

Counting On the Court: The Preservation of Fundamental Freedoms and Liberties in the Era of the Security Revolution

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COUNTING ON THE COURT: THE PRESERVATION OF FUNDAMENTAL FREEDOMS AND LIBERTIES IN THE ERA OF THE SECURITY REVOLUTION

Richard C.C. Peck, Q.C.*

Nikos Harris**

I. INTRODUCTION

A modern democracy is dependent upon the existence of a solid majority of free-thinking citizens. A democracy falters, if not fails, when its populace becomes too willing to accept uncritically the propriety of repressive governmental measures aimed at confronting evil. It is at this point that legislative actions, deemed expeditious and warranted, have the potential to overtake and repress individual rights. Such events, not unknown to modern society, largely occur at the confluence of fear and freedom. In his message to Congress on January 6, 1941, Franklin Roosevelt expressed the ideal of freedom in these lofty terms:

... we look forward to a world founded upon four essential human freedoms. The first is freedom of speech and expression — everywhere in the world. The second is freedom of every person to worship God in his own way — everywhere in the world. The third is freedom from want ... everywhere in the world. The fourth is freedom from fear ... anywhere in the world.¹

Democracies are fragile institutions. Ultimately they remain strong only if their legislators, and more importantly their courts, are courageous in times of strife and fear. While the notion of freedom is somewhat ethereal it is rooted in the acts of countless individuals throughout history and bottomed in a quest for

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¹ Roosevelt's Message to Congress, *The Four Freedoms* (January 6, 1941).

justice, personal freedom, and self-fulfillment. Democracy is essential to ensuring justice while, at the same time, forbidding injustice. As the American theologian, Reinhold Niebuhr stated: "Man's capacity for justice makes democracy possible, but man's inclination to injustice makes democracy necessary."²

Human fear is an instinctive and evolutionary emotion, dedicated to survival. In this sense, it is atavistic. It is a truism that only the dead are without fear. Freedom, on the other hand, is the embodiment of the struggle of the individual to be free from the restraints of external authority. History tells us that freedom must be guarded from fear. George Orwell demonstrated in his prophetic and increasingly relevant work, *1984*,³ that fear, especially that visited upon the citizenry at the vagary of the state, must be eschewed.

In every era there will be individuals who stand intrepidly against governmental incursions into individual rights. However, such persons are a rare breed. As Plato noted: "Thoughtful courage is a quality possessed by very few."⁴ It is increasingly the case in modern western society that the bulwarks against such incursions are, and must be, the courts. By dint of their appointed positions, the courts of our country are constitutionally vested with not only the ability, but the duty, to protect the fundamental rights and freedoms that define democracies. Our judges are expected, and required, to be courageous.

What follows is an examination of the likelihood that our courts, and particularly our Supreme Court, will meet the challenge of preserving our liberty interests in the post-September 11, 2001 anti-terrorism era. It is our view that there are numerous indicators that the Supreme Court will act to curb excessive state interference with individual liberties in this period where no less than the future of our basic rights and freedoms hang in the balance.

1. Balancing Liberty and Security

The application of the *Canadian Charter of Rights of Freedoms*⁵ to the criminal law has taken innumerable forms over the last three decades, from motions to exclude evidence to requests for the appointment of counsel. However, in almost every case, the application of the Charter to the criminal law has required the balancing of certain fundamental values. For example, section 7 abuse of process motions for stays of proceedings balance the protection of the

² Niebuhr, *The Children of Light and the Children of Darkness: A Vindication of Democracy and a Critique of its Traditional Defence* (1946), at xi (foreword).

³ Orwell, *1984* (1990 ed.).

⁴ Plato, *Laches*, Part 3.

⁵ Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

integrity of the justice system with the public interest in there being a final determination of an accused's guilt or innocence.⁶ Many Charter disclosure motions require balancing an accused's right to make full answer and defence with a complainant's right to privacy or the interests of effective law enforcement.⁷

One particular balancing of values that arises in the criminal law Charter jurisprudence perhaps more frequently than any other is the weighing of an accused's right to privacy with the right of the state to investigate crime and maintain public security. This balance, as was held by Dickson J. (as he then was) in *Hunter v. Southam Inc.*, dictates when the state is justified in invading the zone of privacy that exists around individuals in free and democratic states:

This limitation on the right guaranteed by section 8, whether it is expressed negatively as freedom from "unreasonable" search and seizure, or positively as an entitlement to a "reasonable" expectation of privacy, indicates that an assessment must be made as to whether in a particular situation the public's interest in being left alone by government must give way to the government's interest in intruding on the individual's privacy in order to advance its goals, notably those of law enforcement.⁸

This balancing of privacy and security interests not only bottoms section 8 litigation, but also informs other Charter jurisprudence, including that relating to sections 2 and 7 of the Charter.⁹

The horrific events of September 11, 2001 necessarily raise the issue whether there will be a fundamental rebalancing of liberty and security interests that broaden law enforcement powers at the expense of privacy and other individual freedoms. The tragedy of that day has caused a global "security revolution" aimed at protecting against the repetition of such deadly acts, resulting in the vast enhancement of state powers to intrude on individual privacy.¹⁰ Canada has taken aggressive steps in this regard, most notably with the passage of the *Anti-Terrorism Act*.¹¹

While it is inevitable and warranted that the Canadian state grant itself new powers after the events of September 11, 2001, the danger of enduring security excesses being implemented in this era is greater than in any other time since

⁶ See *R. v. Regan* (2002), 161 C.C.C. (3d) 97, at 121-23, 145-46 (S.C.C.).

⁷ See for example *R. v. Mills*, [1999] 3 S.C.R. 668; *R. v. Leipert*, [1997] 1 S.C.R. 281.

⁸ (*Sub nom. Canada (Director of Investigations & Research, Combines Investigation Branch*) v. *Southam*), [1984] 2 S.C.R. 145, at 159-60.

⁹ See for example *R. v. Sharpe*, [2001] 1 S.C.R. 45.

¹⁰ Toope, "Fallout from '9-11': Will a Security Culture Undermine Human Rights?" (2002) 65 Sask. L. Rev. 281, at 285-87.

¹¹ S.C. 2001, c. 41.

the Charter was adopted. The security revolution has the potential to so radically alter the balancing of Charter interests that significant aspects of our criminal justice system, and indeed our society as a whole, could resemble that of an authoritarian state. In the short term, the risk of a failure to curtail the excesses of the security revolution creates an increased potential for state abuse of power. In the longer term, uncurtailed security excesses have the potential to do no less than reshape the fabric of our society. As Professor David Paciocco has stated in regard to a number of controversial provisions of the Canadian *Anti-Terrorism Act*:

... the biggest threat posed by this legislation is that it will support a “creeping incrementalism” as the government borrows its tools, techniques and novel offences to combat less pressing and less exceptional criminal conduct. I fear that this enactment will become part of the fabric of the criminal law in this country, unless courts are scrupulous and governments conscientious. This statute is not just a threat to terrorists, or to those who are wrongly suspected of being terrorists based on creed or nationality. ... If this enactment becomes in any measure the prototype for law reform, it is a threat to all of us.¹²

The fragility of our basic freedoms and liberties must not be underestimated. Indeed, the abrogation of any one of our fundamental liberties can alter the free and democratic nature of our state. Justice Cory in *R. v. Storrey*¹³ held that a detention standard based on less than a reasonable and probable grounds standard could itself undermine our democracy:

Section 450(1) [now section 495(1)] makes it clear that the police were required to have reasonable and probable grounds that the appellant had committed the offence of aggravated assault before they could arrest him. *Without such an important protection, even the most democratic society could all too easily fall prey to the abuses and excesses of a police state.* In order to safeguard the liberty of citizens, the *Criminal Code* requires the police, when attempting to obtain a warrant for an arrest, to demonstrate to a judicial officer that they have reasonable and probable grounds to believe that the person to be arrested has committed the offence. In the case of an arrest made without a warrant, it is even more important for the police to demonstrate that they have those same reasonable and probable grounds upon which they base the arrest (emphasis added).

The *Anti-Terrorism Act*, through its broad definition of “terrorist activity,” its sweeping new offences, its powers of detention without charge and to

¹² Paciocco, “Constitutional Casualties of September 11: Limiting the Legacy of the *Anti-Terrorism Act*” (2002) 16 Sup. Ct. L. Rev. (2d) 185, at 237; see also Gross, “Cutting Down Trees: Law-Making Under the Shadow of Great Calamities” in Daniels, Mackle & Roach, eds., *The Security of Freedom: Essays on Canada’s Anti-terrorism Bill* (2001) 39, at 43.

