**IN THE SUPREME COURT OF BRITISH COLUMBIA**

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| Citation: | ***R. v. Klassen,*** |
|  | 2008 BCSC 1762 |

Date: 20081219  
Docket: 24292  
Registry: Vancouver

**Regina**

v.

**Kenneth Klassen**

Before: The Honourable Mr. Justice Cullen

**Reasons for Judgment**

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| Counsel for the Crown | J. DeWitt-Van Oosten B. McCabe |
| Counsel for the Accused | I. Donaldson, Q.C. |
| Date and Place of Trial/Hearing: | November 17 – 18, 2008 |
|  | Vancouver, B.C. |

**I – Introduction**

[1]                In this case, the accused applies for a declaration that s. 7(4.1) of the ***Criminal Code of Canada***, R.S.C. 1985, c. C-46 [the ***Code***] is *ultra vires*the Parliament of Canada; or in the alternative, that it is of no force and effect pursuant to s. 52(1) of the ***Constitution Act,*** ***1982***, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11.

[2]                Section 7(4.1) reads as follows:

Notwithstanding anything in this Act or any other Act, every one who, outside Canada, commits an act or omission that if committed in Canada would be an offence against section 151, 152, 153, 155 or 159, subsection 160(2) or (3), section 163.1, 170, 171 or 173 or subsection 212(4) shall be deemed to commit that act or omission in Canada if the person who commits the act or omission is a Canadian citizen or a permanent resident within the meaning of subsection 2(1) of the *Immigration and Refugee Protection Act*.

[3]                The applicant is charged on an indictment containing 37 counts.  Counts 36 and 37 allege importation of child pornography into Canada and possession of child pornography in Canada respectively, and are no part of this application as they fall outside the scope of s. 7(4.1).  The other 35 counts charge various offences contrary to s. 151 (sexual interference), s. 152 (invitation to sexual touching), s. 163.1(2) (making child pornography), s. 171 (being a householder permitting sexual activity), and s. 212(4) (obtaining sexual services for consideration of a person under 18 years).

[4]                Originally, the indictment contained Count 7, which alleged an offence under s. 212(1)(a) (soliciting a person to have illicit sexual intercourse with another person) which offence was not enumerated in s. 7(4.1).  In the course of this application, counsel for the Crown applied to amend that Count to bring it within the scope of s. 7(4.1) and I granted that amendment.

[5]                It is alleged that Counts 1 – 17 occurred in the Republic of Colombia; that Counts 18 – 34 took place in the Kingdom of Cambodia; and that Count 35 took place in the Republic of the Philippines.

[6]                It is common ground that the applicant is a Canadian citizen and was so at all times material to the allegations in the 35 counts at issue, which span the period between July 1, 1997 and March 5, 2002.  None of the alleged victims are Canadian citizens or permanent residents of Canada and none of them has lived in Canada.

[7]                During the time frame encompassed by the indictment, proceedings under s. 7(4.1) were governed by ss. 4.2 and 4.3 respectively, which read as follows:

7(4.2)   Proceedings with respect to an act or omission that if committed in Canada would be an offence against section 151, 152, 153, 155 or 159, subsection 160(2) or (3) or section 163.1, 170, 171 or 173 shall be instituted in Canada only if a request to that effect to the Minister of Justice of Canada is made by

(a)        any consular officer or diplomatic agent accredited to Canada by the state where the offence has been committed; or

(b)        any minister of that state communicating with the Minister through the diplomatic representative of Canada accredited to that state.

7(4.3)   Proceedings with respect to an act or omission deemed to have been committed in Canada under subsection (4.1) may only be instituted with the consent of the Attorney General.

[8]                Section 7(4.2) was repealed in May 2002.

[9]                The grounds advanced by the applicant in his Notice of Application and Constitutional Question are as follows:

1.         Section 7(4.1) is *ultra vires*the federal government of Canada as it purports to have extraterritorial effect;

2.         Section 7(4.1) fails to conform to settled principles of customary international law, and infringes the sovereignty of other nations;

3.         Section 7(4.1) purports to criminalize conduct which occurred entirely outside of Canada, and there is no substantial connection with Canada which would permit jurisdiction; and

4.         Section 7(4.1) purports to distinguish, for penal purposes, between citizens and permanent residents, and all others, contrary to ss. 7 and 15 of the *Charter of Rights and Freedoms.*

[10]            The constitutional issues said to be raised by the applicant’s application are set out in his Notice of Application and Constitutional Question thus:

1.         The legislation is *ultra vires* because it fails the Libman test;

2.         The territorial principle is a principle of fundamental justice under s. 7 of the *Charter of Rights and Freedoms*and as such, s. 7(4.1) of the *Criminal Code*is unconstitutional; and

3.         Section 7(4.1) violates s. 7 and 15 of the *Charter of Rights and Freedoms*in its purpose and effect and it is therefore unconstitutional and of no force and effect.

[11]            The applicant seeks in the result that s. 7(4.1) be declared *ultra vires*; or alternatively, that it be declared of no force and effect pursuant to s. 52(1) of the ***Constitution Act, 1982***.

[12]            The argument of the applicant centres on the fact that, apart from his nationality, there is no nexus between the alleged offences and Canada.  The applicant contends that in the absence of any such nexus, legislation which seeks to proscribe conduct and enforce that proscription is beyond Parliament’s competence and hence is both *ultra vires*and at the same time, an infringement of the applicant’s ***Charter*** protected right under s. 7 “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.”  The applicant did not pursue an argument under s. 15 of the ***Charter***.

**II – Summary of Arguments of the Applicant**

**i)          The *Ultra Vires*Argument**

[13]            The applicant seeks a declaration that s. 7(4.1) of the ***Code***is *ultra vires*the Parliament of Canada for two reasons:  first because it fails to meet the “real and substantial link” requirement for Canadian criminal jurisdiction over acts committed entirely in another state; and second, because it is contrary to the international legal principle of sovereignty, and it does not fall into any of the known exceptions to the presumption against extra territoriality that would permit Canada to extend its jurisdiction to acts committed abroad.

[14]            It is the applicant’s contention that in general, there are two kinds of jurisdiction: prescriptive jurisdiction, which concerns a state’s power to regulate conduct through its laws, and enforcement jurisdiction, which deals with the power of the state to arrest, conduct investigations and prosecute offences.  The applicant submits that in enacting s. 7(4.1) of the ***Code***, Parliament has reached beyond its prescriptive and/or enforcement jurisdiction by attempting to bring within the scope of its authority offences that have occurred entirely in another jurisdiction and have no substantial or real nexus with Canada.

[15]            The applicant submits that in ***R. v. Libman***, [1985] 2 S.C.R. 178, 21 D.L.R. (4th) 174 [***Libman***], the Supreme Court of Canada has recognized that the primary basis for jurisdiction is territoriality.  The applicant submits there are two aspects to territoriality – subjective and objective.  Subjective territoriality exists where a state claims jurisdiction over an act begun within that state that has consequences elsewhere.  Objective territoriality exists where a state claims jurisdiction over an act commenced elsewhere, but completed in the forum state.

[16]            The applicant argues that in the present case, the offences alleged fall into neither category as they were neither begun nor completed in Canada.  The applicant submits that the primary test for jurisdiction, which was set out in ***Libman***, is whether there is a real and substantial link between the offence and Canada, and it is that test which determines whether Canada can exercise its prescriptive jurisdiction to enact s. 7(4.1).  The applicant submits there is no evidence of any real and substantial link between Canada and the conduct alleged here and therefore, there is no basis for Canada to extend its jurisdiction to acts that were completed entirely in another state.

[17]            The applicant also turns to the Supreme Court of Canada decision in ***R. v. Hape***, 2007 SCC 26, [2007] 2 S.C.R. 292, [***Hape***] relying on what he characterizes as a presumption against extraterritoriality in the Court’s assertion in para. 43 that:

…despite the rise of competing values in international law, the sovereignty principle remains one of the organizing principles of the relationships between independent states.

[18]            The applicant submits that Canadian law may touch on matters outside Canada’s borders, but that power is subject to the limitation that it cannot interfere with the rights of other states.  He submits that this principle is codified in s. 6(2) of the ***Code***, which provides that “no person shall be convicted … of an offence committed outside Canada.”

