



SUPREME COURT OF CANADA

CITATION: R. v. McGregor, 2023
SCC 4

APPEAL HEARD: May 19, 2022
JUDGMENT RENDERED:
February 17, 2023
DOCKET: 39543

BETWEEN:

Corporal C.R. McGregor
Appellant

and

His Majesty The King
Respondent

- and -

**Attorney General of Ontario, Canadian Constitution Foundation, British
Columbia Civil Liberties Association, Canadian Civil Liberties Association
and David Asper Centre for Constitutional Rights**
Interveners

CORAM: Wagner C.J. and Moldaver, Karakatsanis, Côté, Brown,* Rowe, Martin,
Kasirer and Jamal JJ.

**REASONS FOR
JUDGMENT:**
(paras. 1 to 45)

Côté J. (Wagner C.J. and Moldaver, Kasirer and Jamal JJ.
concurring)

JOINT Karakatsanis and Martin JJ.
CONCURRING
REASONS:
(paras. 46 to 95)

CONCURRING Rowe J.
REASONS:
(paras. 96 to 115)

NOTE: This document is subject to editorial revision before its reproduction in final form in the *Canada Supreme Court Reports*.

* Brown J. did not participate in the final disposition of the judgment.

Corporal C.R. McGregor

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Present: Wagner C.J. and Moldaver, Karakatsanis, Côté, Brown*, Rowe, Martin,
Kasirer and Jamal JJ.

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Constitutional law — Charter of Rights — Search and seizure — Canadian military investigators investigating criminal activity by member of Canadian Armed Forces posted abroad — Foreign police force assisting military investigators by obtaining warrant from local magistrate authorizing search of member’s residence abroad and electronic devices found therein — Military investigators and foreign police executing warrant and searching member’s electronic devices — Military judge ruling that evidence obtained during search admissible at trial and member convicted of several offences — Whether search infringed member’s right to be free from unreasonable search and seizure — Canadian Charter of Rights and Freedoms, s. 8.

M was a member of the Canadian Armed Forces (“CAF”) posted to the Canadian Embassy in Washington, D.C. and residing in Alexandria, Virginia. By virtue of his position, he held diplomatic immunity. Following the discovery by another member of the CAF posted in Washington of two audio recording devices in her residence, the Canadian Forces National Investigation Service (“CFNIS”) investigated the matter and concluded that there were reasonable grounds to believe M had committed the offences of voyeurism and possession of a device for surreptitious interception of private communications. CFNIS sought the assistance of the Alexandria police for the purpose of obtaining a warrant under Virginia law. The Canadian Embassy waived M’s immunity with respect to his residence and property and the Alexandria police obtained a warrant to search his residence and objects found therein,

including electronic devices, and to analyze the seized items.

When CFNIS and Alexandria police executed the search warrant, forensic investigators scanned the contents of some electronic devices found in M's residence to determine which items to seize. They discovered evidence relating to unforeseen offences, including a sexual assault. The investigators seized the devices, removed them to Canada, and obtained Canadian warrants from the Court Martial for further analysis of their contents. M was arrested. He brought a motion in the Court Martial, arguing that the search and seizure of his electronic devices contravened s. 8 of the *Charter*, and seeking exclusion of the evidence. The military judge dismissed the motion, holding that the *Charter* did not apply extraterritorially, and that, in any event, the search and seizure were consistent with *Charter* standards. He subsequently convicted M of voyeurism, possession of a device for surreptitious interception of private communications, sexual assault, and disgraceful conduct. The Court Martial Appeal Court affirmed the military judge's decision. It agreed that the *Charter* did not apply, and held that the evidence did not affect trial fairness at common law. It further concluded that even if the *Charter* applied, the search did not infringe M's s. 8 rights.

Held: The appeal should be dismissed.

Per Wagner C.J. and Moldaver, **Côté**, Kasirer and Jamal JJ.: CFNIS did not infringe M's rights under s. 8 of the *Charter*. There is no need to consider the extraterritorial applicability of the *Charter*.

A search is reasonable within the meaning of s. 8 of the *Charter* if it is authorized by law, if the law itself is reasonable and if the manner in which the search was carried out is reasonable. Digital searches involve unique and heightened privacy interests in personal data. A presumptive requirement of specific, prior authorization applies to digital searches of electronic devices that store personal data.

In the instant case, authorization to gain entry into and search M's residence and property could be granted only by a local magistrate under the law of Virginia. CFNIS communicated with local authorities and availed itself of the only legal mechanism open to it: it first obtained a waiver of the inviolability of M's private residence and property from the Canadian Embassy, and the Alexandria police then obtained a search warrant from a local magistrate. The Virginia warrant meets the requirement for specific, prior authorization for digital searches, and it expressly authorized the search and analysis of the electronic devices found in M's residence. There were grounds to search the electronic devices as they could reasonably be expected to contain evidence of the voyeurism offence. The search of M's devices was authorized by law.

Furthermore, the search was reasonable pursuant to *Charter* standards. It was not more intrusive than necessary. The warrant did not encompass the investigation of sexual assault offences, but the unforeseen evidence was discovered in the process of triaging electronic devices at the scene, as was expressly authorized by the warrant. Seizing the incriminating devices and obtaining Canadian warrants before further

analyzing their contents was consistent with s. 8 of the *Charter*. The plain view doctrine applies to the files disclosing evidence of sexual assault. This doctrine requires that the police officers must have a legitimate prior justification for intrusion into the place where the seizure occurred and that the evidence must be in plain view in that it is immediately obvious and discovered inadvertently. Both requirements are satisfied in the present case. The investigators had a legitimate justification for their inspection of the files containing evidence of sexual assault. The files were discovered while looking for the types of files specifically sought and authorized. In addition, the files were in plain view, given their inadvertent discovery and immediately apparent unlawfulness. Devices containing these files were set aside for seizure and further analysis back in Canada and there was no need to closely examine the files to ascertain their incriminating nature. The application of the plain view doctrine is necessary because the police had no other basis to justify seizing the sexual assault evidence.

The scope of application of the *Charter* is delineated in s. 32(1). The Court's decision in *R. v. Hape*, 2007 SCC 26, [2007] 2 S.C.R. 292, is the governing authority on the territorial reach and limits of the *Charter* under s. 32(1). The interveners invited the Court to decide whether *Hape* should be reaffirmed, modified, or overruled, and drew on academic criticism of the *Hape* framework. This is not an appropriate case in which to reconsider the extraterritorial application of the *Charter*. First, the parties simply debate *Hape*'s application to the facts at hand. The Court should not overrule a precedent without having been asked to do so by a party. Second, reconsidering *Hape* would make no difference to the outcome of the appeal. Third,

academic criticism is not a sufficient reason not to apply the principles of *stare decisis*. Therefore, it is preferable to leave for another day any reconsideration of the *Hape* framework.

Per Karakatsanis and Martin JJ.: There is agreement that the appeal should be dismissed. CFNIS did not infringe s. 8 of the *Charter* and the evidence is admissible.

The extraterritorial application of the *Charter* is squarely before the Court and it is an issue that arises infrequently, may easily escape judicial review, and has been subject to significant and sustained criticism by experts in international law. It was clearly the primary and threshold issue argued by the parties and multiple interveners, it was the reason leave to appeal was sought, and the Court received full submissions on both constitutional and international law. Accordingly, it is appropriate to comment on the central question at issue: whether the *Charter* applies, pursuant to s. 32, to Canadian authorities' investigative actions abroad in M's circumstances.

A purposive reading of s. 32(1) of the *Charter* supports the conclusion that the *Charter* applies extraterritorially to the conduct of CFNIS officials while fulfilling their investigative duties in a foreign state and that a Canadian court may assess that conduct for *Charter* compliance. It is well-established that the interpretation of the *Charter* should be purposive, generous, and aimed at securing for individuals the full benefit of the *Charter's* protections. The *Charter's* text and purpose support extraterritorial application. Nothing in s. 32 imposes or suggests any territorial

limitation. It expressly limits to whom and to what the *Charter* applies but not where the *Charter* applies. Limiting the *Charter*'s scope to all matters within the authority of Parliament and the legislatures does not implicitly impose a territorial limit. Those words merely reference the division of powers in ss. 91 and 92 of the *Constitution Act, 1867*. Section 32(1)'s silence as to the *Charter*'s territorial boundaries was a deliberate choice which must be respected. If s. 32(1) were meant to distinguish between acts of state actors on Canadian soil or abroad, such a distinction could have easily been drawn expressly, as was done elsewhere in the *Charter*. The purpose of s. 32 was to constrain government action and to permit state action abroad that is not constrained by the Constitution would be inconsistent with Canada's constitutional structure, which is premised on preventing arbitrary state conduct.

The majority in *Hape* likewise concluded that s. 32 contained no express territorial limit, but, looking to prohibitive rules of customary international law, concluded that the *Charter* generally could not be applied to the actions of Canadian officials conducted as part of an investigation occurring abroad. This aspect of *Hape* has been the subject of significant and sustained criticism by experts in international law. Three main flaws in *Hape* have been identified: (1) *Hape* applied improper interpretive principles, including jurisdictional principles of international law and a principle of statutory interpretation, to its interpretation of s. 32(1); (2) *Hape* mischaracterized the extraterritorial application of the *Charter* as an unlawful exercise of enforcement jurisdiction; and (3) *Hape*'s three exceptions are inadequate. These are significant concerns. They go to the core of the Court's jurisprudence on the

extraterritorial application of the *Charter*, to the practical implications of its application, and to the ensuing lack of consistency and predictability of this area of the law. Though the decision in *Hape* remains important in many respects, these concerns leave *Hape*'s framework for the extraterritorial application of the *Charter* ripe for reconsideration. However, given the majority's decision not to address it, the determination of whether *Hape* was wrongly decided should be left to another day.

The Court's rules and guidance to the profession place certain limits upon what interveners may argue but those limits were not exceeded in this case. Moreover, any limitation on the role of interveners in no way limits the jurisdiction of the Court to decide issues in a manner other than that proposed by the parties. The role of the Court, as an apex court, is oriented to the development of the jurisprudence by dealing with questions of public importance, and much of the Court's work necessarily goes beyond what is essential for the disposition of the particular case. While interveners must not introduce new issues, the role of interveners is to provide their own view of the legal issues by providing useful and different submissions, thus bringing broader perspectives before the Court to help the Court fulfill its institutional role. Several interveners in this case did precisely that when they asked the Court to revisit *Hape*: they proposed a different view of the core legal issue of whether the *Charter* applied to the conduct of the CFNIS officers.

Assuming that, pursuant to s. 32(1), the *Charter* applied to the conduct of the officers during their investigation, M's s. 8 rights were not infringed. A search is

reasonable if it is authorized by law, if the law is reasonable, and if the search is conducted reasonably; in addition, specific prior authorization is required to search computers. Those requirements are met in the instant case. The warrant issued by a Virginia magistrate specifically authorized the search of computers and electronic devices and M's diplomatic immunity was waived. The law that authorized the search was reasonable in light of *Charter* standards and the search was conducted reasonably, as the warrant expressly authorized the process of triaging the electronic devices at the scene.

Applying the plain view doctrine is not necessary in the present case. This doctrine permits seizure without a warrant but M did not dispute seizure; rather, he argued that the search breached s. 8. The investigators did not intentionally search for files beyond the scope of what the warrant authorized. When they discovered that the devices contained evidence of other offences, they set those devices aside for seizure and further analysis after obtaining a Canadian warrant and they continued their search for evidence of voyeurism, as permitted by the warrant. Discovering evidence of an unrelated offence did not require them to entirely cease their search as to what the warrant authorized them to search for. The Court need not and should not decide in this case the complex question of when a particular file on a device is seized, as opposed to when the device itself is seized; neither M nor any of the interveners made any submissions on this issue. Moreover, the assumption that the sexual assault files were seized when they were initially seen by police is highly questionable. For the purposes of the instant case, it is sufficient that the initial triage and seizure of the laptop

containing the sexual assault evidence was justified by the Virginia warrant and the subsequent search and seizure of its files was justified by the Canadian warrant. The investigators' conduct did not exceed the bounds of prior judicial authorization and the plain view doctrine need not be relied upon.

Per Rowe J.: There is agreement with the entirety of Côté J.'s analysis. There is disagreement, however, with Karakatsanis and Martin JJ.'s approach to *Hape*, which goes beyond the issues raised by the parties and seeks, effectively, to overturn *Hape* at the invitation of interveners. The parties disputed whether the *Charter* applies in the instant case, assuming the application of *Hape* as precedent. No party challenged *Hape*. Rather, they sought to apply it, and its exceptions, to the facts of their dispute. Both lower courts treated this case as an unremarkable application of the *Hape* framework. The issue of whether *Hape* should continue to govern was not before the lower courts, nor is it before the Court.

The purpose of an intervention is to present the Court with submissions which are useful and different based on the intervener's experience and expertise. Intervenors provide additional perspectives on the legal issues raised by the parties and on the broader implications of the Court's decision. Intervenors can often make important contributions. In order to do so, intervenors must operate within recognized limits. These constraints reflect a sound understanding of the intervenors' place within the litigation and of the role of the Court. The parties control their case and decide which issues to raise. Intervenors should not take a position on the outcome of the

appeal; they must not raise new issues or widen or add to the points in issue; and they must not adduce further evidence or otherwise supplement the record without leave.

Interveners who stray beyond their proper role cause prejudice to the parties by usurping control of the litigation. The potential for inaccuracy increases where interveners invite the Court to reason in the abstract without the benefit of lower court decisions or a full evidentiary record. Improper interventions undermine the leave to appeal process, which is based on careful consideration of the existing record and the issues raised by the parties. Finally, when interveners expand the issues, would-be interveners who decided not to intervene are deprived of the opportunity to present their perspectives to the Court.

Raising the new issue of whether *Hape* should continue to govern is an improper intervention. It undercuts the parties' control of their litigation and runs contrary to their submissions. It undermines the leave to appeal process and excludes would-be interveners. It invites the Court to reason in the abstract. Whether *Hape* should continue to govern is not before the Court and to revisit *Hape* as precedent in this case exacerbates the harms created by improper interventions and undermines the limits that preclude the introduction of new issues.

