

21. The *Charter* does *not* apply to every person and in every setting outside the geographic border of Canada. The fact that Canadian police officers played a part in an international investigation does *not*, by itself, mean that the *Charter* is engaged. The *Charter* does *not* apply to conduct outside of Canada unless the impugned action falls within the exception established by this Court in *R. v. Cook*.<sup>28</sup> The *Charter* does *not* apply on foreign territory where the application of *Charter* standards would generate an objectionable extraterritorial effect.<sup>29</sup> In other words, the application of the *Charter* outside Canada will be permitted only “where no conflict occurs in the concurrent exercise of jurisdiction by Canada on the basis of nationality and by a foreign state on the basis of territoriality.”<sup>30</sup>

22. It would be unreasonable to expect that foreign searches controlled by foreign law enforcement officials should be governed by the *Charter*. Such searches are governed by the laws of the foreign state, not Canadian criminal law. To impose the *Charter* on the laws and procedures of a foreign country would constitute interference with the sovereign authority of that country.<sup>31</sup>

23. The authority for each and every act of the RCMP in Turks and Caicos was derived from law enforcement in Turks and Caicos. The searches in Turks and Caicos were investigative actions undertaken by Turks and Caicos authorities in accordance

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<sup>28</sup> *Cook v. The Queen*, [1998] 2 S.C.R. 597.

<sup>29</sup> *Cook*, at paras. 43-48.

<sup>30</sup> *Cook*, at para. 54; *Schreiber v. Canada (A.G.)*, [1998] 1 S.C.R. 841.

<sup>31</sup> *Cook*, at para. 54.

with Turks and Caicos procedures. The evidence makes it clear that the RCMP exercised no control over the Turks and Caicos police. In fact, no investigative steps were taken prior to meeting with Detective Superintendent Lessemun, the highest ranking investigator in Turks and Caicos and a very experienced senior British police officer. Upon meeting with Lessemun, it was clear to the RCMP investigators that the Turks and Caicos police would at all times maintain control of the investigation in Turks and Caicos, although significant RCMP resources would be required in order to maintain the integrity of the investigation and meet operational requirements. This was a reality accepted by the RCMP as they had no authority, of any kind, in Turks and Caicos. The RCMP followed every requirement imposed by their hosts in Turks and Caicos. They took steps to ensure that local warrant requirements were satisfied. To impose Canada's *Charter* standards on the assistance given to the Turks and Caicos police by the RCMP would be direct interference with the sovereign authority of Turks and Caicos.

24. Furthermore, as the trial judge concluded, the appellant never established that the RCMP conduct in Turks and Caicos was unlawful under the domestic law of Turks and Caicos.<sup>32</sup> There was no evidence that the appellant's documents were seized illegally in Turks and Caicos.<sup>33</sup> The appellant never called any evidence of Turks and Caicos law relating to searches. The trial judge found that the RCMP officers

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<sup>32</sup> *Respondent's Record: Reasons for Judgment of the Ontario Superior Court of Justice on the Section 7 Charter Application* (January 18, 2002), Pages 6-7.

<sup>33</sup> *Respondent's Record: Reasons for Judgment of the Ontario Superior Court of Justice on the Section 7 Charter Application* (January 18, 2002), Pages 5-9.

believed that there were warrants in place for these searches and seizures.<sup>34</sup> In fact, at least three of the RCMP officers saw the search warrants while they were in Turks and Caicos.<sup>35</sup> The appellant never established, and there is no reason to believe, that the searches conducted in March, 1998 and February, 1999 were warrantless searches. Indeed, the Turks and Caicos Court of Appeal found that the search warrant for the February 16<sup>th</sup>, 1999 search of the appellant's office was "lawfully issued".<sup>36</sup> Finally, it should be noted that the Turks and Caicos search warrants for March, 1998 and February, 1999 were disclosed to the appellant.<sup>37</sup>

25. The trial judge concluded that the RCMP and Turks and Caicos police were engaged in a "co-operative investigation."<sup>38</sup> The appellant seeks to narrow this Court's decision in *R. v. Terry* by interpreting it as saying only that the *Charter* will not apply to foreign actions of foreign officials.<sup>39</sup> This interpretation of *Terry* is unduly limited and is contradicted by subsequent case law.

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<sup>34</sup> Appellant's Record: *Reasons for Judgment of the Ontario Superior Court of Justice on the Section 8 Charter Application* (January 17, 2002) Pages 4-5 (paras 10-13);  
Respondent's Record: *Reasons for Judgment of the Ontario Superior Court of Justice on the Section 7 Charter Application* (January 18, 2002), Page 6.