[19]            The applicant concedes that there are a number of examples of offences in the ***Code***that depart from the general principle of territoriality under recognized exceptions, citing as an example s. 465(3) and (4) which contemplate two kinds of conspiracies with an extraterritorial component.  In each case, however, the applicant notes the offence has a requisite link with Canada which is sufficient to meet the ***Libman***test that is absent in this case.

[20]            The applicant also concedes that Canada has the authority to assert extraterritorial jurisdiction over offences such as those included in ss. 7(1) to 7(3) of the ***Code***on the basis of what is described as the “universal principle”, where the offences at issue are offences at international customary law (such as piracy, slavery, torture, etc.), or in cases where there is no clear territorial jurisdiction (such as crimes committed on aircraft over international waters).  The applicant concedes that on a reading of international law, extraterritorial jurisdiction also appears to be accepted on the basis of a nationality principle (involving citizens or permanent residents of the forum state) or sometimes on the basis of a “protective principle” (that is, to protect domestic security).

[21]            The applicant submits that the only two of these exceptions that might apply in this case are the nationality principle or the universal principle.  He accepts that the universal principle may be considered as applicable to the case at bar on the basis that the offences listed in s. 7(4.1) prohibit conduct that is also prohibited by international treaty: ***The Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography***, 25 May 2000, 2171 U.N.T.S. 227 (which Canada signed in 2001 and ratified on September 14, 2005) (the “*Optional Protocol*”).  The applicant also concedes that the nationality principle may be considered as applicable to the case at bar on the footing that the applicant is a Canadian citizen.

[22]            So far as the nationality principle is concerned, the applicant refers to the articulation of that principle in ***Hape***,where the Court stated at para. 60 that “[s]tates may assert jurisdiction over acts occurring within the territory of a foreign state on the basis that their nationals are involved.”  The applicant emphasizes, however, that the Court in ***Hape***went on to note at para. 62 that “[w]here two or more states have a legal claim to jurisdiction, comity dictates that a state ought to assume jurisdiction only if it has a real and substantial link to the event.”  The applicant contends that there is no such link here, and thus s. 7(4.1) *prima facie*offends the sovereignty of those countries where the acts in issue are alleged to have occurred.

[23]            The applicant relied on the fact that ***Hape*** dealt with the applicability of Canadian law – specifically the ***Charter*** – in another state’s territory.  The Court in ***Hape***concluded that the application of the ***Charter***in a foreign state is assumed to interfere with that state’s sovereignty and therefore cannot be enforced without the consent of the other state.  The applicant argues that this logic should apply with equal force here, where Parliament is seeking to enforce Canadian laws in Canada for conduct that has occurred entirely in another state.

[24]            On the issue of consent, the applicant further contends that because there is currently no consent requirement for prosecutions under s. 7(4.1) (such a requirement having been repealed in May of 2002), it falls outside the bounds of jurisdiction enunciated in ***Hape***.  He submits that it is irrelevant in this case that consent to prosecute has in fact been obtained from the states where the acts are alleged to have occurred.  He contends that to require the ***Charter***to be applied abroad only with consent but not the ***Code***would be logically incoherent, as Canadian officials could then enforce Canadian law abroad without being subject to ***Charter***scrutiny.

[25]            So far as the universal principle is concerned, it is the applicant’s contention that there is a presumption in the interpretation of statutes that “the legislation … is meant to comply with international law generally and with Canada’s international law obligations in particular”: Ruth Sullivan, Sullivan and Driedger on the Construction of Statutes, 4th ed. (Markham, Ont.: Butterworths, 2002) at 421.

[26]            While the applicant acknowledges that absent a substantial connection to Canada, Canada’s obligations under the *Optional Protocol* can justify the extraterritorial extension of jurisdiction under s. 7(4.1) to the conduct of Canadians abroad, the primary treaty obligation nevertheless rests with the state that has territorial jurisdiction.  The applicant argues that the *Optional Protocol*details the ways in which states may exercise their prescriptive jurisdiction but that s. 7(4.1) goes beyond what the protocol contemplates so that rather than fitting the provision within the universal principle exception, it actually puts Canada in violation of its treaty obligations.

[27]            In support of this proposition, the applicant notes that the preamble to the Protocol states that in order to achieve its objectives, the protocol extends “the measures that States Parties should undertake in order to guarantee the protection of the child.”  This individual state burden is reflected in Articles 1 and 3, which require the state parties to prohibit the sale of children, child prostitution and child pornography, and which specifies the acts that a state party is obliged to prohibit in its criminal law.  The applicant contends on that footing that the *Optional Protocol*therefore recognizes that child exploitation is to be remedied primarily within the state where it occurs.

[28]            The applicant also submits that Article 4(1) – (3) limits the jurisdiction of the state in criminalizing the prohibited acts to offences committed within the territory of that state, either by a national of that state or where the victim is a national of that state.  The *Optional Protocol* also provides in Article 5(5) that where a country refuses to extradite an offender for prosecution, it must exercise jurisdiction to prosecute the offender itself.  On that basis, it is the applicant’s contention that this represents the extent to which Canada may exercise its criminal jurisdiction under the*Optional Protocol*, and s. 7(4.1) goes far beyond that.  By permitting prosecution of a national for acts committed entirely in another state, the applicant contends, Canada has legislated contrary to its international obligations.

**ii)         Section 7 – The Rule Against Extraterritoriality as a Principle of Fundamental Justice**

[29]            It is the applicant’s argument that s. 7(4.1) infringes s. 7 of the ***Charter***and therefore that it should be declared to be of no force or effect pursuant to s. 52(1) of the ***Constitution Act, 1982***.

[30]            The applicant submits that his s. 7 liberty interests are clearly engaged by s. 7(4.1) since a conviction for any of the listed offences could result in a period of incarceration.

[31]            He further submits that it is a basic tenet of our legal system that an accused be tried and convicted in Canada for offences that occurred in Canada, subject only to recognized exceptions at common law.  This common law precept has been codified in s. 6(2) of the ***Code***.  The applicant therefore argues that any provision of the ***Code***that permits prosecution for offences committed outside Canada violates this basic precept.

[32]            The applicant also points to the fact that both s. 32 of the ***Charter***and Canadian jurisprudence restrict the application of the ***Charter***to the territorial jurisdiction of Canada.  Since that is the case, s. 7(4.1) permits prosecution for offences committed abroad without also extending the protection of the ***Charter***to the accused during the investigative stage.  The applicant contends that this would permit a Canadian to be prosecuted to the full extent of Canadian law without the benefit of the protection of ss. 8, 9, 10(a) and 10(b) of the ***Charter***.

[33]            The applicant submits that this is clearly inconsistent with the notion of trial fairness, and that any trial in Canada in which any number of possible ***Charter***breaches are of no consequence would bring the administration of justice into disrepute and would violate the accused’s right to procedural fairness found in s. 11.  The applicant would be denied the opportunity of seeking the exclusion of evidence which was obtained in a matter that infringed the ***Charter***.

**III - Summary of Arguments of the Respondent**

**i)The *Ultra Vires* Argument**

[34]            Counsel for the respondent submits that what the applicant refers to as “exceptions” to a ‘rule’ against extraterritoriality based on the sovereignty principle are, in fact, merely examples of Canada choosing to exercise its authority to act extraterritorially.  Both Canada’s constitutional and legislative framework, as well as international legal principles, support this ability of Parliament to exceed the territorial principle.

[35]            Counsel points to the fact that s. 132 of the ***Constitution Act, 1867*** (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5, expressly states that Parliament “shall have all the Powers necessary or proper for performing the Obligations of Canada… arising under Treaties.”  She therefore argues that the ***Constitution Act, 1867*** expressly grants to Parliament the power to enact extraterritorial legislation in order to fulfil its international commitments, such as those found in the *Optional Protocol*.

[36]            The respondent submits that, contrary to the applicant’s suggested interpretation, the *Optional Protocol*expressly contemplates and requires member states to adopt extraterritorial legislation that authorizes the prosecution of a state’s own nationals for acts committed abroad.  The respondent points in particular to Article 4(2), which states that “[e]ach State Party may take such measures as may be necessary to establish its jurisdiction… [w]hen the alleged offender is a national of that State or a person who has his habitual residence in its territory.”  The respondent also points to Article 4(3), which states:

3.       Each State Party shall also take such measures as may be necessary to establish its jurisdiction… when the alleged offender is present in its territory and it does not extradite him or her to another State Party on the ground that the offence has been committed by one of its nationals.

