

IN THE SUPREME COURT OF CANADA
(On Appeal from the Court of Appeal for Ontario)

B E T W E E N:

LAWRENCE RICHARD HAPE

Appellant
(Appellant in the Court of Appeal)

- and -

HER MAJESTY THE QUEEN

Respondent
(Respondent in the Court of Appeal)

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PART I - STATEMENT OF FACTS

OVERVIEW

1. The Appellant, Lawrence Richard Hape, was convicted of two counts of money laundering contrary to section 9 of the *Controlled Drugs and Substances Act*. At his trial, the Crown relied upon documents seized by R.C.M.P. officers in the Turks and Caicos Islands. The issue in this appeal is the applicability of the *Canadian Charter of Rights and Freedoms* to Canadian police officers conducting investigations outside the geographic border of Canada.

THE OFFENCES ALLEGED

2. Mr. Hape was an investment banker. In October 1996, he was introduced to undercover R.C.M.P. officer, Sgt. Ron Nicholson, who at the time was using the name Paul Olson. Over the following 16 months, Mr. Hape met with Olson from time to time. During the meetings Olson claimed an association to illicit drug business and sought Mr. Hape's assistance in moving money out and back into Canada. The Appellant offered to assist for a commission.
3. On February 2, 1998, Sgt. Nicholson gave Mr. Hape \$252,000.00 of police money. Nicholson gave him this money in Toronto, with instructions that he wanted a simple move down to where the Appellant was, and then in a little while it would go to an account in Europe. On February 18, Nicholson faxed instructions to transfer \$150,000.00 to an account in the Netherlands.

4. On November 11, 1998, in the Turks & Caicos Islands, Sgt. Nicholson gave Mr. Hape a further \$80,000.00 USD. He again instructed the money be sent to the same account in the Netherlands.
5. The monies relevant to both of these transactions were ostensibly from “Jim”, a fictitious heroin trafficker. These two transactions were the subjects of the two charges. Documents seized from Mr. Hape’s place of business in the Turks and Caicos Islands were relied upon by the Crown as evidence of Mr. Hape’s involvement with the money.

THE FOREIGN SEARCHES

6. The relevant facts were summarized by the trial judge in the ruling on the application to exclude the seized evidence:

3 The RCMP had an ongoing investigation of the accused for suspected money laundering activities. That investigation, which had commenced in the spring of 1996, involved an undercover operative, Sergeant Nicholson, who established contact with the accused posing as a person who wished to launder the proceeds of drug trafficking. Sergeant Nicholson understood that the funds that he provided to Mr. Hape, while under his guise, would be transferred by and through the British West Indies Trust Company to accounts that the RCMP had set up in the Netherlands. The RCMP wished to obtain documentation, confirming these transfers, and investigate whether the company was engaged in other money laundering activities.

4 In November of 1997, the officers in charge of the RCMP investigation, Officers Boyle and Flynn, met in Miami with a Detective Superintendent Lessemun of the Turks & Caicos Police Force. Detective Superintendent Lessemun was in charge of criminal investigation on the Islands. Only the commissioner and deputy commissioner of the Turks & Caicos Police were of a higher

rank, but neither of them were involved in day-to-day criminal investigation. Officers Boyle and Flynn dealt exclusively with Detective Superintendent Lessemun. They understood from him that he was not confident he could trust all Turks & Caicos police officers, because Mr. Hape was well known and had many friends on the Islands, and because of the security standards of the resident police force. The RCMP officers sought permission to continue the RCMP investigation in the Turks & Caicos. They provided Detective Superintendent Lessemun with a synopsis of the investigation. He agreed to allow the RCMP to continue its investigation on the Islands, but was adamant he was going to be in charge, and that the RCMP would be working under his authority. Officer Boyle testified that what the RCMP were allowed to do on the Island was at Detective Superintendent Lessemun's discretion.

5 A covert entry into the offices of the British West Indies Trust company took place in March of 1998. In order to prepare for that covert entry, technical experts of the RCMP went to the Islands in February of 1998, in order to obtain information about the door locks and burglar alarm systems of the company. Before their departure from Canada, the experts received technical information from Detective Superintendent Lessemun, and he provided further technical information to them when they met with him on the Island.