¹³ [1990] 1 S.C.R. 241, at 249.

compel testimony, its vast authority to breach basic privacy rights, and the investigatory duties it places on defence counsel, not only raises fundamental issues of arbitrary detention, but also implicates the presumption of innocence, the right to counsel, solicitor-client privilege, the right to remain silent, and judicial impartiality.¹⁴ Further, some legal academics view the security revolution as having the potential to narrow the constitutional rights of all accused persons to the point of permitting police officers to have a general power to stop and question individuals on slight suspicion, and the right to question all detainees whether or not they have invoked their right to counsel.¹⁵

Inevitably, the question whether our society will experience a fundamental rebalancing of individual privacy and liberty rights versus state security interests will be answered by the Supreme Court of Canada. A number of leading Canadian legal academics have written persuasively concerning the direct and indirect risks to our most basic liberties and freedoms posed by the security revolution in Canada if left unchecked.¹⁶ Such a fundamental rebalancing of liberty and security interests could unfold in Charter litigation in two basic respects:

- A. a perceived need to accord broader powers to law enforcement results in a narrowing of constitutional protections to accused persons generally; and
- B. increased security concerns cause there to be overly broad deference to Parliament regarding its anti-terrorism legislation, resulting in provisions being upheld which clearly do not minimally impair privacy and liberty interests.

2. Approach of Our Supreme Court

The central question to be addressed in this article is whether the Supreme Court will be likely to take a broadly deferential approach to Charter review of security legislation and narrow other criminal Charter protections, or whether the Court is likely to provide rigorous scrutiny to the legislation to ensure that state security measures are not overly broad or unreasonable. For four reasons,

¹⁴ Paciocco, *supra*, note 12; Stuart, "The Anti-terrorism Bill C-36: An Unnecessary Law and Order Quick Fix that Permanently Stains the Canadian Criminal Justice System" (2002) 14 N.J.C.L. 153; Roach, "The New Terrorism Offences and the Criminal Law" in Daniels, Mackle & Roach, *supra*, note 12, at 151; Austin, "Is Privacy a Casualty of the War on Terrorism?", in Daniels, Mackle & Roach, *supra*, note 12, at 251.

¹⁵ Stuntz, "Local Policing After the Terror" (2002) 111 Yale L.J. 2137.

¹⁶ Paciocco, *supra*, note 12; Stuart, *supra*, note 14; Daniels, Mackle & Roach, *supra*, note 12; Toope, *supra*, note 10.

which we discuss in detail in the following sections, we believe that the Court is likely to take the latter approach.

(a) *Enforcing Minimal Impairment*

The act of curtailing overly broad security provisions or techniques in the post-September 11, 2001 era will clearly require the Supreme Court to limit state conduct that has the utmost pressing and substantial objectives. However, the Court has demonstrated in its Charter jurisprudence that even the most pressing objectives will not immunize legislation from being struck down where the state uses overly broad means which do not minimally impair fundamental rights and freedoms.

In *R. v. Smith*¹⁷ the objective of a seven-year minimum sentence provision was nothing less than to protect persons and society as a whole from the scourge caused by imported narcotics. As Lamer J. (as he then was) set out in *R. v. Smith*, this objective addressed compelling public interests:

Those who import and market hard drugs for lucre are responsible for the gradual but inexorable degeneration of many of their fellow human beings as a result of their becoming drug addicts. The direct cause of the hardship cast upon their victims and their families, these importers must also be made to bear their fair share of the guilt for the innumerable serious crimes of all sorts committed by addicts [who import] in order to feed their demand for drugs.¹⁸

However, despite this pressing objective of the legislation, and determining the constitutionality of the legislation in the midst of the North America-wide “War on Drugs,” the Court held that the provision’s overly broad scope caused it to fail Charter scrutiny. The Court specifically held in *R. v. Smith* that a laudable objective did not provide Parliament with the right to enact a provision with indiscriminate effect and which impairs freedoms beyond that which is reasonably necessary to meet that objective.

In *RJR-MacDonald Inc. v. Canada (Attorney General)*,¹⁹ the Court was again confronted with legislation with a pressing objective: protecting persons from the serious and widespread health risks of tobacco use. As was described by La Forest J. in his dissenting judgment, the public interests which were associated with the legislative objective were immense:

The harm tobacco consumption causes each year to individual Canadians, and the community as a whole, is tragic. Indeed, it has been estimated that smoking causes

¹⁷ [1987] 1 S.C.R. 1045.