<sup>35</sup> Respondent's Record: *Evidence of Officer Boyle*, Page 139, line 5 to Page 140, line 8; *Evidence of Officer Clark*, Page 148, line 10-31; *Evidence of Officer Lewis*, Page 39, line 1-10; *Evidence of Sgt. McDonagh*, Page 83a.  
Appellant's Record: *Evidence of Sgt. McDonagh*, Page 274, line 13-26.

<sup>36</sup> Respondent's Record: *Submissions* Pages 149 line 1 to Page 153, line 30; *Submissions*, Page 178, line 30 to Page 180, line 25; *Inversiones Globales Ltd. et al v. The Attorney General et al*, a decision of the Turks and Caicos Islands Court of Appeal, released October 20, 1999.

<sup>37</sup> Respondent's Record: *Submissions*, Page 121, lines 10-11.

<sup>38</sup> Appellant's Record: *Reasons for Judgment of the Court of Appeal*, Pages 56-57 (para 7).

<sup>39</sup> *R. v. Terry*, [1996] 2 S.C.R. 207

26. The broader meaning of *Terry* is apparent from the following statement by this Court in *Cook*:<sup>40</sup>

The application of the Charter in this case does not violate the principle of state sovereignty by imposing Canadian criminal law standards on foreign officials and procedures. Our conclusion that the Charter applies in the present case must be understood within this narrow context, i.e., where no conflict occurs in the concurrent exercise of jurisdiction by Canada on the basis of nationality and by a foreign state on the basis of territoriality. It may well be a different case where, for example, Canadian authorities participate, on foreign territory, in an investigative action by foreign authorities in accordance with foreign procedures. As McLachlin J. observed in *Terry*, supra, at para. 19 “any co-operative investigation involving law enforcement agencies of Canada and the United States will be governed by the laws of the jurisdiction in which the activity is undertaken”. However, such facts are not before the Court in this case and remain to be resolved another day. (emphasis added)

27. In this case, the laws of Turks and Caicos applied, not Canadian law. The co-operation between the Turks and Caicos police and the RCMP does not impose Canada’s *Charter* requirements on the enforcement mechanisms utilized by the Turks and Caicos police. It would be untenable to mandate *Charter* compliance or subsequently scrutinize for *Charter* compliance those searches carried out in Turks and Caicos in accordance with the laws of that jurisdiction. When Canadian law enforcement officials work in a foreign country they act at the pleasure of the host government. Canadian police are hardly in a position to demand that the host government recognize the force of the Canadian *Charter* with respect to the searches conducted in the foreign country.

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<sup>40</sup> *Cook*, at para. 54.

28. Contrary to the position taken by the appellant, in *Cook* the *Charter* was applied to foreign police action on facts very different from those in the case at bar. In *Cook*, the Canadian police officers could have interviewed the accused person and easily complied with *Charter* standards without interfering with foreign procedures.<sup>41</sup> Here, the application of the *Charter* to the investigative operations in Turks and Caicos would *by necessity* compel compliance by the foreign authorities, thus impinging on their sovereign authority.

29. Scrutiny by Canadian courts into whether privacy rights are properly protected in foreign countries may have a negative impact on international relations. The exclusion of evidence by a Canadian court obtained in a foreign country has the potential to undermine the ability of Canadian law enforcement to enlist foreign cooperation in the future. In *Harrer*,<sup>42</sup> this Court rejected the imposition of Canadian procedural rules on foreign authorities gathering evidence for use in Canada because to do so would stand in the way of effective cooperation in fighting international crime:

For us to insist that foreign authorities have followed our internal procedures in obtaining evidence as a condition of its admission in evidence in Canada would frustrate the necessary cooperation between the police and prosecutorial authorities among the various states in the world.

30. To hold that section 8 of the *Charter* does not apply to foreign searches is not to suggest that there are or should be no controls over the investigative activities of Canadian law enforcement abroad. Where the admission of evidence would lead to an

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<sup>41</sup> *Cook*, at paras. 51-54.

<sup>42</sup> *R. v. Harrer*, [1995] 3 S.C.R. 562 at para.15.

unfair trial, a court has the discretion to exclude evidence under section 7 of the *Charter*.<sup>43</sup> In this case, the trial judge dismissed the appellant's application for a stay of proceedings.<sup>44</sup>

**B) There Was No Violation of Section 8 of the *Charter***

31. The appellant kept documents used by him in his money laundering operation in Turks and Caicos. Where a Canadian resides in a foreign country he or she should expect his or her privacy to be governed by the laws of that country and, as such, a reasonable expectation of privacy will generally correspond to the degree of protection those laws provide. There was no evidence that the searches and seizures were conducted contrary to Turks and Caicos laws. If section 8 of the *Charter* did apply to the actions of the RCMP in Turks and Caicos, the appellant failed to establish that he had a reasonable expectation of privacy in relation to the searches and seizures in Turks and Caicos because there was no reason to believe that the searches and seizures were not in accordance with foreign law. No violation of the appellant's section 8 *Charter* rights was, therefore, established.<sup>45</sup>

