THAT MOST CANADIAN OF VIRTUES: COMITY IN SECTION 7 JURISPRUDENCE

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INTRODUCTION

A great deal of judicial ink has been spilled on the application of *Canadian Charter of Rights and Freedoms*¹ (*Charter*) protections extraterritorially. The Supreme Court of Canada (SCC) has struggled to provide any conceptual clarity on how to determine if and when those protections might apply outside Canada. In this respect, its jurisprudence has mirrored the jurisprudence of other courts, which have similarly struggled to determine the extraterritorial effects of human rights protections.²

In this paper, I attempt to resolve some of this conceptual uncertainty by focusing on the scope of protections afforded by section 7 of the *Charter*. Section 7 protections serve as a useful entry point into the extraterritoriality debate for two reasons. First, domestic jurisprudence shows substantial overlap between the analysis of section 7 and of other legal rights guaranteed by the *Charter*.³ Second, courts have tended to focus

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¹ Part I of *The Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11) [*Charter*].

² Domestic and international courts have taken a range of approaches to the applicability of human rights protections extraterritorially. The European Court of Human Rights (ECHR) has adopted a test based on the exercise of public powers outside states' borders (*Loizidou v Turkey* (preliminary objections) (1995), 20 EHRR 99; *Al-Skeini v United Kingdom* [GC], No 55721/07 [2011] IV ECHR 99 with a limited exception for transboundary effects (*Issa v Turkey* Appl No 31821/96 (16 November 2004)). It has found that military action alone would not be enough to warrant applications of human rights protections extraterritorially (*Bankovic v Belgium* [GC], No 52207/99, [2001] XII ECHR 333 at para 80).

The Supreme Court of the United States has interpreted the applicability of Bill of Rights protections even more narrowly, holding that protections under the Bill of Rights do not generally apply extraterritorially (*United States v Alvarez-Machain*, 504 US 655 (1992)). However, in some cases, individuals charged with a crime in military tribunals or commissions may be entitled to due process rights (*Reid v Covert*, 354 US 1 (1956)) and to habeas corpus rights *Boumediene v Bush*, 553 US 723 (2008).

³ In particular, many s 7 cases involve purported violations of ss 8 through 14 of the *Charter*.

solely on section 7 violations where extraterritoriality is involved, almost uniformly rejecting purported violations of other *Charter* rights.⁴

This paper aims to advance the scholarly literature in three ways. After discussing the incorporation of international law into Canada's domestic legal order, I first present a broad taxonomy of extraterritorial section 7 cases. Such a taxonomy does not exist anywhere in the scholarly literature.⁵ Second, I identify four key areas where section 7 jurisprudence has dealt with extraterritoriality: extradition cases,⁶ the use of foreign-obtained evidence,⁷ civil cases in Canada where Canadians may be exposed to foreign criminal prosecution,⁸ and in the so-called war on terror.⁹ Third, focusing on those four key areas of law, I argue that the SCC's use of comity as an interpretive principle has produced a conceptual muddle wholly incompatible with the traditional rules of international law. I suggest that the one unifying feature in the SCC's comity jurisprudence is that it has been employed to avoid adjudicating potential *Charter* rights violations against Canadians committed by foreign governments or on foreign territory. I conclude that comity's use should be greatly restricted in *Charter* cases.

I. CLEARING THE WAY: PUBLIC INTERNATIONAL LAW IN THE CANADIAN LEGAL SYSTEM

The principles of public international law are only partially incorporated into the Canadian legal system. Like the United Kingdom, Canada is a dualist legal system where international law does not automatically translate into national law.¹⁰ The English common law divides international law into customary law (traditionally referred to in

⁴ Canadian courts have never outlined why this has been their approach. Plausibly, it is because s 7 is broader than other *Charter* provisions and can include both procedural and substantive rights.

⁵ The work closest to a taxonomy can be found in Gibran Van Ert, *Using International Law in Canadian Courts*, 2nd ed (Toronto: Irwin, 2008) [*Using International Law*]. Individual criticisms of the use of comity have been advanced (see Section II below for discussion of *Burns*, *infra* note 63, and *Khadr*, *infra* note 9).

⁶ See Anne Warner La Forest, "The Balance Between Liberty and Comity in the Evidentiary Requirements Applicable to Extradition Proceedings" (2002) 28 Queen's LJ 95; *Argentina v Mellino*, [1987] 1 SCR 536 at para 24, 1987 CanLII 49 [Mellino]; *United States of America v Ferras*, 2006 SCC 33 [Ferras]; *Kindler v Canada (Minister of Justice)*, [1991] 2 SCR 779, 1991 CanLII 78 [Kindler]; *Canada (Justice) v Fischbacher*, 2009 SCC 46 [Fischbacher].

⁷ See *R v Hape*, 2007 SCC 26 [Hape]; *R v Harrer*, [1995] 3 SCR 562, 1995 CanLII 70 [Harrer].

⁸ See *Spencer v The Queen*, [1985] 2 SCR 278, 1985 CanLII 4 [Spencer].

⁹ The two Khadr cases are the central examples in the field: *Canada (Justice) v Khadr*, 2008 SCC 28 [Khadr (2008)]; *Canada (Prime Minister) v Khadr*, 2010 SCC 3 [Khadr (2010)].

¹⁰ This is distinct from the increased reliance on international law as a heuristic device in interpreting domestic law; see Jutta Brunnée and Stephen J Toope, "A Hesitant Embrace: The Application of International Law by Canadian Courts" (2002) 40 Can YB Int L 3, DOI: <10.1017/S0069005800007992>.

English jurisprudence as the law of nations) and treaty law. Only the former is automatically part of the legal system in the United Kingdom.¹¹

The SCC has held that the same dualist rule governs the use of customary international law in the Canadian constitutional order.¹² The general rule is that principles of customary international law are part of domestic law unless Parliament takes explicit measures to exclude them.¹³

Conversely, an international treaty will have no effect in Canada absent its incorporation into the domestic legal order.¹⁴ The powers of conducting international relations and treaty-making are vested in the Crown.¹⁵ Although the *British North America Act* did not contemplate that the Dominion of Canada would enter into treaties,¹⁶ when Canada received independence in foreign affairs under the *Statute of Westminster*, treaty-making became a power of the executive branch.¹⁷ While the executive branch has

¹¹ This rule was affirmed as early as the 18th century in the United Kingdom. *Buvot v Barbuitt* (*Barbuitt's Case*) (1737), Cas t Talb 281 at 283, 25 ER 777 (Ch) (holding that the law of nations, i.e. customary international law, to “its fullest extent was and formed Part of the law of England”); affirmed in *Triquet v Bath* (1764), 3 Burr 1478 at 1480–81, 97 ER 936 (KB); *Heathfield v Chilton* (1767), 4 Burr 2015 at 2016, 98 ER 50 (KB) (affirming that “the law of nations ... is part of the common law of England”); *Charles Duke of Brunswick v The King of Hanover* (1844), 6 Beav 1 at 45, 49 ER 724.

¹² See *The Ship “North” v R*, [1906] 37 SCR 385 at 394, 1906 Carswell Nat 47 at para 15 (sanctioning the adoption approach taken in British courts: “[t]he right of hot pursuit ... being part of the law of nations was properly judicially taken notice of and acted upon by the learned judge”); *Reference re Newfoundland Continental Shelf*, [1984] 1 SCR 86, 5 DLR (4th) 385; *Reference re Secession of Quebec*, [1998] 2 SCR 217, 161 DLR (4th) 385 (where the court took into account principles of customary international law, albeit without clearly specifying which principles were actually custom).

¹³ *Hape*, *supra* note 7; see also, Armand Claude de Mestral and Evan Fox-Decent, “Rethinking the Relationship Between International and Domestic Law” (2008) 53 McGill LJ 573 at 576–77.

¹⁴ As Van Ert points out, this is to simplify the proposition because the definition of what constitutes implementation has never been settled (*Using International Law*, *supra* note 5).

For instance, sometimes an entire Convention is incorporated (*Geneva Conventions Act*, RSC 1985, c G-3). Sometimes an existing act is amended, e.g. *Criminal Code*, RSC 1985, C-46 (giving effect to Canadian obligations under the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, 1465 UNTS 85). Sometimes the government argues that statutes or constitutional provisions indirectly implemented treaty provisions, as the federal government has with respect to the *Charter* and various international human rights treaties (GAOR, Human Rights Comm, *Core Document Forming Part of the Reports of States Parties: Canada*, ¶137, UN Doc HRI/CORE/1/Add.91 (1998)); all cited by Gibran Van Ert, “Dubious Dualism: The Reception of International Law in Canada” (2010) 44:3 Val U L Rev 927 at 928–29.

¹⁵ AV Dicey, *Introduction to the Study of the Law of the Constitution*, 10th ed (London: Macmillan & Co., 1965) at 119; Arthur Berriedale Keith, *An Introduction to British Constitutional Law* (Oxford: Clarendon Press, 1931) at 76.

¹⁶ *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, s 91, reprinted in RSC 1985, Appendix II, No 5.

¹⁷ *Re: Resolution to amend the Constitution*, [1981] 1 SCR 753, 1981 CanLII 25.

power over treaty-making, it cannot unilaterally amend legislation, and therefore cannot incorporate treaties into law. Law-making is solely a legislative prerogative.¹⁸

This dichotomy has posed a dilemma for courts. The fact that unincorporated treaties do not carry the force of law in the Canadian constitutional order means that courts must follow one of two paths to give effect to international legal norms that have not been legislatively enacted. They can either claim that a treaty norm is also a rule of customary international law, and thus part of the Canadian legal order, or hold that the norm is derivable from some general interpretive principle of international law.

With respect to the first option, there is a sizable jurisprudence in Canada on the rights of states to exercise territorial jurisdiction as well as on the limits of state jurisdiction over persons and territory beyond a state's borders. Much of this is derived from customary international law and from the presumption of conformity with international law. This idea will be further developed in this paper through a discussion of *Hape*.

