by the extension of jurisdiction.[234] It is unlikely that a mere interaction with CSIS will be enough to create a real and substantial link, even if that interaction produces evidence used a foreign prosecution.[235] A target of a TRM may be able to distinguish *Slahi* on the basis that the identification of that target as a threat to Canada may create a sufficient link to Canada. Alternatively, the Canadian government can expressly extend certain rights to non-citizens by deciding to prosecute them in a Canadian court, or if the action targeted a non-citizen within Canada.

B. *The Rights at Stake*

National security investigations naturally have the potential to create a chilling effect on certain protected rights, especially legitimate dissent, and equality. Terrorism is an ideologically based offence, so the political, religious, or other ideological based beliefs of a target come within focus. The parties involved are likely to influence the public perception of the activity. Profiling along enumerated grounds presents the risk that certain groups will be stigmatized, and subject to increased investigative attention

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231 *Criminal Code*, *supra* note 33 at Part VI for intercept authorization and rules of procedure.

232 This was at issue in *Slahi*, *supra* note 17 at para 38.

233 Wallace et al, *supra* note 220 at 38.

234 *Libman v The Queen*, 1985 CanLII 51 (SCC) at paras 71& 74.

235 *Slahi*, *supra* note 17.

in a discriminatory way.[236] Most Canadian terrorism prosecutions relate to Islamic Extremism, yet 59% of "lone wolf" attacks involve white supremacism.[237] Canadian criminal law does not usually include motive as an element of offences. This creates a real possibility that the terrorism label may be applied in a discriminatory manner based on *which* of the enumerated elements is expressed. The cases of Chiheb Esseghaier and Justin Bourque illustrate this point.[238] The former was convicted of terrorism offences following the so called "Via Rail Plot" and is now seeking to avoid deportation on mental health grounds. It may be the case that the ideological component of the offences results from mental illness and not terrorist affiliation. Conversely, Bourque's murder of three RCMP officers was not labeled as terrorism, despite his anti-government manifesto.[239] This distinction is essential when considering the increased options available to address a "threat to Canada," like terrorism, as opposed investigative avenues available in a strictly criminal matter.

The potential of classifying an act as "terrorism" or "foreign" interference in a discriminatory manner is amplified by the *CSIS Act* definition of threats to Canada, which requires the considerations of aspects that would otherwise be prohibited grounds of discrimination.[240] It is essential that sufficient intelligence is obtained, and corroborated before CSIS takes action to avoid allegations of improper classifications based on profiling or another discriminatory basis. Unfortunately, for potential claimants, section 15 challenges are more difficult than other *Charter* claims because of the onerous causation test, and evidentiary barriers.[241] The latter would likely be frustrated by national security privilege.

The fictional TRM taken to discredit the American could also serve to significantly impact his freedom of expression as he could be exiled or

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236 *Arar Commission*, *supra* note 27 at 437.

237 Forcese & Roach, *supra* note 25 at 278.

238 *Esseghaier v Canada* (Citizenship and Immigration), 2025 CanLII 8563 (FC).

239 Christine Muschi, "The Untold story of Justin Bourque", *Maclean's* (15 June 2014), online: <https://macleans.ca/news/canada/untold-story-justin-bourque/>.

240 *Criminal Code*, *supra* note 33 at s 83.01 provides a definition of terrorism. This definition includes political, ideological or religious motivation – typically religion would be a prohibited ground of discrimination, yet it is often a required consideration in terrorism matters.

