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M5S 2C5

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**Conditional Release of Terror Suspects in Canada:  
Lessons from the United Kingdom**

by

**Jonathan Coady**

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## INTRODUCTION

### Clash of the Titans: Human Rights and National Security

Since September 11, 2001, Western countries have been confronted by a fundamental challenge: how to preserve human rights while ensuring national security. The task is a not an easy one. It is clear that terrorism must be fought. Terrorists seek to destroy democracy by any means. However, it is also clear that human rights cannot be abandoned in the struggle. A democracy without individual liberties is no democracy at all. To sacrifice human rights in the name of national security is to give terrorism the victory that it seeks. Reconciling individual liberty with collective security is therefore one of the central problems facing democracies today. It is a “clash of titans.”<sup>1</sup>

The United Kingdom has undertaken a number of measures in its fight against terrorism. Among the most important of those measures have been control orders, which impose serious restrictions on the liberty of individuals suspected of being involved in terrorism. Aimed at preventing terrorist activities, the restrictions have recently been subject to scrutiny under the *Human Rights Act 1998*.<sup>2</sup> Canada relies on a similar preventive mechanism to monitor persons believed to be threats to national security: conditional release orders. The orders, which borrow heavily from the restrictions imposed on terror suspects in the United Kingdom, have become a critical part of Canada’s security architecture. However, unlike control orders, conditional release orders have not yet been subject to constitutional review. This paper explores the recent jurisprudence in the United Kingdom and considers to what extent it may be helpful when conditional release orders are tested under the *Canadian Charter of Rights and Freedoms*.<sup>3</sup>

The object of this paper is not to resolve the clash between the titans of human rights and national security. Rather, its goal is more modest. This paper seeks to derive substantive lessons from the United Kingdom which may serve as guideposts for Canada as it begins to navigate this new and uncharted legal landscape. Drawing on those lessons, the paper aims to define the constitutional boundaries of conditional release orders and to examine the constitutional roles of the government and the court in preventing terrorism. Resolution thus remains a destination for Canada. This paper is simply the beginnings of a map.

### Preventive Control

The legal landscape after September 11, 2001 has been marked by a departure from the traditional principles of government control. The United Kingdom and Canada, like other

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<sup>1</sup> Hon. Mr. Justice Ian Binnie, “Entrenched Rights in the Age of Counter-Terrorism” (Keynote Address at the Archbold Criminal Law Conference, Faculty of Law, University of Hong Kong, Hong Kong, 13 November 2004) at 37.

<sup>2</sup> (U.K.), 1998, c. 42 [*Human Rights Act*], which incorporates into the domestic law of the United Kingdom certain rights found in the *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 U.N.T.S. 221 at 223 [*Convention*].

<sup>3</sup> Part I of the *Constitution Act, 1982* being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11 [*Charter*].

Western countries, have moved from a punitive model, which imposes restrictions on persons for wrongful acts, to a preventive model, which imposes restrictions on persons with the aim of preventing acts that have yet to occur.<sup>4</sup> In the name of national security, the orientation has shifted from one grounded in consequence to one rooted in anticipation. The new perspective is a prospective one.

Preventive control is not a new legal concept. It is a well-established part of the criminal law, expressed in the form of inchoate offences where individuals may be punished for encouraging, facilitating, or attempting certain wrongful acts. What has changed, however, is the “point of intervention.”<sup>5</sup> The statutory license to intervene has been moved forward, capturing conduct and activities previously beyond government control. This extension has resulted in unprecedented intrusions upon individual liberty, even where the threat of harm may not yet be known and its likelihood still uncertain.

This reliance on preventive control in matters involving national security has required courts in the United Kingdom to revisit existing constitutional principles and to develop new ones. Canadian courts will inevitably be faced with a similar challenge. Charged with the responsibility of protecting the rights enshrined in the *Charter*, they will be called upon to determine the legal limits of pre-emption. The assignment is obviously a difficult one; however, it need not be undertaken alone. With its shared commitment to individual liberty and its common experience in preventing terrorism, the United Kingdom can provide Canada with valuable constitutional guidance. Useful comparisons can be made. Lessons may be drawn.

## **LIBERTY AND THE SCOPE OF ITS PROTECTION**

### **United Kingdom**

Heeding to a series of calls to “bring rights home,” the *Human Rights Act* incorporates specific rights found in the *Convention* into the domestic law of the United Kingdom.<sup>6</sup> Among those rights is Article 5, which provides that “[e]veryone has the right to liberty and security of the person.”<sup>7</sup> No person may be deprived of their liberty, except under the exhaustive and carefully-defined conditions set forth in the *Convention*. One such condition is detention “with a view to deportation.”<sup>8</sup> Any deprivation of liberty falling outside the exceptional

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<sup>4</sup> Lucia Zedner, “Seeking Security by Eroding Rights: The Side-stepping of Due Process” in Benjamin J. Goold & Liora Lazarus, eds., *Security and Human Rights* (Oxford: Hart Publishing, 2007) 257 at 259-262. For a similar observation in the Canadian context, see Jonathan Shapiro, “An Ounce of Cure for a Pound of Preventive Detention: Security Certificates and the Charter” (2008) 33 *Queen’s L.J.* 519 at 520.

<sup>5</sup> Zedner, *ibid.* at 259.