6 Late on the nights of February 7 and 8, 1998, the RCMP and Detective Superintendent Lessemun went to the premises of the British West Indies Trust Company. The RCMP technical experts surreptitiously entered onto the premises of the company, to obtain technical information about its security systems. They examined, at extremely close range, the exterior door locks and what could be seen of the interior locks and alarm system by peering into the darkened interior through various windows and doors using a flashlight. They used a video camera to record what they saw. While they were doing this, Detective Superintendent Lessemun, together with the RCMP investigators, kept look-out. Lessemun was with the RCMP team at all times.

7 On February the 9th, 1998, the two RCMP technical experts entered into the reception area of the British West Indies Trust Company, posing as tourists, seeking investment information. They spent a few minutes talking to the receptionist and obtained an advertising pamphlet. Their purpose in entering the offices was to observe what they could of the locks and the burglar alarm system.

8 The RCMP knew there was no warrant to enter onto or into the premises of the British West Indies Trust Company in February of 1998. One of the technical experts, Sergeant McDonagh, testified that he had discussed their intended actions with Detective Superintendent Lessemun and "relied on his expertise as being the knowledge base for the legalities on the Island."

9 Upon their return to Canada, the RCMP technical experts received further technical information from Detective Superintendent Lessemun to facilitate the planned covert entry.

10 In March 1998, the RCMP investigators and technical experts returned to the Turks & Caicos Islands. They, with Detective Superintendent Lessemun, again attended at the premises of the British West Indies Trust Company. On two occasions, shortly after midnight on March 13, in the early hours of March 14, and shortly before midnight on March 14, the RCMP technical experts opened the locked doors and provided the investigators with surreptitious entry into the premises.

11 On these occasions, the RCMP officers testified that they understood that separate warrants were in place for each of the two covert entries. Officer Boyle said he saw a document he understood was a warrant for the first entry. Sergeant McDonagh said that after the first entry, but before the second entry, Detective Superintendent Lessemun showed him a document that he understood was the warrant for the first entry, and he made notes of the document's terms. Both Officer Boyle and Sergeant McDonagh understood from Detective Superintendent Lessemun that there was a warrant for the second entry, but neither had a note or recollection of seeing

it. No warrants were introduced into evidence.

12 Officer Boyle testified that once the RCMP compromised the building security, Detective Superintendent Lessemun entered the premises with what he, Officer Boyle, understood to be the warrant, and then Detective Superintendent Lessemun took up a position outside the building to provide "perimeter security." Officer Boyle testified that Detective Superintendent Lessemun and the RCMP considered that Lessemun should remain outside, so he could intercept any Turks & Caicos police officers who may come by and divert them from jeopardizing the security of the covert operation. Inside the offices, the RCMP investigators downloaded all information on the computer systems located in the offices onto portable hard drives and copied numerous client files, company records, and banking documents by scanning them.

13 In February of 1999, the RCMP returned to the Turks & Caicos Islands again. On February 16, 1999, six RCMP officers and Detective Superintendent Lessemun and three other Turks & Caicos police officers entered the offices of the British West Indies Trust Company, and, over the next three days, seized some 102 or 103 bankers' boxes of records. Officer Boyle said he saw and read a document that he understood was a warrant authorizing the entry and seizure and passed it to his men to read. No warrant was put into evidence before me.

14 The RCMP intended to bring the seized records back to Canada and began loading them into their airplane. Officer Boyle testified that Detective Superintendent Lessemun told the RCMP that they could not remove the records from the Islands and the boxes were unloaded. There was some suggestion, in the testimony, that there was a Court order preventing the RCMP from removing the boxes from the Islands, but none was put into evidence.

15 Later, in March of '99, and again in October of '99, the RCMP took computers and scanning equipment to the Turks & Caicos Islands. On these occasions, in the presence of Turks & Caicos

police, the RCMP scanned some 40,000 documents, comprised of some 62,000 pages, into electronic format and brought them back to Canada. The Crown intends to introduce 26 of these documents at this trial.

Appellant's Record: *Reasons for Judgment of the Ontario Superior Court of Justice, page 3, line 10 to page 5, line 15*
Evidence of D. Lewis, Pages 146 to 164
Evidence of Sgt. McDonagh, Page 243 to 254

7. The covert searches and seizures were directly related to documenting the dealings between Sgt. Nicholson and Mr. Hape. It was part of the R.C.M.P.'s deliberate plan that certain things were done to leave a paper trail that could be found in Mr. Hape's place of business in the Turks and Caicos Islands during the covert searches. This was all orchestrated by the R.C.M.P.

