

**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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ATTORNEY GENERAL OF CANADA  
Department of Justice  
Ontario Regional Office  
130 King Street West  
Box 36, Suite 3400  
Toronto, Ontario M5X 1K6

Per: Robert W. Hubbard  
John North  
Tel.: (416) 973-9042/(905) 454-2627  
Fax.: (416) 973-8253  
E-mail: [robert.hubbard@justice.gc.ca](mailto:robert.hubbard@justice.gc.ca)  
[john.north@justice.gc.ca](mailto:john.north@justice.gc.ca)

Counsel for the Respondent

ALAN D. GOLD  
Gold & Associates  
210 – 20 Adelaide Street East  
Toronto, Ontario M5C 2T6

Tel.: (416) 368-1726  
Fax: (416) 368-6811  
E-Mail: [adg@inforamp.net](mailto:adg@inforamp.net)

Solicitor for the Appellant

ATTORNEY GENERAL OF CANADA  
Department of Justice  
284 Wellington Street  
Suite 2311  
Ottawa, Ontario K1A 0H8

Per: Robert Frater  
Tel: (613) 957-4763  
Fax: (613) 941-7865  
E-mail: [robert.frater@justice.gc.ca](mailto:robert.frater@justice.gc.ca)

Agent for the Respondent

LAWRENCE GREENSPON  
Greenspon, Brown & Associates  
470 Somerset Street West  
Ottawa, Ontario K1R 5J8

Tel.: (613) 288-2890  
Fax: (613) 288-2896  
E-mail: [email@lgreenspon.com](mailto:email@lgreenspon.com)

Agent for the Appellant

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Table of Contents

PART I – THE RESPONDENT'S POSITION AS TO THE FACTS .....	1
a) Overview of the Respondent's Position.....	1
b) Overview of the Facts.....	2
c) The Trial Judge Concluded that the <i>Charter</i> Had No Application .....	3
d) The Court of Appeal Upheld the Trial Judge's Findings .....	4
e) The Intelligence Gathering Operation – February, 1998 .....	5
f) The Searches in Turks and Caicos .....	7
PART II - POINTS IN ISSUE.....	10
PART III – ARGUMENT .....	11
a) Section 8 of the Charter Has No Application in this Case .....	11
b) There Was No Violation of Section 8 of the <i>Charter</i> .....	17
c) The Evidence Should Not be Excluded under Section 24(2) of the Charter .....	21
PART IV – POSITION CONCERNING COSTS .....	22
PART V -- ORDER SOUGHT.....	22
PART VI - TABLE OF AUTHORITIES.....	23

## **PART I – THE RESPONDENT’S POSITION AS TO THE FACTS**

### **A) Overview of the Respondent’s Position**

1. The *Charter* had no application in this case. The trial judge made a factual finding that the investigation in Turks and Caicos, including the searches of the appellant’s offices, was under the control of the Turks and Caicos police, not the RCMP. The Court of Appeal decided that this finding was supported by the evidence.<sup>1</sup> There is no basis to conclude that the trial judge’s finding reflects a palpable and overriding error. The trial judge’s conclusion is fatal to the appellant’s appeal which is predicated on his assertion that the involvement of the Turks and Caicos police in this investigation was nothing more than “mere companionship”.<sup>2</sup> In short, section 8 of the *Charter* is inapplicable because the searches and seizure were done under the authority of the Turks and Caicos police.

2. The impugned searches were carried out in accordance with the law of Turks and Caicos. To impose Canada’s *Charter* standards on the actions of the RCMP while in Turks and Caicos would create an objectionable extraterritorial effect. Section 8 of the *Charter*, therefore, cannot apply to the actions of the RCMP in Turks and Caicos.

3. Furthermore, even if the *Charter* applied to the actions of the RCMP in Turks and Caicos, the appellant’s section 8 Charter rights were not infringed. The appellant did not establish that his *reasonable* expectation of privacy was violated as there was

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<sup>1</sup> Appellant’s Record: Reasons for Judgment of the Court of Appeal, Pages 56-57 (paras. 7-8).