32. At trial, the Crown argued that the appellant did not have a reasonable expectation of privacy in relation to the searches conducted in Turks and Caicos. The trial judge referred to this aspect of the Crown's argument in his reasons for judgment

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<sup>43</sup> *Harrer*, at paras. 10-25; *Schreiber v. Canada* (A.G.) [1998] 1 S.C.R. 841 at para 35; *USA v. Dynar*, [1997] 2 S.C.R. 462.

<sup>44</sup> Appellant's Record: Reasons for Judgment of the Ontario Superior Court of Justice on the Section 7 Charter Application (January 18, 2002).

<sup>45</sup> *Schreiber v. Canada*, at paras. 17 and 19.

but did not decide the issue because his conclusion that section 8 did not apply was dispositive of the *Charter* application.<sup>46</sup>

33. In assessing whether a person had a reasonable expectation of privacy, a court must consider the “totality of circumstances”.<sup>47</sup> Expectations of privacy necessarily vary with the context.”<sup>48</sup>

34. By their nature, reasonable expectations of privacy are not capable of universal application. The privacy rights enjoyed by citizens in different countries are different. The privacy interests protected by section 8 of the *Charter* vary from society to society and country to country. The political system and culture in each country will be an important force in shaping privacy interests. There is no reason to believe that what would be a reasonable privacy expectation in Canada would necessarily be reasonable in another country. Therefore, the best measure of a person’s reasonable expectation of privacy in a foreign country is the law of the foreign state.<sup>49</sup>

35. In *Schreiber*, Lamer C.J. concluded that a foreign search for the respondent’s personal financial records, conducted at the request of Canadian authorities, did not

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<sup>46</sup> *Appellant’s Record: Reasons for Judgment of the Ontario Superior Court of Justice on the Section 8 Charter Application* (January 17, 2002), Page 3 (para. 2).

*Respondent’s Record: Submissions*, Page 184, line 5, to Page 195, line 26; *Applicants’ Written Submissions on Sections 7, 8 and 24 of the Charter*, Pages 10-25; *Respondent’s Written Submissions on Sections 7, 8 and 24 of the Charter*, Pages 26-36.

<sup>47</sup> *R. v. Edwards*, [1996] 1 S.C.R. 128.

<sup>48</sup> *Schreiber v. Canada*, at para. 19.

<sup>49</sup> *Schreiber v. Canada*, at paras. 19-25



violate the respondent's section 8 *Charter* rights because the search did not infringe on his reasonable expectation of privacy. Lamer C.J. placed significant emphasis on the fact that there was no evidence that the foreign records were seized in a manner contrary to the law of the foreign country:<sup>50</sup>

Of critical importance to this case is the fact that the records were located in Switzerland, and obtained in a manner consistent with Swiss law.

In *Terry*, supra, McLachlin J. stated that "[p]eople should reasonably expect to be governed by the laws of the state in which they currently abide, not those of the state in which they formerly resided or continue to maintain a principal residence" (para. 24). This rule means that a Canadian residing in a foreign country should expect his or her privacy to be governed by the laws of that country and, as such, a reasonable expectation of privacy will generally correspond to the degree of protection those laws provide. This, if anything, is more true for the person who decides to conduct financial affairs and keep records in a foreign state.

It may be fairly assumed that such a person has made an informed choice about where to conduct business, and thereby to create corresponding records, particularly banking records.

The state of the prevailing bank secrecy laws in foreign countries is among the considerations a reasonably prudent bank client will take into account in deciding where to conduct his or her affairs. Accordingly, such a client, in my view, cannot reasonably expect greater privacy protection than is provided under the very laws he or she has expressly decided to have applied to his or her financial affairs and create the corresponding records. In short, having sought the benefit of foreign laws in choosing to place his or her funds under the jurisdiction of a foreign state, the client must also accept their burden.

In other words, a person who has property or records in a foreign state runs a risk that a search will be carried out in accordance with the laws of that state. He cannot "reasonably expect" that this will not happen, if the laws of the state clearly permit it. Of course, in Canada, the prevailing domestic law must itself be measured against the Charter to determine whether it violates the constitutional privacy right which s. 8 guarantees (Hunter, supra; R.