With respect to the second option, the SCC has often incorporated international legal norms through judicial interpretation. It has employed two principal interpretive rules. First, the SCC has held that there is a general presumption in the common law that statutes, if ambiguous, should be interpreted in a manner that is compatible with international law. This presumption includes the prohibition on extraterritoriality.¹⁹ Second, the SCC has employed the principle of comity as a means of statutory interpretation.

In the public law context, comity is the principle that states should “refrain from questioning the lawfulness of another sovereign state's acts, and restrict themselves from issuing such judgments and orders when to do so would amount to an unjustifiable interference.”²⁰ As a matter of international relations, comity has traditionally conditioned many of the actions of sovereigns. For example, ships from one state

¹⁸ William R Anson, *The Law and Custom of the Constitution*, vol 1, 4th ed (Oxford: Clarendon Press, 1935) at 65–66; O Hood Phillips, *Chalmers and Hood Phillips' Constitutional Laws of Great Britain* (London: Sweet & Maxwell, 1946) at 173.

¹⁹ *Hape*, *supra* note 7 at para 53; see also *Using International Law*, *supra* note 5; Ruth Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 6th ed (Toronto: LexisNexis, 2014).

²⁰ Thomas Schultz & Niccolo Ridi, “Comity and International Courts and Tribunals” (2017) 50 *Cornell Int LJ* 578 at 578–79, DOI: <doi.org/10.31228/osf.io/9djt2>.

The principle of comity is unusual in international law as it is a principle of both private and public international law. Story defined comity in its simplest form as the “extent of the obligation of the laws of one nation within the territories of another”: Joseph Story, *Commentaries on the Conflict of Laws, Foreign and Domestic, in Regard to Contracts, Rights, and Remedies, and Especially in Regard to Marriages, Divorces, Wills, Successions and Judgements*, 2nd ed (Boston: Hilliard, Grey and Company, 1834) at 37.

regularly perform flag salutes to ships from another state on the high seas.²¹ These actions are based merely on comity or *courtoisie* in the relations between states and do not reflect obligations of international law.

In general, international lawyers believe that the principle of comity should be relied on only to elucidate the meaning and purpose of a rule of international law, rather than to establish the existence of that rule itself.²² However, as comity conditions the interpretation of principles of international law, a reading of a rule of international law with comity in mind could “determine what ... is required by good faith, which takes into account reliability based on tradition and expectations of courtesy.”²³

Many international lawyers do not think highly of comity. In their view, to speak of comity is to speak of a principle that does not satisfy the threshold of legality.²⁴ Michael Barton Akehurst’s international law textbook describes comity as “a wonderful word to use when one wants to blur the distinction between public and private international law, or to avoid clarity of thought.”²⁵ Schultz and Ridi have written, derisively, that it is a concept that “stubbornly refuses to go away.”²⁶ In spite of this criticism, comity remains part of the jurisprudence of Canadian courts.²⁷

The boundary between comity and positive legal norms is not always apparent. The clearest practical distinction is that practices established by comity lack the weight of *opinio juris*.²⁸ However, given the notorious difficulty of establishing *opinio juris*, that

²¹ *Ibid*; see also *North Sea Continental Shelf (Germany v Denmark and the Netherlands)*, [1969] ICJ Rep 3 at para 72.

²² Schultz & Ridi, *supra* note 20 at 605. See also e.g. *Cudak v Lithuania*, No 15869/02, [2010] ECHR 379, IHRL 159 at para 60, where the European Court of Human Rights held that “[t]he Court must first examine whether the limitation pursued a legitimate aim. In this connection, it observes that State immunity was developed in international law out of the principle *par in parem non habet imperium*, by virtue of which one State could not be subject to the jurisdiction of another. The Court considers that the grant of immunity to a State in civil proceedings pursues the legitimate aim of complying with international law to promote comity and good relations between States through the respect of another State’s sovereignty.”

²³ Jörn Axel Kämmerer, “Comity,” in Rüdiger Wolfrum, ed, *Max Planck Encyclopedia of Public International Law*, at §E, online: Oxford Public International Law <<https://opil.ouplaw.com/home/MPIL>>.

²⁴ James Crawford, *Brownlie’s Principles of Public International Law*, 8th ed (Oxford: Oxford University Press, 2012) at 23–24.

²⁵ Peter Malanczuk, *Akehurst’s Modern Introduction to International Law*, 7th ed (London: Routledge, 2002) at 73.

²⁶ Schultz & Ridi, *supra* note 20 at 578–79.

²⁷ Joel R Paul, “Comity in International Law” (1991) 32:1 Harv Intl LJ 1 at 2.

²⁸ *Opinio juris* is the belief that an action is required by a state as a matter of law. For a detailed discussion of *opinio juris*, see *Fisheries Jurisdiction (United Kingdom v Iceland)*, [1974] ICJ Rep 3 [*Fisheries Jurisdiction*]. For a discussion of the difference between *opinio juris* and acts carried out as a

distinction risks merely pushing the problem down the road. Moreover, norms that initially emerge from comity may, over time, become customary international law, as was the case of the seizure of fishing boats in the famous American *Paquete Habana* case.²⁹ Alternatively, states may choose to codify comity-based norms in treaty law obligations.³⁰ Conversely, what were once considered requirements of customary international law may now be seen merely as obligations of comity.³¹

Comity features prominently in both the public and private law jurisprudence of the SCC.³² Many Canadian courts have mistakenly suggested that comity imposes positive legal obligations.³³ It does not. Comity is merely an interpretive principle. According to one commentator, “rules of comity are customs (or, perhaps better, principles of interpretation or application of law) which are normally followed but which are not legally obligatory.”³⁴ Another commentator argues that “[t]he notion of international comity encompasses forms of conduct in relations between sovereign States (Sovereignty) which are based on courtesy, tradition, goodwill, or utility. Though not being legally binding, comity is enshrined in rules, albeit of tradition or usage, and not of international law.”³⁵

matter of courtesy, see *North Sea Continental Shelf (Germany v Denmark and the Netherlands)*, *supra* note 21 at para 77.

²⁹ *The Paquete Habana*, 175 US 677 (1900) at 692–700. See also Lassa Oppenheim, *International Law: A Treatise* (London: Longmans, Green and Co, 1905) (“there can be no doubt that many a rule which formerly was a rule of International Comity only is nowadays a rule of International Law. And it is certainly to be expected that this development will go on in future also, and that thereby many a rule of present International Comity will in future become one of International Law” at 25).

As an example, with respect to the law of immunity, see *Schooner Exchange v McFaddon*, 11 US 116 (1812); see also Hazel Fox, “International Law and Restraints on the Exercise of Jurisdiction by National Courts of States” in Malcolm Evans, ed, *International Law*, 3rd ed (Oxford: Oxford University Press, 2010) at 344; Jasper Finke, “Sovereign Immunity: Rule, Comity or Something Else?” (2010) 21:4 *Eur J Intl L* 853 at 870–71, DOI: <10.1093/ejil/chq068>.

³⁰ The rights of diplomats and consular officials, once protected only by comity, and subsequently by customary international law and treaty law, have been codified in the *Vienna Convention on Diplomatic Relations*, 18 April 1961, 500 UNTS 95 (entered into force 26 June 1987) and the *Vienna Convention on Consular Relations*, 24 April 1963, 596 UNTS 261 (entered into force 19 March 1967).

³¹ A salute between warships, once mandatory, is regarded today as subject to courtesy only. Similarly, so-called “rights of honour” (including a so-called formal salute and a guard of honour, etc.), once required when visiting heads of state, have now “sunk down to become mere acts of hospitality.” Kämmerer, *supra* note 23 at §D.

³² The scope of this paper deals only with public law comity. Interestingly, private law comity is substantially more developed in the legal literature in Canada.

³³ For an example of the mistake, see *France v Diab*, 2014 ONCA 374 at para 223 [*Diab*] (“two competing dynamics are in play—Canada’s international comity and treaty obligations”).

³⁴ Alexander Orakhelashvili, *Akehurst’s Modern Introduction to International Law*, 8th ed (Routledge, 2019) at 70.

³⁵ Kämmerer, *supra* note 23 at §AD.

This interpretation of comity has also found support at the International Court of Justice. For example, in *Fisheries Jurisdiction*, Judge Dillard made a clear distinction between the rules of comity and those of legal obligation.³⁶ In his separate opinion, he wrote that “in practice States accord deference to the twelve-mile limit as a matter of legal obligation and not merely as a matter of reciprocal tolerance or comity.”³⁷

Accordingly, when other judicial bodies have applied comity as a binding rule, it has been in error. For example, the European Court of First Instance erred in a 2005 decision when it held that member states of the European Union (EU) and the EU itself were required to give effect in their legal orders to measures directed against the Taliban. The court determined that “the principle of comity of nations obliges the Community to implement those measures insofar as they are designed to protect all States against terrorist attacks.”³⁸ This decision was subsequently overturned by the European Court of Justice, which found that human rights law would prevent the enactment of the impugned legislation at the domestic level.³⁹

In its earlier jurisprudence, the SCC refrained from declaring that the principle of comity was legally binding. In *Re Foreign Legations*, the SCC held that the principle of international comity generally informs international relations by inducing “every sovereign state to respect the independence and dignity of every other sovereign state.”⁴⁰ However, as I will illustrate in this paper, in its more recent jurisprudence the SCC has gone further and exhibited a pronounced tendency to treat comity as a positive rule of international law, rather than as an interpretative principle.

By discussing the limits of *Charter* protections, I will demonstrate how the uses and misuses of comity in public international law have limited the rights of Canadians. I will focus in particular on how the SCC has, under the guise of comity, misinterpreted extraterritoriality and restricted Canadian courts from interpreting foreign law and the actions of foreign legal systems.