[37]            The respondent also notes the fact that Canada is not the only country that has implemented extraterritorial legislation in furtherance of its obligations under the *Optional Protocol*.  They state that at the time of the enactment of s. 7(4.1), France, Germany, Australia, New Zealand and the United States had already taken similar measures, and that it is estimated that 44 countries currently have comparable extraterritorial legislation in place.  This, the respondent argues, suggests that the international community has largely accepted this kind of legislation, and it therefore forms a part of customary international law.

[38]            Moreover, the respondent notes that s. 6 of the ***Crimes Against Humanity and War Crimes Act***, S.C. 2000, c. 24, purports to have the same extraterritorial effect as that in s. 7(4.1).  In***Hape***, the Court specifically stated that that the ***War Crimes Act*** was an example of valid extraterritorial prescriptive jurisdiction.  The respondent submits that those comments are equally applicable to s. 7(4.1).

[39]            In further support of the argument that Parliament has the legal authority to legislate extraterritorially, counsel also points to: s. 3 of the ***Statute of Westminster, 1931*** (U.K.), 22 & 23 Geo V, c. 4, which expressly confers on Parliament the “full power to make laws having extraterritorial operation”; the other extraterritorial offences included in s. 7 of the ***Code***; and s. 11(g) of the***Charter***, as interpreted in ***R. v. Finta***, [1994] 1 S.C.R. 701, 88 C.C.C. (3d) 417, which renders the use of international legal principles to ground criminal jurisdiction “constitutionally permissible.”

[40]            While the respondent admits that international legal principles such as sovereignty and comity may inform the interpretive process of determining the extraterritorial effect of legislation, such principles are not limitations on the legislative competence of Parliament: ***Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers***, 2004 SCC 45, [2004] 2 S.C.R. 427.  Moreover, not only does Parliament have the authority to legislate extraterritorially, it can knowingly legislate in a manner that violates international law, provided that it does so expressly: ***Hape***.

[41]            The respondent also objects to the applicant’s reliance on ***Hape*** for the suggestion that the court in this case should assume that Parliament’s assertion of jurisdiction in s. 7(4.1) presumptively offends the principle of sovereignty, and therefore ought to require that Canada obtain the consent of foreign states before enforcing under it.  The respondent points out that the applicant’s submissions on this point confuse *prescriptive* and *adjudicative* jurisdiction with *enforcement*jurisdiction.  The respondent acknowledges that a state that legislates contrary to the international legal principles of sovereignty and comity may notionally intrude upon the sovereignty of other states.  However, in practical terms, the potential for conflict will only arise where there is some chance for the legislating state to *enforce* its jurisdiction.

[42]            Section 7(4.1) does not contemplate the regulation of the conduct of criminal investigations in a foreign state, allow for the arrest of offenders in a foreign state, impose procedural requirements on matters undertaken by other states in their own territories, or authorize Canadian officials to use coercive measures outside its own borders.  The Supreme Court of Canada’s statements in ***Hape*** regarding presumptive interference with sovereignty and consent therefore do not apply to s. 7(4.1), as it is an assertion of prescriptive and adjudicative sovereignty only.  As noted in ***Hape***, the differences between types of jurisdiction are significant in determining the extent to which one state may reasonably legislate in relation to activities that occur in another.

[43]            The respondent does admit that the usual basis for asserting criminal jurisdiction is territorial, as reflected in s. 6(2) of the ***Code***.  It submits, however, that it is “permissible under international law to assert jurisdiction on other bases”: ***Libman*** at 184.  Rather than being an exception to a rule against extraterritoriality, the nationality principle is generally recognized as one of the other bases of an assertion of extraterritorial jurisdiction, and applies directly in this case.

[44]            A state’s authority over its own nationals may even be regarded as an aspect of sovereignty itself.  As stated in ***Hape*** at para. 61, “a state may regulate and adjudicate regarding actions committed by its nationals in other countries, provided enforcement of the rules takes place when those nationals are within the state’s own borders.”

[45]            The respondent further notes that many countries – including the United States and Australia – have recognized that a state may enact extraterritorial criminal legislation on the basis of the nationality principle as a valid exercise of its own sovereign powers.

[46]            The respondent therefore takes issue with the applicant’s reliance on ***Libman***, which dealt with the extent to which Parliament may legitimately assert its *territorial* jurisdiction over the prosecution of offences.  Its “real and substantial link” test, according to the respondent, was only meant to be applied to an assertion of jurisdiction based on the territorial principle, as opposed to the nationality principle.  The respondent also seeks to distinguish ***Libman***on the basis that the Court there was not dealing with a provision of the ***Code*** that expressly conferred extraterritorial jurisdiction, as is the case here.

**ii)         The *Charter*Argument**

[47]            Although the respondent admits that the liberty interest of the accused is engaged in this case, counsel points out that the applicant provides no authority for its assertion that it is a principle of fundamental justice that Canadians be tried on Canadian soil only for offences that occur in Canada.  Moreover, the respondent submits that this argument is an attempt by the applicant to elevate the territorial basis for jurisdiction to the *only* basis.  This is inconsistent with Canada’s own constitutional and statutory framework, and with established principles of international law, as discussed above.

[48]            The respondent also argues that the applicant has failed to demonstrate, on a balance of probabilities, that the proposition put forward as a principle of fundamental justice meets the three part test set out in ***Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)***, 2004 SCC 4, [2004] 1 S.C.R. 76:

(1)        that it is a legal principle;

(2)        that there is sufficient consensus that the principle is “vital or fundamental to our societal notion of justice”; and

(3)        that it is a principle that is capable of being identified with precision and applied in a manner that yields predictable results.

[49]            In particular, the respondent states that the principle of territoriality, as a basis for the exercise of criminal jurisdiction, fails to meet the second requirement because it may be subordinated to other concerns in appropriate contexts, including a stated desire among members of the international community to address sexual offending against children through the development of multilateral agreements that authorize the enactment of extraterritorial penal legislation based on the nationality principle.

[50]            Further, there is no sufficient consensus that territoriality is a foundational requirement for the dispensation of justice, or that it trumps all other concerns.  The respondent suggests that the opposite may be true, since one could argue that the extraterritorial legislation aimed at sexual offending against children contemplated by the *Optional Protocol* is actually viewed by the 128 signatory nations to be more fundamental to our societal notion of justice than the notion of territoriality.

[51]            The respondent takes issue with the applicant’s suggestion that any assertion of prescriptive or adjudicative jurisdiction must be accompanied by an assertion of enforcement jurisdiction in the form of procedural safeguards.  The respondent notes that not only does the applicant provide no authority in support of this proposition, but that such an assertion of enforcement jurisdiction by Parliament actually would amount to an impermissible incursion on state sovereignty.

[52]            Finally, the respondent submits that, contrary to the argument of the applicant that an assertion of prescriptive or adjudicative jurisdiction leaves an accused without constitutional safeguards, those who stand trial in Canada are still guaranteed a fair trial by s. 11(d) of the ***Charter***.  The right to a fair trial includes the right to apply for the exclusion of evidence that was gathered in a foreign country: ***R. v. Harrer***, [1995] 3 S.C.R. 562, 128 D.L.R. (4th) 98.  An accused prosecuted in Canada is also protected from deprivations of liberty that do not occur in accordance with the principles of fundamental justice.  The accused in this case can rely on these principles “to obtain redress for abuses abroad in gathering evidence subsequently tendered against” him: ***R. v. Terry***, [1996] 2 S.C.R. 207, 135 D.L.R. (4th) 214 at para. 25.

**IV - Analysis**

[53]            I am not satisfied that s. 7(4.1) is *ultra vires*the Parliament of Canada, or that it should be declared to be of no force and effect pursuant to s. 52(1) of the ***Constitution Act, 1982***.

**i)          The *Ultra Vires*Issue**

[54]            It is clear that s. 7(4.1) was enacted as part of, and in response to, a significant international consensus favouring the need for measures to be undertaken to protect children from induced, coerced or otherwise unlawful sexual activity or practices or exploitative use in pornographic performances and materials.  That consensus was initially expressed in the *United Nations Convention on the Rights of the Child,* 20 November 1989, 1577 U.N.T.S. 3, which was ratified by Canada in December 1991 [the *Convention*].