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1 S.C.R. 518; *R. v. Tim*, 2022 SCC 12; *R. v. M. (M.R.)*, [1998] 3 S.C.R. 393; *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145; *R. v. Grant*, [1993] 3 S.C.R. 223; *R. v. Reeves*, 2018 SCC 56, [2018] 3 S.C.R. 531; *R. v. Spencer*, 2014 SCC 43, [2014] 2 S.C.R. 212; *R. v. Cole*, 2012 SCC 53, [2012] 3 S.C.R. 34; *R. v. Morelli*, 2010 SCC 8, [2010] 1 S.C.R. 253; *Canadian Pacific Wine Co. v. Tuley*, [1921] 2 A.C. 417; *R. v. Buhay*, 2003 SCC 30, [2003] 1 S.C.R. 631; *R. v. Law*, 2002 SCC 10, [2002] 1 S.C.R. 227; *R. v. Jones*, 2011 ONCA 632, 107 O.R. (3d) 241; *R. v. Gill*, 2019 BCCA 260.

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Republic of South Africa, [2004] ZACC 5, 2005 (4) S.A. 235; *Young v. Attorney-General*, [2018] NZCA 307, [2018] 3 N.Z.L.R. 827; *Smith v. R.*, [2020] NZCA 499, [2021] 3 N.Z.L.R. 324; *Afghan Nationals v. Minister for Immigration*, [2021] NZHC 3154, [2022] 2 N.Z.L.R. 102; *Federal Intelligence Service — foreign surveillance*, BVerfG, 1 BvR 2835/17, Decision of May 19, 2020 (Germany); *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, I.C.J. Reports 2004, p. 136; *Munaf v. Romania*, Communication No. 1539/2006, U.N. Doc. CCPR/C/96/D/1539/2006 (2009); *Lopez Burgos v. Uruguay*, Communication No. 52/1979, U.N. Doc. CCPR/C/13/D/52/1979 (1981); *Amnesty International Canada v. Canada (Chief of the Defence Staff)*, 2008 FC 336, [2008] 4 F.C.R. 546, aff'd 2008 FCA 401, [2009] 4 F.C.R. 149; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817; *Nevsun Resources Ltd. v. Araya*, 2020 SCC 5, [2020] 1 S.C.R. 166; *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653; *R. v. Henry*, 2005 SCC 76, [2005] 3 S.C.R. 609; *Reference re Supreme Court Act, ss. 5 and 6*, 2014 SCC 21, [2014] 1 S.C.R. 433; *R. v. Collins*, [1987] 1 S.C.R. 265; *R. v. Vu*, 2013 SCC 60, [2013] 3 S.C.R. 657; *R. v. Jones*, 2011 ONCA 632, 107 O.R. (3d) 241; *R. v. Dymont*, [1988] 2 S.C.R. 417; *R. v. Cole*, 2012 SCC 53, [2012] 3 S.C.R. 34; *R. v. Morelli*, 2010 SCC 8, [2010] 1 S.C.R. 253; *R. v. Fearon*, 2014 SCC 77, [2014] 3 S.C.R. 621.

By Rowe J.

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APPEAL from a judgment of the Court Martial Appeal Court of Canada (Bell C.J. and Rennie and Pardu JJ.A.), 2020 *CMAC* 8, 8 C.M.A.R. 481, [2020] C.M.A.J. No. 8 (QL), 2020 CarswellNat 5694 (WL), affirming a decision of Pelletier M.J., 2019 CM 4015, 2019 CarswellNat 9931 (WL). Appeal dismissed.

Diana Mansour and Mark Létourneau, for the appellant.

Patrice Germain, Natasha A. Thiessen and Chavi Walsh, for the respondent.

Gavin MacDonald and *Stephanie A. Lewis*, for the intervener the Attorney General of Ontario.

Jesse Hartery and *Akshay Aurora*, for the intervener the Canadian Constitution Foundation.

Gib van Ert and *Dahlia Shuhaibar*, for the intervener the British Columbia Civil Liberties Association.

Leah West and *Solomon Friedman*, for the intervener the Canadian Civil Liberties Association.

Gerald Chan and *Alexandra Heine*, for the intervener the David Asper Centre for Constitutional Rights.

The judgment of Wagner C.J. and Moldaver, Côté, Kasirer and Jamal JJ. was delivered by

CÔTÉ J. —

I. Overview

[1] This appeal arises from a criminal investigation conducted by the Canadian Forces National Investigation Service (“CFNIS”) in the Commonwealth of Virginia in the United States. The subject of the investigation, Cpl. McGregor, argues that the

search and seizure of his electronic devices contravened s. 8 of the *Canadian Charter of Rights and Freedoms*, and he seeks to exclude the evidence obtained from them.

[2] In the Court Martial, Cpl. McGregor brought a motion to exclude the impugned evidence under s. 24(2) of the *Charter*. He was unsuccessful. The military judge convicted him on counts of voyeurism, possession of a device for surreptitious interception of private communications, sexual assault, and disgraceful conduct. That decision was affirmed by the Court Martial Appeal Court.

[3] In this appeal, the Court is invited to examine the extraterritorial application of the *Charter* pursuant to s. 32(1) of the *Charter*. Both parties rely on this Court's decision in *R. v. Hape*, 2007 SCC 26, [2007] 2 S.C.R. 292, which is the governing authority on the territorial reach and limits of the *Charter*. Cpl. McGregor takes the position that the *Charter* applied to the actions of the CFNIS, whereas the Crown argues that *Hape* dictates the opposite outcome. For their part, the interveners have focused their submissions on whether the *Hape* framework should be reaffirmed, modified, or overruled.

[4] In the final analysis, I find it unnecessary to deal with the issue of extraterritoriality to dispose of this appeal. This is so because the CFNIS did not violate the *Charter*. Working within the constraints of its authority in Virginia, the CFNIS sought the cooperation of local authorities to obtain and execute a warrant under Virginia law. The warrant which issued authorized the search, seizure, and analysis of Cpl. McGregor's electronic devices expressly. The evidence of sexual assault was

discovered inadvertently by the investigators in the process of triaging the devices at the scene of the search; its incriminating nature was immediately apparent. Although the warrant did not contemplate such evidence, the digital files in issue fell squarely within the purview of the plain view doctrine. Furthermore, the CFNIS obtained Canadian warrants before conducting an in-depth analysis of these devices. It is difficult to see how the CFNIS investigators could have acted differently to attain their legitimate investigative objectives. I conclude that they did not infringe Cpl. McGregor's rights under s. 8 of the *Charter*.

[5] This is not the right case for any reconsideration of the *Hape* framework. In light of my conclusion that the actions of the CFNIS conformed to the *Charter*, reconsidering *Hape* would make no difference to the outcome of this appeal. Furthermore, the parties have not asked this Court to reconsider *Hape*, but rather, as noted above, have based their submissions on how it should apply to the facts of this case. Therefore, I do not decide below whether the *Charter* applies in this case; instead, I show that even if it were to apply, I would still dismiss the appeal.

II. Background

[6] Between August 2015 and March 2017, Cpl. McGregor was a non-commissioned member of the regular Canadian Armed Forces posted to the Canadian Defence Liaison Staff at the Canadian Embassy in Washington, D.C. By virtue of his position in the United States, Cpl. McGregor held diplomatic agent status

with immunity in respect of his person, property, and residence pursuant to the *Vienna Convention on Diplomatic Relations*, Can. T.S. 1966 No. 29.

[7] In 2017, another member of the Canadian Armed Forces posted in Washington, D.C., discovered two audio recording devices in her residence. She believed that Cpl. McGregor had placed them there, and she reported the discovery to her chain of command. Upon investigating the matter, the CFNIS concluded that there were reasonable grounds to believe Cpl. McGregor had committed the offences of voyeurism and possession of a device for surreptitious interception of private communications.

[8] The Commanding Officer could not issue a warrant under s. 273.3 of the *National Defence Act*, R.S.C. 1985, c. N-5, to authorize the search of Cpl. McGregor's residence, as it was not located on the property of the Canadian Armed Forces. M.CPl. Patridge, the lead CFNIS investigator, sought the assistance of the Alexandria Police Department for the purpose of obtaining a warrant under Virginia law authorizing the search of Cpl. McGregor's residence in Alexandria.

[9] The Alexandria Police Department advised the CFNIS that it could not apply for a warrant due to Cpl. McGregor's diplomatic immunity under the *Vienna Convention*. This led to the issuance of a diplomatic note to the American Department of State, in which the Canadian Embassy acknowledged that the "CFNIS is cooperating with local authorities in Virginia and would like to seek a search warrant to enter Corporal McGregor's staff quarters in the company of local police to obtain evidence

for the purposes of their investigation” (A.R., vol. I, at p. 128). In the note, the Embassy waived Cpl. McGregor’s immunity with respect to his “private residence, as well as his papers, correspondence and property”, pursuant to Article 30 of the *Vienna Convention*, but it expressly retained his “personal inviolability and immunity from arrest or detention” (p. 128).

[10] With the waiver of diplomatic immunity in hand, the Alexandria Police Department obtained a warrant from a local magistrate under the law of Virginia. The warrant authorized the search of Cpl. McGregor’s residence in Alexandria as well as objects found therein — including electronic devices. The warrant further authorized the analysis of seized items.

[11] On February 16, 2017, three CFNIS members and the Alexandria Police Department executed the search warrant. The Alexandria Police Department breached the door, secured the premises, and invited the CFNIS officers to conduct the search. The latter took control of the search. Two forensic investigators, one from the CFNIS and one from the Alexandria Police Department, triaged most of the electronic devices found in the residence, scanning their contents to determine which items to seize.

[12] In the triage process, the investigators discovered evidence relating to unforeseen offences — namely sexual assault and what they believed to be child pornography.¹ CFNIS’s forensic investigator, Lieut. Rioux, saw a video file depicting

¹ The child pornography charges, however, were ultimately dropped.

Cpl. McGregor filming himself while sexually touching a woman who appeared to be lying unconscious on a floor.

[13] The investigators did not triage all of Cpl. McGregor's devices in executing the search due to the time constraints set out in the warrant. The Alexandria Police Department seized the devices containing incriminating evidence as well as those that were not triaged at the scene. The items seized at Cpl. McGregor's residence included three fake smoke alarm cameras, two remote controls for these cameras, two personal audio recorders, an oval camera alarm clock, a small square camera alarm clock with a remote, laptops, storage devices, and compact discs.

[14] The Alexandria Police Department made a return before the Virginia magistrate to account for the seized devices, although the CFNIS had them in its custody at all times. Following these events, the CFNIS removed the devices to Canada and obtained Canadian warrants from the Court Martial for further analysis of their contents. A CFNIS investigator arrested Cpl. McGregor in Washington, D.C., and informed him of his right to counsel under s. 10(b) of the *Charter*.

III. Judicial History

[15] At first instance, the military judge held that the *Charter* did not apply extraterritorially. He concluded that the search and seizure were in any event consistent with *Charter* standards, and he noted that the evidence of sexual assault fell within the plain view doctrine. The military judge therefore admitted the evidence relating to the

offence of sexual assault (2018 CM 4023). He subsequently convicted Cpl. McGregor of two counts of voyeurism, one count of possession of a device for surreptitious interception of private communications, one count of sexual assault, and one count of disgraceful conduct (2019 CM 4015).

[16] In a unanimous opinion, the Court Martial Appeal Court affirmed the military judge's decision. It agreed with his conclusion that the *Charter* did not apply, and it held that the evidence did not affect trial fairness at common law. Furthermore, the Court Martial Appeal Court concluded that even if the *Charter* applied, the result would be the same because the search did not infringe Cpl. McGregor's s. 8 rights (2020 CMAC 8, 8 C.M.A.R. 481).

IV. Issues

[17] This appeal raises two main issues:

- (i) Did the *Charter* apply extraterritorially to the CFNIS investigators in the search of Cpl. McGregor's residence in Alexandria, Virginia?
- (ii) Did the CFNIS investigators infringe Cpl. McGregor's *Charter* rights and, if so, should the resulting evidence be excluded?

V. Analysis

A. *Extraterritorial Application of the Charter*

[18] The starting point of the analysis is the text of the Constitution. The scope of application of the *Charter* is delineated in s. 32(1):

32 (1) This 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.

This Court's decision in *Hape* is the governing authority on the territorial reach and limits of the *Charter* under s. 32(1). Under the *Hape* framework, the *Charter* generally cannot apply to Canadian authorities involved in an investigation conducted abroad. This general rule is qualified by two exceptions: (1) consent by the foreign state to the application of Canadian law (para. 106); and (2) Canadian participation in a process that violates Canada's international law obligations (paras. 51-52 and 101; see also *Canada (Justice) v. Khadr*, 2008 SCC 28, [2008] 2 S.C.R. 125, at paras. 18-19).

[19] Unlike ordinary Canadian citizens, members of the Canadian Armed Forces bear the burden of the extraterritorial application of Canadian criminal law (*National Defence Act*, ss. 67 and 163.5). Moreover, the *Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces*, Can. T.S. 1953 No. 13 — to which Canada and the United States are signatories — governs the legal

status under international law of military forces deployed for official purposes. The *Agreement* provides that the sending state can exercise criminal and disciplinary jurisdiction over its military forces. However, the *Agreement* does not confer jurisdiction on the sending state to execute searches of residences located outside of military camps or establishments.

[20] Cpl. McGregor contends that the *Charter* applied extraterritorially to the search and seizure of his electronic devices by Canadian military authorities. He emphasizes that he was a member of the Canadian Armed Forces required to be on foreign soil and that he was the target of a Canadian-led investigation pursuant to the *National Defence Act* and the *Criminal Code*, R.S.C. 1985, c. C-46. In Cpl. McGregor's view, when the *National Defence Act* applies extraterritorially, so too should the *Charter* as a matter of principle. To be clear, at the hearing before our Court, Cpl. McGregor confirmed that he is asking the Court to apply the *Charter* only to the actions of the Canadian authorities in executing the search.