¹⁸ *Id.*, at 1053.

¹⁹ [1995] 3 S.C.R. 199, at 336.

the premature death of over 30,000 Canadians annually ... Overwhelming evidence was introduced at trial that tobacco use is a principal cause of deadly cancers, heart disease and lung disease. In our day and age this conclusion has become almost a truism.²⁰

Despite the fact that the legislation was addressing the fundamental issue of the protection of human life, a majority of the Court struck down the legislation. The majority held that the provision's broad infringements on the expressive rights of corporate entities failed Charter scrutiny because of the absence of specific evidence that these means were necessary to achieve the legislation's objectives.²¹ Further, the Court specifically warned of the danger posed to the fabric of our free and democratic society by excessive judicial deference to Parliament. Justice McLachlin (as she then was) held:

The courts are no more permitted to abdicate their responsibility than is Parliament. To carry judicial deference to the point of accepting Parliament's view simply on the basis that the problem is serious and the solution difficult, would be to diminish the role of the courts in the constitutional process and to weaken the structure of rights upon which our constitution and our nation is founded.²²

There are numerous other examples of the Court striking down legislation, or portions of legislation, which contained similarly pressing objectives because overly broad or unreasonable means were used to achieve those goals. Such legislative objectives have included protecting children from becoming the victims of sexual assault or exploitation,²³ deterring persons from carrying weapons in the commission of offences because of the increased risk of death,²⁴ and promoting social and racial tolerance in society.²⁵

The Court has stated on a number of occasions that it is appropriate that there be a "constitutional dialogue" between itself and the legislature, and that Parliament be permitted flexibility in the means chosen to address its objectives.²⁶ However, the Court has also indicated that it is its responsibility to specify the Charter standards within which those means must be selected, and to declare unconstitutional legislative choices that do not meet those standards

²⁰ *Id.*, at 243-44.

²¹ *Id.*, at 342-44, 353-54.

²² *Id.*, at 332-33.

²³ *R. v. Heywood*, [1994] 3 S.C.R. 761; *R. v. Hess*, [1990] 2 S.C.R. 906.

²⁴ *R. v. Vaillancourt*, [1987] 2 S.C.R. 636.

²⁵ *R. v. Zundel*, [1992] 2 S.C.R. 731.

²⁶ See *R. v. Mills*, *supra*, note 7; *R. v. Hall* (2002), 167 C.C.C. (3d) 449 (S.C.C.).

regardless of the “popularity” of such determinations.²⁷ The Court further has recently twice affirmed that particularly stringent Charter scrutiny will be necessary where a legislative provision curtails a particularly important civil right or fundamental value of our justice system.²⁸

While the Charter jurisprudence also includes a number of instances of the Court providing certain deference to Parliament in light of the importance of the public interest in the issue,²⁹ it is submitted that the Court has clearly indicated that a vital legislative objective will not immunize legislation from close scrutiny. Further, the Court has indicated that it is prepared to strike down legislative provisions that are addressing pressing public interests if the means chosen to achieve the objective clearly do not minimally impair fundamental rights and freedoms. As McLachlin J. (as she then was) held in *RJR-MacDonald Inc. v. Canada*:³⁰

Even on difficult social issues where the stakes are high, Parliament does not have the right to determine unilaterally the limits of its intrusion on the rights and freedoms guaranteed by the *Charter* care must be taken not to devalue the need for demonstration of minimum impairment by arguing the legislation is important and the infringement of no great moment.

As noted in the excerpt above, McLachlin J. (as she then was) held that even if there is a perceived “minor” infringement of a Charter right or freedom, the Court must carefully assess whether that impairment was necessary to achieve the provision’s objective. Given the number of fundamental individual liberties and freedoms which are being significantly curtailed by Parliament in its legislative response to September 11, 2001, it is submitted that the Court will be inclined to apply particularly rigorous scrutiny to these measures.

(b) *Unique Canadian Approach*

Another factor that may indicate a likelihood of our Supreme Court to partake in rigorous scrutiny of Parliament’s security measures is its willingness to formulate significantly different views of constitutional rights from those of the American courts.

²⁷ *Vriend v. Alberta*, [1998] 1 S.C.R. 493, at 564-65; see also the analysis of Iacobucci J. in his dissent in *R. v. Hall*, *supra*, note 26, at 494 where he forcefully sets out that the Court must uphold fundamental freedoms and liberties against mounting pressure to curtail these rights.

