

International Law Comes of Age: *Hape v. The Queen*

H. Scott Fairley\*

---

1. Introduction

Conventional academic and judicial wisdom in Canada has long held that international customary law is part of the Canadian common law. Rules of customary international law, subject to adequate proof thereof, may be identified and applied with the same force and effect as a common law rule, subject to a clear conflict with the expressed will of Parliament, in which case the latter prevails. This view derived from early judicial recognition of the law of nations in English common law and Canadian courts have acted consistently with the premise,<sup>1</sup> but an unambiguous affirmation of the status of customary international law in this regard was lacking until the Supreme Court of Canada elected to do so in *R. v. Hape*.<sup>2</sup> With regard to the international law context, however, *Hape* does not revise or otherwise discuss the generally understood companion principle for the courts in respect of treaties. It remains the case that the latter are neither self-executing nor have any status *per se* in Canadian domestic law, notwithstanding signature and ratification by Canada, absent legislative implementation by Parliament or if necessary by provincial legislatures, in accordance with the federal division of powers under the *Constitution Act, 1867*.<sup>3</sup>

---

\* Partner, Theall Group LLP, Toronto. This comment is a revised version of my text for remarks at the Ontario Bar Association, Joint Constitutional-Civil Liberties/ Criminal Law and Justice/International Law Section Programme: “International Charter Flight Grounded: *R. v. Hape* and Cross-Border Application of the Constitution,” Toronto, 26 November 2007. It has since benefitted from insights gained from my fellow panelists: Crown counsel Michael Fairburn and defence counsel Alan Gold, who argued *Hape* before the Supreme Court of Canada, and Peter Hogg, who was also kind enough to review what follows prior to publication. Errors that remain are mine alone.

<sup>1</sup> See e.g. *Heathfield v. Chilton* (1767), 4 Burr. 215, 98 E.R. 50; cited with approval in *Saint John v. Fraser-Brace Overseas Corp.*, [1958] S.C.R. 263 at 268-69. See R. St. J. Macdonald, “The Relationship between International Law and Domestic Law in Canada” in R. St. J. Macdonald et. al., eds., *Canadian Perspectives in International Law and Organization* (Toronto: University of Toronto Press, 1974) 88 *et seq.*

<sup>2</sup> 2007 SCC 26, 280 D.L.R. (4th) 385 [*Hape*].

<sup>3</sup> This is the well-known rule from *Ontario (A.G.) v. Canada (A.G.) (Labour Conventions)*, [1937] A.C. 325 (P.C.), requiring the “transformation” of the international obligation into domestic legislation. See discussion in H. Scott Fairley, “External Affairs

*Hape* was first and foremost a criminal law and constitutional individual rights case in the context of a criminal prosecution in Canada of an alleged money launderer. The international overlay to an otherwise unexceptional criminal trial arose when defence counsel pleaded protective provisions of the *Canadian Charter of Rights and Freedoms*,<sup>4</sup> primarily directed to the exclusion of documentary evidence obtained by Canadian federal police investigators in the Turks and Caicos, an investigation on foreign soil with the cooperation of local police authorities.

In that context, *Hape* was regarded by counsel as an essentially pure *Charter* case; neither side advanced their cause by pleading “international law” in any respect. At the end of the day, the basis on which a majority of the court effectively overruled a previous line of criminal law decisions on extraterritorial application of the *Charter*, in particular *R. v. Cook*,<sup>5</sup> came as no small surprise to all concerned.

---

in the Constitution of Canada” in Y. Le Bouthillier et. al., eds., *Selected Papers in International Law [:] Contribution of the Canadian Council on International Law, 1972-1997* (The Hague: Kluwer Law International, 1999) at 79 *et seq.*

<sup>4</sup> *Constitution Act, 1982* being Schedule B to the *Canada Act, 1982* (U.K.), 1982, c. 11, s. 52(1) [*Charter*].

<sup>5</sup> [1998] 2 S.C.R. 597 [*Cook*]. *Cook* addressed the acts of Canadian law enforcement officers in foreign jurisdictions, there, an interview of a Canadian accused in US police custody pursuant to a Canadian extradition request. The accused was advised of his right to counsel, consistent with U.S. law but not with the judicial standard imposed under *Charter* s. 10(b). The majority decision in *Cook* held at para. 25 that *Charter* standards could apply to police actions taken outside Canada provided that “(1) the impugned act falls within s. 32(1) of the *Charter*; and (2) the application of the *Charter* to the actions of the Canadian detectives in the United States does not... interfere with the sovereign authority of the foreign state and thereby generate an objectionable extraterritorial effect.” The *Cook* majority found no such extraterritorial effect and the *Charter* defence was made good.