<sup>6</sup> Jack Straw & Paul Boateng, *Bringing Rights Home: Labour’s Plans to Incorporate the European Convention on Human Rights into United Kingdom Law* (London: Labour Party, 1996). For a more detailed history of the discussions leading to the passage of the *Human Rights Act*, see David Feldman, *Civil Liberties and Human Rights in England and Wales*, 2nd ed. (Oxford: Oxford University Press, 2002) at 77-80.

<sup>7</sup> *Convention*, *supra* note 2, Art. 5(1).

<sup>8</sup> *Ibid.*, Art. 5(1)(f).

circumstances listed in Article 5 of the *Convention* is prohibited. The right not to be deprived of liberty is therefore an unqualified one.

Article 5 of the *Convention* has been interpreted as contemplating liberty in its classic sense; that is, “the physical liberty of the person.”<sup>9</sup> While deprivation may take the obvious form of imprisonment, the means of deprivation are not closed. A deprivation of liberty may take other forms.<sup>10</sup> The focus of the deprivation analysis is the “concrete situation” of the particular individual.<sup>11</sup> All the circumstances must be considered, including “the nature, duration, effects and manner of execution or implementation of the ... measure in question.”<sup>12</sup> Each case thus depends on its own set of facts.

In determining the scope of Article 5 of the *Convention*, it has been necessary to distinguish between deprivations of liberty and mere restrictions on movement, against which Protocol No. 4 to the *Convention* provides only qualified protection.<sup>13</sup> Subject to the interests of national security and public safety, Protocol No. 4 protects the right of everyone to leave a country and to move freely within it. The distinction between deprivation and restriction has been held to be one of degree and intensity rather than one of nature or substance.<sup>14</sup> In short, there is no bright line.

Unlike the qualified protection extended to the freedom of movement, the right not to be deprived of liberty, save for the specific exceptions listed in Article 5 of the *Convention*, is protected absolutely. No matter how legitimate the countervailing interest, any deprivation of liberty falling outside the prescribed circumstances is unlawful. Article 15 of the *Convention* does, however, permit a state to derogate from Article 5 “in time of war or other public emergency threatening the life of the nation.”<sup>15</sup> However, such derogations are allowed only to the extent strictly required. Article 15 has been interpreted as imposing a requirement of “strict necessity or proportionality.”<sup>16</sup> In other words, while the *Convention* extends a margin of appreciation to states, the scope of that margin remains subject to judicial supervision.

The *Human Rights Act* requires that legislation in the United Kingdom be interpreted in a manner that is compatible with *Convention* rights.<sup>17</sup> Where such an interpretation is not

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<sup>9</sup> *Guzzardi v. Italy* (1981), 3 E.H.R.R. 333 at para. 92 [*Guzzardi*].

<sup>10</sup> *Ibid.* at para. 95.

<sup>11</sup> *Ibid.* at para. 92.

<sup>12</sup> *Ibid.* paras. 92 and 94.

<sup>13</sup> *Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms*, 16 September 1963, 1469 U.N.T.S. 263, Art. 2 [Protocol No. 4]. While not ratified by the United Kingdom, Article 2 of Protocol No. 4 nonetheless informs the interpretation of Article 5 of the *Convention*. See e.g. *Austin and another v. Commissioner of Police of the Metropolis*, [2009] UKHL 5 at paras. 14-15.

<sup>14</sup> *Guzzardi*, *supra* note 9 at para. 93.

<sup>15</sup> *Convention*, *supra* note 2, Art. 15(1).

<sup>16</sup> *A and others v. Secretary of State for the Home Department*, [2004] UKHL 56 at para. 30 [A].

<sup>17</sup> *Human Rights Act*, *supra* note 2, s. 3.

possible, a declaration of incompatibility may be issued by the court.<sup>18</sup> Such a declaration does not, however, affect the validity of the legislation in question. As a public authority, the court is also required to act in a manner that is consistent with the *Convention*.<sup>19</sup>

## Canada

Section 7 of the *Charter* protects the right not to be deprived of “life, liberty and security of the person” except in accordance with “the principles of fundamental justice.”<sup>20</sup> Those principles, which are found in the basic tenets of the Canadian legal system, contain both procedural and substantive guarantees.<sup>21</sup> For example, the deportation of non-citizens does not, without more, offend the principles of fundamental justice.<sup>22</sup> In order to violate section 7 of the *Charter*, the deprivation of liberty must also be inconsistent with what the law considers fair and just.

Liberty, in the context of the *Charter*, has been interpreted as extending beyond “mere freedom from physical restraint.”<sup>23</sup> It includes “an irreducible sphere of personal autonomy” where individuals may make inherently private choices free from government interference.<sup>24</sup> However, this does not mean that every choice made by an individual falls within section 7 of the *Charter*.<sup>25</sup> Only choices of a personal and fundamental character, going to the very core of individual dignity and independence, are protected.

Given the fundamental nature of the right guaranteed by section 7 of the *Charter*, justifications for its violation are rare.<sup>26</sup> While section 1 of the *Charter* does permit reasonable limits to be placed on protected rights where they can be “justified in a free and democratic society,” the Supreme Court of Canada has been clear that, where the right to liberty is engaged, violations will be saved “only in cases arising out of exceptional conditions, such as natural disasters, the outbreak of war, epidemics and the like.”<sup>27</sup> Proportionality drives the analysis in section 1 of the *Charter*, insisting that the balance struck between the individual right and the public goal be a reasoned and justifiable one.

