SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. Souvannarath*, 2017 NSSC 107

Date: 20170421
Docket: CRH No. 441654
Registry: Halifax

Between:

Her Majesty the Queen

v.

Lindsay Kanitha Souvannarath

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Judge:	The Honourable Justice Peter P. Rosinski
Heard:	April 11, 2017, in Halifax, Nova Scotia
Written Decision:	April 21, 2017
Subject:	The extraterritorial application of the Canadian Charter of Rights and Freedoms to actions of police in the United States of America
Summary:	Ms. Souvannarath was a citizen of the USA. Through Facebook she and two Canadian residents conspired to murder un-named members of the public in Halifax, Nova Scotia, Canada. To effect that purpose she flew to Nova Scotia. Upon arrival she was arrested, cautioned and chartered. She made several utterances to police. In pretrial motions she argued that those utterances should be inadmissible as a result of violations of her s. 10(a) and (b) Charter of Rights and a violation of s. 36 of the Vienna Convention on Consular Relations. Those utterances formed a substantial portion of the grounds for a warrant sought by the Geneva, Illinois, USA police in relation to the alleged conspiracy, to compel

Facebook Inc. to provide its records of communications between the co-conspirators. A US judge ordered Facebook Inc. to comply. Ms. S argues that the violations to her rights would make her utterances inadmissible in Canada, and therefore the derivative use thereof by police in the USA should be prohibited on that basis specifically, or alternatively on the basis of *R. v. Harrer* [1995] 3 S.C.R. 562-that "to admit the evidence would be so grossly unfair as to repudiate the values underlying our trial system and condone procedures which are anathema to the Canadian conscience".

Issues: Can an accused being tried in Canada rely on the extraterritorial application of the Canadian Charter of Rights to permit a Canadian criminal court to assess the validity of a search warrant requested by Canadian police, and issued in Illinois, United States of America?

Result: This court has no jurisdiction to assess the validity of the search warrant issued by the court in the United States, nor is the provision of the material seized thereunder to Canadian police, otherwise inadmissible.

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Heard:	April 11, 2017, in Halifax, Nova Scotia
Counsel:	Mark Heerema and Shauna MacDonald, for the Crown Luke Craggs for the Defence

By the Court:

Introduction

[1] Ms. Souvannarath is to be tried before a jury on a charge that she did conspire with others between December 21, 2014 and February 14, 2015 to murder unnamed members of the public in Halifax, Nova Scotia, Canada.

[2] She is an American citizen who was living in the area of Chicago, Illinois, USA. The conspiracy involved Internet communications, via Facebook, between her and her co-conspirators resident in Nova Scotia, Canada.

[3] Halifax Regional Police (HRP) became aware of the conspiracy on or about February 12, 2015, and arrested Ms. Souvannarath upon her arrival from Chicago on February 13, 2015. She was in possession of a cell phone, laptop and a hard drive. The police were aware that there had been Facebook communications between the alleged co-conspirators. Consequently, HRP requested the assistance of the Geneva Illinois police to draft a warrant compelling Facebook Inc., 151 University Avenue, Palo Alto, California 94301, USA, to produce all requested records regarding Facebook user ID accounts believed to be associated with Ms. Souvannarath, Randy Shepherd, and James Gamble.

[4] In the Summary of Facts establishing Probable Cause, the only information relied upon by the Geneva Illinois police in seeking the warrant, was information provided to them by the HRP.

[5] Ms. Souvannarath has requested this court declare that it has jurisdiction to review the search warrant issued on February 25, 2015, by the Illinois Circuit Court for the 16th Judicial Circuit sitting at Kane County, USA.

[6] The Crown argues in response that, as a matter of law, this court has no jurisdiction to review the search warrant.

[7] Both parties agreed that the court could take notice of the American warrant materials and content of the Canadian warrant materials included as Tab A and Tab B attached to the defendant's brief. Of particular importance are the three different sets of Ms. Souvannarath's utterances made to Detective Constable Robert Fox on February 13, 2015, after her arrest, which Ms. Souvannarath argues were obtained

in violation of, protections afforded to her by s. 10(a) and (b) of the Canadian Charter of Rights and Freedoms, [1] and her rights under s. 36 of the 1963 Vienna Convention on Consular Relations.

Position of the parties

Ms. Souvannarath

[8] In essence, she argues that a Canadian court must have jurisdiction to review an American warrant where information used by an American police agency in their affidavit to obtain that warrant emanated principally from a Canadian investigation, for an offence that is being prosecuted in Canada.