<sup>2</sup> Appellant’s Factum, para. 12.

no evidence that the searches and seizures were conducted contrary to Turks and Caicos laws. 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. Therefore, a reasonable expectation of privacy will generally correspond to the degree of protection those laws provide.

4. Alternatively, if the appellant's section 8 *Charter* rights were breached, the appellant did not establish that the evidence should be excluded under section 24(2) of the *Charter*.

**B) Overview of the Facts**

5. In convicting the appellant, the trial judge relied upon the following facts. The investigation into the appellant's money laundering activities began in 1996. The appellant was a careful and sophisticated money launderer. In 1996, an undercover RCMP officer, Ron Nicholson, established contact with the appellant. Nicholson posed as a person who wanted to launder the proceeds of heroin trafficking. In 1996 and 1997 the appellant met with Nicholson on many occasions. The appellant had a number of companies in Turks and Caicos, including British West Indies Trust, that he used to launder proceeds of crime. The appellant told Nicholson that he handled many accounts for people like Nicholson and that he could assist in clouding the waters to ensure that no trail of the funds could be discovered. In February, 1998 Nicholson provided the appellant with a bag containing C\$252,000 to be laundered. Nicholson instructed the appellant to transfer the laundered money to an RCMP undercover

account in the Netherlands. The appellant laundered the money and transferred the funds to the account in the Netherlands. In November, 1998 Nicholson provided the appellant with a bag containing US\$80,000. Nicholson referred to the money's ostensible source being from heroin. During the course of the investigation, Nicholson sent several faxes to the appellant in the Turks and Caicos. Copies of those faxes were subsequently recovered when a search warrant was executed at the appellant's offices in Turks and Caicos in March, 1999. About two dozen of the documents seized during the execution of the search warrant became exhibits at the appellant's trial.<sup>3</sup>

6. The respondent accepts as substantially correct the facts contained in paragraphs 1-10 of the appellant's factum. The respondent also emphasizes the facts set out below.

**C) The Trial Judge Concluded that the *Charter* Had No Application**

7. The trial judge concluded that the *Charter* did not apply to the searches and seizure in Turks and Caicos. The trial judge found that the actions of the RCMP in Turks and Caicos were part of a "co-operative investigation".<sup>4</sup> Importantly, the trial judge also concluded that the searches were made under the authority and direction of the Turks and Caicos authorities. The trial judge made the following *factual* findings:

“...Detective Superintendent Lessemun [of the Turks and Caicos Police] was with the Canadian police at all times and did play a role in what they did by acting as a look-out, by providing information,

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<sup>3</sup> Appellant's Record: *Reasons for Judgment of the Ontario Superior Court of Justice* (June 10, 2002), Pages 10-52 .

<sup>4</sup> Appellant's Record: *Reasons for Judgment of the Ontario Superior Court of Justice on the Section 8 Charter Application* (January 17, 2002), Page 7 (para. 26).

and, the Canadian police believed, by obtaining warrants. While the Canadians may have made a larger contribution of officers, expertise and equipment, the Turks & Caicos contributed police authority in the jurisdiction. The RCMP sought and was granted permission from the Turks & Caicos authorities to conduct investigation on the Island. I accept Officer Boyle's testimony that the RCMP officers were, and understood that they were, operating under the authority of Detective Superintendent Lessemun. The fact that the RCMP could not remove the seized records from the Island, as they had planned, makes apparent that they were subject to Turks & Caicos authority.<sup>5</sup> (emphasis added)

8. The trial judge concluded that the application of the *Charter* to the "co-operative investigation" would result in an objectionable extra-territorial effect because the propriety and legality of the entries into private premises in Turks and Caicos were subject to the law and procedures in Turks and Caicos.<sup>6</sup>