[21] As a preliminary matter, the parties agree that the issue of extraterritoriality should be resolved on the basis of the existing jurisprudence on s. 32(1) of the *Charter*. The interveners, however, invite our Court to decide whether *Hape* should be reaffirmed, modified, or overruled. Many of their submissions draw on an extensive

body of academic criticism in which the *Hape* framework is challenged on various constitutional and international law grounds.²

[22] To be sure, this Court has taken notice of scholarly writings in reconsidering the soundness of its own precedents (see *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653, at paras. 39 and 209; *Nishi v. Rascal Trucking Ltd.*, 2013 SCC 33, [2013] 2 S.C.R. 438, at para. 28; *Canada v. Craig*, 2012 SCC 43, [2012] 2 S.C.R. 489, at para. 29; *Ontario (Attorney General) v. Fraser*, 2011 SCC 20, [2011] 2 S.C.R. 3, at paras. 86-88, 146-48 and 235-46; *R. v. Robinson*, [1996] 1 S.C.R. 683, at para. 39; *Tolofson v. Jensen*, [1994] 3 S.C.R. 1022, at p. 1042; *R. v. B. (K.G.)*, [1993] 1 S.C.R. 740, at pp. 765-71; *London Drugs Ltd. v. Kuehne & Nagel International Ltd.*, [1992] 3 S.C.R. 299, at pp. 421-23; *R. v. Bernard*, [1988] 2

² See, e.g., J. H. Currie, “Weaving a Tangled Web: *Hape* and the Obfuscation of Canadian Reception Law” (2007), 45 *Can. Y.B. Int’l L.* 55; K. Roach, “*R. v. Hape* Creates Charter-Free Zones for Canadian Officials Abroad” (2007), 53 *Crim. L.Q.* 1; A. Attaran, “Have Charter, Will Travel? Extraterritoriality in Constitutional Law and Canadian Exceptionalism” (2008), 87 *Can. Bar Rev.* 515; O. Delas and M. Robichaud, “Les difficultés liées à la prise en compte du droit international des droits de la personne en droit canadien: préoccupations légitimes ou alibis?” (2008), 21 *R.Q.D.I.* 1; P.-H. Verdier, “International Decisions: *R. v. Hape*” (2008), 102 *Am. J. Int’l L.* 143; J. H. Currie, “*Khadr*’s Twist on *Hape*: Tortured Determinations of the Extraterritorial Reach of the Canadian Charter” (2008), 46 *Can. Y.B. Int’l L.* 307; M. L. Banda, “On the Water’s Edge? A Comparative Study of the Influence of International Law and the Extraterritorial Reach of Domestic Laws in the War on Terror Jurisprudence” (2010), 41 *Geo. J. Int’l L.* 525; C. Sethi, “Does the Charter Follow the Flag? Revisiting Constitutional Extraterritoriality after *R v Hape*” (2011), 20 *Dal. J. Leg. Stud.* 102; C. I. Keitner, “Rights Beyond Borders” (2011), 36 *Yale J. Int’l L.* 55, at pp. 86-87; M. Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (2011), at pp. 62-65; D. Ireland-Piper, “Extraterritorial Criminal Jurisdiction: Does the Long Arm of the Law Undermine the Rule of Law?” (2012), 13 *Melb. J. Int’l L.* 122, at pp. 141-43; N. Karazivan, “L’application de la Charte canadienne des droits et libertés par les valeurs: l’article 32”, in E. Mendes and S. Beaulac, eds., *Canadian Charter of Rights and Freedoms* (5th ed. 2013), 241; C. McLachlan, *Foreign Relations Law* (2014), at para. 8.55; P. M. Saunders and R. J. Currie, *Kindred’s International Law: Chiefly as Interpreted and Applied in Canada* (9th ed. 2019), at pp. 365-66; K. Sun, “International Comity and the Construction of the Charter’s Limits: *Hape* Revisited” (2019), 45 *Queen’s L.J.* 115, at pp. 144-47; K. W. Gray, “That Most Canadian of Virtues: Comity in Section 7 Jurisprudence” (2020), 10:1 *U.W.O. J. Leg. Stud.* 1, at p. 23; R. J. Currie and J. Rikhof, *International & Transnational Criminal Law* (3rd ed. 2020), at pp. 623 and 632-39.

S.C.R. 833, at pp. 865-68). This is not to say, of course, that the judiciary is bound to adopt the prevailing approach proffered in the scholarship or that academic criticism is a sufficient reason not to apply the principles of *stare decisis* (see *Fraser*, at para. 86; *R. v. Tran*, 2010 SCC 58, [2010] 3 S.C.R. 350, at paras. 28-29; *Friesen v. Canada*, [1995] 3 S.C.R. 103, at paras. 56 and 58; *B. (K.G.)*, at pp. 774-77). It is helpful to recall what I wrote with my colleagues Brown and Rowe JJ. in *R. v. Kirkpatrick*, 2022 SCC 33, at para. 248: criticism *per se* is not a reason to overrule one of our own judgments, but it may help a party make the case for overruling it on appropriate grounds.³

[23] I do not believe that this is an appropriate case in which to reconsider the extraterritorial application of the *Charter*. The parties do not contend that the *Hape* framework should be revisited; they simply debate its application to the facts at hand. As a rule, which the Court should depart from only in rare and exceptional circumstances, we should not overrule a precedent without having been asked to do so by a party. In this instance, only some interveners ask us to overturn *Hape*; in doing so, they go beyond their proper role. Doing what they are asking would mean deciding an issue that is not properly before us. Furthermore, as mentioned above, the extraterritorial application of the *Charter* has no bearing on the disposition of the present appeal. Indeed, the actions of the CFNIS conformed to the *Charter*, as the s. 8 analysis below makes clear. Simply put, I would dismiss the appeal even if I were to

³ Though we were concurring in *Kirkpatrick*, the majority did not consider itself to be departing from precedent (para. 97). It therefore did not refer to our discussion on *stare decisis*.

accept Cpl. McGregor’s argument that the *Charter* applies extraterritorially in the present context.

[24] It is thus preferable to leave for another day any reconsideration of the *Hape* framework. A restrained approach is amply supported by our jurisprudence. As Sopinka J. emphasized in *Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)*, [1995] 2 S.C.R. 97, “This Court has said on numerous occasions that it should not decide issues of law that are not necessary to a resolution of an appeal. This is particularly true with respect to constitutional issues” (para. 6; see also *R. v. Yusuf*, 2021 SCC 2, at paras. 3-5; *Canada (Attorney General) v. Federation of Law Societies of Canada*, 2015 SCC 7, [2015] 1 S.C.R. 401, at para. 86; *Law Society of Upper Canada v. Skapinker*, [1984] 1 S.C.R. 357, at pp. 381-82; *The Queen in Right of Manitoba v. Air Canada*, [1980] 2 S.C.R. 303, at p. 320; *Attorney General (Que.) v. Cumming*, [1978] 2 S.C.R. 605, at pp. 610-11; *Winner v. S.M.T. (Eastern) Ltd.*, [1951] S.C.R. 887, at p. 901, per Rinfret C.J., rev’d in part [1954] A.C. 541 (P.C.); *John Deere Plow Co. v. Wharton*, [1915] A.C. 330 (P.C.), at p. 339; *Citizens Insurance Co. of Canada v. Parsons* (1881), 7 App. Cas. 96 (P.C.), at p. 109; *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3, at paras. 301-2, per La Forest J., dissenting). There are no “exceptional circumstances” (*Cumming*, at p. 611) that warrant departing from this general rule in the present appeal. Therefore, I decline the interveners’ invitation to reconsider the proper approach to the extraterritorial application of the *Charter*. I would add that, as my colleagues Brown and Rowe JJ. noted in *R. v. Sharma*, 2022 SCC 39, at para. 75, it is inappropriate for

interveners to supplement the evidentiary record at the appellate level. In the s. 8 analysis which follows, I show that even if the *Charter* were to apply to the actions of the CFNIS, the appeal should still be dismissed.

B. *Section 8 Analysis*

[25] Cpl. McGregor argues that the search of his electronic devices violated his rights under s. 8 of the *Charter*, either because it was unauthorized by law or because it was conducted in an unreasonable manner. For the reasons outlined below, I reject both arguments and conclude that the conduct of the CFNIS investigators was consistent with the requirements of the *Charter*.

(1) Digital Searches: General Principles

[26] Section 8 of the *Charter* guarantees “the right to be secure against unreasonable search or seizure”. A search is reasonable within the meaning of s. 8 “if it is authorized by law, if the law itself is reasonable and if the manner in which the search was carried out is reasonable” (*R. v. Collins*, [1987] 1 S.C.R. 265, at p. 278; see also *R. v. Caslake*, [1998] 1 S.C.R. 51, at para. 10; *R. v. Nolet*, 2010 SCC 24, [2010] 1 S.C.R. 851, at para. 21; *R. v. Vu*, 2013 SCC 60, [2013] 3 S.C.R. 657, at paras. 21-23; *Wakeling v. United States of America*, 2014 SCC 72, [2014] 3 S.C.R. 549, at para. 41; *R. v. Fearon*, 2014 SCC 77, [2014] 3 S.C.R. 621, at para. 12; *Goodwin v. British Columbia (Superintendent of Motor Vehicles)*, 2015 SCC 46, [2015] 3 S.C.R. 250, at para. 48; *R. v. Saeed*, 2016 SCC 24, [2016] 1 S.C.R. 518, at para. 36; *R. v. Tim*, 2022

SCC 12, at para. 46). This Court has established a presumption that “a search requires prior authorization, usually in the form of a warrant, from a neutral arbiter” (*R. v. M. (M.R.)*, [1998] 3 S.C.R. 393, at para. 44, referring to *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, at pp. 160-62; see also *Vu*, at para. 22; *R. v. Grant*, [1993] 3 S.C.R. 223, at pp. 238-39).

[27] In recent years, courts have grappled with the challenges posed by technological innovations in developing the law of search and seizure. This Court’s jurisprudence on digital searches has consistently highlighted the “unique and heightened privacy interests in personal computer data” (*R. v. Reeves*, 2018 SCC 56, [2018] 3 S.C.R. 531, at para. 35; see also *Fearon*, at paras. 74, 132 and 197; *R. v. Spencer*, 2014 SCC 43, [2014] 2 S.C.R. 212, at para. 50; *Vu*, at paras. 40-41 and 47; *R. v. Cole*, 2012 SCC 53, [2012] 3 S.C.R. 34, at para. 47; *R. v. Morelli*, 2010 SCC 8, [2010] 1 S.C.R. 253, at paras. 105-6).

[28] In *Vu*, the Court recognized that the “particular nature of computers” (para. 39) warrants specific constraints under s. 8 of the *Charter* on both the authorization and the reasonable performance of digital searches. In unanimous reasons written by Cromwell J., the Court established a presumptive “requirement of specific, prior authorization” applicable to digital searches, as summarized at para. 3:

In practical terms, the requirement of specific, prior authorization means that if police intend to search computers found within a place with respect to which they seek a warrant, they must satisfy the authorizing justice that they have reasonable grounds to believe that any computers they discover will contain the things they are looking for. If, in the course of a warranted

search, police come across a computer that may contain material for which they are authorized to search but the warrant does not give them specific, prior authorization to search computers, they may seize the device but must obtain further authorization before it is searched.

This requirement, I add, extends to other electronic devices that have a “memory capacity akin to a computer” (para. 38). This broad category includes, for example, devices that store personal data, such as cellphones (*Fearon*, at para. 52).

[29] The fact that a search of an electronic device is expressly authorized by warrant does not mean that any file contained therein may be analyzed — even where no search protocol has been imposed. Cromwell J. stressed in *Vu* that police officers are “bound, in their search, to adhere to the rule that the manner of the search must be reasonable” (para. 61). Consequently, they cannot “scour the devices indiscriminately” (para. 61) but must limit their search to the types of files that are “reasonably necessary to achieve [the warrant’s] objectives” (para. 22). Should “the officers realiz[e] that there was in fact no reason to search a particular program or file on the device, the law of search and seizure would require them not to do so” (para. 61; see also *Fearon*, at paras. 57 and 78; *Reeves*, at para. 35).

(2) Authorization of the Search

[30] In the circumstances of the present case, prior authorization to gain entry into Cpl. McGregor’s residence could be granted *only* by a local magistrate under the law of the Commonwealth of Virginia. Neither the *Criminal Code* nor the *National*

Defence Act provides for the issuance of warrants authorizing the search of private residences located abroad.

[31] Given the limited reach of Canadian law, the CFNIS communicated with local authorities and availed itself of the *only* legal mechanism open to it. The CFNIS first obtained the following diplomatic note from the Canadian Embassy:

... the Embassy has to [*sic*] honour to waive the inviolability of Corporal McGregor’s private residence, as well as his papers, correspondence and property under article 30 of the *Vienna Convention on Diplomatic Relations*, for the exclusive purpose of executing a search warrant obtained for the purposes of the CFNIS investigation. Similarly, the Embassy has the honour to waive Corporal McGregor’s immunity from the civil and criminal jurisdiction of the United States of America to the limited extent necessary to allow the court of jurisdiction to issue the warrant required for this exclusive purpose. The Embassy expressly retains any other applicable immunities, including his personal inviolability and his immunity from arrest or detention. [Emphasis added.]

(A.R., vol. I, at p. 128)

At the request of the CFNIS, the Alexandria Police Department then obtained a search warrant issued by a Virginia magistrate. I note that the Virginia warrant meets the requirement of “specific, prior authorization” for digital searches established in *Vu*. It expressly authorized not only the search of Cpl. McGregor’s residence but also the search and analysis of the electronic devices found therein:

You are hereby commanded in the name of the Commonwealth to forthwith search the following place, person or thing either in day or night

...

for the following property, objects and/or persons:

Camera, video recorder, other electronic audio/photo/video recording devices, computer, cell phone, other internet access devices, internet services devices, external electronic storage devices, and analysis of the seized items. Photographing of the premise and/or seized items. [Emphasis added.]