²⁸ *Lavallee, Rackel & Heintz v. Canada (Attorney General)* (2002), 167 C.C.C. (3d) 1, at 28-29 (S.C.C.); *Sauvé v. Canada (Chief Electoral Officer)* (2002), 168 C.C.C. (3d) 449, at 466-67 (S.C.C.).

²⁹ See for example *R. v. Hall*, *supra*, note 26.

³⁰ *Supra*, note 19, at 346-47.

It is yet to be seen how the United States Supreme Court will deal with the constitutionality of the new American security measures, such as the sweeping new powers contained in the *U.S.A. Patriot Act*³¹ of 2001. It is also likely too early to tell whether the U.S. Supreme Court will seek to limit the constitutional rights of accused persons generally in the post-September 11, 2001 era.³² However, given that the September 11, 2001 terrorist attacks took place on American soil, that security issues remain at the peak of that nation's public agenda, and the Court's current conservative majority, it is not unreasonable to believe that the U.S. Supreme Court will accord maximum deference to legislative measures that enhance the powers of law enforcement and narrow individual rights and freedoms.³³

Our Supreme Court, however, has consistently developed its own distinct constitutional analysis, and has in a number of instances accorded greater rights to accused persons than in American constitutional jurisprudence. While there now appears to be almost no constitutional limits on minimum sentences for

³¹ 2001, Pub. L. No. 107-56.

³² However, Stuntz in his article "Local Policing After the Terror," *supra*, note 15, at 2157-58 notes that the U.S. Supreme Court's decision in *United States v. Arvizu*, 122 S. Ct. 744 (2002) may be an important indicator of that Court's intention to accord particular deference to police officers in the post-September 11, 2001 era. The Court in that decision upheld the legality of the detention of a family in a minivan based on a border patrol agent's assessment of a number of suspicious circumstances. The Court emphasized in *Arvizu* that the reasonableness threshold for detention must take into account the experience and special training of police officers, which permits them to recognize suspicious circumstances that might not be apparent to an "untrained person." Stuntz states that while the terrorist attacks were not specifically mentioned in *Arvizu*, the decision's deferential tone toward law enforcement, the Court's unanimous decision, and the comments by Justice O'Connor in oral argument concerning the "dangerous age" in which we live today, could signal that the Court is prepared to provide significantly greater weight to security interests after September 11, 2001.

³³ The U.S. Supreme Court's recent decisions which declared that California's "three strikes" sentencing scheme did not violate the constitutional protection against cruel and unusual punishment may provide further evidence of a shift in the judicial balancing of rights in the American criminal justice system which is taking place in the post-September 11, 2001 era. Under the objective of protecting public safety, that scheme requires that certain repeat offenders, including those convicted of minor thefts, be incarcerated for 25 years to life. In *Ewing v. California*, No. 01-6978 (U.S.S.C. 2003), a five-to-four majority of the Court held that a *sentence of 25 years* for a repeat offender who was convicted of stealing *three golf clubs* did not violate the constitutional protection against cruel and unusual punishment. In the companion case of *Lockyer v. Andrade*, No. 01-1127 (U.S.S.C. 2003) the Court upheld the constitutionality of a *50 year sentence* provided to a repeat offender who was convicted of *stealing video tapes*. It is also noteworthy that the U.S. Supreme Court recently agreed to hear the cases of *Fellers v. United States*, No. 02-6320 and *United States v. Patane*, No. 02-1183, which will permit the Court to revisit its 1966 *Miranda* ruling concerning warnings that must be provided to a defendant on detention.

even minor offences in the United States,³⁴ our Court in *R. v. Smith* struck down a *seven year minimum sentence* requirement for *drug importation*.³⁵ While constructive murder provisions exist in federal and state jurisdictions throughout the United States, our Court definitively held that such provisions violate the Charter's fundamental principles of justice guarantee.³⁶

Of particular relevance in this regard is our Supreme Court's courageous decision in *United States of America v. Burns*.³⁷ The Court's finding in *Burns* that to send any person from Canada to face the death penalty in the United States violates section 7 of our Charter both conflicted with, and questioned, current American constitutional jurisprudence. The U.S. Supreme Court has not only upheld the constitutionality of the death penalty, but has held that it properly applies to youth offenders.³⁸ Our Court ruled that for the Canadian state to send a person to face the death penalty conflicts with our fundamental principles of justice, and further cited unfairness in American capital litigation to support its conclusion.³⁹

