

**INTERNAL INQUIRY INTO THE ACTIONS OF
CANADIAN OFFICIALS IN RELATION TO
ABDULLAH ALMALKI, AHMAD ABOU-ELMAATI
AND MUAYYED NUREDDIN**

**SUBMISSIONS OF THE ATTORNEY GENERAL OF CANADA ON
THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS**

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INTRODUCTION

1. Terrorism knows no borders. The investigation, prevention, disruption and prosecution of terrorist activities require cooperation between states. Such cooperation is founded on respect for the territorial sovereignty of nations, the comity of nations and reciprocity. Consistent with these fundamental principles of international law, the Supreme Court of Canada has ruled that Canada cannot impose the *Canadian Charter of Rights and Freedoms* ("the Charter") on foreign states, even in respect of the actions of Canadian officials. In respecting these fundamental principles of international law and acknowledging that the Charter does not apply in these circumstances, Canada fully respects its international obligations, including its international human rights obligations.

2. When Canadian citizens travel abroad, they do not bring the Charter with them. Rather, as the Supreme Court has observed:

"[I]ndividuals should expect to be governed by the laws of the state in which they find themselves and in which they conduct financial affairs – it is the individual's decision to go to or operate in another country that triggers the application of foreign law: *R. v. Terry*, [1996] 2 S.C.R. 2007 at paras. 24 and 26 and *Schreiber v. Canada (Attorney General)*, [1998] 1 S.C.R. 841 at para. 23."

R. v. Hape, 2007 SCC 26 at para. 99

3. Similarly, when Canadian officials engage in the investigative practices abroad referred to in Question 2 of the Amended Notice of Hearing (e.g. conducting or participating in an interview of a Canadian detained in a foreign state) those officials are governed by the law of the host state; they are not governed by the Charter.

4. In addition, the Charter is not normally engaged by the sharing of information with a foreign state; the Charter does not demand consideration of, and does not apply to the actions of, foreign officials in that regard.

Schreiber v. Canada (Attorney General), [1998] 1 S.C.R. 841

5. In short, based on the guidance of the Supreme Court of Canada, the Charter does not govern the conduct of the investigative practices referred to in the Amended Notice of Hearing and is not normally engaged by international information sharing.

6. Further, this Internal Inquiry is not a court of law. The Commissioner cannot make findings that would confirm or imply that the actions of Canadian officials did or did not breach the Charter. Rather he must be guided by the Internal Inquiry's Terms of Reference which require the Commissioner to determine the sufficiency or deficiency of the actions of Canadian officials.

7. Accordingly, the Charter does not and cannot establish a standard against which the Commissioner may determine the sufficiency or deficiency of the actions of Canadian officials.

PART ONE – THE INHERENT LIMITS OF A COMMISSION OF INQUIRY

8. By the Terms of Reference of the Internal Inquiry, the Commissioner is mandated to determine whether the actions of Canadian officials directly or indirectly resulted in the detention or mistreatment of Messers. Almalki, Elmaati or Nureddin. If so, the Commissioner must assess whether those actions and the provision of consular services were deficient, taking into consideration the known standards at the time as reflected in the governing legislation for each department and agency, Ministerial directives and policies that were in place at the relevant time and past practice.

Terms of Reference, paragraph (a)(i) – (iii)

9. The Commissioner has not been called upon to apply legal standards such as those established by the Charter or found in tort law. Moreover, the Commissioner is expressly prohibited by his Terms of Reference from making findings of civil or criminal liability. The prohibition on commissions of inquiry

making findings of, or akin to, civil or criminal liability is also well established in the jurisprudence.

10. As Cory J. explained for the Supreme Court in the *Krever* case:

"A commission of inquiry is neither a criminal trial nor a civil action for the determination of liability. It cannot establish either criminal culpability or civil responsibility for damages. Rather, an inquiry is an investigation into an issue, event or series of events. The findings of a commissioner relating to that investigation are simply findings of fact and statements of opinion reached by the commissioner at the end of the inquiry. They are unconnected to normal legal criteria."