Appellant's Record: *Evidence of Officer S. Boyle, Page 191, lines 5 to 20*
Page 205, line 28 to
Page 206, line 19
Page 198, lines 10 to 20
Page 199, line 24 to
Page 200, line 14

8. The briefing meeting for the March 1998 covert searches was held in the Bahamas. Present at the briefing were the seven Canadian officers involved in the investigation, as well as three American officers. Not a single Turks & Caicos police officer was present. Det. Lessemun, who was the R.C.M.P.'s contact person in the Turks and Caicos, had no involvement in the operational plans for the covert searches.

Appellant's Record: *Evidence of Officer S. Boyle, Page 200, line 15 to*
Page 201, line 9
Page 239, line 10 to 19
Page 242, line 13 to 22
Evidence of Sgt. McDonagh, Pages 280 to 282

9. During the execution of the March 1998 searches Det. Lessemun never even entered the premises. The determination of what material was to be seized was entirely an R.C.M.P. determination.

Appellant's Record: *Evidence of Officer S. Boyle, Page 222, line 20 to*

Evidence of A. Alderson, Page 223, line 7
Evidence of Sgt. McDonagh, Page 184, lines 13 to 18
Page 277, line 20 to
Page 279, line 16

10. After the R.C.M.P. tried but were prevented from taking the 103 boxes of materials seized in the February 1999 search out of the Turks and Caicos Islands, thirteen Canadian officers were sent there to scan and catalogue all of the seized documents. This scanning process was conducted with Canadian equipment provided by the R.C.M.P. The scanning was done by R.C.M.P. officers and civilian staff in a resort premise rented by the R.C.M.P.

Appellant's Record: *Evidence of Officer S. Boyle,* Page 220, lines 15 to 30
Evidence of A. Bland, Page 229, lines 23 to 30
Evidence of D. Clark, Page 283, line 1 to
Page 285, line 30
Evidence of G. Letch, Page 166, line 20 to
Page 167, line 20
Page 170, lines 20 to 30
Page 174, line 15 to
Page 177, line 20
Page 177, line 8 to
Page 179, line 25
Page 180, line 5 to
Page 182, line 22

11. From all perspectives this was not a joint-forces type of investigation. This was an R.C.M.P. investigation that happened to take the R.C.M.P. outside the geographic borders of Canada. Sgt. Boyle, who developed the operational plan for the foreign searches, referred to it as “our investigation” in his testimony. Official R.C.M.P. documents described the operation as “our planned covert search in the Turks & Caicos” and “our investigation and the planned covert search” and “our operation down south”.

Appellant's Record: *Exhibit #A11-T17,* Page 308, line 10
Exhibit #A14-T22, Page 314, lines 20 to 30
Exhibit #A15-T24, Pages 316 to 317
Evidence of Officer Boyle, Page 211, line 20 to
Page 212, line 15
Exhibit #A8-T23, Pages 293 to 298

PART II – QUESTION IN ISSUE

12. At issue in this appeal is the Application of the *Charter* to R.C.M.P. search and seizure activities outside Canada, and whether enlisting the mere companionship of a foreign policeman renders the *Charter* inapplicable.

PART III - ARGUMENT

13. It is respectfully submitted that the *Charter* applied to the actions of the R.C.M.P. in their searches and seizures at the B.W.I.T. offices at Arawak House, notwithstanding that those activities took place outside Canada. The trial Judge erred in ruling that the search and seizure actions of the R.C.M.P. in the Turks and Caicos did not fall within the purview of the *Charter*. It is respectfully submitted that Canadian authorities are in fact subject to the *Charter* even when outside the territorial boundaries of Canada, and that the *Charter* does in fact apply to the actions of Canadian police in a foreign jurisdiction.

Appellant's Record: Reasons for Judgment of the Ontario Superior Court of Justice, paras 16 to 32, pages 5 to 7
R. v. Cook, [1998] 2 S.C.R. 597 at para. 23 to 25; and 38 to 48 (explaining *Terry*)
R. v. Terry, [1996] 2 S.C.R. 207 at para. 13 to 20
R. v. Harrer, [1995] 3 S.C.R. 562 at para. 10 to 12
Schreiber v. Canada, [1998] 1 S.C.R. 841 at paras 16, 27, 32 and 34