Moreover, the Court in *Burns* also provided a cautious approach to using cross-border security issues to justify limiting Charter rights in Canada. In response to a submission that a failure to extradite offenders to face the death penalty would make Canada a "safe haven" for American capital offenders, the Court held:

International criminal law enforcement including the need to ensure that Canada does not become a "safe haven" for dangerous fugitives is a very legitimate objective, but there is no evidence whatsoever that extradition to face life in prison without release or parole provides a lesser deterrent to those seeking a "safe haven" than the death penalty, or even that fugitives approach their choice of refuge with such an informed appreciation of tactics. If Canada suffers the prospect of being a

³⁴ *Id.*

³⁵ While our Court indicated a more flexible *Charter* scrutiny to minimum sentences in *R. v. Morrissey*, [2000] 2 S.C.R. 90, and *R. v. Latimer*, [2001] 1 S.C.R. 3, it is submitted that its s. 12 framework would still clearly result in *Charter* protection against anything even close to the types of minimum sentencing measures approved by the U.S. Supreme Court.

³⁶ *R. v. Vallancourt*, *supra*, note 24; *American Jurisprudence*, West Group, 2nd ed. (1999), Volume 40, at 514-18. In *Hopkins v. Reeves*, 524 U.S. 88 (U.S.S.C. 1998) the Court confirmed the constitutionality of felony murder provisions where the intent to kill is conclusively presumed when the state proves the intent to commit the underlying offence. This decision would also appear to confirm that felony murders in the United States can properly be considered an aggravated form of murder.

³⁷ [2001] 1 S.C.R. 283.

³⁸ *Stanford v. Kentucky*, 492 U.S. 361 (1989).

³⁹ *United States v. Burns*, *supra*, note 37, at 342-50; see also *Shulman v. United States*, [2001] 1 S.C.R. 616 where the Court severely criticized the conduct of an American prosecutor and entered a rare stay of proceedings in the extradition proceedings as a result.

haven from time to time for fugitives from the United States, it likely has more to do with geographic proximity than the Minister's policy on treaty assurances. The evidence as stated is that Ministers of Justice have on at least two occasions (since *Kindler* and *Ng*) refused to extradite without assurances, and no adverse consequences to Canada from those decisions were brought to our attention (emphasis added).⁴⁰

The ruling in *United States v. Burns* accordingly may be a particularly important indicator of our Court's willingness to provide rigorous Charter scrutiny to Canada's new security measures. The decision affirms that our Supreme Court will not hesitate to formulate a Charter analysis which is explicitly distinct from American constitutional jurisprudence, and further sets out that cross-border security issues should only be relevant to Charter analysis where there is specific evidence supporting such a justification for limiting fundamental rights and freedoms.

(c) *Balance in Post-September 11, 2001 Decisions*

Another indicator supporting the likelihood of our Supreme Court to provide meaningful Charter review of state security measures in the post-September 11, 2001 era is found in an assessment of its criminal law Charter decisions in this period.

While it is difficult to generalize, it would appear that the Court since September 11, 2001 has taken a balanced approach to the application of the Charter to criminal law. In fact, in this period the Court has affirmed or even expanded certain Charter rights of an accused, including affirming limitations on the search powers of the state in criminal or quasi-criminal investigations,⁴¹ significantly expanding the protection of an accused's rights under section 13 of the Charter,⁴² and affirming that a core value under our Charter is the protection against wrongful conviction and that an accused has a broad right to make full answer and defence.⁴³

Further, there are two post-September 11, 2001, criminal law Charter decisions of the Court which may be particularly indicative of the approach that the Court will take to the review of the new security provisions. In *Lavallee, Rackel & Heintz v. Canada (Attorney General)*,⁴⁴ the Court struck down section 488.1

⁴⁰ *Id.*, at 359-60.

⁴¹ *R. v. Law* (2002), 160 C.C.C. (3d) 449 (S.C.C.); *R. v. Golden* (2001), 159 C.C.C. (3d) 449 (S.C.C.); *R. v. Jarvis* (2002), 169 C.C.C. (3d) 1 (S.C.C.).

⁴² *R. v. Noël* (2002), 168 C.C.C. (3d) 193 (S.C.C.).