[9] She urges the court to examine this issue using the methodology suggested by the Supreme Court of Canada in *R. v. Hape*, [2007] 2 S.C.R. 292, at para. 113:

> Summary of the Approach
>
> 113 The methodology for determining whether the *Charter* applies to a foreign investigation can be summarized as follows. The first stage is to determine whether the activity in question falls under s. 32(1) such that the *Charter* applies to it. At this stage, two questions reflecting the two components of s. 32(1) must be asked. First, is the conduct at issue that of a Canadian state actor? Second, if the answer is yes, it may be necessary, depending on the facts of the case, to determine whether there is an exception to the principle of sovereignty that would justify the application of the *Charter* to the extraterritorial activities of the state actor. In most cases, there will be no such exception and the *Charter* will not apply. The inquiry would then move to the second stage, at which the court must determine whether evidence obtained through the foreign investigation ought to be excluded at trial because its admission would render the trial unfair.

[10] Therefore, she asks the court to find that: the conduct at issue is that of a Canadian state actor; and that the evidence obtained through the foreign investigation ought to be excluded at trial, because: her utterances to Det. Cst. Fox in Canada were obtained in violation of her s. 10(a) and (b) Charter rights, and would properly be excluded as inadmissible evidence for use in the Canadian warrant, and by extension in the US warrant; and if her utterances are excised from

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[1] Formally cited as Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act*, 1982 (UK), 1982, c. 11, proclaimed in force April 17, 1982 (as amended). In contrast to the retrospectively rooted originalism approach taken by the majority of United States Supreme Court in relation to the US Bill of Rights, the Canadian Supreme Court views its constitutional Charter of Rights jurisprudence as properly based on a principled and prospectively viewed evolution.

those warrants, the warrants would no longer contain sufficient grounds for a court to have issued them; and alternatively because the admission of the US warrant authorized Facebook Inc. materials would render the trial intolerably unfair.

[11] She posits that there must be some mechanism for this court, supervising the trial process in Canada, to ensure that her utterances made to Det. Cst. Fox, if inadmissible against her according to Canadian law, and excised from the HRP search warrant authorized February 13, 2015, should also be effectively excised from the American warrant issued February 25, 2015, which required Facebook Inc. to produce their records to the Geneva, Illinois police, which were then provided to HRP.

Position of the Crown

[12] The Crown suggests that for good reasons Ms. Souvannarath does not seriously rely upon s. 7 of the Charter Rights and the reasoning in *R. v. Harrer*, [1995] 3 S.C.R. 562.

[13] Ms. Souvannarath has focused her argument on a breach of s. 8 of the Charter of Rights.

[14] Generally, the Crown argues that our Charter does not apply to search warrants issued in a foreign state. This is so even where the information used by the foreign state emanated from a Canadian investigation, and is being used in a Canadian prosecution.

[15] The Crown relies upon: *R v Schreiber*,[1998] 1 S.C.R. 841; *R. v. Hape*, [2007] 2 S.C.R. 292; *R. v. Filinov*, (1993), 82 CCC (3d) 516 (Ont Gen. Div.); *R. v. Giles*, 2015 BCSC 1744; *R. v. Guilbride*, 2003 BCPC 44, for the general proposition that when a criminal case is prosecuted in Canada, the Canadian Charter of Rights and Freedoms does not apply beyond the borders of Canada, and especially so, when a defendant alleges a s. 8 Charter violation occurring outside the borders of Canada.

[16] The Crown concedes that at law, exceptionally a defendant may argue that in such situations their rights under ss. 7 and 11(d) Charter may be addressed in a Canadian court where there is a live issue as to whether “to admit the evidence would be so grossly unfair as to repudiate the values underlying our trial system and condone procedures which are anathema to the Canadian conscience” per *Harrer,* at para. 51. However, the facts of this case do not rise to anywhere near

that level, which level was described by the court in *Harrer* as including, for example, the use of "torture".

Why s. 8 of the Charter of Rights is not applicable to the search warrant issued February 25, 2015, in Illinois, USA

[17] In *Schreiber*, the defence conceded that it did not allege a section 8 Charter breach against Swiss authorities, but rather argued that the Canadian government's letters of request sent to Swiss authorities seeking banking records to assist your investigation of Schreiber's believed criminal activities in Canada, should have been subject to prior judicial authorization, requiring "reasonable grounds" akin to in a search warrant context.

[18] As the court pointed out, [paras. 28-32]:

> …the request itself would not be subject to Charter scrutiny. No prior judicial authorization would be obtained until the request had been received, at which time the authorities would secure a warrant in order to undertake the search or seizure. In the event that the search or seizure was challenged, it would be the warrant, and actions taken pursuant to that warrant, which would be subjected to Charter review. **The original investigator's action in making the request** to the authorities in another province would not be challengeable, because it **is not an action which invades anyone's right to be secure against unreasonable search and seizure**. This is the reason why no prior judicial authorization is required before making the request and not, as Iaccobucci J. suggests, because the requesting authorities know that the search or seizure eventually will be subject to prior judicial authorization before it is executed. This reasoning is apposite to the present appeal. By itself, the letter of request does not engage section 8 of the Charter. All of those actions which rely on state compulsion in order to interfere with the respondent's privacy interests are undertaken in Switzerland by Swiss authorities. Neither the actions of the Swiss authorities, nor the laws which authorize their actions, are subject to Charter scrutiny: *R. v. Terry*, [1996] 2 S.C.R. 207 at p.217.… The Charter guarantees everyone the right to be secure against unreasonable search and seizure by inter alia, the Government of Canada.
>
> [my emphasis added]

[19] The Crown notes that in both *Schreiber* (para. 33) and *Terry*, [1996], 2 S.C.R. 207, at para. 18, the Supreme Court of Canada endorsed the reasoning in *R. v. Filinov*, (1993), 82 CCC (3d) 516.