14. The evidence clearly demonstrated that the search and seizure operations conducted at Arawak House were Canadian born and bred. This investigation was an R.C.M.P. investigation from start to finish. The searches were a product of an investigation that was completely planned by the R.C.M.P. The R.C.M.P. planned, conducted, and executed the massive invasion of privacy upon the B.W.I.T. business premises in the Turks & Caicos with merely the nominal assistance amounting to little more than mere presence of any non-Canadian police officer. Those actions were an integral part of the Canadian police operation and investigation regarding the Appellant and carried out for the purposes of that Canadian police operation. The briefing in the Bahamas on March 11, 1998 did not

have one Turks & Caicos official present. The R.C.M.P. supplied all of the equipment and expertise utilized in the searches. The searches of Arawak House were conducted by Canadian officers and were part of an R.C.M.P. investigation from start to finish. The Turks & Caicos police, including Detective Lessemun, did not take any active role or interest in the investigation. Officer Lessemun's involvement was at the eleventh hour and limited to standing around outside the premises. The actual searching and seizing was conducted by the R.C.M.P. and these are the actions that are made subject to *Charter* scrutiny. The R.C.M.P. conducted the investigation in a manner evidencing their complete control of the operation. The application of the *Charter* given the almost non-existent role of the Turks & Caicos authorities, does not in any way interfere with that nation's sovereign authority.

*Appellant's Record: Evidence of Officer S. Boyle, Page 200, line 15 to
Page 201, line 9
Page 239, line 10 to 19
Page 242, line 13 to 22
Page 311, line 28*
Exhibit #A11-T17,

15. It is respectfully submitted that the conduct of the Canadian police in this case falls within the factual confines of the decision in *R. v. Cook*. In that decision the American authorities allowed the Canadian police to interview the subjects within their jurisdiction. The search conducted by Canadian officers is analogous to the interviews conducted by Canadian officers in *R. v. Cook*. The words "search and seizure" can be substituted for "taking of the appellant's statement" and "interview" and "Turks & Caicos" for "United States" and "New Orleans" in the following passage:

[...] the principle of state sovereignty is not violated by the application of the *Charter* to the taking of the appellant's statement by Canadian authorities in the United States. In this context, it is

reasonable to expect the Canadian officers to comply with *Charter* standards. Furthermore, it is reasonable to permit the appellant, who is being made to adhere to Canadian criminal law and procedure, to claim Canadian constitutional rights relating to the interview conducted by the Canadian detectives in New Orleans.

R. v. Cook, supra, at para. 51

16. It is respectfully submitted that the courts below erred in excluding the *Charter*'s application by a finding that the R.C.M.P. actions were a "co-operative investigation." The holding in *R. v. Terry* that references "a co-operative investigation" was misunderstood and misapplied in this case. It is respectfully submitted that that passage in *Terry* is simply emphasizing that the *Charter* only applies to Canadian state action and cannot apply to the actions of foreign state agents *per se*, so that to the extent that the foreign agents were "co-operating" with Canadian authorities they would still not be amenable to the *Charter*. In the *Terry* decision it was specifically held that the *Charter* would not apply to the foreign agents acting as such – not that it would not apply to the Canadian authorities or state agents. The *Terry* dicta should be understood as dicta about the foreign agents, not the Canadian state agents, because that is expressly what is being discussed in that passage.

R. v. Terry, supra at para. 19

17. It is respectfully submitted that the searches and seizures carried out by the R.C.M.P. clearly failed to meet *Charter* standards. If the *Charter* does not apply to the numerous and massive extraterritorial R.C.M.P. searches and seizures in this case then it is impossible to imagine any case where it ever would.

PART IV – SUBMISSIONS CONCERNING COSTS

18. The Applicant respectfully submits that no order for costs is appropriate in the circumstances of this case.

PART V – ORDER SOUGHT

19. It is respectfully requested that the appeal be allowed, the convictions quashed, and acquittals entered. In the alternative it is respectfully requested that a new trial be ordered.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated this day of May, 2006.

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Lawrence Richard Hape

PART VI - TABLE OF AUTHORITIES

	Paragraph in Part III where cited
<i>R. v. Cook</i> , [1998] 2 S.C.R. 597 (S.C.C.)	13, 15
<i>R. v. Harrer</i> , [1995] 3 S.C.R. 562 (S.C.C.)	13
<i>R. v. Terry</i> , [1996] 2 S.C.R. 207 (S.C.C.)	13, 16
<i>Schreiber v. Canada</i> , [1998] 1 S.C.R. 841 (S.C.C.)	13