#### **D) The Court of Appeal Upheld the Trial Judge's Findings**

9. The appellant raised multiple grounds of appeal before the Court of Appeal. On the issue of whether the *Charter* applied to the searches and seizure in Turks and Caicos, the Court concluded that the trial judge correctly applied the law to the findings of fact he made. In dismissing the appeal, the Court held:

7 The trial judge dismissed an application to exclude the evidence seized from the appellant's offices on the basis that the *Charter* did not apply ([2002] O.J. No. 3714). He found that the investigation in the Turks and Caicos Islands, including the searches, was under the control of the Turks and Caicos police force, which obtained authorization for all seizures from the Turks and Caicos judicial authorities. He further held that the Canadian police and the Turks and Caicos police were engaged in a "co-operative investigation". The trial judge considered the binding

<sup>5</sup> *Appellant's Record: Reasons for Judgment of the Ontario Superior Court of Justice on the Section 8 Charter Application* (January 17, 2002), Pages 6-7 (para. 25).

<sup>6</sup> *Appellant's Record: Reasons for Judgment of the Ontario Superior Court of Justice on the Section 8 Charter Application* (January 17, 2002), Page 7 (paras. 27-31).

authorities, including *R. v. Terry*, [1996] 2 S.C.R. 207, 106 C.C.C. (3d) 508 (S.C.C.) and *R. v. Cook*, [1998] 2 S.C.R. 597, 128 C.C.C. (3d) 1 (S.C.C.) and concluded on those authorities that the *Charter* did not apply.

8 Counsel for the appellant argued that in fact the role of the Turks and Caicos authorities was minimal and that the investigation was for all intents and purposes a Canadian investigation controlled by Canadian authorities. We must reject this argument as it runs contrary to the findings of fact made by the trial judge. Those findings were supported in the evidence. Counsel for the appellant also argued that even if the investigation was a co-operative one in which the Turks and Caicos authorities played a controlling role, the *Charter* still applied to the conduct of the Canadian authorities. In our view, this submission is contrary to the authorities relied on by the trial judge and referred to above. (Emphasis added)

#### **E) The Intelligence Gathering Operation – February, 1998**

10. Arawak House in Turks and Caicos housed the offices of the appellant's companies. In February, 1998, under the direction and authority of the Turks and Caicos Police, the RCMP conducted an intelligence gathering operation. The RCMP officers, relying on advice given to them by Detective Superintendent Lessemun, the highest ranking investigator in the Turks and Caicos police service, believed that the February, 1998 intelligence gathering operation was lawful according to the domestic law of Turks and Caicos. No evidence to the contrary was called at trial.<sup>7</sup>

11. On February 7 and 8, 1998, Detective Superintendent Lessemun and members of the RCMP performed an external survey of the property of the appellant's

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<sup>7</sup> Appellant's Record: *Reasons for Judgment of the Ontario Superior Court of Justice on the Section 8 Charter Application* (January 17, 2002), Pages 3-4 (paras. 6-8); *Evidence of Sgt. McDonagh*, Page 267, line 13 to Page 271, line 17; Page 266, line 7 to Page 279, line 30.

Respondent's Record: *Evidence of Sgt. McDonagh*, Page 46, line 1 to Page 47, line 29; Page 51, line 18 to Page 52, line 7; Page 53, line 7 to Page 69, line 29; Page 76, line 1 to Page 81, line 20; *Evidence of Officer Boyle*, Page 123 line 4 to line 14.



business. The objective was to obtain technical information about the company's security systems. They examined the building's exterior door locks and what could be seen of the interior locks and alarm system by peering through the windows.<sup>8</sup>