[20] In *Schreiber*, speaking for the majority, Justice L'Heuruex-Dube stated:

> I find further support for this conclusion in the reasons of Dilks J in *Filinov*… On facts analogous to this case, Dilks J made two distinct findings which inform the analysis of the applicability of s 8 of the Charter, and which are relevant to this appeal. First, … he held that 'the sovereign authority of Canada ends with the sending of the request' for assistance. Second… he found that: '… The United States' part of the process was a discrete procedure carried out by authorities who are in no way controlled by or answerable to any Canadian authorities. The fact that the process was initiated by the latter did nothing to make their United States counterparts agents of the Canadian government. Even if they could be so considered, their conduct would not be governed by the Charter unless the Charter expressly said as much.

[21] In *Schreiber*, the court seems to have left open a possibility for a defendant to argue that the issuance of a warrant in the United States to assist a criminal prosecution in Canada could possibly trigger "an action which invades anyone's right to be secure against unreasonable search and seizure".

[22] The majority opinion left open the possibility that if the police in the USA could be considered agents of the Canadian government, by virtue of being "controlled by or answerable to any Canadian authorities" it is possible to thereby apply the Charter of Rights to the actions of such agents. Nevertheless, the court went on to say "their conduct would not be governed by the Charter unless the Charter expressly said as much."

[23] As the Crown has pointed out, Canadian police forces can obtain evidence in foreign jurisdictions, as a result of informal cooperation (requests and responses) between police agencies, or on the basis of bilateral treaty provisions, as well as the Mutual Legal Assistance in Criminal Matters Act (MLAT). However, at law, those processes need not be mutually exclusive scenarios, and in fact will not transform the foreign police agencies into Canadian "agents", except perhaps in extraordinary circumstances, which are not present here. [2]

[2] See: *R v Dorsay*,2006 BCCA 117; *R. v. Guilbride*; *R. v. Terry*: and *R. v. Mehan*, 2017 BCCA 21

[24] Moreover, later in *Hape*, the court stated: [3]

> **Extraterritoriality in Canadian Law**
>
> **66** This Court recognized the foregoing principles in *Terry*. At para. 15, McLachlin J. wrote the following on behalf of the Court:
>
> The principle that a state's law applies only within its boundaries is not absolute: *The Case of the S.S. "Lotus"* (1927), P.C.I.J. Ser. A, No. 10, at p. 20. States may invoke a jurisdiction to prescribe offences committed elsewhere to deal with special problems, such as those provisions of the *Criminal Code*, R.S.C. 1985, c. C-46, pertaining to offences on aircraft (s. 7(1), (2)) and war crimes and other crimes against humanity (s. 7(3.71)). A state may likewise formally consent to permit Canada and other states to enforce their laws within its territory for limited purposes.
>
> The *Statute of Westminster, 1931* (U.K.), 22 Geo. 5, c. 4, s. 3, conferred on Canada the authority to make laws having extraterritorial operation and Canada has enacted legislation with extraterritorial effects on several occasions. Some examples can be found in criminal legislation, including the *Crimes Against Humanity and War Crimes Act*, S.C. 2000, c. 24, which addresses crimes of universal jurisdiction. Section 6(1) of that statute provides that every person who commits genocide, a crime against humanity or a war crime outside Canada is guilty of an indictable offence. Pursuant to s. 8, such a person may be prosecuted in Canada: (a) if at the time of the offence the person was a Canadian citizen or a citizen of a state engaged in armed conflict against Canada, or the victim was a Canadian citizen or a citizen of a state allied with Canada in an armed conflict; or (b) if, after the time of the offence was committed, the person is present in Canada. These provisions exemplify valid extraterritorial prescriptive jurisdiction, and any trial for such offences would constitute a legitimate exercise of extraterritorial adjudicative jurisdiction. [page331] But, importantly, they do not authorize Canada to enforce the prohibitions in a foreign state's territory by arresting the offenders there. Section 7 of the *Criminal Code*, R.S.C. 1985, c. C-46, contains a number of provisions that deem certain acts -- including attacks on internationally protected persons or U.N. personnel, torture or hostage taking -- to have been committed in Canada even though they took place in other countries. Although committed outside Canada, such an act will be deemed to have been committed in Canada if, *inter alia*, the person who committed it is a Canadian citizen or normally resides in Canada, it was committed on an aircraft registered in Canada or it was committed against a Canadian citizen.