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<sup>18</sup> *Ibid.*, s. 4.

<sup>19</sup> *Ibid.*, ss. 6(1) and 6(3)(a).

<sup>20</sup> *Charter*, *supra* note 3, s. 7.

<sup>21</sup> *Reference Re s. 94(2) of the Motor Vehicle Act (British Columbia)*, [1985] 2 S.C.R. 486 [*BC Motor Vehicle Act*].

<sup>22</sup> *Medovarski v. Canada (Minister of Citizenship and Immigration)*, [2005] 2 S.C.R. 539 at para. 46 [*Medovarski*].

<sup>23</sup> *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307 at para. 49 [*Blencoe*].

<sup>24</sup> *R. v. Malmo-Levine*, [2003] 3 S.C.R. 571 at para. 85 [*Malmo-Levine*]. See also *Godbout v. Longueuil (City)*, [1997] 3 S.C.R. 844 at para. 66.

<sup>25</sup> See e.g. *Malmo-Levine*, *ibid.* at paras. 86-87, where it was held that the choice to smoke marijuana for recreational purposes did not attract *Charter* protection.

<sup>26</sup> *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3 at para. 78 [*Suresh*].

<sup>27</sup> *BC Motor Vehicle Act*, *supra* note 21 at para. 85.

The *Charter* applies to legislative, executive and, in certain circumstances, judicial action in Canada.<sup>28</sup> Legislation is presumed to have been enacted to comply with the rights enshrined in the *Charter*. Where legislation is inconsistent with the *Charter*, it is of no force or effect and a declaration of invalidity may be issued by the court. Given that the *Charter* forms part of the supreme law of Canada, it is impossible to interpret legislation as conferring a power to infringe the *Charter*.<sup>29</sup> Discretionary powers must therefore be exercised in a manner consistent with *Charter* rights.<sup>30</sup> Court orders are no exception. Where issued under a statute or made in a public proceeding, an order of the court is open to *Charter* scrutiny.<sup>31</sup> In other words, an appropriate remedy may be fashioned for any governmental action that offends the *Charter*.<sup>32</sup>

## PREVENTIVE CONTROL OF TERROR SUSPECTS

### United Kingdom

#### *Origin of Control Orders*

In response to the events of September 11, 2001, the United Kingdom enacted the *Anti-Terrorism, Crime and Security Act 2001*.<sup>33</sup> Part 4 of the *Anti-Terrorism, Crime and Security Act* empowered the Home Secretary to issue a certificate against non-citizens suspected of being involved in terrorist groups. A person so certified could be detained indefinitely under the *Immigration Act 1971*, even if deportation was otherwise prohibited.<sup>34</sup> Derogation from Article 5 of the *Convention* was necessary because it could not be said that the detention was with a view to deportation. Those subject to certificates could secure their release, however, by agreeing to leave the United Kingdom; the *Anti-Terrorism, Crime and Security Act* was said to construct a prison with only three walls.<sup>35</sup> Part 4 of the *Anti-Terrorism, Crime and Security Act* did not extend to citizens, and no similar provision was made for the detention of British terror suspects.

The House of Lords subsequently held in *A* that the derogation order intended to protect Part 4 of the *Anti-Terrorism, Crime and Security Act* from *Convention* scrutiny was invalid.<sup>36</sup>

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<sup>28</sup> *Charter*, *supra* note 3, s. 32(1).

<sup>29</sup> *Constitution Act, 1982*, s. 52, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

<sup>30</sup> Peter W. Hogg, *Constitutional Law of Canada*, 5th ed. (Toronto: Carswell, 2007) at 37–22-37–23.

<sup>31</sup> *Ibid.*

<sup>32</sup> *Charter*, *supra* note 3, s. 24(1).

<sup>33</sup> (U.K.), 2001, c. 24 [*Anti-Terrorism, Crime and Security Act*].

<sup>34</sup> *Ibid.*, s. 23. Non-citizens in the United Kingdom cannot be deported to a country where they face a real risk of torture or inhumane treatment, even if they are considered to be a threat to security. See *Chahal v. United Kingdom* (1996), 23 E.H.R.R. 413 at paras. 79-80 [*Chahal*].

<sup>35</sup> *A*, *supra* note 16 at para. 81.

<sup>36</sup> *Ibid.*

The indefinite detention of non-citizens was accordingly found to be incompatible with Article 5 of the *Convention*. The United Kingdom responded by enacting a second-generation mechanism of preventive control: control orders.