II. THE EDGES OF SECTION 7

Section 7 of the *Charter* provides that “[e]veryone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with

³⁶ *Fisheries Jurisdiction*, *supra* note 28.

³⁷ *Ibid*, Separate opinion of Judge Dillard, [1974] ICJ Rep 3 at 58.

³⁸ *Kadi v Council and Commission*, T-315/01, [2005] ECR II-3649 at para 163II-3708 (CFI). It is worth noting that the actual EU directives were eventually found to violate international human rights law and that neither comity nor the *Charter of the United Nations* could save them.

³⁹ *Kadi and Al Barakaat International Foundation v Council and Commission*, C-402/05 P and C-415/05 P, [2008] ECR I-06351 (ECJ).

⁴⁰ *Reference as to Powers to Levy Rates on Foreign Legations*, [1943] SCR 208 at 217, [1943] CTC 157, citing *The Parlement Beige* (1880), 5 PD 197 (EWCA) at 214–15 [*Re Foreign Legations*].

the principles of fundamental justice.”⁴¹ However, it contains no explicit territorial limitation.⁴²

The SCC has consistently held that, in principle, section 7 protections apply to all individuals in Canada, irrespective of their citizenship. It also has held that these protections are accorded to individuals under the control of the Canadian government overseas.⁴³

However, over time the SCC has begun to limit the scope of section 7 protections.⁴⁴ It has held that only natural persons—and not legal persons such as corporations—enjoy section 7 rights.⁴⁵ With respect to non-citizens, it has held “that the deportation of a non-citizen does not engage section 7 of the *Charter*.”⁴⁶ Similarly, the SCC has held that non-citizens do not have an unqualified right to enter or to remain in the country.⁴⁷ Further narrowing the territorial scope, it decided, in *Dehghani*, that non-citizens at a port of entry do not have a right to legal counsel.⁴⁸

⁴¹ *Charter*, *supra* note 1, s 7.

⁴² The only relevant limit in the *Charter*, *ibid*, comes from s 32, which states that “(1) This Charter applies

(a) to the Parliament and the government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and the 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.”

⁴³ *Singh v Minister of Employment and Immigration*, [1985] 1 SCR 177, 17 DLR (4th) 422 [Singh].

⁴⁴ However, it is worth noting that there is considerable academic commentary on how the government has acted to reduce the force of *Singh*, *ibid*. See e.g. Catherine Dauvergne, “How the *Charter* Has Failed Non-Citizens in Canada: Reviewing Thirty Years of Supreme Court of Canada Jurisprudence” (2013) 58:3 McGill LJ 663 at 669, DOI: <10.7202/1018393ar>; F Pearl Eliadis, “The Swing from *Singh*: The Narrowing Application of the *Charter* in Immigration Law” (1995) 2 Imm LR (2d) 130. Eliadis writes that *Singh* strengthened “the trend towards ensuring that the newest members of our society as well as those seeking entry to Canada are treated in a way that is consonant with the way Canadians expect to be treated themselves.”

⁴⁵ *Irwin Toy Ltd v Quebec (Attorney General)*, [1989] 1 SCR 927 at 1002–3, 1989 CanLII 87; *British Columbia Securities Commission v Branch*, [1995] 2 SCR 3 at 28, 30, 1995 CanLII 142. However, corporations may indirectly enjoy rights either through the prohibition on conviction under an unconstitutional law (*R v Big M Drug Mart Ltd*, [1985] 1 SCR 295, 1985 CanLII 69) or by virtue of the fact that corporate officers may enjoy s 7 rights.

⁴⁶ *Esteban v Canada (Minister of Citizenship and Immigration)*, 2005 SCC 51. The court eventually clarified that s 7 may be triggered in some situations involving deportation. In *Charkaoui v Canada (Citizenship and Immigration)*, 2007 SCC 9 at para 17, it held that “[w]hile the deportation of a non-citizen in the immigration context may not *in itself* engage s. 7 of the *Charter*, some features associated with deportation, such as detention in the course of the certificate process or the prospect of deportation to torture, may do so” [emphasis in original].

⁴⁷ *Canada (Minister of Employment and Immigration) v Chiarelli*, [1992] 1 SCR 711, 1992 CanLII 87.

⁴⁸ *Dehghani v Canada (Minister of Employment and Immigration)*, [1993] 1 SCR 1053, 1993 CanLII 128.

These restrictions set the stage for a dispute over the scope of *Charter* protections for Canadians outside Canada or where actions of the Canadian government implicate a foreign sovereign. I will demonstrate how these restrictions have developed in the four areas of law identified above in each of the subsequent sections (extradition cases, the use of foreign-obtained evidence, civil cases in Canada where Canadians may be exposed to foreign criminal prosecution, and in the so-called war on terror).

Comity in Extradition Cases

Very few *Charter* cases are litigated solely on the basis of purported violations of section 7. Cases generally involve multiple claims that government action has violated or will violate multiple *Charter* rights. For instance, extradition cases often also involve purported violations of section 12, the prohibition on cruel and unusual punishment, with respect to potential criminal sanctions for individuals in receiving states. They also often involve alleged infringements of section 6, mobility rights.

The tendency in all the claims discussed in this paper has been for the SCC to overturn decisions of lower courts with respect to findings of violations of the rights guaranteed under section 6 and sections 8 through 12, holding that those specific rights do not apply outside the territory of Canada. Instead, the SCC has opted to consider all potential *Charter* claims rights violations under section 7. It has proceeded, in each case, to apply the doctrine of comity to an analysis of the substantive legal issues. Where it has done so, it has employed comity in the most expansive manner possible to preclude virtually any substantive review of the actions of foreign governments.

However, my criticism should not be taken to imply that all uses of comity are objectionable. In some cases, comity serves a vital role. For instance, the SCC's approach to double criminality, which stresses similarity of conduct as opposed to the formal characterization of the offence, is based in comity, and allows for extradition where there are legitimate differences in the characterization of offences.⁴⁹ Such practice is generally unobjectionable. However, comity, as we shall see, covers a wide variety of other situations.

⁴⁹ *Fischbacher*, *supra* note 6 at para 4 (“[t]his approach is not only consistent with prevailing international practice, it also accords with the principle of comity which demands deference and respect for the laws of other nations”). Double criminality is a principle of extradition law that requires that a state will only extradite an individual for conduct that is criminal under the laws of both states involved.

Criminal Sanctions

The SCC has adopted a particularly high standard of deference to executive action in extradition cases.⁵⁰ It has suggested that this deference derives from Canada's strong interest in international law enforcement activities in an increasingly globalized world.⁵¹

In *Kindler*⁵² and its companion case *Ng*,⁵³ the SCC was asked to consider whether non-citizens could be extradited from Canada to the United States without seeking diplomatic guarantees or other assurances that they would not be executed. While the value of plausible diplomatic guarantees is germane to the broader discussion of extradition, Canadian courts have never seriously questioned whether diplomatic guarantees from the United States should be relied upon in death penalty cases.⁵⁴

Both *Ng* and *Kindler* were accused of violent, horrifying crimes in the United States. *Kindler* was convicted of first-degree murder in Pennsylvania. The jury recommended the imposition of the death penalty. *Ng* was charged in California with multiple counts of sexual assault, torture, and murder. He fled to Canada to avoid prosecution.

Both cases were heard at the same time. The court opted to provide detailed reasons in *Kindler*⁵⁵ alone. Counsel for *Kindler* argued that extradition to the United States would violate both section 12, by potentially exposing him to cruel and unusual punishment, and section 7, by depriving him of life in a manner not in accordance with the principles of fundamental justice. Justice McLachlin, as she then was, held that section

⁵⁰ Amanda J Spencer, "Fugitive Rights: The Role of the *Charter* in Extradition Cases" (1993) 51:1 UT Fac L Rev 54.

⁵¹ *United States of America v Cotroni*, [1989] 1 SCR 1469 at 1485, 1989 CanLII 106. The SCC held that "[t]he investigation, prosecution and suppression of crime for the protection of the citizen and the maintenance of peace and public order is an important goal of all organized societies [which] ... cannot realistically be confined within national boundaries." See also *Kindler*, *supra* note 6 at 843–44; *Libman v The Queen*, [1985] 2 SCR 178 at 214, 1985 CanLII 51; *Idziak v Canada (Minister of Justice)*, [1992] 3 SCR 631 at 662, 1992 CanLII 51.

⁵² *Supra* note 6.

⁵³ *Reference Re Ng Extradition (Can)*, [1991] 2 SCR 858, 1991 CanLII 79 [*Ng*].

⁵⁴ Plausibly, there is a question of why Canada is entitled to rely on diplomatic assurances at all. While diplomatic guarantees offered by the United States never have their reliability seriously questioned, the situation is different where extradition is sought to countries with poorer human rights records and less effective state control over police or prison guards. However, relying implicitly on its previous jurisprudence on the role of comity in extradition law, the SCC has held that absent evidence of bad faith, assurances should generally be accepted from other states (*India v Badesha*, 2017 SCC 44 at para 14). The approach of the SCC should be compared to the more interventionist approach of the European Court of Human Rights. See generally *Othman (Abu Qatada) v United Kingdom*, [2012] 55 EHRR 1 at 189.

⁵⁵ The *Ng* decision merely recapitulated the holding in *Kindler*, as the facts were substantially similar.