*Cook* built on three other decisions which, taken together with *Cook*, provided the legal background argued by both sides in *Hape*: *R. v. Harrer*, [1995] 3 S.C.R. 562 (*Charter* standards not applicable to foreign (US) interrogation where foreign police authorities not acting on behalf of Canadian government authorities, but evidence obtained abroad may be excluded if its admission would jeopardize trial fairness in Canada); *R. v. Terry*, [1996] 2 S.C.R. 207 (statement by accused to US police in interrogation on behalf of Canadian police authorities given in accordance with US constitutional (*Miranda* warning) standard, but accused not advised of right to counsel in accordance with *Charter*; statement admissible in Canada, upholding conviction); and *Schreiber v. Canada (Attorney General)*, [1998] 1 S.C.R. 841 (*Charter* standards not applicable to Swiss seizure of documents pursuant to a Canadian request for assistance in a criminal investigation, prior to the

International customary law came into play on the question of whether the *Charter* should apply at all to Canadian police conduct outside Canada in the territory of a foreign sovereign. The majority opinion authored by LeBel J., joined by McLachlin C.J.C. and Fish, Deschamps and Charron JJ., found that the *Charter* could not be applied extraterritorially, on the basis that the “application” provisions in *Charter* section 32(1) could not be interpreted to go that far and remain consistent with settled principles of customary international law on point:

The words of s. 32(1) – interpreted with reference to binding principles of customary international law – must ultimately guide the inquiry . . . [T]he extraterritorial implications of applying the Charter are, in my view, central to the question whether the activity in question falls under s. 32(1) in the first place. The inquiry begins and ends with s. 32(1) of the Charter.<sup>6</sup>

Prior to formulating his analytical approach and applying it to the facts of the case, LeBel J. both confirmed and clarified previous judicial thinking on the role and status of international law as a matter of Canadian domestic law. Those general observations and their potential significance for future cases, both civil and criminal, in and out of the constitutional context, are my principal focus here.

Bastarache J. (joined by Abella and Rothstein JJ.) and Binnie J., each wrote separate reasons for judgment, concurring in the result that the conviction should be affirmed. The separate concurrences neither disputed the general propositions of the majority on the status of international law in Canadian law nor took issue with the majority’s treatment of related doctrine – comity – and the statutory presumption of legislative conformity with international law. Where the Court split quite profoundly, however, was on issues of *Charter* analysis, methodology and application to the specific circumstances of Canadian police conduct abroad, and the appropriate consequences that should attach thereto in the context of a

---

issuance of a search warrant or other judicial authorization in Canada). See discussion by LeBel J. in *Hape*, *supra* note 2, at paras. 71-82.

- <sup>6</sup> *Hape*, *supra* note 2, at para. 93. Section 32(1) provides that the *Charter* applies:
- (a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and
  - (b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

In respect of the “authority of Parliament,” LeBel J. added: “A criminal investigation in the territory of another state cannot be a matter within the authority of Parliament or the provincial legislatures, because they have no jurisdiction to authorize enforcement abroad;” see *Hape*, *ibid.* at para. 94.

domestic criminal trial. In short, the two concurring opinions characterize all those issues as being essentially Canadian police conduct to which the *Charter* could properly apply, and which would not engage or interfere with a foreign sovereign so that international law would have to be invoked for a proper resolution of the case.<sup>7</sup> This comment does not address in detail the impact of *Hape* as a matter of *Charter* jurisprudence. Rather, I focus principally on the judges' recognition and application of international law sources, which is the novel aspect of the case.

## 2. Automatic Incorporation of Customary Law into Canadian Common Law

The principal clarification provided by the Court is its affirmation of the "adoptionist" theory that customary international law is part of the law of Canada. After citing leading English authority on point<sup>8</sup> and previous Canadian decisions supporting that view,<sup>9</sup> but also noting the Supreme Court's failure to affirm the proposition in so many words, LeBel J. took that step forward:

Despite the Court's silence in some recent cases, the doctrine of adoption has never been rejected in Canada. Indeed, there is a long line of cases in which the Court has either formally accepted it or at least applied it. In my view, following the common law tradition, it appears that the doctrine of adoption operates in Canada such that prohibitive rules of customary international law should be incorporated into domestic law in the absence of conflicting legislation. The automatic incorporation of such rules is justified on the basis that international custom, as the law of nations,

---

<sup>7</sup> See *Hape*, *ibid.* at para. 125 (*per* Bastarache J.): "Where we disagree is on the *Charter's* role in this process. My colleague sees international law as the proper vehicle . . . I prefer to continue to rely on the *Charter*, as this Court attempted to do in *Cook* . . ." Also see *Hape*, *ibid.* at para. 183 (*per* Binnie J.):

While the application of *Cook* is not without practical and theoretical difficulties, as my colleagues Bastarache and LeBel JJ. show, there is sufficient flexibility in the notion of *objectionable* extraterritorial effect for such difficulties to be resolved over time in circumstances more challenging than those of the routine police investigations at issue here . . . We should, in my view, avoid premature pronouncements that restrict the application of the *Charter* to Canadian officials operating abroad in relation to Canadian citizens [emphasis in original].

<sup>8</sup> *Hape*, *ibid.* at para. 36, *per* LeBel, J., quoting with approval *Trendtex Trading Corp. v. Central Bank of Nigeria*, [1977] 1 Q.B. 529 (C.A.) at 554 (*per* Denning L.J.).