[55]            When s. 7(4.1) was enacted in 1997, through Bill C-27 (An Act to amend the ***Criminal Code*** (child prostitution, child sex tourism, criminal harassment and female genital mutilation)) Canada’s ratification of the UN Convention on the rights of the child was specifically cited as representing a commitment to enact measures to protect children both nationally and internationally.

[56]            Subsequently in 2001, Canada joined other signatories to the *Convention* in adopting and later ratifying the *Optional Protocol*.  That protocol contemplates the enactment of extraterritorial legislation in furtherance of the protection of children.  The relevant portions of the *Optional Protocol* read as follows:

Considering also that the Convention on the Rights of the Child recognizes the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child’s education, or to be harmful to the child’s health or physical, mental, spiritual, moral or social development,

Gravely concerned at the significant and increasing international traffic of children for the purpose of the sale of children, child prostitution and child pornography,

Deeply concerned at the widespread and continuing practice of sex tourism, to which children are especially vulnerable, as it directly promotes the sale of children, child prostitution and child pornography.

...

Article 3

1.         Each State Party shall ensure that, as a minimum, the following acts and activities are fully covered under its criminal or penal law, whether these offences are committed domestically or transnationally or on an individual or organized basis:

(a)        In the context of sale of children as defined in Article 2:

(i)         The offering, delivering or accepting, by whatever means, a child for the purpose of:

a.         Sexual exploitation of the child;

b.         Transfer of organs of the child for profit;

c.         Engagement of the child in forced labour;

(ii)        Improperly inducing consent, as an intermediary, for the adoption of a child in violation of applicable international legal instruments on adoption;

(b)        Offering, obtaining,  procuring or providing a child for child prostitution, as defined in Article 2;

(c)        Producing, distributing, disseminating, importing, exporting, offering, selling or possessing for the above purposes child pornography as defined in Article 2.

…

Article 4

1.         Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences referred to in Article 3, paragraph 1, when the offences are committed in its territory or on board a ship or aircraft registered in that State.

2.         Each State Party may take such measures as may be necessary to establish its jurisdiction over the offences referred to in Article 3, paragraph 1, in the following cases:

(a)        When the alleged offender is a national of that State or a person who has his habitual residence in its territory;

(b)        When the victim is a national of that State.

3.         Each State Party shall also take such measures as may be necessary to establish its jurisdiction over the above-mentioned offences when the alleged offender is present in its territory and it does not extradite him or her to another State Party on the ground that the offence has been committed by one of its nationals.

4.         This Protocol does not exclude any criminal jurisdiction exercised in accordance with internal law.

[57]            As of October 1st, 2008, 129 states had ratified the *Optional Protocol* including Canada, Columbia, Cambodia and the Philippines, the countries involved in the case at bar.

[58]            As earlier noted, between 1997 and 2002, the time period encompassed by the indictment, prosecutions under s. 7(4.1) were only available when the state in which the offence was alleged to have occurred requested that the foreign state initiate the prosecution.  In the present case, each of Columbia, Cambodia and the Philippines has requested a prosecution pursuant to s. 7(4.2) of the ***Code***.  As noted, that section was repealed in 2002 and no consent by or request of the state in which the alleged offence took place is presently required to initiate or conduct a prosecution under s. 7(4.1).

[59]            The statutory prerequisites for prosecution have thus been met, as Count 7 on the indictment was amended to fall within the scope of s. 7(4.1), as the Attorney General has given his consent to prosecution, and as the accused is and was at all material times a Canadian citizen.

[60]            The prospect of Canada assuming jurisdiction over activities carried on entirely within another country appears, at first blush, to be anomalous, and discordant with precepts of the territorial and jurisdictional integrity of nations represented by the notion of sovereignty.  However, as with many broad precepts, a closer scrutiny brings illumination to the issue.

[61]            A helpful starting point in considering the question of extraterritoriality and its impact on a nation’s sovereignty are the distinctions drawn among prescriptive, adjudicative and enforcement forms of jurisdiction.  Those distinctions were described in Robert Currie *et al*., “Extraterritorial Criminal Jurisdiction: Bigger or Smaller Frame?”, 11 Can. Crim. L.R. 141 at 144-145 … [“Extraterritorial Criminal Jurisdiction”] pp. 144 – 145 in the following terms:

To properly analyze Canada’s practice, it is necessary to consider two separate but related issues: what Canada can, as a matter of domestic and international law, do, and what it has done.  What extraterritorial jurisdiction do we say we have, and how does this comport with what other states would agree we have?  We shall begin by considering the exercise of extraterritorial jurisdiction at international law generally, and then turn to a discussion of past and current Canadian practice.

B.         Jurisdiction Generally

Jurisdiction is one of the most overburdened terms in law, as it has a large number of meanings, all of which depend on context and many of which are overlapping.  The term generally refers to the ability of some manifestation of the state to exert some sort of power over persons (and their acts), places or things.  However, one must immediately separate out the particular manifestation that is being discussed to attain any coherence.  In this article, the focus will be on jurisdiction in its international law sense, as a manifestation of state sovereignty and involving “both the right to exercise it within the limits of the State’s sovereignty and the duty to recognize the same right of other States.”

In his classic essay, Akehurst distinguished between:

the power of one State to perform acts in the territory of another State (executive jurisdiction), the power of a State’s courts to try cases involving a foreign element (judicial jurisdiction) and the power of a State to apply its laws to cases involving a foreign element (legislative jurisdiction).

As will be seen, we are concerned here with the legislature’s extension of the criminal law outside Canada’s territorial boundaries, which will primarily deal with legislative jurisdiction, though the discussion will need to touch upon judicial jurisdiction occasionally.  A similar way of expressing the distinction is as that between “the reach of the legislative power of the state (jurisdiction over the crime),” also referred to as “prescriptive jurisdiction”, and the capacity of the state, through executive or courts, to enforce the criminal law, also referred to as “enforcement jurisdiction.”  We are here concerned with prescriptive jurisdiction, though the impact of legislated extraterritorial criminal jurisdiction on enforcement will be referred to.

1.         Accepted Bases of Jurisdiction at International Law

While the importance of state sovereignty is often said to have been eroded by 20th century developments in international law, the exercise of jurisdiction by states still reflects the classical Westphalian distinction between those matters within a state’s borders and those outside them.  States have plenary jurisdiction over everything within their own territories.  Any exercise of prescriptive jurisdiction that touches matters outside a state’s territory is, by definition, extraterritorial.  The exercise of extraterritorial prescriptive jurisdiction is not necessarily contrary to international law, but is subject to the limitation that it cannot interfere with the rights of other states, whether by involvement in their domestic affairs or by some other means.  Determining where this line is, and when it is crossed, is complex. [Footnotes omitted]

[62]            Those distinctions were also illuminated by the Supreme Court of Canada in ***Hape*** at para. 58, where LeBel J. for the majority wrote as follows:

[58]      Jurisdiction takes various forms, and the distinctions between them are germane to the issue raised in this appeal.  Prescriptive jurisdiction (also called legislative or substantive jurisdiction) is the power to make rules, issue commands or grant authorizations that are binding upon persons and entities.  The legislature exercises prescriptive jurisdiction in enacting legislation.  Enforcement jurisdiction is the power to use coercive means to ensure that rules are followed, commands are executed or entitlements are upheld.  As stated by S. Coughlan et al. in “Global Reach, Local Grasp: Constructing Extraterritorial Jurisdiction in the Age of Globalization” (2007), 6 C.J.L.T. 29, at p. 32, “enforcement or executive jurisdiction refers to the state’s ability to act in such a manner as to give effect to its laws (including the ability of police or other government actors to investigate a matter, which might be referred to as *investigative jurisdiction*)” (emphasis in original).  Adjudicative jurisdiction is the power of a state’s courts to resolve disputes or interpret the law through decisions that carry binding force. …

[63]            In ***Hape***, the Court emphasized the importance of such distinctions in determining the validity of extraterritorial laws, in para. 66, noting that criminal legislation such as the ***Crimes Against Humanity and War Crimes Act***, authorizes prosecutions in Canada against persons who commit genocide, a crime against humanity, or a war crime outside Canada, if that person was a Canadian citizen at the time of the offence, or a citizen of a state engaged in armed conflict with Canada or of a state allied with Canada in armed conflict, or if after the offence was committed the person was present in Canada.  In ***Hape***, the Court noted:

[66]      …These provisions exemplify valid extraterritorial prescriptive jurisdiction and any trial for such offences would constitute a legitimate exercise of extraterritorial adjudicative jurisdiction.  But importantly, they do not authorize Canada to enforce the prohibitions in a foreign state’s territory by investigating the offenders there….