(R.R., at p. 2)

[32] Nevertheless, Cpl. McGregor asserts that the CFNIS's participation in the search was not authorized by law. His first argument in this regard is that the search did not comply with s. 8 of the *Charter* because *Vu* requires a separate warrant to authorize the search of electronic devices, that is, a warrant apart from the one authorizing the search of the residence itself. However, the Court Martial Appeal Court was correct to hold that the substance of *Vu* is directed not at the form the search warrant takes but rather at the requirement of having independent grounds to search the electronic devices (*Vu*, at para. 48). There were such grounds in this case, as the devices could reasonably be expected to contain evidence of the voyeurism offence.

[33] Cpl. McGregor's main argument regarding authorization is that the search fell outside the scope of the waiver of diplomatic immunity granted by Canada under the *Vienna Convention*. This is so, in his view, because the waiver of diplomatic immunity did not contemplate the search and seizure of his electronic devices, as it referred only to his residence in Alexandria, Virginia.

[34] I would not give effect to this argument. Accepting that the authority to conduct the search of the devices depended on the *Vienna Convention*, I find that on

any reasonable interpretation of the Canadian Embassy’s diplomatic note, the waiver encompassed the search of both Cpl. McGregor’s private residence *and* his electronic devices. The express reference to “Corporal McGregor’s . . . property” in the diplomatic note plainly contradicts his submission that “[t]he waiver was limited to [his] residence It did not target the contents of electronic devices” (A.F., at para. 187). Cpl. McGregor’s argument that the search of his devices was unauthorized by law thus fails.

(3) Reasonableness of the Search

[35] Cpl. McGregor further contends that the search was unreasonable pursuant to *Charter* standards in that it was more intrusive than necessary. He argues that the investigators unjustifiably expanded the search of the electronic devices to offences of sexual assault and (what they believed to be) child pornography, whereas the warrant contemplated only the offences of breaking and entering, mischief, interception, harassment, and voyeurism. In his view, once the investigators discovered this unanticipated evidence, the *Charter* required them to stop the search, seize the electronic devices, and obtain a subsequent warrant permitting the analysis of the files in question.

[36] I cannot accept this argument. It is uncontroversial that the Virginia warrant did not encompass the investigation of sexual assault offences. But the discovery of unforeseen evidence does not invalidate the authorization to conduct a search for the purposes outlined in the original warrant. This principle is an old one, and it renders

Cpl. McGregor’s argument meritless, at least as regards the evidence sought (see, for instance, *Canadian Pacific Wine Co. v. Tuley*, [1921] 2 A.C. 417 (P.C.), at pp. 424-25). Here, the investigators discovered the impugned evidence when they were in the process of triaging Cpl. McGregor’s electronic devices at the scene of the search, as was expressly authorized by warrant. The investigators set aside the incriminating devices for seizure and further analysis. Indeed, the CFNIS obtained Canadian warrants before further analyzing their contents. In my view, this investigative process was consistent with s. 8 of the *Charter*.

[37] Nor does the admission of the unanticipated evidence found in the triage process infringe Cpl. McGregor’s s. 8 rights. Key to my reasoning is the application of the plain view doctrine to the files disclosing evidence of sexual assault. This common law doctrine defeats the presumption that seizures must be judicially authorized. Our Court’s jurisprudence teaches that two requirements must be satisfied for the plain view doctrine to apply: (1) the police officers must have a legitimate “prior justification for the intrusion into the place where the ‘plain view’ seizure occurred” (*R. v. Buhay*, 2003 SCC 30, [2003] 1 S.C.R. 631, at para. 37); and (2) the incriminating evidence must be in plain view in that it is “immediately obvious” and “discovered inadvertently” by the police (*R. v. Law*, 2002 SCC 10, [2002] 1 S.C.R. 227, at para. 27; see also *Buhay*, at para. 37). Concerns have been expressed about the plain view doctrine in relation to electronic seizures (e.g., L. Jørgensen, “In Plain View?: *R v Jones* and the Challenge of Protecting Privacy Rights in an Era of Computer Search” (2013), 46 *U.B.C. L. Rev.* 791). In light of the way this case was argued, I feel it is unnecessary

to express a settled opinion on the limits of the doctrine. However, I am satisfied that it does apply in some form to electronic devices (*R. v. Jones*, 2011 ONCA 632, 107 O.R. (3d) 241). In the case at bar, there can be no doubt that the doctrine applies.

[38] A warrant usually provides a legitimate prior justification for the intrusion, thereby satisfying the first requirement of the plain view doctrine. This is not the case, however, where police officers carry out a search unreasonably. In the context of digital searches, the prior justification extends only to the types of files that are “reasonably necessary” for the proper execution of such a search (*Vu*, at para. 22). In other words, there must be a reasonable nexus between the files examined and the purposes of the warrant for a search to satisfy the first requirement of the plain view doctrine.

[39] Even where police officers are initially justified in examining a digital file, the unanticipated evidence contained therein is not necessarily in plain view. This Court’s reasoning in *Law* offers a useful illustration of the second requirement of the plain view doctrine. In that case, a police officer conducted a cursory examination of the documents in question and found “nothing facially wrong with [them]” (para. 27). The officer failed to “detec[t] anything incriminating through the unaided use of his senses”, as the incriminating nature of the evidence “came to light only after he examined, translated and photocopied several documents” (para. 27; see also *Buhay*, at para. 37; *R. v. Gill*, 2019 BCCA 260, at para. 59 (CanLII)). Consequently, this Court rejected the argument that the documents were in plain view, since they “were neither discovered inadvertently nor immediately evident” (*Law*, at para. 10).

[40] Applying the foregoing principles, I conclude that both requirements of the plain view doctrine are satisfied in the present case. The application of the plain view doctrine to digital searches may undoubtedly give rise to intricate issues, but this is a straightforward case. The military judge correctly determined that the plain view doctrine applies to the evidence of sexual assault stored in Cpl. McGregor’s devices.

[41] First, the investigators had a legitimate justification for their inspection of the files containing evidence of sexual assault at the scene of the search. As mentioned above, the Virginia warrant meets the *Vu* requirement of specific, prior authorization applicable to digital searches. Moreover, the military judge found that “[t]he discovery of files relating to a potential sexual assault . . . occurred while looking for the types of files specifically sought and authorized” (*voir dire* decision, at para. 25 (CanLII)). The investigators “demonstrat[ed] care to limit the impact of the search through screening and conduct of a targeted search that involved a minimum of personal information” (para. 27). In these circumstances, the initial search leading to the discovery of the files in issue satisfies the requirement of prior justification.

[42] Second, the digital files disclosing evidence of sexual assault were in plain view, given their inadvertent discovery and immediately apparent unlawfulness. The investigators came upon these files in the triage process, which was designed to quickly identify evidence of interception and voyeurism. The military judge rejected “the submissions to the effect that the investigators continued to look into files they had no authority to look at under the terms of the warrant” (para. 25). He further noted that

“any device that was assessed to contain potential child pornography and sexual assault files [was] set aside for seizure and further analysis back in Canada” (para. 25). Moreover, there was no need to closely examine the files to ascertain their incriminating nature — in contrast to the documents in *Law*, which were not facially unlawful. I thus conclude that the impugned evidence was in plain view and that its seizure during the triage process did not violate s. 8, either as part of a search carried out unreasonably or as an unreasonable seizure.

[43] With respect for the contrary view of my colleagues Karakatsanis and Martin JJ., I believe that the application of the plain view doctrine is necessary in this case. I do not see on what basis the police could justify seizing either the devices containing, or the actual data constituting, the sexual assault evidence without resort to this doctrine. I agree that the devices were searched pursuant to the Virginia warrant, but that warrant did not authorize the seizure of evidence of sexual assault. After all, it had been issued to search for and seize evidence of voyeurism. A warrant in and of itself is not authority to search for or seize anything which might afford evidence of any offence whatsoever; the plain view doctrine and/or s. 489 of the *Criminal Code* could authorize such seizures, but only if their requirements are met. Therefore, to be clear, I disagree with my colleagues Karakatsanis and Martin JJ., and I see no need to discuss further their reasons on this issue.

[44] In sum, the CFNIS demonstrably observed the requirements of the *Charter*. The investigators discovered the incriminating evidence in the execution of a

digital search expressly authorized by a valid warrant. The evidence of sexual assault, although not contemplated in the original warrant, fell squarely within the purview of the plain view doctrine. The CFNIS seized the evidence in accordance with that doctrine and subsequently obtained Canadian warrants before conducting an in-depth analysis of the files in issue. Even on Cpl. McGregor's view of the law, it is difficult to see how the CFNIS could have more fully complied with the *Charter*. In light of my conclusion that the investigative process was consistent with s. 8 of the *Charter*, it is unnecessary to address Cpl. McGregor's argument that the evidence should be excluded under s. 24(2).

VI. Conclusion

[45] For these reasons, I would dismiss the appeal and affirm Cpl. McGregor's convictions.

The following are the reasons delivered by

KARAKATSANIS AND MARTIN JJ. —

I. Overview

[46] In this case a member of the Canadian Armed Forces facing trial in a Canadian court seeks to invoke the protections of the *Canadian Charter of Rights and Freedoms* against actions taken by Canadian officials abroad. Corporal McGregor asks to exclude the contents of certain electronic devices seized from his home by Canadian

and American officials in the State of Virginia. He argues that s. 8 of the *Charter* applies and his *Charter* rights were breached because under Canadian law a further warrant was required to search his devices.

[47] While we agree that the appeal should be dismissed, we also comment on the central question directly at issue in this appeal: does the *Charter* apply, pursuant to s. 32, to Canadian authorities' investigative actions abroad in these circumstances? This was clearly the primary and threshold issue argued by the parties and multiple interveners, it was the reason leave to appeal was sought, and we received full submissions on both constitutional and international law. The extraterritorial application of the *Charter* is squarely before the Court and it is an issue that arises infrequently, may easily escape judicial review, and has been subject to significant and sustained criticism by experts in international law.

[48] While the extraterritoriality of the *Charter* may arise in many different types of situations, we comment only on the particular question before us: that is, whether the *Charter* applies for those people subject to Canadian criminal law for acts committed abroad — whether by virtue of military service or otherwise — and for Canadian officials whose investigations of offences transcend Canada's borders.

[49] We begin by interpreting s. 32(1) of the *Charter* and conclude that the required purposive reading supports the conclusion that the *Charter* applies extraterritorially to the conduct of Canadian Forces National Investigation Service (“CFNIS”) officials while fulfilling their investigative duties in a foreign state and that

a Canadian court may assess that conduct for *Charter*-compliance. This was also the reading of s. 32 endorsed by the majority in *R. v. Hape*, 2007 SCC 26, [2007] 2 S.C.R. 292. However, they were further of the view that international law principles of jurisdiction required a more restrictive reading of s. 32. We say that this restrictive reading is ripe for reconsideration as *Hape* departed from and overruled previous authority without full argument on international law principles. Further, according to scholars in the field, *Hape* misapplied certain key principles of international law in reaching the conclusions it did. While we agree as a matter of error correction that the result is the same whether or not the *Charter* applies, the application of the *Charter* to Canadian officials investigating Canadians abroad is a pressing issue squarely raised in this appeal. While there are significant questions about the correctness of *Hape*'s conclusion that the *Charter* does not apply to such investigative action, given the majority's conclusion, we leave the determination of whether *Hape* was wrongly decided to another day.

II. Interpretation of Section 32(1) of the *Charter*

[50] It is well established that the interpretation of the *Charter* should be purposive, generous, and aimed at securing for individuals the full benefit of the *Charter*'s protections (*R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at p. 344; *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, at p. 156). Under this approach, the *Charter*'s text and purpose support extraterritorial application and the conclusion that the *Charter* applies to Canadian authorities conducting investigations abroad.

[51] Nothing in the text of s. 32 imposes or even suggests any territorial limitation. It expressly limits to *whom* the *Charter* applies: the federal and provincial governments and legislatures. Section 32(1) also expressly limits to *what* the *Charter* applies: “. . . all matters within the authority . . .” of Parliament and the legislatures. Importantly, s. 32(1) imposes no express limitation on *where* the *Charter* applies (*Hape*, at para. 161, per Bastarache J.).

[52] Nor can it be said that s. 32(1)’s limitation of the *Charter*’s scope to “all matters within the authority” of Parliament and the legislatures implicitly imposes a territorial limit on the *Charter*’s reach. According to Wilson J. (with whom Dickson C.J. agreed on this point) in *Operation Dismantle Inc. v. The Queen*, [1985] 1 S.C.R. 441, this phrase in s. 32(1)(a), “like the corresponding words ‘within the authority of the legislature of each province’ . . ., [was] merely a reference to the division of powers in ss. 91 and 92 of the *Constitution Act, 1867*” (pp. 455 and 463-64). It simply describes “the subject-matters in relation to which the Parliament of Canada may legislate or the government of Canada may take executive action” (p. 464). In the context of s. 32(1), therefore, those words do not imply or impose any territorial limitation to or on the *Charter*. To read them in that manner would not only be inconsistent with precedent (see C. Sethi, “Does the Charter Follow the Flag? Revisiting Constitutional Extraterritoriality after *R v Hape*” (2011), 20 *Dal. J. Leg. Stud.* 102, at p. 113; R. J. Currie and J. Rikhof, *International & Transnational Criminal Law* (3rd ed. 2020), at pp. 633-34), but would also fail to acknowledge that Canada has the constitutional authority to make laws with extraterritorial application (*Statute of*

Westminster, 1931 (U.K.), 22 Geo. 5, c. 4, s. 3; *Reference re Offshore Mineral Rights of British Columbia*, [1967] S.C.R. 792, at p. 816; *Hape*, at paras. 66 and 68; see also *Interpretation Act*, R.S.C. 1985, c. I-21, s. 8(3)).