241 Benjamin Perryman, "Proving Discrimination: Evidentiary Barriers and Section 15(1) of the *Charter*" (2024) 114 SCLR 93 at 93-109.

shunned from the platform of his choice. Alternatively, it would be a compelling argument that sections 7 and 12 are engaged if he were to face physical retribution from the Proud Boys for being a perceived turncoat. The type of investigation may influence how much constitutional assistance a claimant may receive in asserting those rights. For example, the *Charter* has been of little help in *Immigration and Refugee Protection Act* (*IRPA*) matters.[242] Canadian law has been critiqued for providing non-citizens a lesser degree of constitutional protection than citizens when there are grounds to believe that a person represents a threat to the security of Canada.[243] In *Suresh,* the Supreme Court left the door open for deportation to face torture, so it seems as though extraterritorial consequences of government action, even when they could limit a *Charter* right or value, are subject to a reasonable limit analysis.[244] The Court suggested that the principles of fundamental justice require a balancing, so it is therefore conceivable that national security could outweigh a person's right not to face torture.[245] Therefore, the use of information obtained by torture, or sharing information that will lead to torture, may not trigger *Charter* remedies in certain circumstances. In any event, it is likely that the Canadian will have more success asserting *Charter* rights than the American.

C. *Evidentiary barriers*

A finding of standing is just the starting point. A claimant must then prove that a right has been limited. National security privilege will apply to both domestic and extraterritorial operations. The *Anti-Terrorism Act* modified the *Canada Evidence Act* to extend government privilege and maintain secrecy over a broader scope of evidence. There may be no disclosure of information that is potentially injurious to international relations, or national security.[246] This restriction is likely necessary to protect the Five Eyes alliance. A major concern stemming from the Ortis matter was that bad actors were provided five eyes intelligence. Canada must safeguard intelligence to protect their standing within the alliance. Given

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242 Diab, *supra* note 36 at 53.

243 Faisal Bhabha, "The Chill Sets in: National Security and the Decline of Equality" (2005) 54 UNBLJ 191.

244 *Suresh, supra* note 105 at para 129.

245 *Ibid.*

246 Bhabha, *supra* note 243 at 12.

the intelligence-evidence distinction, it is understandable that the intent of intelligence agencies in sharing information is to prevent harm, and not necessarily to have the collection of that information tested in open court. Public interest Immunity is thus so broad in scope that it representants a serious departure from the administration of justice. The hearings related to this privilege are held *in camera*. Courts are required to weigh the public interest in the disclosure against non-disclosure. Though, the matter is likely to be stayed to avoid the disclosure in the event of an irreconcilable difference between the Crown and accused.[247] In *R v Ortis,* the first prosecution under the *Security of Information Act,* the Crown withdrew some of the most serious charges to avoid disclosure obligations.[248] The sentencing judge remarked that:

> [2] This is the first case in the history of the *SOIA* to have resulted in a conviction after the completion of a trial. The journey to a verdict was a long and complex one, particularly as it related to what evidence could and could not be presented at trial for reasons of national security. Those issues and others, including what I have decided here, will no doubt be revisited by higher courts.[249]

The intelligence versus evidence divide also contributes to the evidentiary barrier. CSIS may collect evidence, or perform a TRM, for the purpose of prevention or disruption, and not prosecution.[250] The *Hape* decision thus limits the possibility of remedy for an innocent target of improper extraterritorial conduct by denying a potential section 24(1) remedy because the trial fairness exception would not apply.[251] Further, the exception creates another categorical application of the *Charter* as it would only provide the protections contained in section 7 and 11(d).[252] Ultimate accountability rests with NSIRA review, as there are no reporting requirements similar to section 490 of the *Criminal Code* for *CSIS Act* warrants that give rise to judicial oversight.[253]

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247 *Ibid* at 44.

248 *Ortis, supra* note 111.

249 *Ibid*.

250 *CSIS Act, supra* note 13 at s 12.1(4).

251 Roach, "*Charter Free Zones*", *supra* note 9 at 2.

252 *McGregor, supra* note 19 at para 76.

253 National Security and Intelligence Review, "Who we are" (last visited 11 March 2026), online: <https://nsira-ossnr.gc.ca/en/about-nsira/who-we-are/>.