<sup>9</sup> *Hape*, *ibid.* at para. 37, citing *inter alia*, *Bouzari v. Islamic Republic of Iran* (2004), 71 O.R. (3d) 675 (C.A.) at para. 65: "[C]ustomary rules of international law are directly incorporated into Canadian domestic law unless explicitly ousted by contrary legislation" (leave to appeal refused, [2005] 1 S.C.R. vi); see also *Reference Re Foreign Legations*, [1943] S.C.R. 208.

is also the law of Canada unless, in a valid exercise of its sovereignty, Canada declares that its law is to the contrary. Parliamentary sovereignty dictates that a legislature may violate international law, but that it must do so expressly. Absent an express derogation, the courts may look to prohibitive rules of customary international law to aid in the interpretation of Canadian law and the development of the common law.<sup>10</sup>

This affirmation by the Court provides the cornerstone for a long overdue comprehensive discussion of the relationship between international law and domestic law as interpreted and applied in Canada. LeBel J. specifically detailed international authority recognizing the sovereign equality of states as a governing principle of customary law, together with the co-relative duties of non-intervention in the territory of and respect for the territorial sovereignty of foreign states.<sup>11</sup> Taken together, LeBel J. affirmed that these norms “cannot be regarded as anything less than firmly established rules of customary international law.”<sup>12</sup> Therefore, it followed that:

[e]very principle of customary international law is binding on all states unless superseded by another custom or by a rule set out in an international treaty. As a result, the principles of non-intervention and territorial sovereignty may be adopted into the common law of Canada in the absence of conflicting legislation. These principles must also be drawn upon in determining the scope of extraterritorial application of the Charter.<sup>13</sup>

---

<sup>10</sup> *Hape, ibid.* at para. 39 [emphasis added].

<sup>11</sup> *Ibid.* at paras. 40-46. In citing various authorities, (see esp. *Island of Palmas Case Netherlands v. United States*) (1928), 2 R.I.A.A. 829 at 838-39), the LeBel J. opinion does not mention the twentieth-century codification of these principles in the *Charter of the United Nations*, 26 June 1945, U.N. Charter (entered into force 24 October 1945), Art. 2(1), (4) and (7), as follows:

Art. 2

(1) The Organization is based on the principle of the sovereign equality of all its Members.

...

(4) All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, . . .

...

(7) Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state

...

<sup>12</sup> *Hape, ibid.*, at para. 46.

<sup>13</sup> *Ibid.*

The balance of the Court's general discussion of the treatment of international law under domestic law addressed the companion principle of "comity" between nations outside the context of binding legal rules, and the well-known, and here further invigorated, judicial presumption of statutory conformity with international law. Unlike the status of customary law in Canadian law, which had heretofore lacked the unambiguous judicial imprimatur of Canada's highest court, neither of these two established judicial tools was in any doubt. The Court's elaboration of both is nonetheless significant.

*a) Comity*

Comity has served as a principal foundation in private international law for the modern Canadian judicial approach to the recognition and enforcement of foreign judgments since the Supreme Court's 1990 decision in *Morguard Investments Ltd. v. De Savoye*.<sup>14</sup> Canadian lower courts applied that decision with virtually uniform consistency, even though the Supreme Court's affirmation of La Forest J.'s essentially *obiter* analysis in *Morguard* did not come until almost thirteen years later in *Beals v. Saldanha*.<sup>15</sup> As a matter of public international law governing the relations between states, LeBel J. noted in *Hape* that "[c]omity refers to informal acts performed and rules observed by states in their mutual relations out of politeness, convenience and goodwill, rather than strict legal obligation."<sup>16</sup> So understood, "comity is more a principle of interpretation rather than a rule of law, because it does not arise from formal obligations."<sup>17</sup> LeBel J. specifically referenced La Forest J.'s understanding of comity in the private international law context of *Morguard* as "the deference and respect due by other states to the actions of a state legitimately taken within its territory,"<sup>18</sup> and nineteenth-century English authority for the

---

<sup>14</sup> [1990] 3 S.C.R. 1077 [*Morguard*]; for discussion see H. Scott Fairley, "Enforcement of Foreign Judgments by Canadian Courts: A New Age of Uncertainty" (1996), 2 Can. Int'l Law 1. See also Joost Blom, "Reform of Private International Law by Judges: Canada as a Case Study" in J. Fawcett, ed., *Reform and Development of Private International Law: Essays in honour of Sir Peter North* (Oxford: Oxford University Press, 2002) at 31-47.

<sup>15</sup> [2003] 3 S.C.R. 416; see H. Scott Fairley, "Open Season: Recognition and Enforcement of Foreign Judgments in Canada After *Beals v. Saldanha*" (2005), 11 ILSA J. Int'l & Comp. L. 305.

<sup>16</sup> *Hape*, *supra* note 2 at para. 47, citing R. Y. Jennings and A. Watts eds., 1 *Oppenheim's International Law*, 9th ed. (London: Longman, 1996) at 50-51.

<sup>17</sup> *Hape*, *ibid.*

<sup>18</sup> *Ibid.*, citing *Morguard*, *supra* note 13 at 1095.

proposition that the principle “induces every sovereign state to respect the independence and dignity of every other sovereign state.”<sup>19</sup>

Thus, comity becomes a prescriptive tool for judicial sensitivity to external impacts and consequences in the interpretation of Canadian law. Here, however, the common law is speaking primarily in relation to the enacted laws of Canada. LeBel J. concluded: “Where our laws – statutory and constitutional – could have an impact on the sovereignty of other states, the principle of comity will bear on their interpretation.”<sup>20</sup>

What is interesting here is that the majority opinion of the Court drew no upfront distinction in the application of this interpretive tool as between statutory law and constitutional language. The latter clearly has a different order of status as the fundamental law of the nation, effectively removed from legislative whim or any practicable ability to repeal or amend. One may question whether, as a stand-alone proposition, the principle of comity should apply in like manner to constitutional text, which, in the context of *Charter* interpretation, limits conflicting expressions of legislative will altogether. Nevertheless, LeBel J. did delineate clear limitations of the principle out of the international context from which the principle is derived:

The principle of comity does not offer a rationale for condoning another state’s breach of international law....