⁴³ *R. v. Shearing* (2002), 165 C.C.C. (3d) 225 (S.C.C.).

⁴⁴ *Supra*, note 28.

of the *Criminal Code*⁴⁵ that authorized the search and seizure of materials in possession of a lawyer. The Court found that the legislation, on numerous grounds, failed to minimally impair solicitor-client privilege, and accordingly constituted a breach of section 8 of the Charter which could not be saved by section 1. The Court's decision that Parliament clearly failed to protect against unreasonable search and seizure in this instance sent a strong message concerning other legislative provisions that do not minimally encroach on solicitor-client privilege and confidentiality. Justice Arbour held for the Court:

Indeed, solicitor-client privilege must remain as close to absolute as possible if it is to retain relevance. Accordingly, this Court is compelled in my view to adopt stringent norms to ensure its protection. Such protection is ensured by labeling as unreasonable any legislative provision that interferes with solicitor-client privilege more than is absolutely necessary (emphasis added).⁴⁶

This bold statement from the Court indicates an intention to aggressively scrutinize aspects of the new security provisions that encroach on the solicitor-client relationship, such as those that require counsel to report suspicious financial transactions of their clients, or to disclose client information about terrorist property.⁴⁷

In the months following the September 11, 2001 terrorist attacks, the Court in *R. v. Mentuck*⁴⁸ and *R. v. E.(O.N.)*⁴⁹ significantly limited the ability of the police to obtain publication bans concerning their operational methods and investigative techniques. As Professor Mendes sets out in his article, "Between Crime and War: Terrorism, Democracy and the Constitution,"⁵⁰ these decisions provide a strong indication that the Court intends for there to be real public and judicial oversight of the post-September 11, 2001 security measures, and that

⁴⁵ R.S.C. 1985, c. C-46.

⁴⁶ *Lavelle, Rackel & Heintz*, *supra*, note 28, at 29.

⁴⁷ *Paciocco*, *supra*, note 12, at 191-92; Canadian Bar Association, *Submissions on Bill C-36 Anti-terrorism Act* (2001), at 29-31. The Court's decision in *R. v. Lavallee*, *supra*, note 28, appears to already have had an impact on government legislation that affects the role of legal counsel. On March 24, 2003, the Canadian Department of Finance announced that it was repealing provisions of the *Proceedings of Crime (Money Laundering) and Terrorist Financing Act*, S.C. 2000, c. 17, which required lawyers to divulge confidential communications with their clients: see Department of Finance, News Release, "Government Amends Anti-Money Laundering Regulations Affecting Legal Profession," (24 March 2003), online: <<http://www.fin.gc.ca/news03/03-020e.html>>.

⁴⁸ [2001] 3 S.C.R. 442.

⁴⁹ [2001] 3 S.C.R. 478.

⁵⁰ (2002) 14 N.J.C.L. 71, at 89-90. Professor Mendes also sets out in his article that two post-September 11, 2001 immigration decisions from the Supreme Court, *Suresh v. Canada (Minister of Citizenship and Immigration)* (2002), 18 Imm. L.R. (3d) 1 (S.C.C.), and *Ahani v. Canada (Minister of Citizenship & Immigration)* (2002), 18 Imm. L.R. (3d) 175 (S.C.C.) indicated a balanced approach to weighing state security interests and fundamental rights.

any limitations on public scrutiny will have to be specifically justified on clear evidence. These decisions foreshadow that particularly aggressive scrutiny will be accorded to those provisions in the security legislation which propose to immunize invasive techniques from public or judicial review.⁵¹ As the Court held in *R. v. Mentuck*:

A fundamental belief pervades our political and legal system that the police should remain under civilian control and supervision by our democratically elected officials; our country is not a police state. The tactics used by police, along with other aspects of their operations, is a matter that is presumptively of public concern.⁵²

It is clear that in the period since September 11, 2001, there have also been decisions which have been significantly unfavourable to the rights of the accused and which have provided deference to Parliament, most notably *R. v. Hall*.⁵³ It is, however, submitted that when looking at the Court's criminal law Charter decisions as a whole in this period, there has not been any distinct trend to limit the rights of the accused. In fact, a number of the Court's decisions foreshadow serious constitutional hurdles for many of the controversial aspects of the security legislation.