D. *What's a right without a remedy?*

Finding a violation is one thing. Getting a remedy is another. Even citizenship may not guarantee a remedy for an extraterritorial *Charter* breach. Prior caselaw has required a "unique and special circumstance" to trigger section 24(1).[254] Abdelrazik's case is easy – the Court ordered the government to grant an emergency passport.[255] Cases like *Khadr* are more challenging. The first iteration was comparable to Abdelrazik in that the court could compel the government to produce disclosure.[256] However, an effective remedy for *Khadr* (2010) proved to be more challenging. The court originally stopped short of requiring Canada to make diplomatic representations on behalf of terrorism suspects.[257] In a subsequent related decision, the Federal Court acknowledged that the government is responsible for remedying a *Charter* breach that it caused, while being mindful to the fact that the remedy of expatriation or non-use of evidence provided by Canada was only available with the cooperation of the United States.[258] The ultimate remedy was not decided past an order directing procedural fairness in the determination of what constitutes an "appropriate and just" remedy for the situation.[259] Non-citizens, or even citizens who have not been notified of CSIS action will thus have to rely on the oversight provided by the NSIRA. This notion was supported in *Delicate Balance,* where the committee recommended that the SIRC (as the oversight body was then) provide oversight when courts prove unable or incapable of doing so.[260] CSIS was therefore created with an understanding that it would not receive the same judicial oversight as a law enforcement agency. In the scenario above, it is possible that CSIS would be identified as the source of the FBI. This could potentially lead the parties to seek disclosure directly from CSIS by applying *Khadr* or relying on the illegality of international espionage to trigger the *Hape* exception. The disclosure, subject to national security privilege, could alert the parties to the other TRMs. The parties

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254 *Slahi, supra* note 17 at para 42.

255 Forcese & Roach, *supra* note 25 at 77 – 79.

256 *Khadr* (2008), *supra* note 17.

257 *Comparative Assessment, supra* note 97 at 94.

258 *Khadr v. Canada (Prime Minister),* 2010 FC 715.

259 *Ibid.*

260 *Delicate Balance, supra* note 28 *at* para 93.

would be left seeking a remedy under section 24(1) of the *Charter* given that the actions were undertaken without warrant.

E. *Recourse in international law?*

The asymmetric nature of the modern threats presents a challenge in deciding the proper forum of law to apply. Foreign interference can initially present as a diplomatic representation before the subversion becomes clear. Counterterrorism blurs the line between peacetime espionage and armed conflict in the context of the war on terror. The paradox is evident when considering that terrorism is generally treated as a criminal matter, yet the United States invoked Article 5 of the NATO Treaty in the aftermath of 9/11.[261] The conflation of domestic and international jurisdiction may serve to the benefit of a potential complainant since *Charter*-offensive conduct, like torture and racial discrimination, is similarly prohibited by international law. Consequently, CSIS action can be governed outside of the constitution should *Charter* protection end at border.[262]

There are, however, complications associated to Canadian reception of international human rights law.[263] The multitude of norms are afforded different weight domestically because Canada has adopted a dualist approach to the domestic reception of international law. Customary law is akin to the common law – it is automatically recognized in Canada through adoptionism. Treaties, in contrast, require implementation through domestic legislation that explicitly recognizes them. The *International Covenant on Civil and Political Rights* (*ICCPR*), which is ratified and binding on Canada, has not been adopted by legislation.[264] Although, Canada has argued that the *ICCPR* covers "much of the same ground" as the *Charter* so it may be implemented through existing law.[265] Be that as it may, Canada's relationship with the *ICCPR* creates a compelling case to overturn *Hape* and adopt the dissenting opinion in *McGregor* to so that Canada's state practice

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261 Article 5 is the right to collective defence to an armed attack pursuant to the NATO Treaty. See Nato, "Collective Defence and Article 5" (last modified 12 November 2025), online: <https://www.nato.int/cps/bu/natohq/topics_110496.htm> [perma.cc/2P7M-MXH5].