12 guarantees do not apply where punishment would be carried out by a foreign sovereign.⁵⁶

Instead, she dealt with the case principally on section 7 grounds. She cautioned that the principles of “reciprocity, comity and respect for differences in other jurisdictions” are foundational to an effective extradition process.⁵⁷ If Canada wants to engage in cooperative international law enforcement, including having criminals extradited to Canada, it must be prepared to accept that different countries have different legal systems.⁵⁸ To that end, she expressed that “we must avoid extraterritorial application of the guarantees [*viz.* section 7] in our *Charter* under the guise of ruling extradition procedures unconstitutional.”⁵⁹

With that deference in mind, Justice McLachlin summarized the history of the death penalty in Canada, including the rather narrow parliamentary votes in favour of abolition. She concluded that there was no broad consensus in Canada that the death penalty was immoral. She held that since there is no basis to conclude that the death penalty met the standard of shocking the conscience of Canadians,⁶⁰ there was no violation of section 7.⁶¹

In his concurring opinion, Justice La Forest expanded on comity in extradition proceedings. He argued that the principle of deference to foreign states embedded in comity meant that Kindler’s subsidiary argument with respect to the alleged death row phenomenon could not succeed. Any determination that the conditions on death row violated Kindler’s rights would require Canadian courts to engage in a prohibited evaluation of the American legal system.⁶²

Kindler and *Ng* remained good law for a decade. However, in *United States v Burns*,⁶³ the SCC was asked to return to the question of extraditing Canadian citizens to face the death penalty. *Burns* marked the beginning of what one commentator has called

⁵⁶ This was one of the many disagreements in the case. In his dissenting opinion, Cory J found that extradition would violate s 12 of the *Charter* and could not be saved by s 1. He also found that Canadian authorities could not hide behind the artifice that any actual execution would be carried out by American authorities: *Ng*, *supra* note 53.

⁵⁷ *Kindler*, *supra* note 6 at 844.

⁵⁸ *Ibid* at 845.

⁵⁹ *Ibid*. In *Canada v Schmidt*, [1987] 1 SCR 500 at 518, 1987 CanLII 48 [*Schmidt*], quoting La Forest J, McLachlin J wrote that “the *Charter* cannot be given extraterritorial effect to govern how criminal proceedings in a foreign country are to be conducted.”

⁶⁰ Applying the test laid out for s 7 of the *Charter* in *Re BC Motor Vehicle Act*, [1985] 2 SCR 486 at 533, 1985 CanLII 81.

⁶¹ *Kindler*, *supra* note 6 at 845.

⁶² *Ibid* at 837–38.

⁶³ *United States v Burns*, 2001 SCC 7 [*Burns*].

a “kinder, gentler,” court.⁶⁴ Burns and Rafay had been accused of the murder of members of Rafay’s family in Washington State. They had been committed to extradition without assurances that the death penalty would not be sought.

Burns and Rafay subsequently challenged the Minister of Justice’s decision, and it was successfully overturned by the British Columbia Court of Appeal (BCCA). The BCCA held that extradition to face the death penalty violated section 6(1) and could not be saved by section 1.⁶⁵

Burns serves as another example of tension between courts over whether to apply section 7 rights or other *Charter* rights. While the SCC upheld the decision of the BCCA, it preferred to analyze the case in terms of section 7 alone.⁶⁶ The court adopted the test developed in *Kindler* for section 7 rights. It held that while *Kindler* and *Ng* remained good law, neither provided “a blanket approval to extraditions to face the death penalty.”⁶⁷

The SCC reconsidered the abolition of the death penalty and the weight that it should have been given. Factors militating against extradition without assurances included the continued rejection of the death penalty in Canada, Canada’s international advocacy against the death penalty, and growing international opposition to the death penalty.⁶⁸ Evidence not previously given weight in *Kindler* and *Ng* included the relative youth of the accused, increased awareness in the years since *Kindler* and *Ng* of the potential for wrongful convictions, and the death row phenomenon, which refers to the emotional distress felt by prisoners as a result of long delays on death row.⁶⁹

The SCC addressed certain countervailing factors in its decision. First, there is a general presumption that individuals accused of crimes should be brought to trial in the jurisdiction where the alleged crimes took place in order to address the impact of the crimes on that community. Second, individuals who choose to leave Canada accept that they are leaving behind Canadian law and criminal procedures, and that extradition

⁶⁴ Richard Haigh, “A Kindler, Gentler Supreme Court?: The Case of Burns and the Need For a Principled Approach To Overruling” (2001) 14 SCLR (2d) 139 at 140. Haigh writes that “not much about the barbarism of the death penalty, nor the scope of international comity, has changed in this past decade, but the matter was nevertheless reheard in *Burns*.” Haigh suggests that the problem with this case is that the SCC rarely explicitly overrules previous constitutional jurisprudence, preferring to distinguish on increasingly narrow grounds. In this case, the court gave weight to the accused’s citizenship. *Kindler* and *Ng* were not Canadians.

⁶⁵ *Burns*, *supra* note 63 at para 20; *United States of America v Burns*, [1997] 116 CCC (3d) 524, 1997 CanLII 3271 (BCCA).

⁶⁶ The SCC also rejected the argument that s 12 might apply, holding that any penalty would be inflicted by an overseas sovereign. This argument seems disingenuous as Canadian authorities would play an important step in the causal chain.

⁶⁷ *Burns*, *supra* note 63 at para 64.

⁶⁸ *Ibid* at para 81.

⁶⁹ For international considerations of the latter, see *Soering v United Kingdom* (1998), 161 ECHR (Ser A) 14.

requires comity, fairness, and reciprocity to other states rendering mutual assistance in fighting crime.⁷⁰ A state seeking Canada's cooperation today may someday be asked to extradite its own nationals to Canada and might be reluctant to cooperate if Canada did not assist it.⁷¹

The court's review of the factors led to the conclusion that "assurances are constitutionally required in all but exceptional cases."⁷² Importantly, although the SCC had cautioned in previous cases that comity prevented the evaluation of foreign legal systems, it violated its own rules in this holding in two respects. First, the court was willing to go against its previous findings that an evaluation of the death row phenomenon and conditions in US prisons would violate comity. Second, the court determined that the crimes alleged in *Burns* were not exceptional.⁷³

Never before had the SCC determined whether the imposition of the death penalty in a foreign jurisdiction could potentially violate the *Charter*. In *Burns*, the court found that absent exceptional circumstances, it would. One can therefore understand why Norm Maleng, who was a Washington Prosecuting Attorney at the time, felt that the SCC was applying the *Charter* extraterritoriality and pronouncing on American law.⁷⁴

Evidentiary Requirements

Like many common law jurisdictions (and unlike many civil law jurisdictions), Canada will extradite its own nationals; however, its process for doing so changed dramatically two decades ago. Prior to 1999, the *Extradition Act* was based on similar legislation in the United Kingdom.⁷⁵ Extradition in Canada required an evidentiary hearing, similar in principle to a preliminary hearing, where evidence that would be equivalent to what was necessary to justify committal for trial in Canada was made available to a Canadian court. Broadly speaking, the *Extradition Act* required evidence that was admissible in Canada, meaning, in part, "that it was comprised of first-person accounts devoid of hearsay and that false testimony made the witness subject to a penalty."⁷⁶

⁷⁰ The court rejected this on empirical grounds, noting that European nations regularly request assurances (*Burns*, *supra* note 63 at para 138).

⁷¹ *Ibid* ("the legitimate purpose of extradition could be achieved by another means,' namely extradition with assurances, in perfect conformity with Canada's commitment to international comity" at para 137 [emphasis in original]).

⁷² *Ibid* at para 8.

⁷³ *Ibid* ("[w]e further hold that this case does not present the exceptional circumstances that must be shown before the Minister could constitutionally extradite without assurances").

⁷⁴ Robert Harvie & Hamar Foster, "Shocks and Balances: *United States v Burns*, Fine-Tuning Canadian Extradition Law and the Future of the Death Penalty" (2004–2005) 40:2 Gonz L Rev 293 at 294.

⁷⁵ *Extradition Act*, 1870 (UK), 33 & 34 Vict, c 52.

⁷⁶ La Forest, *supra* note 6 at 98.

In 1999, the former *Extradition Act* was repealed and replaced with new legislation. The new *Extradition Act*,⁷⁷ in the words of one commentator, sought “to alter the judicial process of extradition to make the hearing more accessible to some of Canada's extradition partners, especially civil law states, which had experienced difficulties even with the more flexible admissibility rules applicable to the extradition hearing.”⁷⁸

Under the current *Extradition Act*, there is no longer an extradition hearing similar to a preliminary hearing. The record could potentially include evidence that would be inadmissible in Canada, including unsworn evidence and hearsay, whether or not it is necessary or reliable. Instead, the extradition judge is required to review a record of the case, which contains a summary of the evidence that is admissible in the case rather than the evidence itself. Based on this assessment, “a judicial or prosecuting authority of the requesting state certifies that the evidence is available for trial and would be sufficient under the law of that state to justify prosecution.”⁷⁹

In *USA v Yang*,⁸⁰ one of the earliest cases to interpret the changes to the new *Extradition Act*, the Court of Appeal for Ontario was asked to consider whether the move away from admissible evidence violated the principles of fundamental justice embedded in section 7. The court held that section 7 guarantees, including the principle of fundamental justice, do not require the adoption of any specific format for evidence, nor do they require a judge to apply the reliability test to that evidence.⁸¹

Instead, citing *Kindler*, the appeal court relied on the doctrine of comity to find that courts should not impose Canadian evidentiary or procedural standards upon extradition partners: “[a] foreign justice system is not fundamentally unjust because it does not recognize certain safeguards that we would consider principles of fundamental justice.”⁸² Judicial procedures in foreign countries should not be subjected to the scrutiny of Canadian courts.⁸³ Quoting La Forest J, the court held that “[a] judicial system is not, for example, fundamentally unjust—indeed it may in its practical workings be as just as

⁷⁷ *Extradition Act*, SC 1999, c 18.

⁷⁸ La Forest, *supra* note 6 at 99.

⁷⁹ *Ibid* at 100.

⁸⁰ *United States of America v Yang*, 56 OR (3d) 52, 2001 CanLII 20937 (CA) [*Yang*].