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<sup>50</sup> *Schreiber v. Canada*, at paras. 22-25



v. Collins, [1987] 1 S.C.R. 265). However, this Court is much more reluctant to measure the laws of foreign states against guarantees contained in the Canadian Constitution. At the same time, if use of the evidence obtained on the strength of foreign laws affected the fairness of a trial held in Canada, it could be excluded under a combination of ss. 7 and 24(1) of the Charter, as suggested in Terry and Harrer, supra. No such suggestion has been made in this case, as no criminal trial has taken place in this matter, and, therefore, it is unnecessary to say any more about this possibility.

On the facts of this case, therefore, a search carried out by foreign authorities, in a foreign country, in accordance with foreign law does not infringe on a person's reasonable expectation of privacy, as he or she cannot reasonably expect more privacy than he or she is entitled to under that foreign law. In the case at bar, there is no evidence that the respondent's records were seized illegally in Switzerland. In fact, the parties declined to lead any evidence whatsoever about Swiss law. The respondent must have reasonably expected that, if he did his banking in Switzerland, his records could be searched in accordance with Swiss law. Therefore, it cannot be said that his reasonable expectation of privacy was violated. As a result, there can be no violation of s. 8. (Emphasis added)

36. In this case, having set up his money laundering operation in Turks and Caicos, the appellant assumed the risk that a search of his office would be carried out in accordance with the laws and procedures of that state. As a Canadian who resides, conducts business, and maintains business records in Turks and Caicos his reasonable expectation of privacy must be determined by the protection that the laws of Turks and Caicos provide. At trial, the appellant called no evidence of Turks and Caicos law relating to searches. There was *absolutely* no evidence that the appellant's records were seized contrary to the laws of Turks and Caicos.<sup>51</sup> The appellant did not testify on the section 8 application and, therefore, there was no evidence that the appellant had a

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<sup>51</sup> Respondent's Record: Reasons for Judgment of the Ontario Superior Court of Justice on the Section 7 Charter Application (January 18, 2002), Pages 6 to 8.

subjective expectation of privacy. In all of the circumstances, the appellant did not establish that he had a reasonable expectation of privacy.

37. Finally, there is no basis to conclude that the manner in which the searches and seizure were carried out was unreasonable.<sup>52</sup>

**c) The Evidence Should Not be Excluded under Section 24(2) of the Charter**

38. If the appellant's section 8 *Charter* rights were infringed, there is nothing on the facts of this case that warrants the exclusion of the seized documents. The courts below did not address section 24(2) of the *Charter* as they concluded that the Charter did not apply. The onus was on the appellant to demonstrate that the admission of the evidence would bring the administration of justice into disrepute. For the following reasons, it is the *exclusion* of the evidence in this case that could tarnish the administration of justice:<sup>53</sup>

- The seized documents were non-conscriptive evidence, and the admission would not affect trial fairness.<sup>54</sup>
- There was no evidence of an ongoing pattern of disregard for the appellant's *Charter* rights. The RCMP officers took reasonable steps to ensure that they complied with the law in Turks and Caicos. The RCMP officers believed that search warrants had been obtained by the Turks and Caicos police. The RCMP believed that their actions while in Turks and Caicos were lawful.

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<sup>52</sup> *Respondent's Record: Reasons for Judgment of the Ontario Superior Court of Justice on the Section 7 Charter Application* (January 18, 2002), Pages 6 to 7; *R. v. Collins*, [1987] 1 S.C.R. 265

<sup>53</sup> *Stillman v. The Queen*, [1997] 1 S.C.R. 607; *R. v. Belnavis*, [1997] 3 S.C.R. 341; *R. v. Caslake*, [1998] 1 S.C.R. 51.

<sup>54</sup> *Respondent's Record: Reasons for Judgment of the Ontario Superior Court of Justice on the Section 7 Charter Application* (January 18, 2002), Pages 7 to 9.

- If the appellant's section 8 rights were breached, it was, at best, a very minimal breach.
- Some of the seized documents were faxes, records of banking transactions and other evidence in relation to the RCMP undercover operation in respect of which the appellant had no reasonable expectation of privacy.
- The seized documents were important to the prosecution of a significant crime and, if excluded, would tend to have an adverse effect upon the administration of justice.

#### **PART IV – POSITION CONCERNING COSTS**

39. The respondent seeks no order in relation to costs.

#### **PART V -- ORDER SOUGHT**

40. This appeal should be dismissed.

**All of which is respectfully submitted.**

Dated this 7<sup>th</sup> day of July 2006.

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## PART VI - TABLE OF AUTHORITIES

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

BETWEEN:

**LAWRENCE RICHARD HAPE**

Appellant

- and -

**HER MAJESTY THE QUEEN**

Respondent

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**RESPONDENT'S FACTUM**

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