[53] If s. 32(1) were meant to distinguish between acts of state actors on Canadian soil or abroad, such a distinction could have easily been drawn expressly, as was done elsewhere in provisions like ss. 3, 6 and 23 of the *Charter*, which draw distinctions based on citizenship (A. Attaran, “Have Charter, Will Travel? Extraterritoriality in Constitutional Law and Canadian Exceptionalism” (2008), 87 *Can. Bar Rev.* 515, at p. 523; see also L. West, “Canada Stands Alone: A Comparative Analysis of the Extraterritorial Reach of State Human Rights Obligations” (*U.B.C. L. Rev.*, forthcoming), at pp. 8-10). Taking into account what is *not* in s. 32(1)’s text, but is elsewhere in the *Charter*, confirms that no territorial limitation was intended. Section 32(1)’s silence as to the *Charter*’s territorial boundaries when other sections are based on citizenship or are specifically confined to Canada was not an omission or the result of happenstance. It was instead a deliberate choice to not limit the *Charter*’s territorial reach which must be respected.

[54] The purpose of s. 32 was to constrain state action within the newly established constitutional democracy. As this Court has acknowledged, the words of s. 32(1) “give a strong message that the *Charter* is confined to government action. . . . [T]he *Charter* is essentially an instrument for checking the powers of government over the individual” (*McKinney v. University of Guelph*, [1990] 3 S.C.R. 229, at p. 261). To

permit state action abroad that is not constrained by the Constitution would be inconsistent with our constitutional structure, which is premised on preventing arbitrary state conduct (*Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, at para. 70). The sole claim of government, including the executive, to exercise lawful authority “rests in the powers allocated to them under the Constitution, and can come from no other source” (para. 72). Accordingly, there can be no lawful state action without corresponding constitutional limitations — no matter where the conduct takes place. As one commentator put it, “[t]he executive cannot act outside the Constitution and still act within the rule of law. When it is invited to play on the international scene, it must come as it is: as a constitutional government — not an arbitrary one. It has no license to act arbitrarily away from home” (M. Webb, “The Constitutional Question of Our Time: Extraterritorial Application of the Charter and the Afghan Detainees Case” (2011), 28 *N.J.C.L.* 235, at p. 256).

[55] Thus, a purposive interpretation of s. 32(1) leads to the conclusion that the provision draws no distinction between domestic and extraterritorial application. Rather, it sends a strong message that the *Charter* is an instrument for checking the powers of the government over the individual and preventing state action that is inconsistent with the rights and freedoms it enshrines (*McKinney*, at p. 261; see also *Hape*, at para. 91). As a result, based on such an interpretation of s. 32(1), the *Charter* would apply to constrain Canadian authorities conducting investigations, whether that conduct takes place inside or outside Canada.

III. The Hape Decision

[56] In *Hape*, LeBel J., for the majority, also began with the text of s. 32(1) of the *Charter* and likewise concluded that it contained no express territorial limit (paras. 32 and 94). However, in that case, the majority of the Court held the *Charter* did not apply to the Royal Canadian Mounted Police's search and seizure of banking documents in Turks and Caicos Islands (paras. 2-14). The majority overturned *R. v. Cook*, [1998] 2 S.C.R. 597, and set out a new two-stage framework for determining whether a remedy is available for extraterritorial Canadian state conduct alleged to have violated the *Charter*. At the first stage, the court must determine if the activity in question falls under s. 32(1) by asking: (1) whether the conduct at issue is that of a Canadian state actor; and (2) if so, whether, on the facts, there is an exception to the principle of sovereignty that would justify applying the *Charter* to the state actor's extraterritorial activities. If there is no exception and the *Charter* does not apply, then at the second stage the court must ask if the evidence should be excluded from the trial because its admission would render the trial unfair (para. 113).

[57] LeBel J. chose to look to prohibitive rules of customary international law to aid in the interpretation of s. 32 of the *Charter* (paras. 35-39). Customary international law is composed of norms that meet the two requirements of state practice and *opinio juris*: states must actually follow the norm and must view it as legally binding (para. 46). The majority in *Hape* looked to the principle of sovereign equality, which rests upon respect for territorial sovereignty and is "inseparable" from the

principle of non-intervention, and which provides that all states are sovereign and equal (paras. 40 and 45-46). The majority relied on the doctrine of adoption to conclude that the principles of non-intervention and territorial sovereignty should be relied on to interpret the *Charter's* scope. They also applied the presumption of conformity, a principle of statutory interpretation that legislation will be presumed to conform with international law, unless its wording compels otherwise (paras. 39, 46 and 53). They held that in interpreting the *Charter's* scope, the Court should seek to ensure compliance with Canada's binding obligations under international law where the *Charter's* express words are capable of supporting that construction.

[58] The majority found that the comity of nations — defined as “the deference and respect due by other states to the actions of a state legitimately taken within its territory” — was another interpretive principle that aids in interpreting the *Charter's* extraterritorial reach (paras. 32-33, 47, 50 and 53-56, quoting *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077, at p. 1095). LeBel J. observed that comity encourages states to cooperate with each other to investigate transnational crime and, where one state assists another, to respect how assistance is given within a state's territory. However, he made clear that comity “does not offer a rationale for condoning another state's breach of international law” and that comity's deference “ends where clear violations of international law and fundamental human rights begin” (paras. 51-52).

[59] Having set out these additional interpretive principles, the majority reviewed and applied jurisdictional principles of international law. LeBel J. observed there are three forms of jurisdiction: prescriptive, enforcement, and adjudicative. Prescriptive jurisdiction “is the power to make rules, issue commands or grant authorizations that are binding upon persons and entities” (para. 58). Enforcement jurisdiction “is the power to use coercive means to ensure that rules are followed, commands are executed or entitlements are upheld” (*ibid.*). Finally, adjudicative jurisdiction “is the power of a state’s courts to resolve disputes or interpret the law through decisions that carry binding force” (*ibid.*). He also summarized several bases upon which a state may exercise its jurisdiction, including the territoriality, nationality, and universality principles (paras. 59-61).

[60] The majority proceeded to discuss principles pertaining to extraterritorial jurisdiction in the Canadian context. They stated that “it is a well-established principle that a state cannot act to enforce its laws within the territory of another state absent either the consent of the other state or, in exceptional cases, some other basis under international law” (para. 65). Observing that, pursuant to the *Statute of Westminster, 1931*, Canada has the authority to make laws having extraterritorial operation (para. 66), they noted that Parliament’s ability to pass extraterritorial legislation is also informed by the above-mentioned interpretive principles. They concluded that while Parliament can *enact* legislation inconsistent with these interpretive principles, any Canadian law can only be *enforced* abroad with the consent of other states (paras. 67-68).

[61] With these principles in mind, the majority turned to a review of this Court's prior jurisprudence and explained why *Cook*, the Court's previous decision allowing extraterritorial application of the *Charter* to the actions of Canadian police abroad, ought to be revisited. In *Cook*, the Court had determined that the *Charter* applied to the taking of the accused's statement by Canadian police in the United States in connection with an investigation of an offence to be prosecuted in Canada.

[62] The majority raised three criticisms of *Cook*. First, they noted that the decision failed to distinguish prescriptive and enforcement jurisdiction (paras. 84-85). As they viewed the extraterritorial application of the *Charter* as an exercise of enforcement jurisdiction, and since extraterritorial enforcement of Canadian laws is not possible (without consent), they concluded that extraterritorial application of the *Charter* is impossible (para. 85).

[63] Second, they noted practical and theoretical difficulties arose when the *Cook* approach was applied to different facts, such as those in *Hape*, where a warrant for the impugned search was not necessary under Turks and Caicos law (paras. 86-92). The majority concluded that, both theoretically and practically, the *Charter* cannot apply to searches and seizures conducted abroad (paras. 86-92).

[64] Third, they found that *Cook* failed to give proper consideration to the wording of s. 32(1) (paras. 93-95). Interpreting s. 32(1) in light of the interpretive principles discussed above, they concluded that extraterritorial enforcement actions were outside the scope of the *Charter*. Section 32(1) states the *Charter* applies to

“matters within the authority of” Parliament or the provincial legislatures. Having found that Parliament and the provincial legislatures do not have jurisdiction to authorize enforcement abroad, the majority concluded that activities such as criminal investigations abroad are not “matters within the authority of” Parliament or the provincial legislatures and are thus not captured by s. 32(1) (para. 94).

[65] Despite finding that the *Charter* generally could not be applied to the actions of Canadian officials conducted as part of an investigation occurring abroad, *Hape* identified three exceptions pursuant to which *Charter* protections might apply. First, the *Charter* could apply extraterritorially where the foreign state consented to the *Charter*’s application (para. 106). Second, the principle of comity “may give way” where the participation of Canadian officers in the investigative activities would violate Canada’s international human rights obligations (para. 101). Third, ss. 7 and 11(d) of the *Charter* could operate to exclude evidence obtained by Canadian officials abroad, if admitting the evidence would result in an unfair trial (paras. 107-12).

IV. Criticisms of *Hape*

[66] The decision in *Hape* and its approach has been the subject of significant and sustained criticism by experts in international law.⁴ Three main flaws in *Hape* have

⁴ See K. Roach, “*R. v. Hape* Creates Charter-Free Zones for Canadian Officials Abroad” (2007), 53 *Crim. L.Q.* 1, at p. 1; J. H. Currie, “Weaving a Tangled Web: *Hape* and the Obfuscation of Canadian Reception Law” (2007), 45 *Can. Y.B. Int’l L.* 55; G. van Ert, “Canadian Cases in Public International Law in 2006-7” (2007), 45 *Can. Y.B. Int’l L.* 527, at pp. 544-55; J. H. Currie, “*Khadr*’s Twist on *Hape*: Tortured Determinations of the Extraterritorial Reach of the Canadian *Charter*” (2008), 46 *Can. Y.B. Int’l L.* 307; A. Attaran, “Have Charter, Will Travel? Extraterritoriality in Constitutional Law and Canadian Exceptionalism” (2008), 87 *Can. Bar Rev.* 515; P.-H. Verdier, “International Decisions: *R. v.*

been identified: (1) *Hape* applied improper interpretive principles, including jurisdictional principles of international law and a principle of statutory interpretation, to its interpretation of s. 32(1); (2) *Hape* mischaracterized the extraterritorial application of the *Charter* as an unlawful exercise of enforcement jurisdiction; and (3) *Hape*'s three exceptions are inadequate. LeBel J.'s reliance on and misapplication of these international law principles has generated the level and type of cogent criticism and doctrinal instability which calls for a reconsideration of this aspect of the *Hape* decision. We look at each of these three main criticisms in turn.

[67] First, a fundamental underpinning of *Hape* was that s. 32(1) ought to be interpreted in a way that ensures compliance with rules of international law that are binding on Canada, which in this case led to a more restrictive reading of s. 32 (para. 56). Methodologically, imposing international law principles as an overlay to *limit* the scope of the *Charter* undermines the purposive approach to *Charter* interpretation (West, "Canada Stands Alone", at pp. 9-10; *Cook*, at para. 147, per Bastarache J.). Rather, international law should generally be used to support or confirm

Hape" (2008), 102 *Am. J. Int'l L.* 143; J. H. Currie, "International Human Rights Law in the Supreme Court's Charter Jurisprudence: Commitment, Retrenchment and Retreat — In No Particular Order" (2010), 50 *S.C.L.R.* (2d) 423; M. L. Banda, "On the Water's Edge? A Comparative Study of the Influence of International Law and the Extraterritorial Reach of Domestic Laws in the War on Terror Jurisprudence" (2010), 41 *Geo. J. Int'l L.* 525; C. Sethi, "Does the Charter Follow the Flag? Revisiting Constitutional Extraterritoriality after *R v Hape*" (2011), 20 *Dal. J. Leg. Stud.* 102; M. Webb, "The Constitutional Question of Our Time: Extraterritorial Application of the Charter and the Afghan Detainees Case" (2011), 28 *N.J.C.L.* 235; D. Ireland-Piper, "Extraterritorial Criminal Jurisdiction: Does the Long Arm of the Law Undermine the Rule of Law?" (2012), 13 *Melb. J. Int'l L.* 122; C. McLachlan, *Foreign Relations Law* (2014), at paras. 8.36-8.38 and 8.52-8.94; R. J. Currie and J. Rikhof, *International & Transnational Criminal Law* (3rd ed. 2020), at pp. 631-39; L. West, "'Within or Outside Canada': The Charter's Application to the Extraterritorial Activities of the Canadian Security Intelligence Service" (2023), 73 *U.T.L.J.* 1; L. West, "Canada Stands Alone: A Comparative Analysis of the Extraterritorial Reach of State Human Rights Obligations" (*U.B.C. L. Rev.*, forthcoming).

an interpretation arrived at through the purposive approach (*R. v. Bissonnette*, 2022 SCC 23, at para. 98; H. S. Fairley, “International Law Comes of Age: *Hape v. The Queen*” (2008), 87 *Can. Bar Rev.* 229, at p. 236). Moreover, jurisdictional principles of international law are not an appropriate basis for limiting the meaning of “authority” in s. 32(1) as a matter of domestic constitutional law. Parliament’s authority is plenary within the classes of subjects enumerated in s. 91 of the *Constitution Act, 1867* and extends to extraterritorial enforcement action, including actions that violate international law itself (*Statute of Westminster, 1931*, s. 3; *Croft v. Dunphy*, [1933] A.C. 156 (P.C.), at p. 163; *Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers*, 2004 SCC 45, [2004] 2 S.C.R. 427, at para. 141, per LeBel J.; J. H. Currie, “*Khadr’s* Twist on *Hape*: Tortured Determinations of the Extraterritorial Reach of the Canadian *Charter*” (2008), 46 *Can. Y.B. Int’l L.* 307, at pp. 318-19; *Hape*, at paras. 39, 53 and 68; G. van Ert, “Canadian Cases in Public International Law in 2006-7” (2007), 45 *Can. Y.B. Int’l L.* 527, at p. 551; West, “Canada Stands Alone”, at pp. 13-14). As well, concerns over international comity and the policy goal of increasing international cooperation between police forces should not be permitted to overtake a proper purposive interpretation or used to insulate state conduct from judicial review (Currie and Rikhof, at pp. 628-29).