⁸¹ *Ibid* at para 43. The court held that in “the pronouncements of the Supreme Court of Canada in post-Charter extradition cases and particularly the need to respect differences in other jurisdictions, the evidentiary provisions of the Extradition Act comply with the principles of fundamental justice. Put simply, if we are prepared to countenance a trial of persons, including our own citizens, in jurisdictions with very different legal systems from our own, it is open to Parliament to design an extradition procedure that, with appropriate safeguards, accommodates those differences. Our extradition process need only meet ‘the basic demands of justice’.”

⁸² *Ibid* at para 42.

⁸³ *Schmidt*, *supra* note 59 at 522.

ours—because it functions on the basis of an investigatory system without a presumption of innocence or, generally, because its procedural or evidentiary safeguards have none of the rigours of our system.”⁸⁴

Yang illustrates precisely how far Canadian courts have been willing to depart from Canadian norms of due process—including evidentiary safeguards and the presumption of innocence—in order to avoid judging foreign legal systems. They have done so in the name of comity.

Subsequently, the SCC clarified the role of comity in the rules governing the use of foreign evidence in extradition cases. In *Ferras*,⁸⁵ the court refined the rules of evidence applicable during extradition. The court portrayed the demands of fundamental justice as tempered by comity⁸⁶ and held that fundamental justice requires only an independent and impartial judicial determination of the facts and no specific procedure.⁸⁷

However, when called on to review extradition based on certified evidence, the court yet again held that deference to the requesting state is “justified by the principle of comity and the ability of Canada to determine who it will accept as extradition partners.”⁸⁸ Canada could rely on the “good faith and diligence of its extradition partners.”⁸⁹ Where evidence has been certified, there is a presumption of reliability.⁹⁰

Despite this holding, the SCC did apply section 7 to create a minimum standard in extradition cases. It held that an individual could not be extradited absent “showing that the evidence actually exists and is available for trial is fundamental to extradition.”⁹¹ Sending a person to languish in prison without trial is antithetical to the principles of fundamental justice.⁹²

⁸⁴ *Yang*, *supra* note 80 at para 42; citing *Schmidt*, *supra* note 59 at 522–23.

⁸⁵ *Supra* note 6.

⁸⁶ *Ibid* at para 21. The court held that “[t]he two purposes are complementary. International comity does not require the extradition of a person on demand or surmise. Nor does basic fairness to the person sought for extradition require all the procedural safeguards of a trial, provided the material establishes a case sufficient to put the person on trial.” *Ferras* was affirmed in *United Mexican States v Ortega*, 2006 SCC 34 (sub nom *United States of America v Fiessel*).

⁸⁷ *Ibid* at para 19, citing to *Glucksman v Henkel*, 221 US 508 (1911) at 512 (holding that individuals cannot be extradited on mere suspicion).

⁸⁸ *Ferras*, *supra* note 6 at para 31.

⁸⁹ *Ibid* at para 32.

⁹⁰ *Ibid* at para 52.

⁹¹ *Ibid* at para 55.

⁹² The minimum standard for extradition cases appears to be very low. The most recent leading case on the subject is the extradition decision of *Diab*, *supra* note 33 at para 44. Hasan Diab was accused of participating in a synagogue bombing in France in 1980 based on what the Ontario courts found to be scant evidence. France claimed that Diab had travelled to Paris on a false passport and stayed at a hotel while the bombing was carried out. Over objections from the defence, handwritten evidence was

Due Process in Extradition

The final issue that has emerged in the context of comity's role in extradition is the question of what I label due process rights, which include fair trial rights in extradition proceedings. A factor uniting due process concerns before the SCC has been whether comity prevents Canadian courts from interrogating a foreign court's procedures.

Due process concerns involve both the sufficiency of evidence and the general likelihood that the individual would be tried. In both *Ferras* and *Diab*, courts have expressed concerns that individuals should not be left to languish indefinitely in foreign prisons.

The first (and still most important) case to deal with the issue is *Mellino*.⁹³ In *Mellino*, the SCC was asked to consider whether a failure by the requesting state to provide the necessary evidence for extradition meant that subsequent attempts at extradition must be rejected under section 11(b) for undue delay, or under section 7 for an abuse of process.

The SCC dealt with the issues raised by the case predominantly under section 7.⁹⁴ It found that section 7 protections would only be triggered by a delay attributable to Canadian authorities.⁹⁵ It excused the failure of the Argentinian authorities to provide evidence at the first extradition hearing, which resulted in *Mellino*'s release, holding that it was attributable to the complexity "in dealing with activities that reach across national boundaries and involve different systems of law and several levels of bureaucracies in the same way as that in local prosecutions."⁹⁶ The court held that comity precluded it from supervising "the conduct of the diplomatic and prosecutorial officials of a foreign state."⁹⁷

In *Fischbacher*,⁹⁸ the SCC was asked to consider whether all of the elements of an offence must be met under Canadian law to justify extradition on specific charges. It

proffered that purported to show his participation in the bombing. *Diab* was extradited but ultimately never put on trial in France, and he returned to Canada.

⁹³ *Supra* note 6.

⁹⁴ The SCC declined to apply s 11(b) protections extraterritorially.

⁹⁵ *Mellino*, *supra* note 6 at 552; cited approvingly in the similar *United States v Allard*, [1987] 1 SCR 564, 1987 CanLII 50.

⁹⁶ *Mellino*, *supra* note 6 at 551. *Mellino* similarly held, at 551–52, that there was no violation of the principle of *ne bis in idem*: "Since a discharge at an extradition hearing for lack of evidence, like that at a preliminary hearing, is not final, it has long been recognized that new proceedings may be instituted on new, or even on the same evidence before the judge at the original hearing or another judge: see, for example, *Attorney-General of Hong Kong v Kwok-A-Sing* (1873), LR 5 PC 179; *Re Harsha (No 2)* (1906), 11 CCC 62 (Ont HC); *Armstrong v State of Wisconsin*, [1972] FC 1228 (CA) This was recognized by the judge and the parties, who acted on that basis."

⁹⁷ *Ibid* at 551.

⁹⁸ *Supra* note 6.

is well-established that the principle of double criminality applies in Canadian extradition law.⁹⁹ Lower courts had held, prior to *Fischbacher*, that where evidence was not proffered to establish that all elements of a Canadian offence had been met (i.e., the charges were misaligned), extradition was not possible.

Fischbacher assessed the possibility of extradition when individuals faced first degree versus second degree murder charges. This case is particularly important given that Canadian courts had insisted that a heightened *mens rea* was constitutionally required under section 7 to sustain murder charges.¹⁰⁰ Lower courts had found that extradition was only possible, on the facts of the case, to face second degree murder charges.

On appeal, however, the SCC held that it was not for judges to inquire into every aspect of foreign criminal law.¹⁰¹ It held that comity required Canadian judges to defer to foreign judges' understanding of their own laws and not compare whether foreign criminal laws contain equivalent elements to those of Canadian crimes.¹⁰² If the evidence was sufficient to establish the elements of the foreign crime and the conduct was criminalized in Canada, then it is sufficient to warrant extradition for that charge. Even the dissent held that only in the rarest of circumstances would "a substantial discrepancy between the evidence placed before the extradition judge and the evidence that is plainly required to establish an undisputed element of the foreign offence ... warrant judicial intervention."¹⁰³

As illustrated by the above due process concerns, the SCC used comity as a means of limiting courts' supervision of Canada's extradition partners. First, it precluded a detailed examination of the foreign sovereign's legal or political arrangements, including whether foreign delays in acting violated the principles of fundamental justice. However, state practice shows that no positive rule of international law requires this examination.¹⁰⁴ Instead, the SCC could have applied the test from *Jordan*,¹⁰⁵ creating a rebuttable presumption that delays are due to state action. Second, the deployment of comity has

⁹⁹ *Extradition Act*, *supra* note 77.

¹⁰⁰ *R v Vaillancourt*, [1987] 2 SCR 636, 47 DLR (4th) 399; *R v Martineau*, [1990] 2 SCR 633, 6 WWR 97.

¹⁰¹ A principle that is echoed in all cases involving comity is that Canadian judges should not interpret foreign law. For instance, in *Diab*, *supra* note 33 at para 193, the court, in discussing whether Diab had been charged and could even be extradited, wrote that "[t]he application of French law is a matter for the French authorities. While the Minister can take foreign law into account in deciding whether to order surrender, he does not make his own assessment of how foreign law should apply, as to do so would offend the principle of comity."

¹⁰² *Fischbacher*, *supra* note 6 at para 50 (criticizing the misalignment test).

¹⁰³ *Ibid* at para 60, Fish J, dissenting.

¹⁰⁴ Other common law states appear to consider delay by the requesting state, at least in exceptional circumstances, as grounds to decline to extradite: *Kakis v Government of the Republic of Cyprus* [1978], 1 WLR 779, 2 All ER 634 (HL); *Gomes v Trinidad and Tobago*, [2009] UKHL 21, 3 All ER 549.

¹⁰⁵ *R v Jordan*, 2016 SCC 27 (admittedly, *Jordan* was decided on s 11(b) and not s 7 grounds).

limited courts' abilities to scrutinize foreign legal systems more broadly, largely requiring them to accept the word of foreign states on the workings of their legal systems. This is a particularly troublesome finding, as it indicates that section 7 *mens rea* requirements need not necessarily apply in extradition cases. It remains to be seen whether these concerns are truly justified or if, instead, they reflect a policy decision by the court to abstain entirely from scrutinizing foreign sovereigns.

Comity and the Use of Foreign-Obtained Evidence

Parallel to the question of the use of foreign evidence in extradition is the use of foreign evidence in domestic criminal proceedings. A line of cases has held that normal *Charter* protections do not apply absent specific actions by Canadian governmental officials overseas.¹⁰⁶

In *Harrer*, a 1995 SCC decision, the court was asked to consider whether statements made by the accused in the United States were admissible in a Canadian court. The accused was interrogated by the police to ascertain the lawfulness of her status in the United States. She was later questioned by the police—without being provided a second warning of her right to counsel—about her role in her boyfriend's escape from police custody in Canada.¹⁰⁷ Her statements were excluded at trial but the Crown appealed in seeking to admit the evidence. The BCCA reversed the trial decision and ordered a new trial.¹⁰⁸ The SCC dismissed *Harrer*'s appeal.