[3] I will be quoting liberally from the Supreme Court of Canada's decisions because they demonstrate the tensions between the countervailing interests at play, and the evolving and different views of the court respecting these issues. However, in an effort to reduce the decision's length, I have therefore attached: Appendices "A" (*Hape* quotations), and "B" (*Harrer* quotations).

67 On the other hand, it is recognized that there are limits to the extraterritorial application of Canadian law. Section 6(2) of the *Criminal Code* provides: "Subject to this Act or any other Act of Parliament, no person shall be convicted or discharged under section 730 of an offence committed outside Canada." **As a general rule, then, Canadian criminal legislation is territorial unless specifically declared to be otherwise**. Further, as noted by McLachlin J. in *Terry*, at para. 18, bilateral treaties negotiated pursuant to the *Mutual Legal Assistance in Criminal Matters Act*, R.S.C. 1985, c. 30 (4th Supp.), provide that the actions requested of the assisting state are governed by that state's own laws, not by the laws of the requesting state.

68 Parliament has clear constitutional authority to pass legislation governing conduct by non-Canadians outside Canada. Its ability to pass extraterritorial legislation is informed by the binding customary principles of territorial sovereign equality and non-intervention, by the comity of nations, and by the limits of international law to the extent that they are not incompatible with domestic law. By virtue of parliamentary sovereignty, it is open to Parliament to enact legislation that is inconsistent with those principles, but in so doing it would violate international law and offend the comity of nations. However, in light [page332] of the foregoing discussion of the jurisdictional principles of customary international law, the prohibition on interference with the sovereignty and domestic affairs of other states, and this Court's jurisprudence, Canadian law can be *enforced* in another country only with the consent of the host state.

69 As the supreme law of Canada, the *Charter* is subject to the same jurisdictional limits as the country's other laws or rules. **Simply put, Canadian law, whether statutory or constitutional, cannot be enforced in another state's territory without the other state's consent.** This conclusion, which is consistent with the principles of international law, is also dictated by the words of the *Charter* itself. The *Charter*'s territorial limitations are provided for in s. 32, which states that the *Charter* applies only to matters that are within the authority of Parliament or the provincial legislatures. In the absence of consent, Canada cannot exercise its enforcement jurisdiction over a matter situated outside Canadian territory. **Since effect cannot be given to Canadian law in the circumstances, the matter falls outside the authority of Parliament and the provincial legislatures.**

…

94 Section 32(1) puts the burden of complying with the *Charter* on Parliament, the government of Canada, the provincial legislatures and the provincial governments. **While my colleague is correct in stating, at para. 161, that s. 32(1) defines *to whom* the *Charter* applies and not *where* it applies, s. 32(1) does more than that. It also defines *in what circumstances* the *Charter* applies to those actors. The fact that a state actor is involved is not in itself sufficient, as Bastarache J. suggests. The activity in question must also fall within the "matters within the authority of" Parliament or the legislature of each**

> **province. 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. Criminal investigations, like political structures or judicial systems, are intrinsically linked to the organs of the state, and to its territorial integrity and internal affairs. Such matters are clearly within the authority of Parliament and the provincial legislatures when they are in Canadian territory; it is just as clear that they lie outside the authority of those bodies when they are outside Canadian territory.**
>
> [My emphasis added]

[25] Though *Hape* is factually distinguishable from the case at bar, it did address the central issue in dispute here: the extraterritorial application of s. 8 of the Charter of Rights.

[26] Beyond the rare circumstances where the reasoning in *Harrer* (ss. 7 and 11(d) Charter) could apply to exclude the Facebook evidence, I acknowledge that there may seem to be a troubling inconsistency between my conclusion that I have no jurisdiction to review the validity of the US search warrant, and the precise factual circumstances in this case, which are arguably distinguishable from *Hape* and *Schreiber*, and suggest that the court *should have* the jurisdiction to review the validity of the US search warrant. Let me explain.

[27] The Crown accepted that in assessing this question, in keeping with its *Vukelich* motion, I should take Ms. Souvannarath's argument at its highest.

[28] The relevant sections of the Charter of Rights read:

> 1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society;
>
> 7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice;
>
> 8. Everyone has the right to be secure against unreasonable search or seizure;
>
> 9. Everyone has the right not to be arbitrarily detained or imprisoned;

10. Everyone has the right on arrest or detention;
    (a) to be informed promptly of the reasons therefor;
    (b) to retain and instruct counsel without delay and to be informed of that right; and
    (c) to have the validity of the detention determined by way of *habeas corpus* and to be released if the detention is not lawful.

24(1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances;

(2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

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.

[29] The present governing jurisprudence regarding s. 24 of the Charter includes the principles and reasoning contained in *R. v. Grant*, [2009] 2 S.C.R. 353; *R. v. Harrison*, [2009] 2 S.C.R. 494.