[68] Additionally, *Hape* applied the presumption of conformity — a principle of *statutory* interpretation (para. 53) — to its interpretation of s. 32(1) (Currie (2008), at p. 315; Sethi, at p. 113; J. H. Currie, “International Human Rights Law in the

Supreme Court’s Charter Jurisprudence: Commitment, Retrenchment *and* Retreat — In No Particular Order” (2010), 50 *S.C.L.R.* (2d) 423, at pp. 441-43 and 453-54). The presumptions used in *Charter* interpretation are different from those used in statutory interpretation (*Hunter*, at p. 155). Rather than presuming conformity, in the *Charter* context we presume that the *Charter* “provide[s] protection at least as great as that afforded by similar provisions in international human rights documents which Canada has ratified”, creating a floor — but not a ceiling — for *Charter* protections based on binding international human rights instruments (*Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313, at p. 349, per Dickson C.J.; *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, at p. 1056, quoted in *Hape*, at para. 55; L. West, “‘Within or Outside Canada’: The Charter’s Application to the Extraterritorial Activities of the Canadian Security Intelligence Service” (2023), 73 *U.T.L.J.* 1, at p. 39; Currie (2008), at p. 321). *Hape*’s application of international law principles and statutory interpretation principles to its interpretation of s. 32(1), contrary to the established purposive approach, suggests the need for reconsideration.

[69] Second, according to international law scholars, this portion of *Hape* mischaracterizes the extraterritorial application of the *Charter* as an unlawful exercise of enforcement jurisdiction. We agree with *Hape* that Canadian officials conducting an investigation abroad are exercising extraterritorial enforcement jurisdiction (*Hape*, at paras. 58, 64-65 and 105; Currie and Rikhof, at p. 98). But, academics contend that when jurisdictional principles are properly applied, it becomes clear that requiring Canadian officials to comply with the *Charter* when abroad and allowing Canadian

courts to assess their conduct for such compliance are exercises of prescriptive and adjudicative jurisdiction respectively, neither of which violate international law nor interfere with the sovereign authority of another state (van Ert, at p. 552; J. Crawford, *Brownlie's Principles of Public International Law* (9th ed. 2019), at p. 462; see also Currie (2008), at p. 317). These criticisms leave *Hape's* analysis ripe for reconsideration.

[70] Furthermore, *Hape* equated the application of the *Charter* with a requirement that Canadian procedure govern the investigation (paras. 84, 86 and 98), which muddied the analysis. Applying the *Charter* to the conduct of Canadian officials acting abroad is not the same thing as requiring Canadian laws of criminal procedure to govern the foreign investigation (Currie and Rikhof, at p. 634). The *Charter* does not govern the activities of foreign officials and Canadian officials engaging in enforcement activities in another state are required to comply with that state's laws (*R. v. Terry*, [1996] 2 S.C.R. 207, at para. 19; *R. v. Harrer*, [1995] 3 S.C.R. 562, at para. 15). State sovereignty is respected by gaining consent to participate in the investigation and by requiring that Canadian officers conducting duties abroad comply with the laws of the foreign state. Requiring Canadian authorities to also abide by the *Charter* does not preclude the need to respect foreign law prerequisites.

[71] In addition, scholarship and foreign case law suggest comity concerns are minimal. States routinely apply their domestic law to the actions of their officials abroad, without seeking the consent of the territorial state (M. Milanovic,

Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy (2011), at p. 65; see, e.g., *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), at p. 283, fn. 7, per Brennan J., dissenting; C. McLachlan, *Foreign Relations Law* (2014), at paras. 5.154-5.156; *Smith v. Ministry of Defence*, [2013] UKSC 41, [2014] A.C. 52, at paras. 46-49; *Kaunda v. President of the Republic of South Africa*, [2004] ZACC 5, 2005 (4) S.A. 235, at paras. 42-44 and 228-29; *Young v. Attorney-General*, [2018] NZCA 307, [2018] 3 N.Z.L.R. 827, at paras. 28-30; *Smith v. R.*, [2020] NZCA 499, [2021] 3 N.Z.L.R. 324, at para. 92; *Afghan Nationals v. Minister for Immigration*, [2021] NZHC 3154, [2022] 2 N.Z.L.R. 102, at para. 39; *Federal Intelligence Service — foreign surveillance*, BVerfG, 1 BvR 2835/17, Decision of May 19, 2020 (Germany), at paras. 91, 93-94, 101 and 104). This reality of state practice suggests that no norm of customary international law prohibits a state from regulating the actions of its officials abroad through its domestic law. And it indicates that comity is in no way offended by applying domestic law to state officials' actions abroad because states do not view this as any breach of rules of courtesy or any violation of international law.

[72] Moreover, Canada's international human rights obligations support applying the *Charter* extraterritorially. The *International Covenant on Civil and Political Rights*, Can. T.S. 1976 No. 47, which is ratified by and therefore binding on Canada, "covers much of the same ground" and is "relevant to the interpretation of the *Charter*" (P. W. Hogg and W. K. Wright, *Constitutional Law of Canada* (5th ed. Supp.), at § 36:28; *Bissonnette*, at para. 99). The *International Covenant on Civil and Political Rights* has been interpreted as imposing extraterritorial obligations on state

parties (Article 2(1); *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, I.C.J. Reports 2004, p. 136, at paras. 108-11; Human Rights Committee, *General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, U.N. Doc. CCPR/C/21/Rev.1/Add.13, May 26, 2004, at para. 12; *Munaf v. Romania*, Communication No. 1539/2006, U.N. Doc. CCPR/C/96/D/1539/2006 (2009), at para. 14.2; *Lopez Burgos v. Uruguay*, Communication No. 52/1979, U.N. Doc. CCPR/C/13/D/52/1979 (1981), at para. 12.3; Currie (2010), at pp. 440-41). Because the *Charter* is presumed to provide protections at least as great (*Slaight*, at p. 1056), it would follow that the *Charter* should also extend to the actions of state officials when abroad.

[73] Third, critics contend that *Hape*'s three exceptions — consent, violations of international human rights obligations, and trial fairness — are inadequate. They fail to provide the same robust protections as expressly contained in the *Charter*. This is cause for concern and suggests the need to revisit *Hape*'s conclusion.

[74] Scholars have pointed out that the consent exception proves illusory in many circumstances (Attaran, at pp. 534-36 and 538-39; West, "Within or Outside Canada", at pp. 37-39). Moreover, if the extraterritorial application of the *Charter* is not an exercise of enforcement jurisdiction (as international law scholars contend), the consent exception is based on: (1) the unsustainable notion of Canadian officials asking for other states' permission to apply Canada's constitutional limits to Canada's own

conduct; and (2) the assumption that the territorial state would understand the question or should control the answer (van Ert, at p. 555).

[75] Academics have noted that the human rights exception leaves gaps where *Charter* protections exceed the rights guaranteed in international human rights instruments (West, “Within or Outside Canada” at p. 39; Currie (2008), at pp. 320-21). That gaps will arise is a given in light of the presumption that the *Charter* provides protections at least as great as those provided for under Canada’s international human rights obligations (*Slaight*, at p. 1056). As well, it is illogical for the nature of the breach to determine the application of the rights-protecting instrument (Attaran, at p. 520; see also *Amnesty International Canada v. Canada (Chief of the Defence Staff)*, 2008 FC 336, [2008] 4 F.C.R. 546, at paras. 312-13, aff’d 2008 FCA 401, [2009] 4 F.C.R. 149). Doctrinally, the exception is inconsistent with the principle that treaties, the key source of Canada’s international human rights obligations, do not take effect in Canadian law directly unless they have been implemented through legislation and fails to recognize that the *Charter* is the means by which Canada has implemented many of these obligations (*Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at para. 69; van Ert, at p. 553; J. H. Currie, “Weaving a Tangled Web: *Hape* and the Obfuscation of Canadian Reception Law” (2007), 45 *Can. Y.B. Int’l L.* 55, at pp. 80-81; Currie and Rikhof, at p. 636; see also K. Sun, “International Comity and the Construction of the *Charter*’s Limits: *Hape* Revisited” (2019), 45 *Queen’s L.J.* 115, at p. 145). And the “curious” result of the exception — that international human rights law, rather than the *Charter*, is used to assess the actions of Canadian officials acting

abroad (van Ert, at p. 553) — creates uncertainty for Canadian state actors acting abroad who are unlikely to be familiar with Canada’s international human rights obligations (*Amnesty International*, at para. 314; *Hape*, at para. 173, per Bastarache J.).

[76] Finally, critics suggest the trial fairness exception also leaves gaps because it does not apply when an individual’s *Charter* rights are breached in a manner that does not result in obtaining evidence that would place the fairness *of the trial* in question or when the *Charter*-infringing state conduct never leads to a criminal trial in Canada (K. Roach, “*R. v. Hape* Creates Charter-Free Zones for Canadian Officials Abroad” (2007), 53 *Crim. L.Q.* 1, at p. 2; Currie and Rikhof, at p. 634). And, as originally outlined in *Harrer*, the exception was intended to apply to circumstances where evidence was collected by foreign authorities to whom the *Charter* does not apply. It was not intended to address the gap created by failing to apply the *Charter* to *Canadian* authorities. More significantly, in our view, the exception only provides the protections contained in ss. 7 and 11(d) of the *Charter*. These two rights alone are insufficient to guarantee a fully *Charter*-compliant trial. Attempting to supercharge ss. 7 and 11(d) so that they can stand in the stead of all the other rights contained in the *Charter* defeats the very purpose of the *Charter*: to guarantee all the rights and freedoms set out within it.

V. Conclusion on *Hape*

[77] The decision in *Hape* remains important in many respects, such as its pronouncements on the incorporation of customary international law by the common

law (see *Nevsun Resources Ltd. v. Araya*, 2020 SCC 5, [2020] 1 S.C.R. 166, at para. 86; *van Ert*, at p. 555), on state sovereignty and sovereign equality, and on the interpretative principle that statutes are presumed to operate in conformity with Canada's international obligations (see *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653, at para. 114; *van Ert*, at p. 555).

[78] The Court, however, had received no submissions on international law, and it departed from the theoretical foundation of this Court's prior jurisprudence on the application of the *Charter* abroad even though no parties or interveners before the Court in *Hape* had asked for the previous jurisprudence to be revised or overruled (paras. 182, 184-86 and 189, per Binnie J.). Numerous theoretical and practical problems have unfortunately followed *Hape*, as highlighted by the wealth of judicial and academic criticisms that have emerged in the last 15 years.

[79] These are significant concerns. They go to the core of our jurisprudence on the extraterritorial application of the *Charter*, to the practical implications of its application, and to the ensuing lack of consistency and predictability of this area of the law. These concerns leave this portion of *Hape* ripe for reconsideration. However, given the majority's decision not to address it, we would leave the determination of whether *Hape* was wrongly decided to another day.

[80] Because we do not reach a conclusion as to whether *Hape* was wrongly decided, we need not elaborate *how* the *Charter* should apply abroad — an issue that was also not a major focus of the submissions in this appeal. However, we note that in

our view the *Charter* is sufficiently flexible to take foreign context and the associated concerns raised by the *Hape* majority into account in the analysis, on a case-by-case basis. As Bastarache J. recognized in *Hape* (para. 125), the *Charter* “is a flexible document, amenable to contextual interpretation and permitting reasonable justifications of limitations to fundamental rights”. Such flexibility could exist at both the breach and remedial stages. Foreign laws and procedures may be relevant in assessing whether there was a *Charter* breach. And operational concerns arising from differences between Canadian and foreign procedures might be addressed through a flexible application of remedial discretion under s. 24.

[81] In conclusion, we would add that while this Court’s rules and guidance to the profession do place certain limits upon what interveners may argue, we disagree with our colleagues that the interveners went beyond their proper role in this case. While interveners must not introduce new issues, the role of interveners is to provide their own view of the legal issues by providing “useful . . . and different” submissions, thus bringing “broader perspectives” before the Court (Supreme Court of Canada, *Notice to the Profession: November 2021 – Interventions*, November 15, 2021, (online)). Several interveners in this case did precisely that when they asked this Court to revisit *Hape*: they proposed a different view of the core legal issue of whether the *Charter* applied to the conduct of the CFNIS officers. Indeed, these interveners were granted leave to intervene on this basis: when seeking leave, they all clearly signaled their intent to criticize *Hape* and suggest revisions to its framework, with the Canadian Constitution Foundation specifically stating *Hape* must be revisited (memorandum of

argument, at para. 10). To hold that we cannot engage with this different view, simply because the parties themselves did not propose it, ignores the purpose of intervener submissions as set out in the *Notice to the Profession* and runs contrary to this Court's past practice in decisions that have relied on the frameworks proposed by interveners.

[82] More importantly, any limitation on the role of interveners in no way limits the *jurisdiction of this Court* to decide issues in a manner other than that proposed by the parties. Indeed, *Hape* itself demonstrates that this Court can overturn precedent without any invitation from the parties or interveners (para. 187, per Binnie J.). Such a restriction also runs counter to the role of this Court, which is not merely one of error correction. Rather, the role of the Court, as an apex court, is oriented to the “development of the jurisprudence” by “deal[ing] with questions of ‘public importance’”, and much of the Court’s work “necessarily [goes] beyond what [is] essential for the disposition of the particular case” (*R. v. Henry*, 2005 SCC 76, [2005] 3 S.C.R. 609, at para. 53; *Reference re Supreme Court Act, ss. 5 and 6*, 2014 SCC 21, [2014] 1 S.C.R. 433, at para. 86). By “bringing broader perspectives before the Court than those advanced by appellants and respondents”, and by advancing their own views on legal issues before the Court, interveners help the Court fulfill this institutional role (*Notice to the Profession*).

VI. Application

[83] Assuming that, pursuant to s. 32(1), the *Charter* applied to the conduct of the officers during their investigation, Cpl. McGregor’s s. 8 rights were not infringed.