Echoing a familiar theme, the SCC held that the BCCA erred by focusing on the violations of section 11(d). It found that such protections did not apply outside Canada.¹⁰⁹ Instead, the court held that the only potential ground for exclusion of evidence was a violation of the principles of fundamental justice.

Adopting a more liberal approach than it would in subsequent cases, the SCC held that it could evaluate whether the circumstances of the collection of that evidence would result in unfairness if admitted at trial under section 7.¹¹⁰ Nevertheless, following the line of reasoning adopted in extradition cases, the SCC found that there was no requirement

¹⁰⁶ Such situations rarely obtain, on its view.

¹⁰⁷ *Harrer*, *supra* note 7.

¹⁰⁸ *R v Harrer*, [1994] BCWLD 1236, 1994 CanLII 1047 (CA).

¹⁰⁹ *Harrer*, *supra* note 7 at para 11, where the court held that the *Charter* did not apply, but that “had the interrogation about a Canadian offence been made by Canadian peace officers in the United States in circumstances that would constitute a violation of the *Charter* had the interrogation taken place in Canada, an entirely different issue would arise.”

¹¹⁰ See *ibid* at para 17, where the court said that “it may happen that the evidence was obtained in a manner that conformed with the law of the country where it was obtained, but which a court in this country would find in the circumstances of the case would result in unfairness if admitted at trial.” While *Harrer* is likely still good law on this specific point, the effect of subsequent jurisprudence has been to make inadmissibility a very high bar to meet.

that foreign criminal procedures conform exactly to Canadian procedures.¹¹¹ It concluded on a functional analysis that the warnings given to *Harrer*, even if not identical to those normally provided in Canada, did not render the use of the evidence unfair, and ordered a new trial.

Importantly, the SCC made no mention of comity in *Harrer*. At the time that the decision was rendered, Justices LeBel and La Forest, who would subsequently apply comity in many public law cases, had not yet developed the doctrine to prevent a detailed *Charter* analysis of the actions of foreign sovereigns in evidentiary questions.¹¹²

However, the cases subsequent to *Harrer* narrowed the SCC's holding that section 7 may temper the use of foreign-obtained evidence. In *Terry*,¹¹³ the court again considered foreign evidence in the context of an accused who was alleged to have fatally stabbed a man in Canada before fleeing to the United States. Canadian police requested that he be detained pending extradition and that, when detained, American police read him his *Miranda* rights, but did not ask that they comply with *Charter* rules. Terry spoke to the police, largely denying the crime; however, his statement was admitted at trial to challenge other parts of his defence. Terry was convicted, and appealed.

In dismissing his appeal, the SCC drew on comity to formulate a rule for evaluating foreign-obtained evidence. In a unanimous decision, Justice McLachlin, as she then was, wrote that: "[t]his Court has repeatedly affirmed the territorial limitations imposed on Canadian law by the principles of state sovereignty and international comity."¹¹⁴ Narrowing the holding in *Harrer*, the SCC held that where evidence had been gathered in an abusive fashion, the court could exclude it as it would constitute a violation of section 7.¹¹⁵

In *Schreiber*,¹¹⁶ a 1998 SCC decision, the court considered whether the Canadian government's use of letters rogatory to request evidence from Switzerland violated

¹¹¹ See *ibid* at para 15, where the court said that "[l]ooking specifically at the present situation, it is obvious that Canada cannot impose its procedural requirements in proceedings undertaken by other states in their own territories. And I see no reason why evidence obtained in other countries in a manner that does not conform to our procedures should be rejected if, in the particular context, its admission would not make the trial unfair."

¹¹² LeBel had yet to be appointed to the SCC at the time of *Harrer*, arriving only in 2000.

¹¹³ *R v Terry*, [1996] 2 SCR 207, 135 DLR (4th) 214.

¹¹⁴ *Ibid* at para 16; McLachlin J, as she then was, writing for the court, drew on the court's private law jurisprudence, quoting from La Forest J in *Tolofson v Jensen*, [1994] 3 SCR 1022 at 1050–51, 120 DLR (4th) 289, "[o]rdinarily people expect their activities to be governed by the law of the place where they happen to be and expect that concomitant legal benefits and responsibilities will be defined accordingly. The government of that place is the only one with the power to deal with these activities. The same expectation is ordinarily shared by other states and by people outside the place where an activity occurs."

¹¹⁵ *Ibid* at para 25.

¹¹⁶ *Schreiber v Canada (Attorney General)*, [1998] 1 SCR 841, 158 DLR (4th) 577.

section 8 protections. Although largely decided on section 8 grounds, the majority in *Schreiber* suggested in *obiter* that compulsion and extraterritoriality would be key factors in future section 7 cases.¹¹⁷ The majority found that violations of section 8 depend on state compulsion, which only occurred outside the territorial scope of the *Charter*. Writing a letter to Swiss authorities to request information (although that letter was likely to be acted upon) did not amount to compulsion exercised by the Canadian government.¹¹⁸

Finally, in *Cook*,¹¹⁹ another 1998 decision, the SCC returned to the issue of the interrogation of Canadian nationals overseas. Cook, after being accused of murder in Canada, was detained in the United States by American detectives and was read his *Miranda* rights. He was allowed to be interrogated by Canadian detectives while in US custody. The Canadian detectives told him that he could contact a lawyer but did so in a way that the court described as “convoluted.”¹²⁰

Cook denied the murder but provided other statements, which the Crown sought to introduce at trial in Canada to challenge his defence. The statements were admitted. He was convicted at trial and appealed.

The SCC held that the statements were improperly admitted. In so doing, it formulated a specific test to determine when the *Charter* could apply extraterritorially. The Charter would apply extraterritorially where “(1) the impugned act falls within section 32(1) of the *Charter*,” insofar as it was carried out by Canadian officials, and “(2) the application of the *Charter* to the actions of the Canadian [officials] ... does not ... interfere with the sovereign authority of the foreign state and ... generate an objectionable extraterritorial effect.”¹²¹ The majority qualified this holding by suggesting that considerations of comity and extraterritoriality would often lead to the failure of the second prong of the test.¹²²

Cook was the last of the cases to deal with extraterritoriality for almost a decade. In *Hape*, *Cook*’s ruling would be substantially narrowed on grounds of comity and extraterritoriality. While investigating money laundering, the RCMP worked alongside

¹¹⁷ The court also found that residual s 7 rights could be invoked in exceptional circumstances to guarantee a fair trial.

¹¹⁸ *Schreiber*, *supra* note 116 at para 31.

¹¹⁹ *R v Cook*, [1998] 2 SCR 597, 164 DLR (4th) 1.

¹²⁰ *Ibid* at paras 6–7 (“the manner in which the warning was provided was so confusing that it deprived the appellant from forming a decision about whether or not to seek legal advice” at para 6).

¹²¹ *Ibid* at para 25.

¹²² *Ibid* at para 92. In dissent, L’Heureux-Dubé J (joined by McLachlin CJ) took a particularly hard line in holding that *Charter* protections do not apply to actions carried out overseas. She wrote that “even if the action being challenged is attributable to a government listed in s. 32, that action will not trigger *Charter* application if it is carried out outside Canada in cooperation with another jurisdiction” [emphasis in original]. As we will see below, McLachlin CJC softened this stance in *Khadr*.

police in Turks and Caicos to determine Hape's potential criminal activity in the Caribbean territory. The RCMP organized a raid on Hape's office in Turks and Caicos. However, they did not acquire a warrant, relying instead on a local detective to procure warrants, if necessary, under local law.¹²³

The majority in *Hape* found that the actions were not carried out by Canadian authorities within the meaning of section 32. Justice LeBel, writing for the majority, drew on the principles of sovereign equality of states, comity, and territorial jurisdiction to limit the territorial scope of the *Charter*. First, Justice LeBel held that international law required respect for the sovereign equality of states.¹²⁴ Second, he held that the principle of comity required that laws be interpreted in a manner compatible with the sovereignty of other states.¹²⁵ Finally, he found that, as a "principle of statutory interpretation[,] ... legislation will be presumed to conform to international law."¹²⁶ Where there are multiple interpretations of statutes or constitutional instruments, courts will avoid a construction that would place Canada in breach of those obligations.

The majority found that jurisdiction "cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention"¹²⁷ or with "the consent of the host state."¹²⁸ The SCC held that where legislation does not expressly state that Parliament intended to act in breach of international law or that the court was not to apply comity, courts are required to interpret the *Charter* in accordance with those principles. The majority then concluded that applying section 7 to the collection of evidence overseas would violate both comity and international law.¹²⁹

¹²³ At trial, the RCMP officers testified that they had understood separate warrants to be in place for each of the two covert entries. However, although the Crown sought to introduce copies of two Turks and Caicos warrants purportedly issued to Lessmun (the detective in the Turks and Caicos), one dated March 13 and the other March 14, 1998, authorizing entry into Hape's office, "[t]he copies of the warrants had not been authenticated, and counsel for the appellant objected to their admission at trial": *Hape*, *supra* note 7 at para 10.

¹²⁴ *Ibid* at para 40.

¹²⁵ *Ibid* at para 48. At para 50, LeBel J quotes Michael Akehurst, "Jurisdiction in International Law" (1972-1973), 46 *Brit YB Intl L* 145 at 215 in support of his view that comity plays an important role in international law.

¹²⁶ *Hape*, *supra* note 7 at para 53.

¹²⁷ *Ibid* at para 65, citing *The Case of the SS "Lotus"* (1927), PCIJ Ser A, No 10 at 18-19. However, the court does not take into consideration the next line in *Lotus*, which finds that states can give any effect (or none whatsoever) to the acts of other states within their own legal systems.