[30] Earlier in the seminal case, *Canada (Combines Investigation Act, Dir. of Investigations and Research) v. Southam Inc.*, [1984] 2 SCR 145, Justice Dickson spoke of the importance of a purposive interpretation and analysis of our Charter of Rights:

> As is clear from the arguments of the parties as well as from the judgment of Prowse J.A., **the crux of this case is the meaning to be given to the term "unreasonable" in the s. 8 guarantee of freedom from unreasonable search or seizure.** The guarantee is vague and open. The American courts have had the advantage of a number of specific prerequisites articulated in the Fourth Amendment to the United States Constitution, as well as a history of colonial opposition to certain Crown investigatory practices from which to draw out the nature of the interests protected by that Amendment and the kinds of conduct it

proscribes. There is none of this in s. 8. There is no specificity in the section beyond the bare guarantee of freedom from "unreasonable" search and seizure; nor is there any particular historical, political or philosophic context capable of providing an obvious gloss on the meaning of the guarantee.

It is clear that the meaning of "unreasonable" cannot be determined by recourse to a dictionary, nor for that matter, by reference to the rules of statutory construction. **The task of expounding a constitution is crucially different from that of construing a statute.** A statute defined present rights and obligations. It is easily enacted and as easily repealed. **A constitution, by contrast. is drafted with an eye to the future. Its function is to provide a continuing framework for the legitimate exercise of governmental power and, when joined by a Bill or a Charter of Rights, for the unremitting protection of individual rights and liberties.** Once enacted, its provisions cannot easily be repealed or amended. It must, therefore, bc capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers. The judiciary is the guardian of the constitution and must, in interpreting its provisions, bear these considerations in mind. Professor Paul Freund expressed this idea aptly when he admonished the American courts "not to read the provisions of the Constitution like a last will and testament lest it become one"

The need for a broad perspective in approaching constitutional documents is a familiar theme in Canadian constitutional jurisprudence.

…

Such a broad, purposive analysis, which interprets specific provisions of a constitutional document in the light of its larger objects is also consonant with the classical principles of American constitutional construction enunciated by Chief Justice Marshall in M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819). It is, as well, the approach I intend to take in the present case.

I begin with the obvious. **The Canadian Charter of Rights and Freedoms is a purposive document. Its purpose is to guarantee and to protect, within the limits of reason, the enjoyment of the rights and freedoms it enshrines. It is intended to constrain governmental action inconsistent with those rights and freedoms**; it is not in itself an authorization for governmental action. In the present case this means, as Prowse J.A. pointed out, that in guaranteeing the right to be secure from unreasonable searches and seizures, **s. 8 acts as a limitation on whatever powers of search and seizure the federal or provincial governments already and otherwise possess**. It does not in itself confer any powers, even of "reasonable" search and seizure, on these governments. This leads, in my view, to the further conclusion that an assessment of the constitutionality of a search and seizure, or of a statute authorizing a search or seizure, must focus on its "reasonable" or "unreasonable" impact or the subject of the search or the seizure, and not simply on its rationality in furthering some valid government objective.

Since the proper approach to the interpretation of the Charter of Rights and Freedoms is a purposive one, before it is possible to assess the reasonableness or unreasonableness of the impact of search or of a statute authorizing a search, **it is first necessary to specify the purpose underlying s. 8: in other words, to delineate the nature of the interests it is meant to protect.**

…

In my view the interests protected by s. 8 are of a wider ambit than those enunciated in *Entick v. Carrington*. Section 8 is an entrenched constitutional provision. It is not therefore vulnerable to encroachment by legislative enactments in the same way as common law protections. There is, further, nothing in the language of the section to restrict it to the protection of property or to associate it with the law of trespass. It guarantees a broad and general right to be secure from unreasonable search and seizure.

The Fourth Amendment of the United States Constitution, also guarantees a broad right. It provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Construing this provision in *Katz v. United States*, 389 U.S. 347 (1967), Stewart J. delivering the majority opinion of the United States Supreme Court declared at p. 351 that "the Fourth Amendment protects people, not places". Justice Stewart rejected any necessary connection between that Amendment and the notion of trespass. With respect, I believe this approach is equally appropriate in construing the protections in s. 8 of the Charter of Rights and Freedoms.

In Katz, Stewart J. discussed the notion of a right to privacy, which he described at p. 350 as "his right to be let alone by other people". Although Stewart J. was careful not to identify the Fourth Amendment exclusively with the protection of this right, nor to see the Amendment as the only provision in the Bill of Rights relevant to its interpretation, it is clear that this notion played a prominent role in his construction of the nature and the limits of the American constitutional protection against unreasonable search and seizure. In the Alberta Court of Appeal, Prowse J.A. took a similar approach to s. 8, which he described as dealing "with one aspect of what has been referred to as the right of privacy, which is the right to be secure against encroachment upon the citizens' reasonable expectation of privacy in a free and democratic society".