[64]            It is clear that what is at issue in the present case is prescriptive and adjudicative jurisdiction, not enforcement jurisdiction.  The gradient along which those aspects of extraterritorial jurisdiction are positioned was illustrated in ***Hape***, in which LeBel J. used the hypothetical example of a Canadian law proscribing its citizens from smoking in the streets of Paris in paras. 63 and 64 as follows:

[63]      In the classic example, Parliament might pass legislation making it a criminal offence for Canadian nationals to smoke in the streets of Paris, thereby exercising extraterritorial prescriptive jurisdiction on the basis of nationality.  If France chooses to contest this, it may have a legitimate claim of interference with its territorial sovereignty, since Canada’s link to smoking on the Champs-Ếlysèes is less real and substantial than that of France.  France’s territorial jurisdiction collides with Canada’s concurrent claim of nationality jurisdiction.  The mere presence of the prohibition in the *Criminal Code*of Canada might be relatively benign from France’s perspective.  However, France’s outrage might be greater if Canadian courts tried a Canadian national in Canada for violating the prohibition while on vacation in Paris.  It would be greater still if Canadian police officers marched into Paris and began arresting Canadian smokers or if Canadian judges established a court in Paris to try offenders.

[64]      This example demonstrates the nuances of extraterritorial jurisdiction.  It is not uncommon for states to pass legislation with extraterritorial effects or, in other words, to exercise extraterritorial prescriptive jurisdiction.  This is usually done only where a real and substantial link with the state is evident.  Similarly, comity is not necessarily offended where a state’s courts assume jurisdiction over a dispute that occurred abroad (extraterritorial adjudicative jurisdiction), provided that the enforcement measures are carried out within the state’s own territory.  The most contentious claims for jurisdiction are those involving extraterritorial *enforcement*of a state’s laws, even where they are being enforced only against the state’s own nationals, but in another country.  The fact that a state has exercised extraterritorial prescriptive jurisdiction by enacting legislation in respect of a foreign event is necessary, but not in itself sufficient, to justify the state’s exercise of enforcement jurisdiction outside its borders: F.A. Mann, “The Doctrine of International Jurisdiction Revisited After Twenty Years”, in W.M. Reisman, ed., *Jurisdiction in International Law*(1999), 139, at p. 154. [Emphasis in original]

[65]            The limitations that are contemplated on the exercise of extraterritorial jurisdiction, as reflected in the hypothetical example given in ***Hape***, arise from international law “based on sovereign equality, non-intervention and the extraterritoriality principle.”  They apply when “states must refrain from exercising territorial enforcement jurisdiction over matters in respect of which another state has, by virtue of territorial sovereignty, the authority to decide freely and autonomously.”  (See ***Hape***at para. 65)

[66]            The critical issue between the parties is whether, in enacting s. 7(4.1), Parliament has encroached on the authority of other states to decide freely and autonomously in respect of matters occurring within their sovereign territory, or whether the reach of s. 7(4.1) comports with international law.

[67]            The issue of what creates a recognized expression of jurisdiction is at the root of the difference between the parties, and is not readily discernible.  In *Extraterritorial Criminal Jurisdiction,*the authors note that there are five accepted bases of jurisdiction at international law: the territorial principle, the nationality principle, the passive personality principle, the protective principle, and the universal principle.

[68]            The three principles at play in this application concerning Canada’s jurisdiction under s. 7(4.1) are the territorial principle, the nationality principle and the universal principle.  They are described as follows by the authors at 146 – 148:

(i)         Territorial Principle

The state has jurisdiction over any crime committed within its territory, whether by a citizen, resident, tourist, or illegal alien.  The notion of “territory” includes land but also the territorial sea, internal waters, airspace and certain maritime zones.  This is the basic and most widely accepted basis for the exercise of criminal jurisdiction, and operates as the “default” principle employed by states.  The other bases of jurisdiction are effectively exceptions to the territorial principle and, logically, all of them are extraterritorial.

In cases where the criminal conduct took place in, or had an impact upon, more than one state, there are several alternative theories which have a stretching effect on the idea of territoriality.  The most important are the subjective or initiatory principle, whereby “a state has jurisdiction over crimes which consist partly of an act committed within its territory and partly of consequences which take place in another state;” and the objective or terminatory principle, whereby “a state has jurisdiction over a crime which is completed within its territory.”  As will be seen in the discussion of *Libman,*below, the more modern and less orthodox approach is to hold that a state is entitled to assert territorial criminal jurisdiction where it has a “real and substantial connection” to the offence, usually meaning that “a significant portion of the activities have taken place” there.

(ii)        Nationality Principle

This principle allows states to exercise criminal jurisdiction over the conduct of their nationals, wherever in the world they may be.  It also extend to persons who are almost assimilated to nationality in terms of their link to the state, such as permanent residents and foreign citizens who are servicing in the state’s armed forces.  Use of this principle is most common among civil law states, and is connected to their refusal to extradite nationals.  If, for example, a German national were to commit a crime in Canada and then flee back to Germany, he/she would never face criminal process if nationality-based jurisdiction was not asserted, since the fugitive could not be returned to the *locus*state.

…

(v)        Universal Principle

This is the most expansive of the jurisdictional principles.  In its broadest accepted form, the universal principle allows states to exercise criminal jurisdiction over any individual, regardless of nationality, who commits certain crimes in any geographical location.  It is applied to the limited number of crimes which are agreed to be offences under international law: genocide, war crimes, crimes against humanity, piracy, slavery, aggression, torture.  No direct links to the forum state are required, since the perpetrator is deemed to be *hostis humani generis*, an enemy of humankind, which provides every state with sufficient interest in repression and prosecution.

A subsidiary brand of universality is imposed on states under the various “suppression conventions” which internationalize the suppression of certain crimes, such as various terrorist offences, crimes against internationally-protected persons and the like.  Under these treaties, the member states agree that any of them who apprehend an individual accused of the relevant crime may prosecute the individual, regardless of whether there is any connection between the crime and the apprehending state.  If the state does not wish to prosecute, then it is obliged to extradite the individual to a treaty partner state which indicates a willingness to prosecute.  This kind of mechanism is known as *aut dedare, aut judicare*(“extradite or prosecute”), and can be distinguished from “pure” universality both by its mandatory character and by the fact that it applies only as between the parties to the relevant treaty.

[69]            The authors noted of the five basis of jurisdiction:

These bases overlap and sometimes conflict and not all are equally accepted by states, but nonetheless they provide a means by which states and their courts can determine legal competence and avoid conflict with other states.  Each is also permissive: unless a state is under a treaty obligation to prosecute offenders for particular crimes, there is no obligation under international law to do so.  It follows that given the principles are parallel, more than one state may legally extend jurisdiction over an individual criminal act, a situation called “concurrent jurisdiction”.

[70]            In the present case, much of the applicant’s analysis is premised on the reasoning in ***R. v. Libman*** that in the face of state sovereignty or the presumption against extraterritoriality codified in s. 6(2) of the ***Code***, “a real and substantial link” must be established between Canada and the alleged wrongdoing to justify even the prescriptive jurisdiction to legislate.  The applicant asserts that the lack of a real and substantial link in the present case, and a correlative absence of support in international law for extraterritorial prescriptive jurisdiction, render s. 7(4.1) *ultra vires*Parliament’s authority.

[71]            I conclude, however, that the “real and substantial link between an offence and this country,” referred to in ***Libman***as the foundation for jurisdiction, and its later invocation in ***Hape*** as the circumstance in which the exercise of extraterritorial prescriptive jurisdiction “is usually done,” does not operate as a bar to jurisdiction in the present case.  ***Libman***was concerned only with the territorial aspect of jurisdiction in the context of a domestic prosecution — that is, a prosecution not based on the nationality or residence of the alleged offender or any other of the jurisdictional principles set out in para. 68 above.  As such, the prosecution was based solely upon “subjective” or “objective” territorial considerations, and was subject to the codified presumption against extraterritoriality in s. 6(2) (then s. 5(2)) of the ***Code***that “no person shall be convicted … of an offence committed outside Canada.”