....

Comity means that when one state looks to another for help in criminal matters, it must respect the way in which the other state chooses to provide the assistance within its borders. That deference ends where clear violations of international law and fundamental human rights begin. If no such violations are in issue, courts in Canada should interpret Canadian law, and approach assertions of foreign law, in a manner respectful of the spirit of international cooperation and the comity of nations.<sup>21</sup>

The majority’s discussion of comity was framed in language that deferred – with considerable generosity – to the policy objective of facilitating mutual legal assistance in “an era characterized by transnational criminal activity.”<sup>22</sup> It remains open to argument

---

<sup>19</sup> *Ibid.*, citing *The Parlement Belge* (1880), 5 P.D. 197 (C.A.).

<sup>20</sup> *Idid.* at para. 48.

<sup>21</sup> *Ibid.* at paras. 51, 52.

<sup>22</sup> *Ibid.* at para. 52; on the majority opinion’s concern with “[t]he [g]lobalization of [c]riminal [a]ctivities and the [n]eed for [i]nternational [c]ooperation”, see the discussion

that *Hape* limits – perhaps more than was necessary for purposes of resolving the instant case – the possible reach of otherwise constitutionally protected rights of accused persons in future cases. Yet it must also be acknowledged that the international law of extraterritoriality, itself resting on a competitively principled legal foundation, urged just such a conclusion. That analysis, once embraced by the *Hape* majority, decided the issue in broader terms as a precedent going forward.

The history of *Charter* adjudication strongly demonstrates that international law, particularly in the field of international human rights law, has consistently served to expand the judicially interpreted scope, content and application of constitutionally protected human rights in Canada.<sup>23</sup> In this instance, however, and for purposes of future application, it is clear that the sword carries two edges and has cut the other way from the perspective of individual litigants.

*b) Conformity with International Law*

The *Hape* majority did not break any new ground here, but arguably enriches the existing turf of established doctrine.<sup>24</sup> First, LeBel J. characterized the presumption as a “rule of judicial policy” such that “courts will strive to avoid constructions of domestic law pursuant to which the state would be in violation of its international obligations, unless the wording of the statute clearly compels that result.”<sup>25</sup> The LeBel reasons elaborated that the presumption is twofold, the first aspect being that the legislature is presumed to act in compliance with its obligations “as a signatory to international treaties and as a member of the international community.”<sup>26</sup> The second aspect of the presumption goes further, however, treating the corpus of international law, both “customary and conventional...,” as a necessary part of the contextual background to the legislative process. For judges, at least,

---

by LeBel J., *ibid.*, at paras. 96-101.

<sup>23</sup> See Gibran van Ert, *Using International Law in Canadian Courts* (Alphen aan den Rijn: Kluwer Law International, 2002), Ch. 10 § 7.3 at 238-75 [van Ert, *Using International Law*]; William Schabas, *International Human Rights Law and the Canadian Charter*, 2nd ed. (Toronto: Carswell, 1996); Anne F. Bayefsky, *International Human Rights Law: Use in Canadian Charter of Rights and Freedoms Litigation* (Toronto: Butterworths, 1992).

<sup>24</sup> See Ruth Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4th ed. (Markham, Ontario and Vancouver: Butterworths, 2002) at 421-39.

<sup>25</sup> *Hape*, *supra* note 2 at para. 53.

<sup>26</sup> *Ibid.*

[t]hose values and principles form part of the context in which statutes are enacted, and courts will therefore prefer a construction that reflects them. The presumption is rebuttable, however. Parliamentary sovereignty requires courts to give effect to a statute that demonstrates an unequivocal legislative intent to default on an international obligation.<sup>27</sup>

The extent of the presumption elaborated in *Hape*, if not its very existence, may be something of a revelation to many of our elected representatives toiling away in legislative and parliamentary committees, but there it is. The tool remains essentially the same, but the LeBel exegesis appears to sharpen it significantly for future application. For example, it should make no difference that a statute was enacted before or after a treaty is ratified by Canada or a customary norm of international law subsequently crystallizes in state practice; a court will approach the task of interpretation in terms of the relevant contemporary international law context. Resort to contemporary international law will also tend to reinforce a similarly contemporary, “purposive” and “generous” interpretation of constitutional language, already established by Canada’s highest court.<sup>28</sup> All of this may serve to effectively buttress Lord Sankey’s famous metaphor for the Constitution as a “living tree,”<sup>29</sup> steering constitutional interpretation further away from static notions of original intent.<sup>30</sup> Of course, clear enacted language contrary to international law is still a decisive answer that any court must recognize and apply.