Like the Supreme Court of the United States, I would be wary of foreclosing the possibility that the right to be secure against unreasonable search and seizure might protect interests beyond the right of privacy, but for purposes of the present appeal I am satisfied that its protections go at

> **least that far.** The guarantee of security from unreasonable search and seizure only protects a reasonable expectation. This limitation on the right guaranteed by s. 8, whether it is expressed negatively as freedom from "unreasonable" search and seizure, or positively as an entitlement to a "reasonable" expectation of privacy, indicates that **an assessment must be made as to whether in a particular situation the public's interest in being left alone by government must give way to the government's interest in intruding on the individual's privacy in order to advance its goals, notably those of law enforcement.**
>
> **The question that remains**, and the one upon which the present appeal hinges, **is how this assessment is to be made. When is it to be made, by whom and on what basis? Here again, I think the proper approach is a purposive one.**
>
> [my emphasis]

[31] In *Reference, re Motor Vehicle Act (British Columbia) s. 94(2)*, [1985] 2 S.C.R. 486, Justice Lamer stated:

> 23 In the framework of a purposive analysis, designed to ascertain the purpose of the s. 7 guarantee and "the interests it was meant to protect" (R. v. Big M Drug Mart Ltd., supra), it is clear to me that the interests which are meant to be protected by the words "and the right not to be deprived thereof except in accordance with the principles of fundamental justice" of s. 7 are the life, liberty and security of the person. **The principles of fundamental justice, on the other hand, are not a protected interest, but rather a qualifier of the right not to be deprived of life, liberty and security of the person.**
>
> …
>
> 27 **Sections 8 to 14, in other words, address specific deprivations of the "right" to life, liberty and security of the person in breach of the principles of fundamental justice, and as such, violations of s. 7**. They are designed to protect, in a specific manner and setting, the right to life, liberty and security of the person set forth in s. 7. It would be incongruous to interpret s. 7 more narrowly than the rights in ss. 8 to 14. The alternative, which is to interpret all of ss. 8 to 14 in a "narrow and technical" manner for the sake of congruity, is out of the question (Law Society of Upper Canada v. Skapinker, supra, at p. 366).
>
> 28 Sections 8 to 14 are illustrative of deprivations of those rights to life, liberty and security of the person in breach of the principles of fundamental justice. For they, in effect, illustrate some of the parameters of the "right" to life, liberty and security of the person; they are examples of instances in which the "right" to life, liberty and security of the person would be violated in a manner which is not in accordance with the principles of fundamental justice. **To put matters in a different way, ss. 7 to 14 could have been fused into one section, with inserted between the words of s. 7 and the rest of those sections the oft utilised**

> **provision in our statutes, "and, without limiting the generality of the foregoing (s. 7) the following shall be deemed to be in violation of a person's rights under this section".**
>
> 29 **Thus, ss. 8 to 14 provide an invaluable key to the meaning of "principles of fundamental justice". Many have been developed over time as presumptions of the common law, others have found expression in the international conventions on human rights. All have been recognized as essential elements of a system for the administration of justice which is founded upon a belief in "the dignity and worth of the human person**" (preamble to the Canadian Bill of Rights, R.S.C. 1970, App. III) **and on "the rule of law"** (preamble to the Canadian Charter of Rights and Freedoms).
>
> 30 It is this common thread which, in my view, must guide us in determining the scope and content of "principles of fundamental justice". **In other words, the principles of fundamental justice are to be found in the basic tenets of our legal system**. They do not lie in the realm of general public policy but in the inherent domain of the judiciary as guardian of the justice system. Such an approach to the interpretation of "principles of fundamental justice" is consistent with the wording and structure of s. 7, the context of the section, i.e., ss. 8 to 14, and the character and larger objects of the Charter itself. It provides meaningful content for the s. 7 guarantee all the while avoiding adjudication of policy matters.
>
> [my emphasis added]

[32] If I take Ms. Souvannarath's argument at its highest, I should presume that her s. 10 Charter rights were violated during the time she made her utterances to Detective Constable Fox, and that in Canada an analysis pursuant to s. 24(2) would render those statements *inadmissible* at her trial.

[33] According to the governing jurisprudence, derivative evidence (such as the Facebook Inc., fruits of the US search warrant) emanating from her utterances to Detective Constable Fox, *should similarly be inadmissible* at her trial- see *R. v. Grant*, 2009 SCC 32, at paras. 116-128.

[34] Her utterances were used by the police in Illinois, as a substantial portion of their grounds to satisfy the judge in question that they had "probable cause" that the records of the three co-conspirators maintained by Facebook Inc. should be produced to the Illinois police.

[35] Although the grounds relied on by the Illinois police were in relation to both, the "Revised Statues of Canada: conspiracy to commit murder, RSC s.465(1)(a) Criminal Code of Canada" and "Statute: Conspiracy to Commit Murder, 720 ILCS

5/8-2", which appears to be a similar Illinois State offence reference, upon receipt of the Facebook Inc. materials, the Illinois police forwarded those to HRP.