262 Wallace et al, *supra* note 220 at 37.

263 See Gib Van Ert, *Using International Law in Canada Courts*, 2nd ed (Toronto: Irwin Law, 2008) at 325-332 for a discussion of the complexities.

264 *ICCPR supra* note 83.

265 Gib Van Ert, *supra* note 263 at 330; *McGregor, supra* note 19 at para 75.

is more consistent with the *ICCPR*. Though, the onus to do so falls short of a legal requirement, the practice may find its basis in a moral obligation fitting on a nation committed to upholding human rights.

Two interpretative factors arise from recognizing the adoption of the *ICCPR*. First, Canadian legislation is presumed to conform with Canada's international obligations. Second, the *ICCPR* imposes extraterritorial obligations on signatory states. It follows that the *Charter* must apply extraterritorially to comply with the *ICCPR*.[266] The Supreme Court was, however, reluctant to accept such a complicated consideration. *McGregor* suggested that Canadian officials are more likely to be familiar with the *Charter's* expectations than Canada's obligations at international law, so it is safer to apply the constitution.[267] International human rights law may be best suited as a "relevant, persuasive, informing and valuable" tool for *Charter* interpretation, as opposed to characterizing the *Charter* as a means of implementation.[268] Regardless of the avenue, the destination is that *Hape* improperly limits the *Charter* because its purpose is to prevent violations of fundamental freedoms before they happen. To respect the *Charter's* objectives, Canadian officials must not conduct operations that violate Canada's customary or treaty-based international human rights obligations.[269] Compliance with the *ICCPR* thus requires Canadian officials to consider the *Charter* at home and abroad. However, the issue of remedy remains. While *McGregor* suggests that the international application can be considered for remedial discretion under section 24, the court was likely referring to the exclusion of evidence that was lawfully obtained in the host-state, but would not withstand constitutional scrutiny had it been collected in Canada.[270] The *Charter* and International Law must then be considered in tandem to create a comprehensive framework governing Canadian Officials abroad.

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266 *McGregor*, *supra* note 19 at para 72; see also Wallace et al, *supra* note 220, at 35; *Mason v Canada (Immigration and Citizenship)*, 2023 SCC 21 at para 105.

267 *McGregor*, *supra* note 19 at para 75.

268 Gib Van Ert , *supra* note 263 at 334.

269 Wallace et al, *supra* note 220 at 35.

270 *McGregor*, *supra* note 19 at para 80.

V. CONCLUSION:

Canada should not just symbolically assert its jurisdiction abroad. After all, a right without a remedy doesn't protect anyone. For the *Charter's* application to be worthwhile, it must produce practical consequences.[271] State action will likely be more tolerated in fast-changing legal environments, as was seen in the aftermath of the September 11th attacks, provided that the course of action is consistent with other, like-minded nations.[272] But how that action should look remains to be seen. Extraterritorial exertion of enforcement jurisdiction is a breach of international law absent the consent or a permissible rule of international law.[273] Therefore, it is essential to consider the collaboration between prescriptive and adjudicative jurisdiction to avoid ungovernable regions. National security law underwent two extreme reforms during the global war on terror. The first rapidly expanded the role of security services. The second was a cry for accountability following high profile controversies from the United States and the Canadian parallels like Khadr and Arar. Canada must do away with the constitutional grey-zone's created by *Hape* and adopt a flexible approach to the *Charter's* reach as proposed by *McGregor*. This can be done through legislating in areas that Canada has a real and substantive interest in, including ensuring that international conventions are implemented and executed in good faith, and upholding international law by extending jurisdiction to avoid lawless territory.[274] This includes ensuring constitutional oversight to state action in these areas.