LeBel J. went on – and here lies perhaps a good deal of irony in the result – to emphasize the role that international law has played in amplifying *Charter* rights by interpreting them against the rich background

---

<sup>27</sup> *Ibid.*

<sup>28</sup> On purposive interpretation as a dominant theme, see *Hunter v. Southam*, [1984] 2 S.C.R. 145 at 156; *R. v. Big M. Drug Mart*, [1985] 1 S.C.R. 295 at 344, and commentary in H. Scott Fairley, “Developments in Constitutional Law: The 1984-1985 Term” (1986) 8 Sup. Ct. L. Rev. 53 at 54-55, and 56-70; see generally Peter W. Hogg, *Constitutional Law of Canada*, 5th ed., looseleaf, supplemented (Toronto: Thomson-Carswell, 2007), vol. 1, §§36.8(b) and (c).

<sup>29</sup> *Edwards v. A.G. Canada*, [1930] A.C. 124 at 136.

<sup>30</sup> Arguments of “original intent” championed by the late US Supreme Court Chief Justice William Rehnquist and current US Supreme Court Justice Antonin Scalia in relation to the United States Constitution have not resonated with Canadian courts in *Charter* interpretation. However, they remain a pivotal focus of controversy in American judicial and scholarly debate over the appropriate scope of judicial review. For discussion, see and compare Laurence Tribe, *Constitutional Choices* (Cambridge, Mass.: Harvard University Press, 1985); Robert H. Bork, *The Tempting of America* (New York: The Free Press, 1990). The *Hape* precedent provides an additional rationale for why Original Intent should not become a mantra for constitutional interpretation in Canada.

of international human rights law and Canada's assumed obligations thereunder. Dickson C.J.C. in *Slaight Communications Inc. v. Davidson*,<sup>31</sup> himself vindicating a view previously expressed in a dissenting opinion prior to assuming leadership of the Court, was quoted for this now widely appreciated proposition:

The content of Canada's international human rights obligations is, in my view, an important indicia of the meaning of the "full benefit of the Charter's protection." I believe that the Charter should generally be presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents which Canada has ratified.<sup>32</sup>

*Hape* does not undercut this proposition in relation to the content of Charter rights in any way. To reiterate, however, the Court did apply international law rules of extraterritorial limitation to limit the reach of the Charter beyond Canada's borders in this case, at the same time making conformity with international law a litmus test for future cases.

The additional proposition that principles of international law not related to human rights *per se* should not receive the same benefit of the presumption of conformity, where the effect of applying international law is to circumscribe the scope of the Charter rather than enlarge it, was raised by way of *obiter* in *R. v. Cook*,<sup>33</sup> which *Hape* effectively overruled.<sup>34</sup> In *Cook*, Bastarache J. suggested:

That an interpretation of such [Charter] rights might place the state in violation of its international law obligations should be accorded less weight than in the case of a mere statute, an expression of the legislative will of the state as it may exist from time to time.<sup>35</sup>

*Hape* decisively forecloses a differential application of the presumption of conformity as between constitutional and statutory contexts. Despite the reservations expressed above in relation to the *Hape* majority's treatment of comity in similar terms, I argue here that *Hape* nevertheless takes the correct approach on the legal question.

---

<sup>31</sup> [1989] 1 S.C.R. 1038 [*Davidson*].

<sup>32</sup> *Hape*, *supra* note 2 at para. 55, quoting *Davidson*, *ibid.* at 1056, quoting in turn *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313 at 349 (*per* Dickson J., dissenting).

<sup>33</sup> *Supra* note 5.

<sup>34</sup> Binnie J. expressed this view clearly in *Hape*, *supra* note 2 at para. 182, but the majority opinion did not; the case editors formally classify *R. v. Cook* as being "distinguished" rather than "overruled."

<sup>35</sup> *Cook*, *supra* note 5 at para. 147.

The rule of law, international as well as domestic, readily distinguishes itself from notions of mere courtesy; thus, the latter may appear less persuasive without more in the context of constitutional interpretation.<sup>36</sup> Comity is a discretionary judicial consideration where fidelity to constitutional norms clearly is not. However, the proposition that the *Charter* does not presumptively accord with governing rules of international law, but Canadian statutes do, appears inherently contradictory and is much more difficult to reconcile on a legally principled footing. Moreover, from an international perspective, asymmetric application of the presumption puts the rights of Canadians on a higher plain as against other states and their nationals, refuting the basic principle of sovereign equality of states, which Canada otherwise accepts and *Hape* affirms in upholding the integration of customary law into Canadian domestic law.<sup>37</sup> Absent specific language of the *Charter* expressly parting company with international law so as to rebut the presumption, just as a statute can do, the better answer must be that the presumption should apply with equal force to constitutional language.

### 3. *Extraterritoriality at International Law and the Ability to Legislate Extraterritorially*

The majority's analysis of the principal international law bases for asserting prescriptive or adjudicative jurisdiction – territoriality, nationality, and universality – is useful<sup>38</sup> but needs no further elaboration here. It is important to note, however, that the Court's care in its treatment of and the weight it gave to the limited mandate accorded by international law to extraterritorial acts is consistent with Canadian practice more generally. Canada consistently takes serious exception to the extraterritorial acts of other states, even to the extent of enacting blocking legislation to preclude judicial recognition and enforcement by Canadian courts of acts of other states so designated by Parliament.<sup>39</sup> There is no

---

<sup>36</sup> This is particularly the case where, unlike an accepted legal rule, notions of comity may not be universally shared. In the field of private international law, for example, comity – now the cornerstone to the approach of Canadian courts in the recognition and enforcement of foreign judgments – enjoys less currency in other jurisdictions; see discussion in H. Scott Fairley, "In Search of a Level Playing Field: The Hague Project on Jurisdiction and the Recognition and Enforcement of Foreign Judgments" in Chi Carmody *et. al.*, eds., *Trilateral Perspectives on Legal Issues: Conflict and Coherence* (Irvington: Transnational Publishers Inc., 2003) 57 at 60-69.