12. On February 9, 1998, two RCMP officers entered the reception area of the appellant's business at Arawak House, posing as tourists seeking investment information. They spent a few minutes talking to the receptionist. Their purpose in entering the office was to observe the locks and the burglar alarm system. This involved nothing more than a visual scan of the premises for security features that were in plain view to any person entering the office. These were business rather than residential premises, housing a number of offices and open to the public.<sup>9</sup> These RCMP officers conducted this inspection after receiving advice as to what would be permissible under the law of the Turks and Caicos.<sup>10</sup>

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<sup>8</sup> Appellant's Record: *Reasons for Judgment of the Ontario Superior Court of Justice on the Section 8 Charter Application* (January 17, 2002), Pages 3-4 (paras. 6-8); *Evidence of Officer Lewis*, Page 160, line 15 to line 30;

Respondent's Record: *Evidence of Officer Boyle*, Page 122, line 11 to Page 127, line 15; *Evidence of Sgt. McDonagh*, Page 45, line 30 to Page 53, line 6.

<sup>9</sup> Appellant's Record: *Evidence of Sgt. McDonagh*, Page 243, line 23 to Page 248, line 21.

Respondent's Record: *Evidence of Sgt. Lewis*, Page 40, lines 10-31 (7 January, 2002).

<sup>10</sup> Appellant's Record: *Reasons for Judgment of the Ontario Superior Court of Justice on the Section 8 Charter Application* (January 17, 2002), Pages 3-4 (paras. 5-7); *Evidence of Officer Lewis*, Page 161, line 3 to Page 164, line 1.

Respondent's Record: *Evidence of Officer Boyle*, Page 122, line 11 to Page 127, line 15; *Evidence of Officer Lewis*, Page 40, lines 10 to 20.



## F) The Searches in Turks and Caicos

13. In March, 1998 and February, 1999, there were three searches conducted at Arawak House. At trial, there was evidence that all of the searches were under the authority of warrants issued by the Turks and Caicos courts.<sup>11</sup> The searches were under the control of Detective Superintendent Lessemun. Detective Superintendent Lessemun was the third highest ranking officer in the Turks and Caicos police service, outranked only by the administrative positions of the Commissioner and Deputy Commissioner.

14. The first two searches, conducted on March 13 & 14, 1998, were "covert" searches done at night to gather information. The RCMP were not prepared to do the March 1998 covert entries unless satisfied that local warrant requirements were met. The RCMP officers testified that Detective Superintendent Lessemun of the Turks and Caicos Police obtained authorization from the local magistrate for the covert entries in March 1998 and was present for the searches.<sup>12</sup>

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<sup>11</sup> Appellant's Record: *Evidence of Sgt. McDonagh*, Page 274, lines 13-21; *Evidence of Officer Boyle*, Page 238, lines 15 to 30; Page 219, line 20 to Page 220, line 20.

Respondent's Record: *Evidence of Sgt. Lewis*, Page 38, line 15 to Page 39, line 15; *Evidence of Officer Boyle*, Page 112, line 5 to Page 145, line 28; Page 120, lines 1-17; Page 107, line 29 to Page 110, line 1; Page 141, lines 1 to 18 *Evidence of Sgt. McDonagh*, Page 83a, lines 1-29; Page 97, line 9 to Page 99, line 21; *Evidence of Officer Clark*, page 148, lines 10 to 31.

<sup>12</sup> Appellant's Record: *Evidence of Sgt. McDonagh*, Page 83a, lines 1-29; Page 267, line 20 to Page 271, line 1; Page 274, lines 13-20; *Evidence of Officer Lewis*, Page 149, lines 3-6.

Respondent's Record: *Evidence of Officer Lewis*, Page 38, lines 15-31 *Evidence of Sgt. McDonagh*, Page 97 to Page 99; *Evidence of Officer Boyle*, p. 112, line 5 to p. 114, line 28; p. 120, lines 1-17 ; Page 107, line 29 to Page 110, line 1; *Evidence of Officer Clark*, page 148, lines 10 to 31.