(d) *Tailored Remedies*

One final factor in the Supreme Court's jurisprudence that may weigh in favour of meaningful Charter review of the security legislation involves the creative approaches the Court has taken to modifying legislative provisions to protect the rights of accused persons. Given the broad threat to human life that terrorism poses, and the inevitable acceptance that the state is justified in taking certain measures to provide greater public security in this era, it is simply not realistic to conceive of the Court striking down entire portions of the framework of the new security provisions. If the Court is boxed into an "all or nothing" option in determining the validity of the post-September 11, 2001 security provisions, the prospects for substantive Charter scrutiny would realistically be significantly reduced.

However, the Court has indicated in its recent jurisprudence an ability to make substantive changes to legislative schemes that limit their scope without having to strike down the provisions as a whole. These targeted Charter remedies have been achieved through means such as progressive interpretation of aspects of the legislation, or through striking down certain unreasonable por-

⁵¹ See an analysis of these provisions in Stuart, *supra*, note 14, at 160-64.

⁵² *Supra*, note 48, at 471.

⁵³ *Supra*, note 26.

tions of the provisions. For example in *R. v. Mills*,⁵⁴ the Court interpreted numerous aspects of section 278.1 of the *Criminal Code* to balance an accused's right to full answer and defence and a complainant's right to privacy in a much more equitable manner than was necessarily apparent on the face of the provisions.

Further, the Court has also shown a willingness to strike down certain provisions within a legislative scheme, or even set out new or expanded defences to an accused as part of a Charter remedy.⁵⁵ Even in the case of *R. v. Hall*, the majority struck down one of the grounds for denying bail in paragraph 515(10)(c) of the *Criminal Code*, and further used some language to limit the breadth of the tertiary ground.⁵⁶

While these more limited types of constitutional remedies can sometimes appear to be a "compromise" position that do not provide the broadest protection of an accused's Charter rights, in light of the serious security issues raised by the September 11, 2001 attacks, they may provide the Court with the ability to curtail clearly unreasonable aspects of the legislative provisions without having to choose between striking down or upholding the new security scheme as a whole.

II. CONCLUSION

How the Supreme Court will ultimately balance privacy and liberty rights versus security interests may still be subject to a number of contingencies, from the occurrence of future terrorist attacks on North American soil to evidence of the state using its new powers for improper purposes. It is, however, submitted that in considering the Supreme Court's historic and recent record on the application of the Charter to criminal law, there are a number of signs that the Court will not shy away from its responsibility to rigorously scrutinize the State's post-September 11, 2001 security measures. It is further submitted that there are also a number of reasons to believe that the Court will curtail those measures which clearly do not minimally impair fundamental rights and freedoms.

⁵⁴ *Supra*, note 7.

⁵⁵ See for example *R. v. Ruzic*, [2001] 1 S.C.R. 687; *R. v. Sharpe*, *supra*, note 9; *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [2000] 2 S.C.R. 1120.

⁵⁶ The majority's judgment in *R. v. Hall*, *supra*, note 26, struck down the portion of para. 515(10)(c) of the *Code* which permitted the denial of bail "on any other just cause." The majority also set out that to deny bail based on maintaining public confidence in the criminal justice system should be an exceptional occurrence, such as where the offence is particularly horrific and there is a very strong case against the accused. The majority also set out that "public confidence" must be analyzed from the perspective of a reasonable member of the community properly informed about Charter values.

If and when the Court does act to curb the excesses of the security revolution in Canada, these limitations will ultimately not be made in the name of the Court or even in the name of the Charter, but will be in the name of the democratic choice of the Canadian people. The prophetic words of Iacobucci J. in *Vriend v. Alberta*⁵⁷ will be worth repeating many times through the public and judicial debate on the role of the Court in limiting the excesses of the security revolution:

... it should be emphasized again that our *Charter's* introduction and the consequential remedial role of the courts were choices of the Canadian people through their elected representatives as part of a redefinition of our democracy. Our constitutional design was refashioned to state that henceforth the legislatures and executive must perform their roles in conformity with the newly conferred constitutional rights and freedoms. That the courts were the trustees of these rights insofar as disputes arose concerning their interpretation was a necessary part of this new design.... *Because the courts are independent from the executive and legislature, litigants and citizens generally can rely on the courts to make reasoned and principled decisions according to the dictates of the constitution even though specific decisions may not be universally acclaimed* (emphasis added).

⁵⁷ *Vriend v. Alberta*, *supra*, note 27, at 564.

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