### *Prevention of Terrorism Act 2005*

The *Prevention of Terrorism Act 2005* creates a system of “derogating” and “non-derogating” control orders, which allow the Home Secretary to impose restrictions on individuals suspected of being involved in terrorism.<sup>37</sup> Unlike the earlier scheme of indefinite detention, control orders apply to citizens and foreign nationals alike. A derogating control order imposes conditions amounting to a deprivation of liberty and, for this reason, derogation under the *Convention* is necessary. To date, no derogating control order has been issued in the United Kingdom. This is contrasted with non-derogating control orders, which have been commonly used by the Home Secretary to limit the liberty of individuals “for purposes connected with preventing or restricting involvement ... in terrorism-related activity.”<sup>38</sup>

Where there are reasonable grounds for suspecting that an individual is or has been involved in terrorism, the Home Secretary may make a non-derogating control order placing conditions on the liberty of that individual.<sup>39</sup> A judge of the High Court then considers whether the suspicion of the Home Secretary is obviously flawed. If not, the control order has effect for a period of twelve months, subject to renewal, and imposes extensive restrictions on the individual, including: curfews; electronic tagging; prohibitions on the possession or use of certain items; restrictions on associating or communicating with specific persons; and limitations on movement.<sup>40</sup> While the *Prevention of Terrorism Act* contemplates a division between mere restrictions of liberty (non-derogating control orders) and deprivations of liberty (derogating control orders), the dividing line is not explicit. The House of Lords has recently sought to clarify this distinction in *Secretary of State for the Home Department v. JJ and others*, *Secretary of State for the Home Department v. MB*, and *Secretary of State for the Home Department v. E and another*.<sup>41</sup>

### *Current Use*

Since the inception of the *Prevention of Terrorism Act*, thirty-one individuals have been subjected to a control order.<sup>42</sup> At present, there are fifteen orders in force.<sup>43</sup> Given the individualized nature of control orders, a thorough review of the various restrictions imposed in each case is beyond the scope of this paper. However, it can be said that controlled persons

<sup>37</sup> (U.K.), 2005, c. 2 [*Prevention of Terrorism Act*].

<sup>38</sup> *Ibid.*, s. 1(3).

<sup>39</sup> *Ibid.*, s. 2(1).

<sup>40</sup> *Ibid.*, ss. 2(4) and 1(4).

<sup>41</sup> [2007] UKHL 45 [*JJ*]; [2007] UKHL 46 [*MB*]; and [2007] UKHL 47 [*E*].

<sup>42</sup> U.K., *Third Report of the Independent Reviewer Pursuant to Section 14(3) of the Prevention of Terrorism Act 2005* by Lord Carlile of Berriew, Q.C. (London: The Stationery Office, 2008) at 4.

<sup>43</sup> *Ibid.*

are subject to intrusive and unprecedented restrictions, including curfews up to sixteen hours, electronic monitoring tags, telephone interceptions, reporting requirements, prohibitions on visitors, geographic limitations on movement, and restrictions on the use of communication devices.<sup>44</sup>

## Canada

### *Origin of Conditional Release Orders*

Introduced in 1991, the security certificate is a mechanism by which Canada can detain and remove non-citizens who are suspected of being threats to national security. Security certificates have been issued against twenty-eight individuals since their creation.<sup>45</sup> Those named in certificates are deemed to be inadmissible to Canada and subject to deportation. Until recently, the information underlying the certificate was not released to the named individual and remained secret.

In *Charkaoui v. Canada (Minister of Citizenship and Immigration)*, the Supreme Court of Canada held that the security certificate process, specifically the non-disclosure of the information giving rise to the individual's detention and removal, was fundamentally unfair and infringed section 7 of the *Charter*.<sup>46</sup> The procedure then existing was declared to be invalid, and Canada was given one year to craft a less-intrusive process for protecting confidential information. That process took the form of special advocates, a system which closely resembled that already being used in the United Kingdom.<sup>47</sup>

### *Immigration and Refugee Protection Act*

Under the current *Immigration and Refugee Protection Act*, a non-citizen is deemed to be inadmissible to Canada on "security grounds" where there are reasonable grounds to believe that they are a member of an organization that engages, has engaged, or will engage in acts of terrorism.<sup>48</sup> The Minister of Public Safety and Emergency Preparedness and the Minister of Citizenship and Immigration may then sign a security certificate declaring that the non-citizen is not permitted to enter or remain in Canada.<sup>49</sup> An individual so named can be arrested and detained.<sup>50</sup> A designated judge of the Federal Court subsequently reviews the certificate to determine whether it is reasonable. If so, the detention is reviewed every six months.

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<sup>44</sup> *Ibid.* at 37-38.

<sup>45</sup> Canada, House of Commons, Standing Committee on Citizenship and Immigration, *Detention Centres and Security Certificates* (Ottawa: Communication Canada, 2007) at 5.

<sup>46</sup> [2007] 1 S.C.R. 350 [*Charkaoui*].

<sup>47</sup> *An Act to amend the Immigration and Refugee Protection Act (certificate and special advocate) and to make a consequential amendment to another Act*, S.C. 2008, c. 3.

<sup>48</sup> S.C. 2001, c. 27, s. 34 (as amended) [*Immigration and Refugee Protection Act*]. A non-citizen may also be deemed to be inadmissible to Canada on other grounds, including on the basis that they constitute a "danger to the security of Canada."

<sup>49</sup> *Ibid.*, s. 77(1).

<sup>50</sup> *Ibid.*, s. 81.

The *Immigration and Refugee Protection Act* does contemplate the release of non-citizens detained under security certificates. A designated judge of the Federal Court, where satisfied that release would not constitute a danger to national security, can order that an individual be released from detention on “appropriate” conditions.<sup>51</sup> While the *Immigration and Refugee Protection Act* is silent as to the content of such conditions, the restrictions imposed by the Federal Court have been drawn heavily from those attaching to control orders in the United Kingdom.<sup>52</sup> They include daily curfews, limitations on visitors, restrictions on communication, and geographic boundaries on movement. Each conditional release order is then subject to regular judicial review.