[72]            As noted in *Extraterritorial Criminal Jurisdiction,*at 151-152, ***Libman*** is distinguishable from cases not relying on the territorial principle to ground jurisdiction:

What distinguishes *Libman*in the present context, however, was that the accused was charged under the domestic conspiracy provisions of the *Criminal Code*which, unlike the other conspiracy provisions, had no explicit extraterritorial application.  The question for the court, then, was whether there was a basis on which Canada could properly be said to have *territorial*jurisdiction over the offence without any specific indication from the legislature to this effect.  On our reading of *Libman*, it stands for the proposition that Canadian domestic law recognizes the subsets of the territorial principle discussed above, whether characterized as “objective” or “subjective” territoriality, as means by which the courts themselves may determine that there is a sufficient connection to properly take jurisdiction.  It may be described, then, as dealing with *judicial*jurisdiction (as opposed to legislative) whereby the courts can determine whether Parliament has given them jurisdiction over a particular offence that occurs, in part, in Canada.

[73]            I agree with the analysis above.  ***Libman***was dealing with the circumstances that justify a court assuming jurisdiction over a particular offence in the absence of explicit extraterritorial legislation, and was thus necessarily based on the territorial principle alone.  It says little or nothing about jurisdiction over offences based on the four other principles recognized in customary international law.

[74]            By contrast, s. 7(4.1) operates notwithstanding s. 6(2) and hence is taken outside what is “usually done” to establish extraterritorial jurisdiction by focusing on the presence of objective or subjective territoriality.

[75]            The Court in ***Hape***cited the principle in ***Libman***to the effect that “where two or more states have a legal claim to jurisdiction, comity dictates that a state ought to assume jurisdiction only if it has a real and substantial link to the event”.  That link, according to LaForest J. in ***Libman***, “may be coterminous with the requirements of international comity”.  (see ***Hape*** para. 62)

[76]            The question which this application raises is what are the circumstances that allow Canada to assume jurisdiction “coterminous with the requirements of international comity” where the offence has no territorial link to Canada?

[77]            There can be no real dispute that Canada has the authority and jurisdiction to legislate extra-territorially.  The issue is what conditions that authority and jurisdiction, and how should a court interpret its limits in the context of s. 7(4.1).

[78]            The ***Constitution Act, 1867***does not preclude Parliament from legislating extraterritorially.  As the respondent points out, s. 132 of that act provides that Parliament “shall have all the Powers necessary or proper for performing the Obligations of Canada … towards Foreign Countries, arising under Treaties between the [British] Empire and such Foreign Countries.”  Moreover, s. 3 of the ***Statute of Westminster*** expressly confers on Parliament the “full power to make laws having extraterritorial operation”.  That power is recognized by s. 8(3) of the***Interpretation Act***,R.S.C. 1985, c. I-23, which provides for retroactive application of acts “intended … to have extraterritorial operation,” and, of course, by s. 7 of the ***Criminal Code***,which sets out provisions excepted from the operation of s. 6(2), which confines the scope of the ***Code*** to offences committed within Canada.

[79]            Section 11(g) of the ***Charter***adds to the constitutional weight of Canada’s authority to operate extraterritorially by allowing for findings of guilt in matters that may not be offences in Canada but constitute “an offence … under international law or [which] was criminal according to the general principles of law recognized by the community of nations.”  As expressed by Cory J. at 493 of ***R. v. Finta***, [s]ection 11(g) of the ***Charter***allows customary international law to form a basis for the prosecution of war criminals who have violated general principles of law recognized by the community of nations regardless of when or where the criminal act or omission took place.”

[80]            There is thus no bar to Parliament enacting laws with extraterritorial effect, subject of course to the proviso that it must do so by clear words in or by necessary implication of a statutory provision.  In ***Society of Composers, Authors and Music Publishers of Canada v. Canadian Association of Internet Providers***,Binnie J. for the majority held in paras. 54 and 55 as follows:

[54]      While the Parliament of Canada, unlike the legislatures of the Provinces, has the legislative competence to enact laws having extraterritorial effect, it is presumed not to intend to do so, in the absence of clear words or necessary implication to the contrary.  This is because “[i]n our modern world of easy travel and with the emergence of a global economic order, chaotic situations would result if the principle of territorial jurisdiction were not, at least generally, respected”, See *Tolofson v. Jensen,*[1994] 3 S.C.R. 1022 at p. 1051, *per*LaForest J.

[55]      While the notion of comity among independent nation States lacks the constitutional status it enjoys among the provinces of the Canadian federation … and does not operate as a limitation on Parliament’s legislative competence, the courts nevertheless presume, in the absence of clear words to the contrary, that Parliament did not intend its legislation to have extraterritorial application.

[81]            In ***Hape***, the court addressed the effect of “certain fundamental rules of customary international law” on “what actions a state may legitimately take outside its territory” according to the “doctrine of adoption.”  In his judgment, LeBel J. explained at para. 36 that the doctrine of adoption as one in which “the courts may adopt rules of customary international law as common-law rules in order to base their decisions upon them, provided there is no valid legislation that clearly conflicts with a customary rule.”

[82]            LeBel J. then held at para. 39 that the doctrine of adoption operates in Canada as follows:

[39]      …In my view, following the common law tradition, it appears that the doctrine of adoption operates in Canada such that prohibitive rules of customary international law should be incorporated into domestic law in the absence of conflicting legislation.  The automatic incorporation of such rules is justified on the basis that international custom, as the law of nations, is also the law of Canada unless, in a valid exercise of its sovereignty, Canada declares that its law is to the contrary.  Parliamentary sovereignty dictates that a legislature may violate international law, but that it must do so expressly.  Absent an express derogation, the courts may look to prohibitive rules of customary international law to aid in the interpretation of Canadian law and the development of the common law.

[83]            The applicant’s position of the *vires*of s. 7(4.1) is largely premised on the contention that it compromises one of the cornerstones of the customary principles of international law — that of sovereign equality.  That principle was described in ***Hape***at paras. 41 – 45 as follows:

[41]      The principle of sovereign equality comprises two distinct but complementary concepts: sovereignty and equality.  “Sovereignty” refers to the various powers, rights and duties that accompany statehood under international law.  Jurisdiction — the power to exercise authority over persons, conduct and events — is one aspect of state sovereignty.  Although the two are not coterminous, jurisdiction may be seen as the quintessential feature of sovereignty.  Other powers and rights that fall under the umbrella of sovereignty include the power to use and dispose of the state’s territory, the right to state immunity from the jurisdiction of foreign courts and the right to diplomatic immunity.  In his individual opinion in *Customs Régime between Germany and Austria*(1931), P.C.I.J. Ser. A/B, No. 41, at p. 57, Judge Anzilotti defined sovereignty as follows: “Independence … is really no more than the normal condition of States according to international law; it may also be described as *sovereignty* (*suprema potestas*), or *external sovereignty,*by which is meant that the State has over it no other authority than that of international law.” (Emphasis in original)

[42]      Sovereignty also has an internal dimension, which can be defined as “the power of each state freely and autonomously to determine its tasks, to organize itself and to exercise within its territory a ‘monopoly of legitimate physical coercion’”; L. Wildhaber, “Sovereignty and International Law”, in R. St.J. Macdonald and D.M. Johnston, eds., *The Structure and Process of International Law: Essays in Legal Philosophy, Doctrine and Theory*(1983), 425, at p. 436.

[43]      While sovereignty is not absolute, the only limits on state sovereignty are those to which the state consents or that flow from customary or conventional international law.  Some such limits have arisen from recent developments in international humanitarian law, international human rights law and international criminal law relating, in particular, to crimes against humanity (R. Jennings and A. Watts, eds., *Oppenheim’s International Law*(9th ed. 1996), vol. 1, at p. 125; K. Kittichaisaree, *International Criminal Law*(2001), at pp. 6 and 56; H.M. Kindred and P.M. Saunders, *International Law, Chiefly as Interpreted and Applied in Canada*(7th ed. 2006), at p. 836; Cassese, at p. 59).  Nevertheless, despite the rise of competing values in international law, the sovereignty principle remains one of the organizing principles of the relationships between independent states.