<sup>37</sup> This discussion acknowledges and draws considerable sustenance from similar points of argument raised in van Ert, *Using International Law*, *supra* note 23 at 251-52.

<sup>38</sup> *Hape*, *supra* note 2 at paras. 57-65.

<sup>39</sup> See *Foreign Extraterritorial Measures Act*, R.S.C. 1985, c. F-29 (as amended by S.C. 1996, c.28); for discussion, see W. C. Graham, "The *Foreign Extraterritorial*

question that the extraterritorial zeal of other members of the international community, most notably that of our good neighbour to the south,<sup>40</sup> has been and remains a perennial area of sensitivity for Canadian governments and legislators.

None of the foregoing undermines the sovereign reality that the laws of Canada, inclusive of its fundamental law, can apply extraterritorially if they clearly say so. The Court makes clear that Parliament has the constitutional authority to legislate extraterritorially, and has clearly done so on several occasions.<sup>41</sup> The issue for the Court, however, was filling in the blank in favour of extraterritorial application, where to do so would involve a violation of international law. Clarity in constitutional language or in statutory language at the federal level would have yielded an affirmative answer to both questions, requiring the Court to affirm Parliament's power to legislate extraterritorially and the validity of enacted language for domestic legal purposes, notwithstanding a violation of international law.<sup>42</sup>

At the end of the day, the LeBel majority concluded, with the aid of a contextual international law background, that the language of the *Charter* does not clearly provide for extraterritorial application, and that, absent express clarity on point, applicable customary international law

---

*Measures Act*" (1986) 11 Can. Bus. L.J. 410; and H. Scott Fairley, "Exceeding the Limits of Territorial Bounds: The Helms-Burton Act" (1996) 34 Can. Yrbk Int'l L. 161 at 178-83.

<sup>40</sup> See Fairley, *ibid.*; H. Scott Fairley and John Currie, "Projecting Beyond the Boundaries: A Canadian Perspective on the Double-Edged Sword of Extraterritorial Acts" in M. K. Young and Y. Iwasawa, eds., *Trilateral Perspectives on International Legal Issues* (Irvington: Transnational Publishers Inc., 1996) at 119 *et seq.*

<sup>41</sup> *Hape*, *supra* note 2 at para. 66, citing discussion of international law sources by McLachlin J. in *R. v. Terry*, [1996] 2 S.C.R. 207 at para. 15 ("The principle that a state's law applies only within its boundaries is not absolute;" see *The Case of the S. S. Lotus*, (1927), P.C.I.J. Ser. A, No. 10); *Statute of Westminster, 1931* (U.K.), 22 Geo. 5, c. 4, s. 3.

<sup>42</sup> Where constitutional language is concerned, the simple answer is that it is the "supreme law of Canada;" see the *Charter*, *supra* note 4, s. 52(1). In respect of legislative enactments, federal legislative powers are symmetrical in relation to both extraterritorial reach and violations of international law, but provincial powers are not. Provincial legislative incapacity to legislate extraterritorially is well established in constitutional language and the authorities; see Hogg, *supra* note 28 at § 13.3. Whether or not a province could legislate within its territory, but still in violation of international law remains an issue which has not been definitively resolved. Contemporary opinion nevertheless suggests that provincial and federal powers to violate international law are essentially symmetrical. See discussion in van Ert, *Using International Law*, *supra* note 23 at 58-65; but see G. V. La Forest, "May the Provinces Legislate in Violation of International Law" (1961) 39 Can. B. Rev. 78.

incorporated into Canadian common law, considerations of comity, and the presumption of conformity with international law militated against any such interpretation of section 32(1) of the *Charter*.

#### *4. Reconciling Respect for International Law with Domestic Constitutional Guarantees*

In concluding that the *Charter* did not apply to the Canadian police officers' investigation in Turks and Caicos, LeBel J. made clear that various legal provisions of the *Charter*<sup>43</sup> could be reinserted by the Canadian domestic trial court in aid of an *ex post facto* review of investigation conduct, "pursuant to which evidence may be excluded to preserve trial fairness."<sup>44</sup> For the LeBel majority, "[t]he inquiry under these provisions relates to the court's responsibility to control its own process and is fundamentally different from asking at trial whether the Canadian officer's conduct [abroad] amounted to a violation of a particular *Charter* right."<sup>45</sup> As to the latter point, extraterritorial application of the *Charter ab initio* law did not appear to be a viable alternative, once international considerations were factored in.