[84] A search is reasonable if it is authorized by law, if the law is reasonable, and if the search is conducted reasonably (*R. v. Collins*, [1987] 1 S.C.R. 265, at p. 278). In *R. v. Vu*, 2013 SCC 60, [2013] 3 S.C.R. 657, this Court decided that specific prior authorization was required to search computers (paras. 3 and 47). This means “that if police intend to search any computers found within a place they want to search, they must first satisfy the authorizing justice that they have reasonable grounds to believe that any computers they discover will contain the things they are looking for” (para. 48).

[85] We conclude, as does our colleague Côté J., that those requirements are met in this case. First, the warrant issued by a Virginia magistrate specifically authorized the search of computers and electronic devices. As well, the reference to “Corporal McGregor’s . . . property” (A.R., vol. I, at p. 128) in the diplomatic note brings the authorization under the waiver of diplomatic immunity. Second, the law that authorized the search was reasonable in light of *Charter* standards developed in our jurisprudence: as noted by both courts below, the grounds relied upon to obtain the warrant would have been sufficient in Canada. Third, the search was conducted reasonably, as the warrant expressly authorized the process of triaging the electronic devices at the scene.

[86] We disagree that applying the plain view doctrine is necessary in this case. The plain view doctrine permits seizure without a warrant in defined circumstances. Cpl. McGregor does not dispute *seizure* before this Court. Rather, he argued that the

search was unauthorized by law or conducted in an unreasonable manner (A.F., at para. 185). He maintained that “once investigators had come across evidence of what they believed to be child pornography they ought to have ceased searching, seized the electronic devices, and obtained a subsequent warrant outlining same” (para. 200). They breached s. 8, he argued, by instead “continu[ing] to search through the devices on scene for additional evidence”, in the course of which they viewed the files containing sexual assault evidence (*ibid.*). In sum, his argument is that “[o]nce evidence of a new offence has been discovered in the execution of a search, in order to continue searching devices, investigators must obtain a subsequent warrant for that offence” (para. 199).

[87] The Court Martial rejected Cpl. McGregor’s submissions that the police had “continued looking for child pornography and sexual assault files”, rather than for files relating to the offences covered by the Virginia warrant (2018 CM 4023, at para. 25 (CanLII) (emphasis added)). In this regard, the Court Martial noted that the instant case was a “completely different situation than what transpired in [*R. v. Jones*, 2011 ONCA 632, 107 O.R. (3d) 241], where investigators, while looking for files relating to an alleged fraud, inadvertently discovered child pornography and from that point started looking for completely different kinds of files than what was envisaged by their initial warrant” (*ibid.* (emphasis added)).

[88] Because the police in *Jones* — unlike in this case — intentionally searched for files beyond the scope of what the warrant authorized, they needed an alternate

justification for that unwarranted search and attempted to rely on the plain view doctrine (*Jones*, at para. 26). In addition to improperly expanding the scope of the search, in *Jones* police continued searching the individual hard drive that contained the evidence of child pornography after that evidence was discovered. Here, by contrast, police did not continue a search for evidence of crimes other than those covered by the warrant. Rather, they continued their search for evidence of *voyeurism*, as permitted by the warrant. And, they did not continue searching the devices that contained evidence of other offences. Rather than continuing to search those devices, they “set aside for seizure and further analysis”, after obtaining a Canadian warrant, “any device that was assessed to contain potential child pornography and sexual assault files” (*voir dire* decision, para. 25). Cpl. McGregor’s arguments that the search was unlawful or unreasonable must therefore fail. The search was authorized by the Virginia warrant and the police did not inappropriately expand the scope of their search.

[89] As such, reliance on the plain view doctrine is unnecessary. The parties have not argued any seizure issue. And, in any event, the initial seizure of the *device* containing sexual assault evidence was judicially authorized by the Virginia warrant, which allowed seizure of devices that may contain evidence of voyeurism. Continued seizure and search of the device was judicially authorized by the subsequent Canadian warrant. Because police set aside any devices that contained evidence of unrelated offences rather than continuing to search them, it is unnecessary to decide in this case whether continuing to search a particular device even after discovering evidence of an unrelated offence on that device could violate s. 8. To the extent that Cpl. McGregor

argues that discovering evidence of an unrelated offence on one device required police to not just cease searching that device, but also to refrain from searching *any other* devices (even for evidence of offences covered by the warrant), we reject that argument. Discovering evidence of an unrelated offence neither authorizes police to begin searching for evidence pertaining to that unrelated offence nor requires them to entirely cease their search as to what the warrant authorized them to search for. That conclusion is all that is required to resolve the s. 8 issue that Cpl. McGregor actually raised: the reasonableness of continuing to triage other devices after discovering evidence of child pornography.

[90] In concluding that applying the plain view doctrine is necessary, the majority assumes that the files disclosing evidence of sexual assault were seized when they were seen by police, even though they were conducting a lawful search on the computer for voyeurism under a valid warrant. Cpl. McGregor never raised such an argument, nor did any of the interveners. Our Court has never decided the issue of when a particular *file* on a device is seized, as opposed to when the *device* (e.g., a laptop) itself is seized. This Court should not decide it in this case. Unintended consequences may flow from deciding the issue without the benefit of any submissions. And it is unnecessary to a resolution of the case.

[91] Further, the assumption that the files were seized when they were initially seen by police is highly questionable under existing precedent. In *R. v. Dymont*, [1988] 2 S.C.R. 417, this Court offered general guidance on the “line between a seizure and a

mere finding of evidence”, which we articulated as “the point at which it can reasonably be said that the individual had ceased to have a privacy interest in the subject matter” (p. 435). In our view, simply seeing the file at Cpl. McGregor’s home did not likely constitute a seizure because he did not “ceas[e] to have a privacy interest in” it in the required sense (*ibid.*), as evidenced by the need for the subsequent Canadian warrant. Additionally, finding that a file is seized when it is “viewed” conflates merely seeing a file with seizing it. To analogize to physical files, this would suggest that the police seize every piece of paper that they view during the search of a file cabinet.

[92] Rather than deciding this complex question without the benefit of submissions, we would conclude that the initial seizure of the laptop was justified by the Virginia warrant — as Cpl. McGregor accepts (A.F., at paras. 200-201) — and the subsequent search and seizure of its files was justified by the Canadian warrant. The Virginia warrant did not encompass the investigation of sexual assault offences and the officers discovered the file relating to the alleged sexual assault only while looking for the types of files specifically authorized by the warrant (*voir dire* decision, at para. 25). The Virginia warrant did, however, authorize *seizure* of the electronic devices which may have contained evidence of voyeurism. The Virginia warrant also authorized the *search* of the laptop’s files for evidence of voyeurism, which explains how the police found the sexual assault file and why they were acting lawfully when they saw it. At this point, the police chose a sound approach in the circumstances: they set aside the (already seized) laptop and subsequently obtained a Canadian warrant that authorized them to search the content of the computers and electronic devices for the purpose of

obtaining evidence of sexual assault (para. 20; A.R., vol. I, at p. 100). Accordingly, their conduct did not exceed the bounds of prior judicial authorization and the plain view doctrine need not be relied upon.

[93] In addition to being in lawful possession of the computer under the Virginia warrant, we note that when the police discovered the sexual assault file, they may also have been authorized to take physical control of the laptop “temporarily, and for the limited purpose of safeguarding potential evidence of a crime until a search warrant” specific to sexual assault “could be obtained” (*R. v. Cole*, 2012 SCC 53, [2012] 3 S.C.R. 34, at para. 65 (emphasis deleted)). *Vu* likewise contemplated seizure of computers so as to preserve evidence of an offence, even where the warrant did not provide authorization to search the computer for evidence of that offence, “assuming it may reasonably be thought to contain the sort of things that the warrant authorizes to be seized” (paras. 3 and 49). Here, the police reasonably thought the laptop may have contained evidence of voyeurism and so were justified under the Virginia warrant to seize the laptop in order to preserve the integrity of the data.

[94] Not only is reliance on the plain view doctrine superfluous and dependent on questionable assumptions regarding when a file is seized, whether or not to extend the plain view doctrine to the search of the content of a computer is a fraught issue that has not been addressed by this Court. We have never endorsed the application of the doctrine to electronic files as set out by the Ontario Court of Appeal in *Jones*. The search and seizure of personal computers marks an incredibly intrusive, extensive and

invasive search of one's privacy (*R. v. Morelli*, 2010 SCC 8, [2010] 1 S.C.R. 253, at paras. 2-3). To that end, we have required specific authorization for the search and seizure of computers (*Vu*) and modified the common law approach to searches incident to arrest in the case of cell phones (*R. v. Fearon*, 2014 SCC 77, [2014] 3 S.C.R. 621). There are special considerations associated with electronic data which suggest we should not assume that the plain view doctrine applies, or that it applies without modification. Additionally, we did not receive any submissions on the issue. We would leave that issue for another day.

[95] As such, the police did not infringe s. 8 of the *Charter* and the evidence is admissible. We would dismiss the appeal.

The following are the reasons delivered by

ROWE J. —

[96] I have read the reasons of Justice Côté, and agree with the entirety of her analysis. To be clear, Justice Côté's reasons state the opinion of a majority of this Court.

[97] I have also read the reasons of Justices Karakatsanis and Martin. My colleagues use their reasons, at length, to criticize a precedent of this Court, *R. v. Hape*, 2007 SCC 26, [2007] 2 S.C.R. 292. Their treatment of *Hape* implies that its merits as a precedent can properly be questioned on this appeal.

[98] I disagree with their approach, which goes beyond the issues raised by the parties and seeks, effectively, to overturn *Hape* at the invitation of interveners. This invitation, as I explain below, exceeds the well-established limits on interveners. To be clear, I neither endorse nor refute my colleagues’ criticisms of *Hape*; I take no position on the substantive merits of the *Hape* framework. Rather, I object to my colleagues’ methodology, which has led them to state an opinion on an issue that is not properly before this Court.

[99] While my colleagues are correct that the applicability of the *Charter* was argued at length by the parties, their reasons do not explain the litigation fully: the parties disputed whether the *Charter* applies in this case, *assuming the application of Hape as precedent*. No party — not at trial, or before the Court Martial Appeal Court, or before this Court — challenged *Hape*. Rather, they sought to apply it, and its exceptions, to the facts of their dispute. Counsel for the respondent argued that this case was a “straightforward application of *Hape*” (R.F., at para. 51) and, in oral submissions, urged the Court not to revisit *Hape* (transcript, at pp. 118-19). The appellant’s submissions focused on the applicability of the exceptions set out in *Hape* (A.F., at paras. 86-181). The appellant did not ask this Court to overturn *Hape*, nor did he lead evidence at the lower courts to support overturning a precedent. The military judge and the Court Martial Appeal Court treated this case as an unremarkable application of the *Hape* framework.

[100] My colleagues' insistence, then, that neither they nor the interveners have strayed from the issue before the Court is untenable. The arguments on the merits of *Hape* were advanced solely by interveners at this Court, thereby introducing a new issue. This Court's practice direction, on which my colleagues rely (para. 82), cautions against this situation: interveners are to advance their own view of a legal issue before the Court; they must *not* introduce new issues; and the Court always retains a discretion to take any steps it sees fit *to prevent unfairness to the parties* (see *Notice to the Profession: November 2021 — Interventions*, November 15, 2021 (online) ("*Notice of November 2021*").

[101] To that end, I disagree with my colleagues' suggestion that the interveners' submissions are simply a different perspective on a legal issue that is before the Court. This would effectively mean that any time a governing precedent is relevant to deciding a case, interveners could insert themselves before this Court to call for it to be overturned, thereby "piggy-backing" onto the parties' dispute what amounts to a reference on a judicial decision which the interveners wish to overturn. Such an approach does not accord with the rules of this Court. In addition, as an important policy consideration, it runs the risk that this Court will make ill-advised decisions, as they would be made without the benefit of lower court analysis, a proper evidentiary record, or submissions from those who would be affected (including vulnerable groups) but who had no notice that the issue would be placed before the Court. It is this simple: the issue of whether *Hape* should continue to govern was not before the lower courts,

nor is it before this Court. In light thereof, I seek to explain the proper place of interveners relative to the discharge of this Court’s adjudicative role.

[102] While the discussion that follows is directed to the place of interveners, I note a separate methodological point. My colleagues rely heavily on what they perceive to be academic consensus that is critical of *Hape*. I will not repeat what was set out at length in the concurring reasons in *R. v. Kirkpatrick*, 2022 SCC 33, save to highlight that primarily relying on such an approach undermines *stare decisis* and leads to doctrinal instability (paras. 246-49). Academic criticism can be persuasive where it demonstrates a recognized basis to overturn precedent, but this Court cannot depart from precedent “simply because a chorus of voices, even well-informed voices, expresses disagreement with our decisions” (para. 247, referring to *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653, at para. 274, per Abella and Karakatsanis JJ., concurring). Moreover, I am concerned by my colleagues’ insistence that this Court is free to depart from precedent at will, *a fortiori*, to do so without submissions or an evidentiary record (para. 82). Adherence to precedent “furthers basic rule of law values such as consistency, certainty, fairness, predictability, and sound judicial administration” (*R. v. Sullivan*, 2022 SCC 19, at para. 64). Departing from precedent in the absence of proper methodology necessarily jeopardizes those qualities of our legal system. Indeed, applying my colleagues’ implicit criteria, it would be hard to imagine a judgment of the Court that could be considered secure. Having made this point, I now return to the place of interveners.