[44]      Equality is a legal doctrine according to which all states are, in principle, equal members of the international community: Cassese, at p. 52.  It is both a necessary consequence and a counterpart of the principle of sovereignty.  If all states were not regarded as equal, economically and politically weaker states might be impeded from exercising their rights of sovereignty.  Once commentator suggests the following rationales for the affirmation of the equality of states in their mutual relations: “to forestall factual inequities from leading to injustice, to ensure that one state should not be disadvantaged in relation to another state, and to preclude the possibility of powerful states dictating their will to weaker nations” (V. Pechota, “Equality: Political Justice in an Unequal World”, in Macdonald and Johnston, 453, at p. 454).  Although all states are not in fact equal in all respects, equality is, as a matter of principle, an axiom of the modern international legal system.

[45]      In order to preserve sovereignty and equality, the rights and powers of all states carry correlative duties, at the apex of which sits the principle of non-intervention.  Each state’s exercise of sovereignty within its territory is dependent on the right to be free from intrusion by other states in its affairs and the duty of every other state to refrain from interference.  This principle of non-intervention is inseparable from the concept of sovereign equality and from the right of each state to operate in its territory with no restrictions other than those existing under international law.  (For a discussion of these principles, see the comments of Arbitrator Huber in the *Island of Palmas Case (Netherlands v. United States)* (1928), 2 R.I.A.A. 829, at pp. 838-39).

[84]            The applicant also relies on the concept of comity of nations, asserting that absent a real and substantial link between Canada and the events under prosecution, comity weighs against Canada’s assumption of jurisdiction.  The nature and role of comity in determining jurisdiction was addressed by LeBel J. in ***Hape***in para. 47 as follows:

[47]      Related to the principle of sovereign equality is the concept of comity of nations.  Comity refers to informal acts performed and rules observed by the states in their mutual relations out of, politeness, convenience and goodwill, rather than strict legal obligation: *Oppenheim’s International Law*, at pp. 50-51.  When cited by the courts, comity is more a principle of interpretation than a rule of law, because it does not arise from formal obligations.  Speaking in the private international law context in *Morguard Investments Ltd. v De Savoye*, [1990] 3 S.C.R. 1077, at p. 1095, La Forest J. defined comity as “the deference and respect due by other states to the actions of a state legitimately taken within its territory”.  In *Re Foreign Legations,*both Duff C.J. and Hudson J. referred in their reasons to *The Parlement Belge*(1880), 5 P.D. 197 (C.A.), in which Brett L.J. commented, at pp. 214-15, that the principle of international comity “induces every sovereign state to respect the independence and dignity of every other sovereign state”.

[85]            The principle thrust of the applicant’s argument is, however, deflected by the fact that s. 7(4.1) is not an enforcement provision implicating enforcement jurisdiction.  Rather, it is prescriptive and engages prescriptive and adjudicative jurisdiction.  It does not seek to intervene in “the power of each state freely and autonomously to determine its tasks or organize itself and to exercise within its territory a monopoly of legitimate physical coercion.”  What it does do is seek to control the conduct of Canadian nationals abroad, but only by the use of enforcement measures in Canada.

[86]            As such, s. 7(4.1) does not run afoul of the principle of sovereign equality or impinge upon the concept or requirements of comity.  International law recognizes nationality or permanent residence as a foundation for prescriptive or adjudicative jurisdiction.  In Ian Brownlie, *Principles of Public International Law,*6th ed. (Oxford: Oxford University Press, 2003) at 301 it is noted:

Nationality, as a mark of allegiance and an aspect of sovereignty, is also generally recognized as a basis for jurisdiction over extra-territorial acts.

[87]            Similarly in ***Hape***, after noting that “territoriality is not the only legitimate basis for jurisdiction,” the Court concluded at para. 60:

[60]      …Under international law, a state may regulate and adjudicate regarding actions committed by its nationals in other countries, provided enforcement of the rules takes place when those nationals are within the state’s own borders.

[88]            The Court in ***Hape***was careful to distinguish between prescriptive and adjudicative jurisdictions on the one hand and enforcement jurisdiction on the other, however, in cautioning that “[w]hen a state’s nationals are physically located in the territory of another state, its authority over them is strictly limited.”

[89]            The assertion of extraterritorial prescriptive jurisdiction based on the nationality or permanent residence of the alleged offender has been recognized by courts in other jurisdictions, including the United States.  See: ***United States of America v. Clark***, 435 F.3d 1100 (9th Cir. Wash. 2006), which held that “the nationality principle ‘permits a country to apply its statutes to extraterritorial acts of its own nationals’” and that “…[j]urisdiction based solely on the defendant’s status as a U.S. Citizen is firmly established by our precedent…”;

[90]            Similarly, in ***XYZ v. Commonwealth***[2006] H.C.A. 25, the High Court of Australia held that “[t]he territorial principle of legislative jurisdiction over crime is not the exclusive source of competence recognized by international law.  Of primary relevance to the present case is the nationality principle which covers conduct abroad by citizens or residents of a state…”.

[91]            Section 7(4.1) is not anomalous in asserting prescriptive and adjudicative jurisdiction extraterritorially in Canadian legislation.  As noted, the ***Crimes Against Humanity and War Crimes Act***authorizes the prosecution of persons in Canada for offences committed abroad if, among other things, they were at the material time Canadian citizens or employed by Canada in a civilian or military capacity.

[92]            The applicant contends that the rationale for extraterritorial effect in the ***Crimes Against Humanity and War Crimes Act***is distinguishable from s. 7(4.1) because it addresses crimes of universal jurisdiction (see ***Hape***para. 66), which s. 7(4.1) does not.  The applicant contends that the nationality principle alone, without a real and substantial link between the offence and Canada, is not sufficient to overcome sovereignty or the requirements of international comity.

[93]            It is clear, however, that s. 7(4.1) is not the only legislation enacted by a signatory to the *Optional Protocol*.  Some 44 countries currently have comparable legislation.  In addition, as previously noted, 129 countries have ratified the *Optional Protocol* and accepted its implications.  In my view, this strongly augers in favour of a conclusion that this legislation itself forms a part of customary international law under the universal principle in much the same way as the ***Crimes Against Humanity and War Crimes Act***does.

[94]            Thus, s. 7(4.1) rests on two of the bases recognized as sources of jurisdiction by international law: the nationality principle and the universal principle.  The nationality principle reflects Canada’s clear interest in taking steps to prevent its own nationals or residents from using the advantages of Canadian nationality and residence to perpetuate the economic and/or sexual exploitation of children in other nations.

[95]            A failure to assume prescriptive jurisdiction over such offences in the long term diminishes the likelihood that alleged offenders with direct and permanent ties to Canada will be investigated or prosecuted.  The reduced opportunity that states with territorial jurisdiction have to identify, investigate or apprehend those who are only transient within their borders inhibits the likelihood of successful investigation or prosecution.  In the absence of extraterritorial legislation, Canada would become a safer harbour for those who engage in the economic or sexual exploitation of children.  That is a consequence which, from any point of view, is antagonistic to Canada’s own sovereign interest to “freely and autonomously determine its tasks, to organize itself and to exercise within its territory a monopoly of legitimate physical coercion.”

[96]            The sale of children and the sexual exploitation of children through prostitution and the creation of child pornography are thus activities which, conducted anywhere, a nation has a sovereign interest in preventing among its nationals or residents, simply because of their nationality or residence.

[97]            The universal principle reflects Canada’s commitment under the *Convention* and the *Optional Protocol* to contribute to the suppression of the “significant” “widespread” and “continuing” exploitation of “particularly vulnerable groups,” but within the limitations of both prescriptive (and adjudicative) jurisdiction and the nationality principle.

[98]            In considering s. 7(4.1), I can see nothing in the principle of sovereign equality, the principle of non-intervention, or in the concept of comity as described in ***Hape***, that would justify interpreting the provision in a way so as to limit its scope to require a real and substantial link between Canada and the offences, alleged as would be necessary in a domestic prosecution resting on the territorial principle alone.

[99]            On the contrary, customary international law appears to support s. 7(4.1) in its extraterritorial effect, rather than to curtail it.  There is nothing in s. 7(4.1) that engages a challenge to the independence or autonomy of other nations or compromises their jurisdiction so as to compel the conclusion that it infringes international law or is beyond the authority of Parliament to legislate.