### *Current Use*

At present, five non-citizens are named in security certificates under the *Immigration and Refugee Protection Act*.<sup>53</sup> After significant periods of time in detention, each individual is now subject to a conditional release order.<sup>54</sup> Given the constraints on this paper, a full account of

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<sup>51</sup> *Ibid.*, s. 82(5)(b).

<sup>52</sup> See e.g. *Almrei (Re)*, 2009 FC 3 at para. 262 [*Almrei*], where the restrictions attaching to control orders in the United Kingdom were described as being “analogous” to those imposed by conditional release orders in Canada.

<sup>53</sup> Mohammed Zeki Mahjoub of Egypt is alleged to be a high-ranking member of a radical wing of Al Jihad, an Egyptian terrorist organization linked with Osama bin Laden and al-Qaeda. For a summary of the intelligence underlying the certificate, see Canada, Canadian Security Intelligence Service, *Summary of the Security Intelligence Report Concerning Mohammed Zeki Mahjoub* (Ottawa: Canadian Intelligence Security Service, 2008). Mahmoud Jaballah of Egypt is alleged to be a senior member of Al Jihad. For a summary of the intelligence underlying the certificate, see Canada, Canadian Security Intelligence Service, *Summary of the Security Intelligence Report Concerning Mahmoud Jaballah* (Ottawa: Canadian Intelligence Security Service, 2008). Hassan Almrei of Syria is alleged to be a member of an international network of individuals which support the Islamic extremist ideology espoused by Osama bin Laden. For a summary of the intelligence underlying the certificate, see Canada, Canadian Security Intelligence Service, *Summary of the Security Intelligence Report Concerning Hassan Almrei* (Ottawa: Canadian Intelligence Security Service, 2008). Mohamed Harkat of Algeria is alleged to be a member of the Osama bin Laden network, which includes al-Qaeda. For a summary of the intelligence underlying the certificate, see Canada, Canadian Security Intelligence Service, *Summary of the Security Intelligence Report Concerning Mohamed Harkat* (Ottawa: Canadian Intelligence Security Service, 2008). Adil Charkaoui of Morocco is alleged to be a member of the Osama bin Laden network. For a summary of the intelligence underlying the certificate, see Canada, Canadian Security Intelligence Service, *Summary of the Security Intelligence Report Concerning Adil Charkaoui* (Ottawa: Canadian Intelligence Security Service, 2008).

<sup>54</sup> Mohammed Zeki Mahjoub was detained from June 26, 2000 to February 15, 2007. However, Mr. Mahjoub was returned to detention on March 18, 2009 following the withdrawal of the supervising sureties named in his conditional release order. See *Canada (Minister of Citizenship and Immigration) v. Mahjoub*, 2009 FC 439 [*Mahjoub*]. For a copy of the decision imposing the original conditional release order, see *Mahjoub v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 171. Mahmoud Jaballah was detained from August 15, 2001 to April 12, 2007. For a copy of the decision imposing the original conditional release order, see *Jaballah v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2007 FC 379. Hassan Almrei was detained from October 19, 2001 to January 2, 2009. For a copy of the decision imposing the original conditional release order, see *Almrei*, *supra* note 52. Mohamed Harkat was detained from December 10, 2002 to May 23, 2006. For a copy of the decision imposing the original conditional release order, see *Harkat v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 628 [*Harkat*]. Adil Charkaoui was detained from May 21, 2003 to February 17, 2005. For a copy of the decision imposing the original conditional release order, see *Charkaoui (Re)*, 2005 FC 248.

the various conditions imposed in each case is not possible. However, it may generally be said that the restrictions are extensive, invasive, and extend to all aspects of the individuals' lives, including residence, association, movement, and communication. The implements of control reflect those used in the United Kingdom: curfews; electronic tagging and surveillance; telephone monitoring; and mail interception.<sup>55</sup> Some individuals are also required to be accompanied by a supervising surety at all times.<sup>56</sup> In addition to imposing these extraordinary obligations, conditional release orders empower government officials to enter and search the individuals' residences at any time. Failure to observe any term of the order may result in arrest and detention.<sup>57</sup>

## JUDICIAL SCRUTINY OF PREVENTIVE CONTROL

### United Kingdom

Any discussion about the judicial scrutiny of preventive control in the United Kingdom must begin with the decision of the House of Lords in *A*.<sup>58</sup> Eight individuals suspected of being involved in terrorism challenged their indefinite detention under the *Anti-Terrorism, Crime and Security Act*. The detainees submitted that the derogation order protecting Part 4 of the *Anti-Terrorism, Crime and Security Act* was invalid, arguing that there was no public emergency threatening the United Kingdom, that their detention went well beyond what was strictly required, and that the legislation discriminated against them on the basis of nationality.