15. The third search (the “overt” search) was conducted on February 16, 1999. Four police officers from Turks and Caicos and six RCMP officers entered the appellant’s office and seized over 100 boxes of records. Detective Superintendent Lessemun was present for the search. The RCMP officers testified that they believed that Detective Superintendent Lessemun obtained a search warrant for the overt entry in February 1999.<sup>13</sup>

16. The evidence in relation to the searches of Arawak House demonstrated the following:

(i). When the RCMP decided that searches in Turks and Caicos would be helpful in their investigations, they conferred with Detective Superintendent Lessemun, starting some time before November, 1997, including ensuring *via* him that the Governor and Police Commissioner of the Turks and Caicos were aware of the police search plans;<sup>14</sup>

(ii). The RCMP provided Detective Superintendent Lessemun “with documentation and information. It would have to be his determination as to whether that was what constituted his reasonable grounds.” Lessemun also had information of his own;<sup>15</sup>

(iii). RCMP operations in Turks and Caicos were under Detective Superintendent’s Lessemun’s control;<sup>16</sup>

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<sup>13</sup> Appellant’s Record: *Evidence of Officer Boyle*, Page 219, line 20 to Page 220, line 20;  
Respondent’s Record: *Evidence of Officer Lewis*, Page 39, lines 1-15; *Evidence of Officer Boyle*, Page 140a, line 129 to Page 141, line 8; *Evidence of Sgt. Alderson*, Page 37, lines 5-15; *Affidavit of Sgt. Alderson*, Page 206.

<sup>14</sup> Appellant’s Record: *Evidence of Officer Boyle*, Page 215, line 1 to Page 217, line 15;  
Respondent’s Record: *Evidence of Officer Boyle*, Page 107, line 8 to Page 108, line 17; Page 111, lines 6-30.

<sup>15</sup> Appellant’s Record: *Evidence of Officer Boyle*, Page 211, line 21 to Page 212, line 11;  
Respondent’s Record: *Evidence of Officer Boyle*, Page 128, lines 1-11.

<sup>16</sup> Appellant’s Record: *Evidence of Officer Boyle*, Page 237, lines 19-30;  
Respondent’s Record: *Evidence of Officer Boyle*, Page 131, line 7 to Page 137, line 27; Page 140a lines 1-14; Page 142, line 28 to Page 143, line 18.

“he was the officer in charge of the Turks and Caicos criminal investigation division. He had the authority as the police on the island and we had to follow whatever direction he was going to take.....he was adamant that he was going to be in charge of the operation in the Turks and Caicos; and that there was going to be no “steam-rolling”, I think was his term, that we were going to be dictating to him how he was going to be conducting himself; and that we would be working under his authority....it was at his discretion as to what we were allowed to do on that island....I had no authority. None of our officers...had any authority to conduct any investigations or searches on the island.”

“he indicated there were some people that he would want to make aware of our request, and –and it wasn’t going to be strictly his decision that would allow us to conduct any operations in the islands; and that specifically regarding any obtaining of any search warrants there, there would have to be strong evidence to be shown that there was evidence to be gathered there...”

“as we had no authority, unless we were working under his [Lessemun’s] direction, he was the one that had ultimate authority and controlled our actions....I guess the best evidence of that is when we originally were under the impression that we could remove the documents that were seized on the overt search and had the RCMP plane in fact loaded with a, I’ve forgotten how many, 30 or 40 boxes of material, and he came to me and said, “The documents stay here. Remove them from the plane,” and that’s what we did.” (Emphasis added)

(iv). While the RCMP were permitted to make scanned copies, and although the RCMP’s desire had been to take the original documents seized back to Canada, in fact, custody and control over the boxes of material seized in the overt search in February 1999 was always maintained by the Turks and Caicos police<sup>17</sup> and the Turks and Caicos courts;<sup>18</sup>

(v) The only way that original documents came to Canada was pursuant to an MLAT request by the government of Canada, approved by the Governor of Turks and Caicos;<sup>19</sup>

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<sup>17</sup> Appellant’s Record: Evidence of Officer Letch, Page 178, line 29 to Page 180, line 14.