The activity in question must also fall within the "matters within the authority of" Parliament or the legislature of each province. A criminal investigation in the territory of another state cannot be a matter within the authority of Parliament or the provincial legislatures, because they have no jurisdiction to authorize enforcement abroad. Criminal investigations, like political structures or judicial systems, are intrinsically linked to the organs of the state, and to its territorial integrity and internal affairs. Such matters are clearly within the authority of Parliament and the provincial legislatures when they are in Canadian territory; it is just as clear that they lie outside the authority of those bodies when they are outside Canadian territory.<sup>46</sup>

With these considerations in mind the LeBel reasons adopt and apply a two-stage analysis, with two components to the first stage, as follows:

1. (a) [I]s the conduct at issue that of a Canadian State actor?  
(b) [I]f the answer is yes, it may be necessary, depending on the facts of the case, to determine whether there is an exception to the principle of sovereignty that would justify the application of the *Charter* to the extraterritorial activities of the state actor. In most cases, there will be no such exception and the *Charter* will not apply.

---

<sup>43</sup> Sections 7 to 11(d).

<sup>44</sup> *Hape*, *supra* note 2 at para. 91.

<sup>45</sup> *Ibid.*

<sup>46</sup> *Ibid.* at para. 94.

2. [Assuming no application of the Charter under the first stage of the test,] [t]he inquiry would then move to the second stage, at which the court must determine whether evidence obtained through the foreign investigation ought to be excluded at trial because its admission would render the trial unfair.<sup>47</sup>

Applying this test, the majority determined that Canadian police officers were clearly state actors, but the search conduct in question was carried out on foreign soil under foreign legal authority and as such “is not a matter within the authority of Parliament” pursuant to section 32(1) of the *Charter* and there was no evidence of consent by foreign legal authorities to the exercise of Canadian extraterritorial enforcement jurisdiction to vitiate this conclusion.<sup>48</sup>

Going to the second, *ex post facto* stage of the test, LeBel J. noted that the trial judge determined no unfairness to the accused would arise from admitting the evidence obtained by the Canadian police search in Turks and Caicos. That issue was also not argued on appeal.<sup>49</sup> While those two elements were enough to dispose of the fairness issue, the majority also noted that the police conduct in question in no way undermined the reliability of the evidence admitted, the accused’s “reasonable expectation” must be that Turks and Caicos law would apply to his business activity there, and there was no evidence of the requirements of Turks and Caicos law not being met.<sup>50</sup>

The minority concurring judgments, as noted earlier, agreed in the result that there was no concern for trial fairness and that the conviction should be upheld, but did so within the four corners of previously established *Charter* analysis, taking issue with the majority’s resort to “international law standards” as an unnecessary introduction of a “new set of standards to the mix.”<sup>51</sup>

For the Bastarache minority, it remained important to preserve some elements of *Cook*, in particular the applicability of *Charter* standards to independent Canadian police action abroad, “i.e., where the foreign state takes absolutely no part in the action and does not subject the action to its laws.”<sup>52</sup> But where the host state is involved, the Bastarache minority would still apply a *Charter* test irrespective and independent of international law standards, suggesting “there will be no *Charter* violation

---

<sup>47</sup> *Ibid.* at para. 113; I have divided the paragraph into sections and added emphasis.

<sup>48</sup> *Ibid.* at paras. 115-16.

<sup>49</sup> *Ibid.* at para. 119.

<sup>50</sup> *Ibid.* at paras. 120-21.

<sup>51</sup> *Ibid.* at para. 173 (*per* Bastarache J.)

<sup>52</sup> *Ibid.* at para. 176.

where the Canadian officers abide by the laws of the host state,” subject to a rebuttal of the presumption that the laws of the foreign state do not fall substantially short of Canadian standards of justice. “Unless it [can be] shown that those laws or procedures are substantially inconsistent with the fundamental principles emanating from the *Charter*, they will not give rise to the breach of a *Charter* right.”<sup>53</sup>

Applying this test, Bastarache J. quickly concluded that Canadian police authorities were acting under Turks and Caicos law and “there was no evidence that the local laws had been breached or did not meet fundamental human rights standards.”<sup>54</sup>

What is the fundamental difference in the two approaches? In practical terms for the accused in *Hape*, there is not much difference at all. Bastarache J. took the view that there was “no meaningful distinction between *ex post facto* and *ex ante* application of the *Charter* to Canadian officials.”<sup>55</sup> Outside the four corners of its propounded test, the LeBel majority left open the additional “possibility” for future cases, of a further *caveat*, again *ex post facto* in application, that a *Charter* section 24(1) remedy might be justified if “participation by Canadian officers in activities in another country would violate Canada’s international human rights obligations . . .”<sup>56</sup>

Under the Bastarache approach, LeBel J.’s *ex post facto* safety net to ensure Canadian trial fairness appears akin to looking through the wrong end of the telescope, where the task of *Charter* interpretation informed by the *corpus* of international law becomes a spurious complexity in between. In short, Bastarache J. did not think the majority’s design holds up. In reaching such a view, however, the Bastarache concurrence gave no weight to the doctrine of extraterritoriality as an independent legal value in the context of Canadian public authorities venturing abroad. From the perspective of a Canadian international lawyer, that is a surprising point of view to emanate from the highest court of a nation that has taken a consistently strong stand against the extraterritorial reach of public authority coming the other way.<sup>57</sup>

The separate concurrence of Binnie J. did not proffer any refinement of the test in *Cook*, and concluded that the appeal can be dismissed

---

<sup>53</sup> *Ibid.* at paras. 176, 174.

<sup>54</sup> *Ibid.* at para. 179.

<sup>55</sup> *Ibid.* at para. 177.

<sup>56</sup> *Ibid.* at para. 101.