[36] Thus, the arguably derivative evidence, namely the Facebook Inc. materials, made their way back to the trial in Canada as *admissible* evidence against Ms. Souvannarath.

[37] If the trial court in Canada finds on the one hand that the original evidence is *inadmissible*, can that evidence still lead to derivative evidence in the United States, which then finds its way back into the trial in Canada, as if the original evidence was *not inadmissible*, merely because the original evidence passed through the hands of the authorities (police and court) in the United States of America? Yes, it can.

[38] In spite of the concerns I have raised, I find myself bound by the reasoning of the Supreme Court of Canada in its various decisions, and most recently in *Hape*. That jurisprudence dictates that unless I conclude that the American police were "agents" of the Canadian government/a Canadian state actor, I cannot review the validity of the US warrant. The American police here were not answerable to/or obligated to follow the instructions of HRP who informally requested their help. They were not "agents" of the "Canadian government". Though the Illinois police may have received inadmissible evidence from HRP, provided that the *Harrer* threshold is not met, I must not consider that in my Charter analysis.

[39] Among others which I considered, I refer specifically to the following statements by Lebel J speaking for the majority in *Hape*:

> As a result of the principles of sovereign equality, non-intervention and comity, Canadian law and standards cannot apply to searches and seizures conducted in another state's territory. It is also evident from a practical standpoint that the Charter cannot apply to searches and seizures in other countries. (paras. 87-88)
>
> 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. (para. 94)
>
> When individuals choose to engage in criminal activities that cross Canada's territorial limits, they can have no guarantee that they carry Charter rights with them out of the country. As this Court has noted in the past, individuals should expect to be governed by the laws of the state in which they find themselves and in which they conduct [the activities that form the basis of the evidence sought to be introduced at a Canadian trial] (para. 99)

> The court must first turn to s. 32 [Charter] in order to determine whether the actors are agents of government and then determine whether the activities fall within the scope of the legislative authority of Parliament or the provincial legislatures… **As a threshold question, it must be asked whether there is a state actor in the sense of a government agent or official possessing statutory authority or exercising a public function… However, the inquiry does not end there**. It is clear that s. 32(1) applies to state actors "in respect of all matters" within the authority of Parliament or the provincial legislatures.… **Neither Parliament nor the provincial legislatures have the power to authorize the enforcement of Canada's laws over matters in the exclusive territorial jurisdiction of another state**. Canada can no more dictate what procedures are followed in a criminal investigation abroad then it can impose a taxation scheme in another state's territory… **Any attempt to dictate how [investigations of crimes linked with more than one country] are to be performed in a foreign state's territory without that state's consent would infringe the principle of non-intervention. And, as mentioned above, without enforcement, the Charter cannot apply**" (paras 103-105).
>
> [my emphasis added]

Why s. 7 of the Charter of Rights will not assist Ms. Souvannarath

[40] Next, I will briefly turn to a consideration of *Harrer* and ss. 7 and 11(d) of the Charter of Rights. Sections 7 and 11(d) read:

> 7 – Everyone has the right to life, liberty and security of the person and the right not be deprived thereof except in accordance with the principles of fundamental justice.
>
> 11 – Any person charged with an offence has the right… (d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal.

[41] Although the jurisprudence suggests that it will be very rare that someone in Ms. Souvannarath's position will be able to make a successful s. 8 Charter argument, the reasoning of all three opinions in *Harrer*, confirm that there is a residual right under the Charter even in such circumstances, by virtue of the mere fact that the trial is being conducted in Canada.

[42] In *Harrer*, the issue was whether the failure of the United States police to comply with Canadian law made Ms. Harrer's statement inadmissible in Canada. That issue raised two further questions: Whether the Charter applies outside

Canada's boundaries and whether the principles of fundamental justice and the right to a fair trial permit exclusion of evidence obtained outside Canada.

[43] Ms. Harrer, a Canadian, was apprehended in America as United States immigration agents and police wanted to question her about her immigration status. At some point, however, the police interview "shifted to Harrer's alleged criminal participation in [her boyfriend's] escape from custody in Canada [where he was awaiting extradition to the United States in regard to serious drug charges in the United States]."

[44] Thereafter, she was not given a second warning as would be required of Canadian police investigating a crime in Canada [*R. v. Black*, [1989] 2 S.C.R. 138; *R. v. Evans*, [1991] 1 S.C.R. 869].