¹²⁸ *Hape*, *supra* note 7 at para 68.

¹²⁹ Further cases have extended the holding in *Hape* to cases involving the use of foreign wiretaps and other similar evidence; see e.g. *R v Della Penna*, 2012 BCCA 3; *R v Anaso*, [1999] OJ No 5759, 2000 CarswellOnt 1597; *R v Nguyen*, 2016 BCSC 2181.

The SCC's solicitous attitude was likely influenced by the same concern as in the extradition cases: to enhance international cooperation in an era of globalized crime.¹³⁰ It defended its decision by arguing that any other interpretation of the *Charter* would be unworkable.¹³¹ First, it found that it would be unrealistic to require police to follow different procedural requirements in the same investigation; second, as investigations require careful and detailed planning, it would render joint investigations unmanageable; and third, police would not necessarily know which rules to follow.¹³²

The court rejected the possibility of *ex post facto* scrutiny of the methods under which foreign evidence is collected, holding that the role of the *Charter* is primarily prescriptive rather than remedial. Moreover, while some provisions of the *Charter* can be applied in an adjudicative manner at trial, not all provisions can be. Some require specific actions at the time of arrest, with which police might not be able to comply overseas. For instance, section 10(b), which guarantees everyone the right to retain and instruct counsel without delay could not be complied with outside of Canada.¹³³

The majority proposed a new test for determining whether the *Charter* applies. First, courts should determine whether the activity in question was carried out by an actor defined in section 32(1). If it was, the court should ask 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."¹³⁴ It concluded that in most cases there will be no such exception.¹³⁵ However, in exceptional cases, section 7 could be applied at the time of trial.

The dissent in *Hape* outlined the theoretical problems with the majority's approach. Justice Bastarache stated that the *Charter* should have been applied, concluding that the RCMP had been exercising governmental functions outside Canada,¹³⁶ but found that Hape's rights were not violated. Instead, he argued for a functional approach that

¹³⁰ *Hape*, *supra* note 7 at paras 52 and 98.

¹³¹ *Ibid* at para 91, where the court held that "[t]he fact that the *Charter* could not be complied with during the investigation because the relevant state action was being carried out in a foreign jurisdiction strongly intimates that the *Charter* does not apply in the circumstances." The SCC adopted much of the dissent from *Cook*, in which McLachlin J, as she then was, had joined.

¹³² *Ibid* at paras 89–90, where the courts says at para 90 that "[t]he only reasonable approach is to apply the law of the state in which the activities occur, subject to the *Charter*'s fair trial safeguards and to the limits on comity that may prevent Canadian officers from participating in activities that, though authorized by the laws of another state, would cause Canada to be in violation of its international obligations in respect of human rights."

¹³³ *Ibid* at para 92.

¹³⁴ *Ibid* at para 113.

¹³⁵ *Ibid*.

¹³⁶ *Ibid* at para 152, where Bastarache J states that "[t]he facts of this case do tend to support the view that this was indeed an investigation initiated by Canadians and that the role played by Turks and Caicos authorities was merely one of facilitating the RCMP's investigation."

asks if there were equivalent protections and fundamental human rights norms available in the foreign jurisdiction. Where foreign procedure was different, that would be *prima facie* evidence of a breach of the *Charter*. However, such breaches would often be saved by section 1.¹³⁷

The dissent argued, in my view persuasively, that there is no principled basis to believe that allowing Hape's appeal would result in Canadian law being enforced in another country.¹³⁸ In the dissent's view, Canadian courts would only determine what effect to give foreign legal acts in the Canadian legal system.

Perhaps the oddest feature of *Hape* is the majority's holding that "the principle of comity may give way where the participation of Canadian officers in investigative activities sanctioned by foreign law would place Canada in violation of its international obligations in respect of human rights."¹³⁹ There is no clear jurisprudential reason why this is true. Naturally, legal obligations must be interpreted, as a general rule, in conformity with international human rights law. That is clearly the minimum standard of protection that should be afforded to Canadians. But there are international legal norms that are not human rights norms, and presumably the principle of comity should yield to them as well as a matter of interpretation. There is no principled juridical reason for comity to yield only to international human rights norms. Yet that is precisely the approach adopted by the courts.

Comity and Self Incrimination

A subset of evidentiary concerns in proceedings involving other states is the risk of self-incrimination in transnational investigations. I have argued that comity has been used to protect foreign courts from scrutiny in extradition cases, leading Canadian courts to exercise great deference with respect to claims of insufficient evidence or where proof of foreign law is demanded. Similarly, Canadian courts have been reluctant to evaluate procedural safeguards in place in foreign criminal investigations or to permit detailed examinations of the operation of foreign legal systems (though, as I have argued, such an evaluation would be better characterized as the effect to be given in Canada to the actions of foreign sovereigns).

A different question emerges when Canadian authorities enforcing domestic laws may expose Canadians to foreign penal sanctions. There are relatively few such cases,

¹³⁷ *Ibid* at para 169, where Bastarache J writes that "[t]rivial and technical differences will easily be discarded[;] more substantial differences between the protections that would be available in Canada and those available in the foreign state will require more in order to be justified."

¹³⁸ International law says nothing about evaluating the actions of foreign sovereigns in domestic criminal proceedings. Moreover, courts do this frequently, for instance, by evaluating the validity of foreign wills, marriages, etc.

¹³⁹ *Hape*, *supra* note 7 at para 101.

but to the extent that they have occurred, they have arisen most often in the context of banking, financial, and securities regulation investigations.¹⁴⁰

As we have seen, the SCC has tended to consider the extraterritorial application of *Charter* protections principally under section 7. For that reason, the jurisprudence on self-incrimination and extraterritoriality has not been decided on section 13 grounds but on section 7 grounds.¹⁴¹

In this line of cases, Canadians' section 7 rights have once again run up against the doctrine of comity. In *Spencer*,¹⁴² an individual who was a Crown witness in an income tax prosecution refused to reveal evidence about specific customers and transactions he had acquired while working as a bank manager of the Royal Bank of the Bahamas. In justifying his refusal, he claimed that a blocking statute in the Bahamas prevented him from revealing such information.¹⁴³

La Forest J dismissed Spencer's arguments, rejecting his claim that an order compelling him to testify in Canada would violate section 7. Relying on a similar line of reasoning that pervades many extraterritorial cases, he held that Spencer could not rely on section 7. He held that even if he was convicted for the crime of revealing information, Canadian law would not be acting to deprive him of his liberty or security.¹⁴⁴

Subsequent jurisprudence has reinterpreted this principle to apply not only to Canadian witnesses, but also to Canadian defendants in civil matters. Canadian courts will compel testimony even where it might expose individuals to foreign penal sanctions.

¹⁴⁰ Mary Anne Vallianatos, "Enforcing American Letters of Request: The Fickle Charter Guarantee of Evidentiary Immunity" (2015) 52:4 Alta L Rev 869 at 874. As American subpoenas are not valid in Canada, American plaintiffs are required to rely on letters rogatory in order to compel testimony in Canada.

¹⁴¹ See e.g. *Sun-Times Media Group Inc v Black*, 2007 CanLII 6248 (Ont SC); *Re Uszinska and the Republic of France* (1980), 27 OR (2d) 604 at 607 (H Ct J): foreign criminal proceedings would need to be ongoing to prevent compelled testimony.

¹⁴² *Supra* note 8.

¹⁴³ *Banks and Trust Companies Regulation Act, 1965*, Bahamas, No. 64 of 1965, s 10, quoting the Bahamian Chief Justice, who wrote that "the secrecy provisions is one of the pillars of this part of our economic structure, the destruction of which would lead to the collapse of the whole structure which it supports" (*Re Nassau Bank and Trust Co.*, Supreme Court of the Bahamas, No 95 of 1975, unreported), cited in *Spencer*, *supra* note 8, at para 8.

¹⁴⁴ *Spencer*, *supra* note 8. At para 4, La Forest J suggested that Spencer would only be at risk if he voluntarily returned to the Bahamas, exculpating Canada entirely "[t]o the extent that these [rights] may be interfered with, it is the foreign law that does so."

There was a suggestion at para 9 from Estey J, writing in concurrence, that the principle of comity should at least require a consideration of other possible solutions. The court, however, showed no interest in employing comity to protect Canadian nationals from sanctions (rather than exposing them to sanctions).

In *Beaudette*,¹⁴⁵ the Alberta Court of Appeal invoked comity in refusing to analyze the scope of Fifth Amendment protections against self-incrimination in the American legal system after the defendant asked the court to determine whether compelling a witness's testimony in Canada might impermissibly expose him to potential criminal sanctions in the United States. The court found that the prohibition of extraterritoriality and the principle of comity prevented Canadian courts from evaluating "the investigative or judicial processes of friendly foreign rule of law democracies."¹⁴⁶ In effect, the Alberta Court of Appeal did not apply the *Charter* to protect Beaudette, although an analysis of the Fifth Amendment may have prevented compelled testimony in the United States.

Comity in the War on Terror

My final discussion of comity emerges from the involvement of the Canadian government in the so-called war on terror. The central cases in this area of law are *Khadr* (2008) and *Khadr* (2010),¹⁴⁷ which dealt with the Canadian government's complicity in the detention of a Canadian national at the American military prison at Guantanamo Bay. The SCC framed the tension in those cases in terms of the need to balance *Charter* rights, the actions of Canadian government officials overseas in fighting terror, and proof of violations of foreign law.

The twin *Khadr* cases were decided one and three years, respectively, after *Hape*. They posed a conundrum for the SCC. If the role played by the Canadian officials in the Turks and Caicos' investigation did not amount to Canadian government action, it is difficult to see how, on a principled distinction, the role of the Canadian government in *Khadr*'s interrogations could be construed as the actions of the Canadian government. In *Khadr*, Canadian detectives merely participated in interrogations that were organized by

¹⁴⁵ *Beaudette v Alberta (Securities Commission)*, 2016 ABCA 9 [*Beaudette*].