<sup>57</sup> See discussion and sources cited, *supra* notes 39 and 40 and accompanying text.

consistent with that case and its companions.<sup>58</sup> In his view, the Court did not need to overrule *Cook*, at least not in this case which Binnie J. “[d]id not believe . . . afford[ed] a proper springboard for such sweeping conclusions” on the issue of extraterritoriality.<sup>59</sup> For him, the majority came too far too fast, so much as to provoke his resort to the Bard: “There are more things in heaven and earth, Horatio, [t]han are dreamt of in your philosophy.”<sup>60</sup> Consequently, Binnie J. “would retain, at least for the present, the *Cook* test of “objectionable extraterritorial effect,” while leaving the door open to future developments in assessing the extraterritorial application of the *Charter*.”<sup>61</sup>

### 5. Concluding Comments and Prospectus

Whatever one’s view of the particular vehicle chosen by the Supreme Court to affirm the role and status of international law as part of the domestic legal order, it is of considerable value that the Court has finally done so.

Judicial awareness of the law of nations as part of the law of Canada will be a welcome development for some lawyers, but also a problematic one for many. The sources of international law<sup>62</sup> are not a particularly familiar feature on the typical landscape understood by most Canadian practitioners. When it comes to issues of *Charter* interpretation, international law may be less obscure for some criminal lawyers than their

<sup>58</sup> *Hape*, *supra* note 2, at paras. 182-83.

<sup>59</sup> *Ibid.* at para. 182.

<sup>60</sup> *Ibid.* at para. 184, quoting *Hamlet*, Act I, Scene V.

<sup>61</sup> *Ibid.* at para. 189. In this regard, Justice Binnie appears to carry the “torch” for judicial restraint, which, as a general proposition, is to be welcomed. For a complementary view on point, see H. Scott Fairley, “Deciding not to Decide: Judicial Restraint in Charter Adjudication” in G. Beaudoin, ed., *As the Charter Evolves* (Ottawa: Canadian Bar Association 1990) 49 *et seq.*

<sup>62</sup> The most convenient authoritative summary of the basic categories for the “sources” of international law is found in Article 38(1) *Statute of the International Court of Justice*, 26 June 1945, UN Charter (entered into force 24 October 1945):

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
  - a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
  - b. international custom, as evidence of a general practice accepted as law;
  - c. the general principles of law recognized by civilized nations;
  - d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law

counterparts in civil and commercial litigation. However, the *Hape* precedent should resonate for all litigators, whatever their principal stripe.

How does one articulate and prove arguments of this kind? The first thing to appreciate in this regard is that the courts take judicial notice of international law, just as they do of Canadian statute and common law.<sup>63</sup> As such, these arguments are to be distinguished from the typical approach of Canadian courts with respect to foreign law, which must be proved essentially as fact evidence, typically through expert affidavits.<sup>64</sup> This is not to say that expert witnesses will not enhance your ability to persuade, but you can certainly cite cases and other authorities without resorting to expert testimony. However you do it, a broad realm awaits to buttress or revise received understandings of domestic law.

In the context of *Charter* interpretation, where the deployment of international law sources and argument has some longstanding currency in the criminal law field, *Hape* cuts against the general trend to expanding the scope of *Charter* rights, but it does not undercut substantive content. What *Hape* clearly does do, however, is limit the extension of the *Charter* to embrace related conduct abroad for purposes of defences to a criminal prosecution at home. As a matter of judicial policy in an era of increasingly transnational crime, *Hape* must be regarded as a clear victory for the Crown, giving added scope for Canadian police investigations in other countries.

Beyond its particular facts or consequences, *Hape* unambiguously affirms the appropriateness and importance of the international dimension to understanding the contextual will, not only of the legislature, but also of the framers of the Constitution. In both contexts, the content of relevant international law norms now has increased value to inform a purposive and contemporary interpretation of enacted language.

---

<sup>63</sup> See e.g. *The Ship North v. The King* (1906), 37 S.C.R. 385; *Jose Pereira E. Hijos S.A. v. Canada (Attorney General)*, [1997] 2 F.C. 84 (T.D.); *Pan American World Airways Inc. v. the Queen* (1979), 96 D.L.R. (3d) 267 (F.C.T.D.): (expert opinion on treaty interpretation not admissible as evidence but may be employed as argument); for discussion, see Gibran van Ert, "The Admissibility of Legal Evidence" (2005) 84 Can. B. Rev. 31. The Quebec *Civil Code* also provides directly for judicial notice of international law; see *Code Civil*, S.Q. 1991, c. 64, Art. 2807.

<sup>64</sup> "Foreign law is treated like a fact, which must be specifically pleaded . . . ;" see J. Walker, *Castel and Walker: Canadian Conflict of Laws* 6th ed. looseleaf (Markham: Butterworths, 2007) at §7.1.

The international law background does matter and makes a difference. More often than not, consideration of the international legal dimension has better served the cause of individual litigants than a court either foregoing or disallowing such recourse. The new recognition it has been accorded also holds promise for broadening the scope of available argument in relation to governmental and private action in civil as well as criminal cases. Whether the *Hape* majority had to go as far as it did in apparently overruling the trend of previous authority on the extraterritoriality issue will likely remain a source for vigorous debate in Canadian criminal law circles. Regardless of where one comes out on that question, however, this case will endure and remain important for the statements of general principle discussed here.