[45] The majority decision, which dismissed her appeal, was written by Justice La Forest who stated:

> 19 While no new warning was given when the interrogation moved to the more serious offence under Canadian law, I do not think this was unfair in the circumstances of this case. **In general terms, I have some hesitation in accepting in the abstract that an enquiry conducted in the United States in accordance with the Miranda case is automatically unfair in situations that would in this country require a second warning. Our law may be more protective, but it does not necessarily follow that the rule developed in that case is unfair**. It would be surprising if it were. Miranda is, after all, a recent case that stands as a landmark decision for the protection of the rights of a person arrested or detained that this Court has emulated. While this Court has required the further warning described in fleshing out the protection accorded by s. 10(b), **it by no means follows that the admission of evidence obtained under a lesser standard in another country would make a trial automatically unfair**. Our more stringent rule, as I indicated before, exists for systemic reasons and is not addressed to determining the fairness of a single situation taking place in another country. I would be inclined to think that **evidence obtained following a Miranda warning should ordinarily be admitted in evidence at a trial unless in the light of other circumstances the court has reason to think the admission of the evidence would make the trial unfair**.
>
> 20 **There were no such circumstances here -- quite the opposite**. As I mentioned, not only was the Miranda warning given at the outset of the questioning by the Immigration agents; it was also later recalled to the appellant when the police began their questioning. As well, before the relevant statements were made, the interrogating Marshal impressed upon the appellant the seriousness of her situation and his knowledge that she was involved in the escape. On a reading of the judge's findings, **it is abundantly clear that the**

> **appellant** (whom the trial judge, despite her age, described as a "cagey witness" and as "a streetwise and sophisticated young woman" intimately associated with a fugitive sought on charges of high level cocaine trafficking) **knew full well that she was being questioned in relation to the very matter in respect of which it is argued a second warning should have been given. Under these circumstances, I am at a loss to understand how these statements would, if admitted, result in the trial being unfair**.
>
> 21 I should add that, **had the circumstances been such that the admission of the evidence would lead to an unfair trial, I would have had no difficulty rejecting the evidence by virtue of the Charter**. I would not take this step under s. 24(2), which is addressed to the rejection of evidence that has been wrongfully obtained. Nor would I rely on s. 24(1), under which a judge of competent jurisdiction has the power to grant such remedy to a person who has suffered a Charter breach as the court considers just and appropriate. Rather, I would reject the evidence on the basis of the trial judge's duty, now constitutionalized by the enshrinement of a fair trial in the Charter, to exercise properly his or her judicial discretion to exclude evidence that would result in an unfair trial.

[46] In concurring reasons Justices Major and McLachlan stated that “the Charter does not apply to non-Canadian authorities and cannot be so regarded by the courts”. Regarding the suggestion that American officers were agents of Canadian officers and hence bound by the Charter, they found this to be a question of fact, and as they were dealing with an appeal as of right, which is limited to questions of law alone, “the issue of agency is not properly before us and I offer no further comment on it.”

[47] Importantly, however, they did agree that in some cases ss. 7 and 11(d) of the Charter can provide relief:

> 42 In addition to the common law exclusionary power, the Charter guarantees the right to a fair trial (s. 11(d)) and provides new remedies for breaches of the legal rights accorded to an accused person. Evidence obtained in breach of the Charter may only be excluded under s. 24(2): *R. v. Therens*, [1985] 1 S.C.R. 613. **Evidence not obtained in breach of the Charter but the admission of which may undermine the right to a fair trial may be excluded under s. 24(1), which provides for "such remedy as the court considers appropriate and just in the circumstances" for Charter breaches.** Section 24(1) applies to prospective breaches, although its wording refers to "infringe" and "deny" in the past tense: *Operation Dismantle Inc. v. The Queen*, [1985] 1 S.C.R. 441. **It follows that s. 24(1) permits a court to exclude evidence which has not been obtained in violation of the Charter, but which would render the trial unfair contrary to s. 11(d) of the Charter.**
>
> [my emphasis added]

[48] While the argument was not presented directly to me, from my understanding of the factual matrix in the case at bar, there would have been no air of reality to an argument that the provision by Canadian police of the information to the Geneva, Illinois, police (which became the basis for their search warrant of Facebook Inc. records), could be found to have met the threshold required by *Harrer* (at para. 51) per McLachlan: [4]

> To admit the evidence would be so grossly unfair as to repudiate the values underlying our trial system and condone procedures which are anathema to the Canadian conscience.

Conclusion

[49] This court has no jurisdiction to scrutinize the validity of the search warrant issued by the Circuit Court for the 16th Judicial Circuit in the Unites States, for compliance with the Canadian Charter of Rights and Freedoms.

Rosinski, J.

[4] As the Crown has properly argued in this case, such frivolous applications to have evidence excluded may be pre-emptively terminated by a court pursuant to the persuasive authority of the reasoning in *R. v. Vukelich* (1996) CCC (3d)193 (BCCA) leave to appeal to the Supreme Court of Canada denied[1996] SCCA 461; which has been endorsed regarding unnecessary delays in trials proceeding in *R. v. Jordan*, 2016 SCC 27 at para 63; *R. v. B.M.*, 2016 BCCA 476 at paras 45-48; *R. v. Pires, R. v. Lising*, 2005 SCC 66 at paras. 35 – 37.