[100]        I do not accept the applicant’s argument that the convention and the *Optional Protocol* establish a jurisdictional priority in favour of the state in which the offences are alleged to have occurred as against the state in which the alleged offender is located and of which the alleged offender is a national or a resident.  There is nothing in the convention or the *Optional Protocol* to support that contention and it is not logically persuasive.  Where, as here, there are allegations of a series of offences being committed in four different states, the clear advantage to Canada’s assumption of jurisdiction in relation to all the offences weighs in favour of an extraterritorial prosecution based on the nationality principle, rather than four separate prosecutions in four separate jurisdictions at four different times based on the territorial principle.

[101]        I conclude therefore that s. 7(4.1) is *intra vires*theParliament of Canada, and that its extraterritorial effect is not prohibited by any principle of international law or by the concept of comity.  The extraterritoriality contemplated by s. 7(4.1) is clearly justified under the nationality principle and the universal principle, the latter in light of the *Convention* and the *Optional Protocol*, and the critical mass of international support that multi-national ratification of those treaties represents.

[102]        A secondary issue that arises in the present case is whether the applicant can challenge Parliament’s jurisdiction to enact s. 7(4.1) in its present state, which has no requirement for consent of the foreign state, even though the legislation as it existed at the time of the applicant’s alleged wrongdoing required consent and, indeed, although consent was obtained.

[103]        I am not satisfied that the law as it presently stands is the law under which the applicant is being prosecuted.  Hence, the lack of a consent provision in the present law is not an aspect of the legislation on which the applicant can rely in advancing his position on jurisdiction.

[104]        If, however, I am wrong in that conclusion, I would nevertheless find that s. 7(4.1) in its present state is within Parliament’s jurisdiction to enact.  Canada’s clear interest in living up to its treaty commitments and in regulating the conduct of its nationals and residents abroad in the context of preventing the widespread exploitation of children is, in my view, sufficient to establish and maintain jurisdiction with or without a provision for consent from the foreign state.  In coming to that conclusion, I am fortified by the fact that in the *Optional Protocol*, there is no provision for consent to prosecution as between signatory nations, and, similarly in the ***Crimes Against Humanity and War Crimes Act***, there is no requirement for consent from the foreign state.

**ii)         The Section 7 Challenge**

[105]        The appellant’s contention that s. 7(4.1) creates conditions inconsistent with trial fairness guaranteed by s. 7 of the ***Charter***, because it extends Canada’s prescriptive jurisdiction beyond the reach of the ***Charter***, is met by the reasoning in ***Hape***, ***R. v. Harrer***, [1995] 3 S.C.R. 562, 128 D.L.R. (4th) 98, and ***R. v. Terry***,[1996] 2 S.C.R. 207, 135 D.L.R. (4th) 214.

[106]        In ***Hape***, the Supreme Court of Canada held that s. 32(1) of the ***Charter***confined the ***Charter’s*** application to the governments of Canada, the provinces and the territories, and hence did not apply extraterritorially (without consent) to searches and seizures that took place abroad.

[107]        In coming to grips with the issue of whether and how the absence of ***Charter***protection in an investigation conducted abroad affects the fairness of a trial conducted in Canada, the Court in ***Hape*** also noted that the right to a fair trial is a principle of fundamental justice guaranteed by s. 7 and s. 11(d) of the ***Charter***:  ***R. v. Seaboyer***,[1991] 2 S.C.R. 577, 83 D.L.R. (4th) 193 at 603 (S.C.R.).  Thus, evidence acquired by means falling short of certain minimum standards, even extraterritorially, could be regarded as a violation of s. 7 and excluded.  Then at para. 109, the Court cited the judgment of LaForest J. in ***Harrer***in concluding that a trial will not automatically be rendered unfair if evidence is obtained in circumstances not meeting ***Charter*** standards, but that:

The circumstances in which the evidence was gathered must be considered in their entirety to determine whether admission of the evidence would render a Canadian trial unfair.  The way in which the evidence was obtained may make it unreliable, as would be true of conscriptive evidence, for example.  The evidence may have been gathered through means, such as torture, that are contrary to fundamental *Charter*values.  Such abusive conduct would taint the fairness of any trial on which the evidence was admitted: *Harrer*at para. 46….

[108]        The Court in ***Hape***then went on to quote from LaForest J. in ***Harrer***at paras. 17 – 18 as follows:

But the foreign law is not governing in trials in this country.  For example, 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.  On the other hand, the procedural requirements for obtaining evidence imposed in one country may be more onerous than ours.  Or they may simply have rules that are different from ours but are not unfair.  Or again we may not find in the particular circumstances that the manner in which the evidence was obtained was sufficiently objectionable as to require its rejection.  In coming to a decision, the court is bound to consider the whole context.

At the end of the day, a court is left with a principled but fact-driven decision.

[109]        The Court in ***Hape***also noted at para. 110 that LaForest J. and McLachlin J. (as she then was), who gave concurring reasons, found no trial unfairness in the admission of the evidence at issue in ***Harrer*** and McLachlin J.:

…noted in particular that the relevant circumstances included the expectations of the accused in the place where the evidence was taken, and that the police conduct was neither unfair nor abusive.  She made the following comment, at para. 49: “The unfairness arises in large part from the accused’s expectation that the police in Canada will comply with Canadian law.  Where the [evidence] is [gathered] abroad, the expectation is otherwise.”

[110]        In ***R. v. Terry***, which dealt with an investigation conducted in the U.S. in relation to an offence alleged to have occurred in Canada, the Court held as follows at para. 20:

It follows that the *Charter*did not apply to the California police when they detained the appellant.  They were subject only to American law.  Their conduct cannot amount to a breach of the *Charter*.  No breach of the *Charter*being established, the statement cannot be ruled inadmissible under s. 24(2) of the *Charter* …

[111]        In concluding that notwithstanding the lack of a remedy under s. 24(2) the accused was not deprived of his s. 7 or 11(d) rights to a fair trial, the Court held as follows in paras. 24 and 25:

The second answer to this argument is that it is not in fact unfair to treat evidence gathered abroad differently from evidence gathered on Canadian soil.  People should reasonably expect to be governed by the laws of the state in which they currently abide, not those of the state in which they formerly resided or continue to maintain a principal residence:*Harrer*, *supra*, at para. 50; *Tolofson, supra*.  The appellant’s argument amounts to asserting that a Canadian traveller takes Canadian law with him or her, a proposition that is belied by the principle that within its territory, a state is exclusively competent to exercise an enforcement jurisdiction.

Nor does this leave the traveller abroad without a remedy for abuse in the course of foreign evidence-gathering.  As this Court articulated in *Harrer*, *supra*, while s. 24(2) of the*Charter*may not be available in such a case, other provisions are.  The *Charter* guarantees the accused a fair trial: s. 11(d).  More generally, the *Charter*provides that the accused’s liberty cannot be limited except in accordance with the principles of fundamental justice: s. 7.  To admit evidence gathered in an abusive fashion may well violate the principles of fundamental justice.  For example, the common law confessions rule was extended in accordance with the principles of fundamental justice under s. 7 of the *Charter*in *R. v. Hebert*, [1990] 2 S.C.R. 151.  the principle against self-incrimination has similarly been held to be one of the principles of fundamental justice under s. 7: *R. v. S. (R.J.)*, [1995] 1 S.C.R. 451, per Iacobucci J.  The accused may use these and other principles of fundamental justice to obtain redress for abuses abroad in gathering evidence subsequently tendered against him or her.

[112]        As I see it, the clear statement that emerges in ***Harrer***, ***Terry***and ***Hape***is that while the right to a fair trial is a principle of fundamental justice guaranteed by s. 7 of the ***Charter***, that right is not breached by investigations conducted extraterritorially where the ***Charter***, as a manifestation of Canada’s enforcement jurisdiction, is inapplicable.

[113]        Because the s. 7 right imports a right to exclude evidence obtained beyond the reach of the ***Charter*** that otherwise would render a trial unfair, the prospect of extraterritorial prescriptive or adjudicative jurisdiction does not controvert the fair trial principle of fundamental justice guaranteed by s. 7.  I accordingly conclude that a proscription against extraterritorial jurisdiction is not a principle of fundamental justice, and therefore I dismiss the applicant’s application to have s. 7(4.1) declared to be of no force or effect pursuant to s. 52(1) of the ***Constitution Act, 1982***.

**V - Conclusion**

[114]        It follows that in the result, the accused’s application is dismissed.

“A.F. Cullen J.”  
The Honourable Mr. Justice A.F. Cullen