The House of Lords held that the derogation order intended to insulate the *Anti-Terrorism, Crime and Security Act* from review was unlawful and declared that the indefinite detention of foreign terror suspects was incompatible with Article 5 of the *Convention*. While accepting that great weight had to be accorded to the political judgment that there was a public emergency within the meaning of Article 15 of the *Convention*, the House of Lords noted that the *Human Rights Act* conferred upon courts a specific mandate to determine the boundaries of protected rights, including the question of whether a particular measure went beyond what was strictly required in the circumstances. On this point, the House of Lords questioned how Part 4 of the *Anti-Terrorism, Crime and Security Act*, which potentially allowed terror suspects to leave the United Kingdom and continue their alleged activities in another country with impunity, contributed to the stated objective of protecting the public from terrorism. The House of Lords also observed that the *Anti-Terrorism, Crime and Security Act* was directed at a risk that did not emanate from non-citizens alone; citizens involved in terrorism also presented a risk to national security. Since other less intrusive measures were sufficient to monitor the activities of citizens, the House of Lords reasoned that indefinite detention was not necessary in the case of foreign nationals. Although it did acknowledge that distinctions between citizens and non-citizens were permissible in the context of immigration, the House of Lords found that the use of an immigration measure to address a general security problem was

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<sup>55</sup> See e.g. *Harkat, ibid.* at para. 95.

<sup>56</sup> *Ibid.*

<sup>57</sup> *Immigration and Refugee Protection Act, supra* note 48, s. 82.2(1).

<sup>58</sup> *A, supra* note 16.

both ineffective and discriminatory. The United Kingdom responded by enacting the *Prevention of Terrorism Act*.

Control orders were not, however, immune from *Convention* scrutiny. The restrictions placed on terror suspects under the *Prevention of Terrorism Act* were immediately subject to challenge. In *JJ*, *E* and *MB*, the House of Lords was called upon to consider whether the conditions imposed by the Home Secretary in each case amounted to an unlawful deprivation of liberty under Article 5 of the *Convention*.

In *JJ*, non-derogating control orders had been issued against six individuals.<sup>59</sup> Each were confined to a specified residence for eighteen hours a day, required to wear electronic monitoring tags, limited to a defined geographical area outside of the curfew period, obligated to report regularly to a monitoring company, allowed only pre-approved visitors, prohibited from meeting unauthorized persons outside of the residence, not allowed to possess or use any communication devices, permitted to use only a monitored telephone line, and liable to police search at any time. The issue was whether the restrictions deprived the individuals of their liberty in breach of Article 5 of the *Convention*. A majority of the House of Lords concluded that the conditions imposed did in fact result in an unlawful deprivation of liberty.

Relying on the principles laid down by the European Court of Human Rights in *Guzzardi*, Lord Bingham, writing as part of the majority in *JJ*, observed that a deprivation of liberty under the *Convention* could take “numerous forms other than classic detention in prison or strict arrest.”<sup>60</sup> Account therefore had to be taken of a whole range of factors, such as the nature, duration, effects, and implementation of the control order in question. While acknowledging that there might be no deprivation of liberty if only one restriction was considered, Lord Bingham stated that the combination of conditions, viewed together, could have such a result. The task of the court, according to Lord Bingham, was to assess the impact of all the restrictions on the controlled individuals. For this reason, Lord Bingham felt it was inappropriate to draw a line between a period of confinement that would amount to a deprivation of liberty and one which would not.<sup>61</sup> Baroness Hale agreed with this principled approach.

Lord Bingham found that the curfew of eighteen hours, when coupled with the exclusion of visitors, meant that the controlled persons were essentially in solitary confinement for a significant period every day. Lord Bingham also observed that the requirement to obtain prior approval of meetings outside the residence had the effect of isolating the controlled persons even during the non-curfew hours. In his view, the lives of the controlees were “wholly regulated by the Home Office.”<sup>62</sup> While the trial judge likened the effect of the restrictions to detention in an “open prison,” Lord Bingham went further, noting that the controlled persons did not even enjoy some of the privileges accorded to prisoners:

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<sup>59</sup> *JJ*, *supra* note 41.

<sup>60</sup> *Ibid.* at para. 15.

<sup>61</sup> *Ibid.* at para. 16.

<sup>62</sup> *Ibid.* at para. 24.

The judge's analogy with detention in an open prison was apt, save that the controlled persons did not enjoy the association with others and the access to entertainment facilities which a prisoner in an open prison would expect to enjoy.<sup>63</sup>

Lord Brown, while reaching the same conclusion as Lord Bingham and Baroness Hale in *JJ*, found that the decisions of the European Court of Human Rights provided little assistance beyond setting out some general parameters as to the scope of Article 5 of the *Convention*. The line between an unlawful deprivation of liberty and a permissible restriction on movement was said to be “a matter of pure opinion.”<sup>64</sup> Seeking to introduce a degree of certainty into the analysis, Lord Brown suggested that “18 hour curfews [were] simply too long to be consistent with the retention of physical liberty” while “12 or 14-hour curfews ... [were] consistent with physical liberty.”<sup>65</sup> However, rather than forcing the Home Secretary to guess as to the precise point at which control orders would be vulnerable to challenge, Lord Brown went on to state his view that “[p]ermanent home confinement beyond sixteen hours a day ... involve[d] the deprivation of physical liberty.”<sup>66</sup>