Stephen Coughlan proposes certain variables to justify extraterritorial legislation.[275] The same variables can be applied to consider whether *Charter* governance of Canadian officials abroad is permissible. First, the intrusiveness of the action ought to be considered. In cases where extraterritorial impacts result without extraterritorial action, like intercepts conducted from within Canada, the *Charter* ought to guide the conduct of officials as it will not impact the sovereignty of another state. This aligns

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271 Stephen Coughlan et al, *Law Beyond Borders: Extraterritorial Jurisdiction in an Age of Globalization* (Toronto, On: Irwin Law, 2014) at 305.

272 *Ibid at* 304.

273 Forcese, *supra* note 52 at 201.

274 Coughlan et al, *supra* note 271, at 302.

275 *Ibid* at 300.

with the position adopted by the majority in *Cook*, indicating that the extraterritorial application of the *Charter* does not automatically interfere with sovereignty. The more unilateral the operation by Canadian state officials, the more necessary constitutional guidance becomes.

The second variable considers the nature of the extraterritorial application of the law. Using Canadian law to prohibit acts abroad presents a high risk that foreign sovereignty will be offended. In *Hape,* Justice LeBel relied on such prohibitive rules of international law as a guide to interpret section 32 of the *Charter.*[276] This interpretation presents a serious barrier to extraterritorial application of the *Charter*. Alternatively, legislation that is viewed as controlling, or facilitating conduct is more acceptable. The least-intrusive view of the extraterritorial application of the *Charter* is to consider its role as facilitating the lawful actions of Canadian officials abroad. However, the *McGregor* interpretations of the purpose of the *Charter* is to constrain, thus control state action.[277] *McGregor* is consistent with the Supreme Court of the United States' decision to extend extraterritorial applications of the US Constitution abroad in the context of detainees.[278] While extraterritorial action to control conduct can still present a risk of offending sovereignty, the risk is less than the prohibitive action contemplated by *Hape.* The shift in reasoning is illustrative of a more tolerant approach to extraterritorial constitutionality.

Lastly, the subject of the proposed extraterritorial legislation should be considered. Here, section 32 of the *Charter* is clear – it applies to matters within the control parliament and the provincial legislatures.[279] It is difficult to imagine a state objecting to Canadian officials acting within their own constitutional limits. It is also difficult to imagine a jurisdictional problem with Canadian courts hearing matters concerning the extraterritorial conduct of Canadian officials. So long as the *Charter* is used to guide CSIS agents alone, it should be sufficiently flexible to apply wherever those agents operate.[280] Additionally, the principle of comity will not be offended if

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276 *Hape, supra* note 10 at para 36.

277 *Ibid*; *McGregor, supra* note 19 at para 54.

278 *Boumediene v Bush*, 553 US 723 (2008).

279 *The Charter, supra note 9* at s 32.

280 *McGregor, supra* note 19 *at* para 80.

Canadian nationals are permitted to assert *Charter* protections abroad based on the nationality principle.[281]

Hape is thus inapplicable to intelligence operations as its guidance does not consider unilateral extraterritorial operations. *Hape's* prohibition on the *Charter* unless there is consent or a violation of human rights is irreconcilable with the clandestine nature of intelligence operations and unduly limits the constitution's ability to be an *ex ante* protector of human rights.[282] A new framework should prevail. What that framework should be, however, is up to the judiciary to establish when *Hape* is inevitably reconsidered. This paper concludes that the *Charter* can apply to CSIS acts abroad given parliament's decision to legislate in that space. Extraterritorial *Charter* protections need not be considered through enforcement or prescriptive lenses as its application is limited to Canadian officials acting under Canadian law. International law is more amenable to extraterritorial constitutionality than *Hape* considered. A future court ought to consider the principles of nationality, self-defence, and reasonable nexus justifications in determining whether the state action is limited by a constitutional leash, and whether the claimant is protected by a constitutional shield. Until such a framework replaces *Hape*, recourse must be sought through the *ICCPR's* extraterritorial obligations on signatory states.

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281 Coughlan et al , *supra* note 271 at 309.

282 West, *supra*, note 11 at 44 & 45.