<sup>18</sup> Appellant’s Record: Evidence of Officer Alderson, Page 185, line 21 to Page 187, line 22; Evidence of Officer Boyle, Page 220, line 21 to Page 221, line 10.

<sup>19</sup> Respondent’s Record: Evidence of Officer Bland, Page 42, lines 1-29.

(vi). Detective Superintendent Lessemun minimized the involvement of Turks and Caicos officers in these searches because he “could not trust the local police force working there on the island, and this was our reason why he was working alone directly with us.”<sup>20</sup>

(vii). The Turks and Caicos police faced resource limitations, that had to be made up for by the RCMP. Notwithstanding these limitations, the Turks and Caicos police clearly asserted their proper authority over all aspects of the searches and seizure.<sup>21</sup>

## **PART II - POINTS IN ISSUE**

17. The participation by Canadian law enforcement in the searches conducted under the authority and supervision of Turks and Caicos police did not engage section 8 of the *Charter*. Both Courts below correctly determined that the *Charter* did not apply to the foreign search. The application of the *Charter* to the actions of the RCMP in Turks and Caicos would interfere with the sovereign authority of Turks and Caicos and would thereby generate an objectionable effect.

18. If section 8 of the *Charter* applied to the RCMP actions in Turks and Caicos, the appellant failed to demonstrate that his rights under section 8 were breached.

19. If the appellant’s section 8 *Charter* rights were breached, the appellant did not demonstrate that the evidence should be excluded under section 24(2) of the *Charter*.

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<sup>20</sup> Appellant’s Record: Evidence of Officer Boyle, Page 232, line 21 to Page 233, line 6; Respondent’s Record: Evidence of Sgt. McDonagh, Page 82, line 21 to Page 83, line 4.

<sup>21</sup> Respondent’s Record: Evidence of Officer Boyle, Page 140, lines 13-23.

### **PART III – ARGUMENT**

#### **A) Section 8 of the Charter Has No Application in this Case**

20. The appellant claims that the RCMP had “complete control” of the investigation in Turks and Caicos and that the Turks and Caicos police had an “almost non-existent role”.<sup>22</sup> The appellant took this position at trial.<sup>23</sup> The appellant also characterizes the involvement of the Turks and Caicos police in this investigation as “the mere companionship of a foreign policeman”.<sup>24</sup> However, as the Court of Appeal noted, the trial judge rejected the appellant’s position on this factual issue.<sup>25</sup> In other words, the appellant’s position is completely *inconsistent* with the trial judge’s factual findings. The trial judge found that, “...the investigation in the Turks and Caicos Islands, including the searches, was under the control of the Turks and Caicos police force”.<sup>26</sup> As the Court of Appeal found, this conclusion was supported by the evidence.<sup>27</sup> The appellant has not demonstrated that this factual finding reflects a palpable and overriding error. Instead, the appellant asks this Court to reweigh the evidence and substitute its view for that of the trial judge.

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<sup>22</sup> Appellant’s Factum, para 14.

<sup>23</sup> Appellant’s Record: Reasons for Judgment of the Ontario Superior Court of Justice on the Section 8 Charter Application (January 17, 2002), Page 6 (para. 23).

<sup>24</sup> Appellant’s Factum, para. 12.

<sup>25</sup> Appellant’s Record: Reasons for Judgment of the Court of Appeal, Pages 56-57 (paras 7-8); Reasons for Judgment of the Ontario Superior Court of Justice on the Section 8 Charter Application (January 17, 2002), Pages 56, 61-63 (paras 4, 23-36, 29).

<sup>26</sup> Appellant’s Record: Reasons for Judgment of the Court of Appeal, Page 56-57 (para 7).

<sup>27</sup> Appellant’s Record: Reasons for Judgment of the Court of Appeal, Page 57 (para 8).