Lord Hoffman and Lord Carswell, in dissenting judgments, disagreed with the approach taken by the majority in *JJ*, insisting that it was essential not to give “an over-expansive interpretation” to the concept of deprivation so as to preserve the distinction between the unqualified right to liberty and other qualified rights, such as the freedom of movement.<sup>67</sup> According to Lord Hoffman, Article 5 of the *Convention* dealt with literal physical restraint and the concept of deprivation contemplated “[t]he paradigm case of ... being in prison, in the custody of a gaoler.”<sup>68</sup> It was impossible, in Lord Hoffman's view, to conclude that controlled persons were in prison. Such a characterization of the restrictions was said to be an “extravagant metaphor.”<sup>69</sup>

In *E*, the House of Lords considered whether the terms of a non-derogating control order, which included a twelve-hour curfew, resulted in a deprivation of liberty under the *Convention*.<sup>70</sup> The order required the controlled person to wear an electronic tag, reside at a specified address, report to a monitoring company, and obtain permission from the Home Office for any visitors. The House of Lords unanimously held that the restrictions did not amount to a deprivation of liberty. Lord Hoffman, Lord Carswell, and Lord Brown relied on their judgments in *JJ*, while Lord Bingham and Baroness Hale reasoned that the “core element

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<sup>63</sup> *Ibid.*

<sup>64</sup> *Ibid.* at para. 95.

<sup>65</sup> *Ibid.* at para. 105.

<sup>66</sup> *Ibid.*

<sup>67</sup> *Ibid.* at para. 44, per Lord Hoffman.

<sup>68</sup> *Ibid.* at para. 36.

<sup>69</sup> *Ibid.* at para. 45.

<sup>70</sup> *E*, *supra* note 41.

of confinement” – the curfew – was not sufficiently severe to engage Article 5 of the *Convention*.<sup>71</sup>

In *MB*, the House of Lords was faced with two control orders imposing very different restrictions.<sup>72</sup> AF was confined to his residence for a fourteen-hour period each day, prohibited from accessing any communications equipment, forced to wear an electronic tag, required to report to a monitoring company, and confined to a specific geographical area during non-curfew hours. MB, on the other hand, was subject to no curfew and required only to report daily at a local police station. While MB was required to live at a specified address, he was not under any visitation restrictions. In both cases, the House of Lords found that the conditions did not amount to a deprivation of liberty.

## Canada

Unlike the House of Lords, the Supreme Court of Canada has not yet been called upon to determine the point at which preventive restrictions amount to a deprivation of liberty. In *Charkaoui*, the Supreme Court of Canada heard a challenge to the security certificate scheme; however, the main issue under review was a narrow one: whether the procedure for determining the reasonableness of a security certificate – a process that did not permit confidential information to be disclosed to the named individual – infringed the right to a fair hearing under section 7 of the *Charter*.<sup>73</sup> The appeal in *Charkaoui* was taken by three non-citizens who had been living in Canada when they were arrested and detained under security certificates. The individuals argued that the process for reviewing security certificates was unfair, that their detention was arbitrary and constituted cruel and unusual treatment, and that the certificate scheme was discriminatory because it distinguished between citizens and non-citizens.

The Supreme Court of Canada held that the security certificate scheme failed to provide the fair hearing that section 7 of the *Charter* required before an individual could be lawfully deprived of their liberty. While acknowledging the best efforts of the judges of the Federal Court to “breathe judicial life” into the process, the Supreme Court of Canada concluded that “the secrecy required by the scheme denie[d] the named person the opportunity to know the case put against him or her, and hence to challenge the government’s case.”<sup>74</sup> Other less-intrusive means of protecting the confidential information were found to be available. The Supreme Court of Canada pointed specifically to the use of special advocates in the United Kingdom. While conceding that the special advocate system “may not be perfect,” the Supreme Court of Canada concluded that it nonetheless illustrated that Canada could do more to protect the procedural rights of individuals named in security certificates.<sup>75</sup>

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<sup>71</sup> *Ibid.* at para. 11, per Lord Bingham.

<sup>72</sup> *MB*, *supra* note 41.

<sup>73</sup> *Charkaoui*, *supra* note 46.

<sup>74</sup> *Ibid.* at para. 65.

<sup>75</sup> *Ibid.* at para. 86.

As to the claim that detention under a security certificate was arbitrary and amounted to cruel and unusual treatment, the Supreme Court of Canada unanimously disagreed. The danger posed by a named individual was held to provide a rational basis for their detention. While the guarantee against arbitrariness was found to require judicial review in a more timely manner, detention itself did not amount to cruel or unusual treatment. According to the Supreme Court of Canada, the security certificate scheme did not violate the *Charter* because named persons were provided regular opportunities to challenge “the continued need for and justice of [their] detention.”<sup>76</sup> The Supreme Court of Canada was careful to point out, however, that its finding did not “preclude the possibility of a judge concluding at a certain point that a particular detention ... [was] inconsistent with the principles of fundamental justice, and therefore infringe[d] the *Charter*.”<sup>77</sup>

The Supreme Court of Canada in *Charkaoui* went on to hold that the security certificate system was not discriminatory. It noted that the *Charter* itself contemplated differential treatment between citizens and non-citizens. A deportation scheme applicable only to non-citizens did not, for that reason alone, amount to discrimination. The finding by the House of Lords in *A* that the *Anti-Terrorism, Crime and Security Act* discriminated against non-citizens was distinguished on the ground that “the legislation went *beyond* the concerns of immigration legislation” and expressly provided for indefinite detention.<sup>78</sup> According to the Supreme Court of Canada, the record before it failed to establish that the detentions in question had “become unhinged from the state’s purpose of deportation.”<sup>79</sup> The deprivations of liberty continued to be related to the stated object of the security certificate scheme: removal.