I. The Place of Interveners at the Supreme Court of Canada

[103] The purpose of an intervention is to “present the court with submissions which are useful and different from the perspective of a non-party who has a special interest or particular expertise in the subject matter of the appeal” (*R. v. Morgentaler*, [1993] 1 S.C.R. 462, at p. 463; see also *R. v. Barton*, 2019 SCC 33, [2019] 2 S.C.R. 579, at para. 52; *Rules of the Supreme Court of Canada*, SOR/2002-156, r. 57(2)(b)). Interveners provide additional perspectives on the legal issues raised by the parties and on the broader implications of the Court’s decision. Depending on the context, interveners might highlight relevant jurisprudence, present insightful arguments, or clarify the potential analytical paths to resolving the issues placed before the Court. Interveners may also enhance accuracy by representing diverse cross-sections of the Canadian public and furnishing an analysis informed by their particular experience or specialized expertise. Since the cases heard by this Court are frequently matters of public importance, such experience and expertise can “assist the court in deciding complex issues that have effects transcending the interests of the particular parties before it” (*Barton*, at para. 52). Through their submissions, interveners inform the Court of the direct and indirect consequences of the dispute on various stakeholders and on other areas of law. In this way, interveners can often make important contributions. In order to do so, however, interveners must operate within recognized limits. The *Rules of the Supreme Court of Canada* clearly state these limits, and this Court has issued practice directions, more than once, to remind potential interveners of

the boundaries they must respect (see *Notice of November 2021*; *Notice to the Profession: March 2017 — Allotting Time for Oral Argument*, March 2, 2017 (online)).

[104] These constraints reflect a sound understanding of interveners' place within the litigation and of the role of this Court. While the Court is often tasked with deciding issues that have implications extending beyond the parties, it remains an adjudicative body. The polycentric nature of a legal issue does not turn the Court into a legislative committee or a Royal Commission (*J.H. v. Alberta (Minister of Justice and Solicitor General)*, 2019 ABCA 420, 54 C.P.C. (8th) 346, at paras. 25-27). The Court's process also remains firmly grounded in the adversarial system: the parties control their case and decide which issues to raise. This does not change when the parties argue before the Supreme Court. Indeed, the importance of this principle only increases: as an apex court, this Court's role is to adjudicate disputes with the benefit of trial-level findings of fact and appellate-level reasons on the issues fully argued by the parties.

[105] Such considerations help explain the specific limits placed on interventions. First, interveners are not parties. The purpose of an intervention is not to support a party — by which I mean the appellant(s) and respondent(s) — but to put forward the intervener's own view of a legal issue already before the Court. Despite the involvement of interveners, the appeal remains a dispute between the parties (*Notice of November 2021*, at point 2). Consequently, interveners should not take a position on

the outcome of the appeal (*Rules of the Supreme Court of Canada*, r. 42(3); *Notice of November 2021*, at point 3).

[106] Secondly, interveners must not raise new issues or “widen or add to the points in issue” (*Morgentaler*, at p. 463; *Reference re Goods and Services Tax*, [1992] 2 S.C.R. 445, at p. 487; *Rules of the Supreme Court of Canada*, r. 59(3); *Notice of November 2021*, at point 4). Intervenors may, however, present their own legal arguments on the existing issues and make submissions on how those issues affect the interests of those whom they represent (see, e.g., *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 S.C.R. 388, at para. 40; *Canada (Justice) v. Khadr*, 2008 SCC 29, [2008] 2 S.C.R. 143, at para. 18; *Barton*, at para. 52).

[107] Intervenors must be careful to distinguish between developing a permissible legal argument and adding prohibited new issues; the two are conceptually distinct. A fresh perspective or legal argument on an existing issue is not the same as the introduction of a new issue, outside the scope of the appeal or, even further, in contradiction to the parties’ submissions regarding the scope of the appeal. The former may assist the Court’s deliberation, while the latter detracts from it. While in rare cases it may be difficult to distinguish between the two, this appeal is not such a case. By asking this Court to overturn *Hape*, certain intervenors, upon whom Justices Karakatsanis and Martin rely, have introduced what is clearly a new issue.

[108] Finally, interveners must not adduce further evidence or otherwise supplement the record without leave (*Rules of the Supreme Court of Canada*, r. 59(1)(b)). They may, of course, use their submissions to explain the impact of the appeal on the group(s) they represent; this represents an appropriate exercise of their role. But they must take the case and the record as they find it, or seek leave to tender new material, such as supplementary legislative facts or contested studies (see, e.g., D. L. Watt et al., *Supreme Court of Canada Practice 2022* (2022), at pp. 369-70, referring to *R.J.R. MacDonald Inc. v. Canada (Attorney General)*, *Bulletin of Proceedings*, June 10, 1994, at p. 990, and *Anderson v. Amoco Canada Oil and Gas*, *Bulletin of Proceedings*, March 19, 2004, p. 453). This Court, as always, retains a discretion to take any steps it sees fit where an intervener presents new evidence without leave or otherwise makes improper submissions (see *Notice of November 2021*, at point 6).

[109] In sum, an intervener can make useful contributions when it respects the rules, practice directions, and jurisprudence of this Court. By contrast, it exceeds its role when it seeks to alter the nature of the litigation by usurping the role of the parties, expanding the issues before the Court, or presenting new evidence. An intervention that contravenes these settled rules is improper, and has negative consequences for the parties, potential interveners, and the administration of justice.

II. The Consequences of Improper Interventions

[110] Interveners who stray beyond their proper role, first of all, cause prejudice to the parties by usurping control of the litigation. The parties — not interveners — are meant to control their own litigation. They define the issues and the relief sought. *Proper* intervention is consistent with this distribution of responsibilities because it is responsive to the issues the parties have raised. *Improper* intervention jeopardizes fairness by forcing the parties to respond to issues on which they did not adduce evidence at trial and by “tak[ing] the litigation away from those directly affected by it” (*Attorney-General of Canada v. Aluminum Co. of Canada* (1987), 35 D.L.R. (4th) 495 (B.C.C.A.), at p. 507; *M. (K.) v. M. (H.)*, [1992] 3 S.C.R. 3, at pp. 4-5; see also *R. v. N.S.*, 2021 ONCA 605, 497 C.R.R. (2d) 75, at para. 49). Practical forms of unfairness may also befall the parties as a result of improper intervention, including increased legal costs, delays in responding to intervener submissions, or being forced to bring motions to strike parts of an intervener’s submissions.

[111] Secondly, and most fundamentally, interveners who improperly add to or expand the issues on appeal may cause deleterious effects to the proper administration of justice. The potential for inaccuracy increases where interveners invite the Court to reason in the abstract without the benefit of lower court decisions or a full evidentiary record.

[112] Thirdly, improper interventions undermine the leave to appeal process. The Court decides whether to grant or deny leave upon careful consideration of the existing record and the issues specifically raised by the parties. Where an intervener’s

arguments fall outside of the set of issues for which leave has been granted, the Court's careful consideration at the leave stage is frustrated.

[113] Finally, potential interveners, whether organizations or Attorneys General, decide whether to intervene based on the issues placed before the Court by the parties. Where interveners expand that set of issues, would-be interveners who have decided not to intervene are prejudiced. They might have decided differently had they been made aware that new issues would be raised (see *Morgentaler*, at pp. 463-64). By the time interveners have introduced the new issues, however, it is too late: the would-be interveners have already been deprived of the opportunity to present, and the Court has been deprived of the opportunity to receive, valuable perspectives on these new issues.

[114] The present appeal illustrates these serious consequences. Raising the new issue of whether *Hape* should continue to govern is an improper intervention. It undercuts the parties' control of their litigation and, in fact, runs contrary to their submissions that this Court should apply *Hape*. It undermines the leave to appeal process and excludes would-be interveners who could make useful submissions on the extraterritorial application of the *Charter*. And, rather than further the accuracy of decision making, it invites the Court to reason in the abstract without the benefit of lower court decisions, a full evidentiary record, or submissions from the parties.

[115] This Court's rules, practice directions, and jurisprudence are carefully designed to avoid these consequences, while ensuring that interveners properly assist the Court. It is therefore critical for interveners to adhere to these limits. When they do

so, they can make useful contributions grounded in their expertise and experience. However, that is not what occurred in the present case, as certain interveners overstepped the well-established limits on their role. The issue of whether *Hape* should continue to govern is not before the Court. Neither party has called this framework into question; indeed, both the appellant and respondent have relied on it. I therefore reject my colleagues' decision to accept the invitation from certain interveners and revisit *Hape* as precedent. Their reasons exacerbate the harms created by improper interventions and undermine the limits that preclude the introduction of new issues. In light of the foregoing, I endorse the reasons of Justice Côté.

APPENDIX

Relevant Legislation and Treaties

Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces, Can. T.S. 1953 No. 13

Article VII

1. Subject to the provisions of this Article,
 - (a) the military authorities of the sending State shall have the right to exercise within the receiving State all criminal and disciplinary jurisdiction conferred on them by the law of the sending State over all persons subject to the military law of that State;

3. In cases where the right to exercise jurisdiction is concurrent the following rules shall apply:
 - (a) The military authorities of the sending State shall have the primary right to exercise jurisdiction over a member of a force or of a civilian component in relation to
 - (i) offences solely against the property or security of that State, or offences solely against the person or property of another member of the force or civilian component of that State or of a dependent;

6. — (a) The authorities of the receiving and sending States shall assist each other in the carrying out of all necessary investigations into offences, and in the collection and production of evidence, including the seizure and, in proper cases, the handing over of objects connected with an offence. The handing over of such objects may, however, be made subject to their return within the time specified by the authority delivering them.

National Defence Act, R.S.C. 1985, c. N-5

60 (1) The following persons are subject to the Code of Service Discipline:

- (a) an officer or non-commissioned member of the regular force;

67 Subject to section 70, every person alleged to have committed a service offence may be charged, dealt with and tried under the Code of Service Discipline, whether the alleged offence was committed in Canada or outside Canada.

68 Every person alleged to have committed a service offence may be charged, dealt with and tried under the Code of Service Discipline, either in Canada or outside Canada.

93 Every person who behaves in a cruel or disgraceful manner is guilty of an offence and on conviction is liable to imprisonment for a term not exceeding five years or to less punishment.

130 (1) An act or omission

(b) that takes place outside Canada and would, if it had taken place in Canada, be punishable under Part VII, the *Criminal Code* or any other Act of Parliament,

is an offence under this Division . . .

273.3 Subject to sections 273.4 and 273.5, a commanding officer who is satisfied by information on oath that there is in any quarters, locker, storage space or personal or movable property referred to in section 273.2

(a) anything on or in respect of which any offence against this Act has been or is believed on reasonable grounds to have been committed,

(b) anything that there are reasonable grounds to believe will afford evidence with respect to the commission of an offence against this Act, or

(c) anything that there are reasonable grounds to believe is intended to be used for the purpose of committing any offence against the person for which a person may be arrested without warrant,

may issue a warrant authorizing any officer or non-commissioned member named in the warrant, assisted by such other officers and non-commissioned members as are necessary, or a peace officer, to search the quarters, locker, storage space or personal or movable property for any such thing, and to seize and carry it before that commanding officer.

Vienna Convention on Diplomatic Relations, Can. T.S. 1966 No. 29

Article 30

1. The private residence of a diplomatic agent shall enjoy the same inviolability and protection as the premises of the mission.

Article 31

1. A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State. He shall also enjoy immunity from its civil and administrative jurisdiction

Article 32

1. The immunity from jurisdiction of diplomatic agents and of persons enjoying immunity under Article 37 may be waived by the sending State.

2. Waiver must always be express.

Code of Virginia — Title 19.2. Criminal Procedure

§ 19.2-56. To whom search warrant directed; what it shall command; warrant to show date and time of issuance; copy of affidavit to be part of warrant and served therewith; warrants not executed within 15 days.

A. The judge, magistrate, or other official authorized to issue criminal warrants shall issue a search warrant only if he finds from the facts or circumstances recited in the affidavit that there is probable cause for the issuance thereof.

Every search warrant shall be directed (i) to the sheriff, sergeant, or any policeman of the county, city, or town in which the place to be searched is located; (ii) to any law-enforcement officer or agent employed by the Commonwealth and vested with the powers of sheriffs and police; or (iii) jointly to any such sheriff, sergeant, policeman, or law-enforcement officer or agent and an agent, special agent, or officer of the Federal Bureau of Investigation, the Bureau of Alcohol, Tobacco and Firearms of the United States Treasury, the United States Naval Criminal Investigative Service, the United States Department of Homeland Security, any inspector, law-enforcement official, or police personnel of the United States Postal Service, or the Drug Enforcement Administration. The warrant shall (a) name the affiant, (b) recite the offense or the identity of the person to be arrested for whom a warrant or process for arrest has been issued in relation to which the search is to be made, (c) name or describe the place to be searched, (d) describe the property or person to be searched for, and (e) recite that the magistrate has found probable cause to believe that the property or person constitutes evidence of a crime (identified in the warrant) or tends to show that a person (named or described therein) has committed or is committing a crime or that the person to be arrested for whom a warrant or process for arrest has been issued is located at the place to be searched.

The warrant shall command that the place be forthwith searched and that the objects or persons described in the warrant, if found there, be seized. An inventory shall be produced before a court having jurisdiction of the offense or over the person to be arrested for whom a warrant or process for arrest has been issued in relation to which the warrant was issued as provided in § 19.2-57.

Any such warrant as provided in this section shall be executed by the policeman or other law-enforcement officer or agent into whose hands it shall come or be delivered. If the warrant is directed jointly to a sheriff, sergeant, policeman, or law-enforcement officer or agent of the Commonwealth and a federal agent or officer as otherwise provided in this section, the warrant may be executed jointly or by the policeman,

law-enforcement officer, or agent into whose hands it is delivered. No other person may be permitted to be present during or participate in the execution of a warrant to search a place except (1) the owners and occupants of the place to be searched when permitted to be present by the officer in charge of the conduct of the search and (2) persons designated by the officer in charge of the conduct of the search to assist or provide expertise in the conduct of the search.

...

B. . . .

Search warrants authorized under this section for the search of any place of abode shall be executed by initial entry of the abode only in the daytime hours between 8:00 a.m. and 5:00 p.m. unless (i) a judge or a magistrate, if a judge is not available, authorizes the execution of such search warrant at another time for good cause shown by particularized facts in an affidavit or (ii) prior to the issuance of the search warrant, law-enforcement officers lawfully entered and secured the place to be searched and remained at such place continuously.

Appeal dismissed.

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