Canada (Attorney General) v. Canada (Commission of Inquiry on the Blood System in Canada – Krever Commission) [1997] 3 S.C.R. 440 at para. 34

11. The Internal Inquiry is an investigative inquiry. It is not a policy inquiry in which the Commissioner has been asked to assess the merit of existing policies or practices. That has already been done by Commissioner O'Connor in the Arar Inquiry. The Government has accepted and taken steps to implement the recommendations in Part 1 of Commissioner O'Connor's Report.

PART TWO – THE CHARTER DOES NOT APPLY

12. Even if the Commissioner were authorized to apply the Charter in the context of this Internal Inquiry, it remains that the Charter does not govern the investigative practices conducted abroad referred to in the Amended Notice of Hearing or the international sharing of information. Absent the consent of the host state, the Charter does not apply in these circumstances outside of Canada.

Hape, supra

R. v. Terry, [1996] 2 S.C.R. 207

R. v. Harrer, [1995] 3 S.C.R. 562

Schreiber, supra

13. This conclusion finds its roots in s. 32(1) which governs the application of the Charter.

“Pursuant to s. 32(1), the *Charter* serves to limit the legislative and executive powers of Canada and each of the provinces. The problem involved in establishing the *Charter’s* scope has two aspects. First, s. 32(1) determines who is bound by the *Charter*: Parliament and the federal government, and the provincial legislatures and governments, bear the burden of complying with the requirements of the *Charter*. Second, s. 32(1) specifies what powers, functions or activities of those bodies and their agents are subject to the *Charter*: constitutional limitations are imposed “in respect of all matters within the authority of” Parliament or the provincial legislatures.”

Hape, supra at para. 32

14. In regard to the first part of the analysis under s. 32(1), the Supreme Court has repeatedly held that the Charter does not apply to foreign authorities. Its application is limited to Parliament and the federal government (or the provincial legislatures and governments).

15. In regard to the second part of the analysis, the Supreme Court recently concluded that “[a] criminal investigation in the territory of another state cannot be a matter within the authority of Parliament or the provincial legislatures, because they have no jurisdiction to authorize enforcement abroad.” The Court went on to conclude that without enforcement the Charter cannot apply.

Hape, supra at paras. 94 and 104

16. As Lebel J. put it, speaking for the majority in *Hape* “[s]ince extraterritorial enforcement is not possible, and enforcement is necessary for the Charter to apply, extraterritorial application of the Charter is impossible.”

Hape, supra at para. 85

17. The Supreme Court’s conclusion that the Charter does not apply to the conduct of a criminal investigation in the territory of another state must include,

by necessary implication, the investigative practices referred to in the Amended Notice of Hearing when conducted in the territory of another state.

Application of the Charter to the Conduct of Canadian Officials in Canada in Relation to International Information Sharing or Investigative Activities Abroad

18. The Charter does not prohibit Canadian officials from engaging in international investigations where Charter rights may be implicated. As L'Heureux-Dube J, wrote for the majority in *Schreiber*:

"The reality of international criminal investigation and procedure is that it necessitates co-operation between states. The fact that the government of Canada may play a part in international investigations and proceedings, which might have implications for individual rights and freedoms such as those enumerated in the *Charter*, does not by itself mean that the *Charter* is engaged."

Schreiber, supra at para 29

19. While the Charter does apply to the conduct of Canadian officials in Canada, it applies only to the actual conduct within Canada, independent of any related actions abroad, which must be governed not by the Charter but by the laws of the foreign state.

20. In *Schreiber*, for example, the majority drew a clear distinction between the sending of a letter of request, an action which occurred in Canada, and the subsequent search and seizure conducted in Switzerland. As the majority explained:

"In this case, the sending of the letter of request is the only relevant action which was authorized and undertaken by the government of Canada, and therefore the only action which can be assessed for any impact on the respondent's *Charter* rights...."

"By itself, the letter of request does not engage s. 8 of the *Charter*. All of those actions which rely on state compulsion in order to interfere with the respondent's privacy interests were undertaken in Switzerland by Swiss authorities. Neither the actions of the Swiss

authorities, nor the laws which authorized their actions are subject to *Charter* scrutiny: *R. v. Terry*, [1996] 2 S.C.R. 207, at p. 217.”