¹⁴⁶ *Ibid* at para 49; *Charles v Royal Bank of Canada et al; Canadian Imperial Bank of Commerce et al., Third Parties*, 1987 CanLII 4156 (Ont SC) (relying on comity to decline to consider the effects of compelling disclosure in Canada that might lead to criminal sanctions in Trinidad and Tobago); *In the Matter of an Application Under s 83.28 of the Criminal Code and Satnam Kaur Reyat*, 2003 BCSC 1152 at para 133 (declining to consider potential exposure to criminal sanction in India for disclosing evidence in Canada as a violation of s 7); *Banque Paribas (Suisse) SA c Wightman*, 1997 CanLII 10291, EYB 1997-00037 (QCCA) (with respect to German and Swiss banking secrecy regulations); *Laxton v Coglon*, 2006 BCSC 1458 (with respect to Lichtenstein's business secrets act); *Kolitsidas c R*, 2005 QCCA 741, (with respect to the use of evidence in the United States after extradition).

Put another way, the SCC has never recognized an exemption to testimony when the purpose is foreign, as opposed to domestic, self-incrimination (for the domestic exemption, see *BC Securities Commission v Branch*, [1995] 2 SCR 3, 1995 CanLII 142; *R v S (RJ)*, [1995] 1 SCR 451, 1995 CanLII 121.

¹⁴⁷ *Supra* note 9.

American military interrogators.¹⁴⁸ This seems to involve less control by the Canadian government than the actions of the Canadian detectives in *Hape*, where the detectives organized a break-in into Hape's office in the Caribbean. The only significant factual difference, without defending Khadr's treatment by the Americans, appears to be widespread Canadian antipathy to the so-called war on terror.¹⁴⁹

Omar Khadr sought disclosure of documents in the Crown's possession.¹⁵⁰ After the Crown refused, he then applied for a writ of mandamus, alleging that the lack of disclosure violated his section 7 rights. The Crown argued that there was no requirement for disclosure as the *Charter* does not apply outside of Canada.

However, the SCC found that the interrogations were imputable to the Canadian government. Invoking the exception from *Hape*, it held that the principle of comity "ends where clear violations of international law and fundamental human rights begin."¹⁵¹ While in other cases the SCC had found that Canadian courts cannot scrutinize the actions of foreign sovereigns, in *Khadr* (2008) the court avoided answering this question. It found that while "[i]ssues may arise about whether it is appropriate for a Canadian court to pronounce on the legality of the process at Guantanamo Bay," it did not need to resolve them in this case. The SCC relied on the findings of the US Supreme Court that "the detainees had illegally been denied access to *habeas corpus* and that the procedures ... violated the *Geneva Conventions*."¹⁵² This holding was sufficient to prevent the invocation of comity. Thus, section 7 required disclosure.¹⁵³

Meanwhile, in *Khadr* (2010), the SCC was asked to consider whether the Canadian government, in light of its involvement in Khadr's detention, was required to

¹⁴⁸ *Khadr* (2008), *supra* note 9 (American authorities who detained Khadr allowed for him to be questioned by Canadian authorities: "The CSIS agents questioned Mr. Khadr with respect to matters connected to the charges he is now facing, and shared the product of these interviews with U.S. authorities" at para 7).

¹⁴⁹ The *Khadr* decision was heavily criticized by legal academics who argued that there was no principled exception to *Hape* upon which the SCC could rely. See generally John Currie, "Khadr (2008) and Extraterritorial Applicability of the Charter: Deepening the Morass" (4 November 2009), online: <thecourt.ca/khadr-2008-and-extraterritorial-applicability-of-the-charter-deepening-the-morass>.

¹⁵⁰ *Khadr* (2008), *supra* note 9 at para 8; relying on *R v Stinchcombe*, [1991] 3 SCR 326 (which had found such a requirement under s 7 of the *Charter*).

¹⁵¹ *Hape*, *supra* note 7 at para 52.

¹⁵² *Khadr* (2008), *supra* note 9 at para 21, citing to the evidentiary findings in *Rasul v Bush*, 542 US 466 (2004) and *Hamdan v Rumsfeld*, 126 USSC 2749 (2006). In this respect, the SCC treated foreign law as a matter of fact to be determined by the trier of fact.

¹⁵³ The courts have declined to extend these findings to non-Canadian citizens, where the facts as in *Khadr* (2008) are otherwise the same: *Slahi v Canada (Justice)*, 2009 FC 160, 340 FTR 236.

request Khadr's repatriation.¹⁵⁴ Once again, considerations of comity were at the forefront. The court began its analysis with its usual recitation:

Canadians abroad are bound by the law of the country in which they find themselves and cannot avail themselves of their rights under the *Charter*. International customary law and the principle of comity of nations generally prevent the *Charter* from applying to the actions of Canadian officials operating outside of Canada.¹⁵⁵

In an ordinary case, this would have led to the dismissal of Khadr's claims. However, it again reiterated the exception from *Hape* with respect to violations of international human rights obligations.¹⁵⁶ Concluding that there was a significant causal connection between the actions of the Canadian government and the deprivation of his liberty, it found that Khadr could rely on section 7.¹⁵⁷ The actions of the Canadian government amounted to a violation of the principles of fundamental justice.¹⁵⁸ However, the court declined to order the Canadian government to seek Khadr's repatriation, citing the prerogative power, opting instead to provide declaratory relief.¹⁵⁹

CONCLUSION: THE POLITICAL AND LEGAL USES OF COMITY

In this paper, I have summarized the introduction of the principle of comity into the *Charter* jurisprudence of the SCC, focusing on section 7. I have argued that the SCC has generally been too deferential under the doctrine of comity to foreign sovereigns, thereby creating a situation in which any evaluation of the actions of those sovereigns in

¹⁵⁴ *Khadr* (2010), *supra* note 9, citing to the decisions of the Federal Court in *Khadr v Canada (Prime Minister)*, 2009 FC 405, where O'Reilly J had concluded that in light of the special circumstances, Canada had a "duty to protect" Khadr; he also found, at para 92, that "[t]he ongoing refusal of Canada to request Mr. Khadr's repatriation to Canada offends a principle of fundamental justice and violates Mr. Khadr's rights under section 7 of the *Charter*," and he held that "[t]o mitigate the effect of that violation, Canada must present a request to the United States for Mr. Khadr's repatriation to Canada as soon as practicable."

¹⁵⁵ *Khadr* (2010), *supra* note 9 at para 14.

¹⁵⁶ As I noted above, there is no reasonable basis to think that such an obligation exists in international law, or that international human rights obligations are the place to draw the line on the limits of comity.

¹⁵⁷ *Khadr* (2010), *supra* note 9 at paras 19–20, citing to *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 at para 54.

¹⁵⁸ *Khadr* (2010), *supra* note 9 ("[i]nterrogation of a youth, to elicit statements about the most serious criminal charges while detained in these conditions and without access to counsel, and while knowing that the fruits of the interrogations would be shared with the U.S. prosecutors, offends the most basic Canadian standards about the treatment of detained youth suspects" at para 25), applying the test from *R v DB*, 2008 SCC 25 at para 46.

¹⁵⁹ *Khadr* (2010), *supra* note 9 at para 43.

Canadian courts will likely be found to run afoul of comity. By chaining itself to a rigid prohibition on the exercise of extraterritorial jurisdiction, the court has demonstrated its willingness to give effect to the rules of virtually any foreign legal system that is even remotely compliant with human rights norms. It has invoked comity as a trump card where section 7 and international legal obligations are in tension.

Fundamentally, the SCC's comity jurisprudence is overly broad, capricious,¹⁶⁰ and rests on a misunderstanding of what extraterritoriality is.

The first problem is that the SCC has often misinterpreted this interpretive principle of international law. Comity does not prevent a judicial determination of what effect to give the actions of foreign sovereigns. While there may be a limited place for comity in diplomatic relations and the law of immunity, there is no principled reason, other than solicitude to foreign sovereigns, for its expansive use in *Charter* jurisprudence.

Second, the SCC has also stated that comity is necessary to prevent the near limitless application of *Charter* protections abroad. However, rather than relying on the narrow doctrine announced in *Khadr*, abandoning the concept of comity would not necessarily require extending full *Charter* protections.

Fear of unlimited *Charter* application was, at least in part, the SCC's justification for declining to analyze the legality of the actions of the RCMP in their collaboration with police in Turks and Caicos in *Hape*. Another concern of the SCC, present in *Cook*, was that some *Charter* protections—such as the right to counsel—could not be meaningfully applied extraterritorially. However, I propose another option to analyzing such issues that would address both of these concerns. As Justice Bastarache suggested in *Hape*, Canadian courts could always ask, after finding that the alleged rights infringing actions were imputable to a Canadian government actor, whether there were equivalent human rights protections and fundamental human rights norms available in the foreign jurisdiction. Differences in criminal procedure, as was the case in *Hape* and *Cook*, might be *prima facie* evidence of a breach of the *Charter*, but in most circumstances, they would be permitted by section 1.

It is not clear that this approach would materially affect most of the cases considered here. Much of our *Charter* jurisprudence on the rights of individuals in criminal detention or the requirements to obtain search warrants have parallels in other jurisdictions. However, it would put Canadian authorities on notice that they could not use foreign law as a means to avoid *Charter* scrutiny.

Such an approach need not offend the comity of nations. The Canadian courts would not be judging the legality of the actions of foreign actors, but merely the effect

¹⁶⁰ In both *Khadr* cases, the SCC was willing to look beyond comity, limiting its application to cases of human rights violations. Additionally, in *Burns* and *Khadr* (2010), it disregarded its own warning not to scrutinize foreign legal systems.

given to them in the Canadian legal system. However, it would protect the rights of Canadians from actions taken by Canadian actors, in light of foreign events.