Schreiber, supra at paras. 29 and 31

21. L’Heureux-Dube J., for the majority, went on to observe:

“I note that drawing a line between those Canadian actions which did not implicate the *Charter*, and the actions by Swiss authorities which would have implicated the *Charter* had they been undertaken by Canadian authorities, is consistent with this Court’s jurisprudence on matters involving Canada’s international co-operation in criminal investigations and prosecutions: see, e.g., *Canada v. Schmidt*, [1987] 1 S.C.R. 500, at pp. 518-19; *Argentina v. Mellino*, [1987] 1 S.C.R. 536, at p. 547; *Kindler v. Canada (Minister of Justice)*, [1991] 2 S.C.R. 779, *per* La Forest J. at p. 831, and *per* McLachlin J. at p. 846.”

Schreiber, supra at para. 34

22. It follows that the actions of Canadian officials involved in international information sharing, including requesting information from a foreign state, do not implicate the *Charter*. Similarly, receiving information in Canada from a custodial interview conducted abroad does not engage the *Charter*.

Schreiber, supra at para. 39

Terry, supra at para. 19

Harrer, supra at para. 11

Limitations on the Extra-territorial Application of the Charter and International Human Rights Law

23. In *obiter*, in *Hape*, the majority observed that in some circumstances the international law principle of comity, which ordinarily prohibits the operation of Canadian standards in a foreign state, might give way to competing international human rights obligations. As the Lebel J. put it:

“Moreover, there is an argument that comity cannot be invoked to allow Canadian authorities to participate in activities that violate

Canada's international obligations. As a general rule, Canadian officers can participate in investigations abroad, but must do so under the laws of the foreign state.... But the principle of comity may give way where the participation of Canadian officers in investigative activities sanctioned by foreign law would place Canada in violation of its international obligations in respect of human rights..."

It is unclear what this reasoning might mean in practice and, not surprisingly, the majority specifically left this argument "to be considered in a future case."

Hape, supra at para. 101

24. Two things are clear. First, a possible line of argument identified in *obiter* in 2007 cannot serve as a basis upon which this Internal Inquiry could reasonably and fairly determine whether the actions of Canadian officials in 2001-2004 were sufficient or deficient. As O'Keefe J. stated in *Stevens* "...it would be unfair to develop a standard at a point in time after the conduct being complained of has occurred."

Stevens v. Canada (Attorney General), [2004] F.C.J No. 2116 (T.D.) at para. 42

25. Second, while this may be an emerging area of international law, no international human rights obligations directly governed the conduct in 2001-2004 by Canadian officials referred to in the Amended Notice of Hearing. For example, while the general spirit of the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* ("the CAT") and the *International Covenant on Civil and Political Rights* ("the ICCPR") clearly inform the conduct of Canadian officials, neither the CAT nor the ICCPR created binding legal obligations that governed information sharing, the sharing of questions with foreign authorities or the conduct of a custodial interview absent an allegation of abuse during that interview.

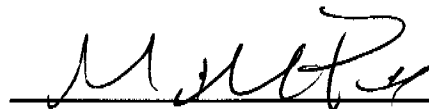
26. It is the position of the Canadian government that Canada's international human rights obligations extend to persons in its territory or subject to its jurisdiction. Consistent with the reasoning of the Supreme Court of Canada

regarding limits on the extra-territorial application of the Charter, Canada's obligations under the CAT and the ICCPR do not extend to foreign territories not under its jurisdiction. As a result, even if the *obiter* in *Hape* somehow reached back to 2001-2004, it still would not create a standard by which this Internal Inquiry could properly judge the actions of Canadian officials because no such standard existed at international law at the relevant time.

27. The fact that no international human rights obligations directly governed international information sharing and the investigative practices referred to in the Amended Notice of Hearing in 2001-2004 should not be taken to mean that Canada in any way disregards its international human rights obligations or fails to be mindful of the spirit of those obligations. The risk of mistreatment and torture faced by a Canadian citizen detained abroad was and is an important consideration in determining whether to engage in a particular investigative practice.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated: January 25, 2008

A handwritten signature in dark ink, appearing to read 'M. Peirce', written over a horizontal line.

Michael Peirce