The constitutionality of conditional release orders issued under the *Immigration and Refugee Protection Act* was not challenged in *Charkaoui*. The Supreme Court of Canada carefully and repeatedly noted that only the fairness of “detention *pending* deportation” was under review.<sup>80</sup> Nevertheless, it did not ignore the fact that two of the individuals challenging the certificate procedure had, by the time of the hearing, been made subject to conditional release orders. Given the “onerous” nature of the conditions imposed in such orders and their serious impact upon individual liberty, the Supreme Court of Canada held that they too must be accompanied by a process of robust and ongoing judicial review.<sup>81</sup> The substantive requirements of section 7 of the *Charter*, however, were not defined.

## **CONDITIONAL RELEASE ORDERS AND THE CHARTER: WHAT CAN BE LEARNED FROM THE UNITED KINGDOM?**

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<sup>76</sup> *Ibid.* at para. 123.

<sup>77</sup> *Ibid.*

<sup>78</sup> *Ibid.* at para. 130 [emphasis added].

<sup>79</sup> *Ibid.* at para. 131.

<sup>80</sup> *Ibid.* at para. 123 [emphasis added].

<sup>81</sup> *Ibid.* at para. 107.

The anti-terrorism measures used in the United Kingdom exert considerable influence abroad, especially in the Commonwealth.<sup>82</sup> Canada is no exception. When conditional release orders began to be developed in Canada, the conditions attached to control orders in the United Kingdom served as a template. The restrictions imposed on terror suspects in both countries are therefore remarkably similar. However, relative to Canada, the United Kingdom has developed a substantial body of jurisprudence in the area of preventive control. The House of Lords has had an opportunity to delineate the constitutional boundaries of pre-emption. It is time for Canada to take stock.

### **Immigration Legislation is an Improper and Ineffective Mechanism for Controlling Terror Suspects**

In the immediate wake of September 11, 2001, the United Kingdom and Canada, like many Western countries, turned to immigration legislation to counter the threat of terrorism and protect national security.<sup>83</sup> While the United Kingdom amended its immigration law to permit the indefinite detention of individuals suspected of being involved in terrorism, Canada relied on existing legislation to detain terror suspects under security certificates. Immigration law became the prime instrument for preventing terrorism.<sup>84</sup> However, unlike the United Kingdom, Canada has continued its “use of immigration law as anti-terrorism law.”<sup>85</sup> The experience of the United Kingdom provides an important lesson for Canada: immigration legislation is an improper and ineffective vehicle for pursuing preventive control of terror suspects.

The *Immigration and Refugee Protection Act* has been Canada’s exclusive means of controlling individuals suspected of involvement in terrorism.<sup>86</sup> While the *Anti-terrorism Act* criminalizes a broad range of conduct before the actual commission of a terrorist act, including the provision of assistance to terrorist groups, Canada has relied instead on security certificates as its primary tool for preventing terrorism.<sup>87</sup> The *Anti-terrorism Act* “has largely sat on the shelf.”<sup>88</sup> This reliance upon the *Immigration and Refugee Protection Act* is not surprising given that liability under the *Anti-terrorism Act* does not extend to mere membership in a terrorist organization. By contrast, a non-citizen may be deprived of their liberty under a security certificate for “being a member of an organization that there are reasonable grounds to believe engages, has engaged or will engage in acts of terrorism.”<sup>89</sup> With its broader rules of

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<sup>82</sup> Kent Roach, “Sources and Trends in Post-9/11 Anti-terrorism Laws” in Goold & Lazarus, *supra* note 4, 227 at 250.

<sup>83</sup> Kent Roach, “The Criminal Law and Terrorism” in Victor V. Ramraj, Michael Hor & Kent Roach, eds., *Global Anti-Terrorism Law and Policy* (Cambridge: Cambridge University Press, 2005) 129 at 142.

<sup>84</sup> *Ibid.*

<sup>85</sup> Roach, *supra* note 82 at 229.

<sup>86</sup> Kent Roach, “Canada’s Response to Terrorism” in Ramraj, Hor & Roach, *supra* note 83, 511 at 521.

<sup>87</sup> S.C. 2001, c. 41, s. 4 [*Anti-terrorism Act*].

<sup>88</sup> Roach, *supra* note 86 at 512.

<sup>89</sup> *Immigration and Refugee Protection Act*, *supra* note 48, ss. 34(1)(f) and 77(1).

engagement and diminished standard of proof, the *Immigration and Refugee Protection Act* has been the “easiest route” for Canada to control terror suspects.<sup>90</sup>

No parallel mechanism of preventive control applies to Canadian citizens. Although the *Anti-terrorism Act* did initially allow for the arrest of citizens where there were reasonable grounds to believe that a terrorist activity would be carried out, the power was never exercised and has now lapsed.<sup>91</sup> The *Anti-terrorism Act* had also conferred a power to impose restrictions on citizens in order to prevent an act of terrorism. It too was never exercised and has since expired.<sup>92</sup> All attempts to introduce a security certificate scheme for citizens, which would allow Canada to revoke the citizenship of those suspected of being involved in terrorism, have been unsuccessful.<sup>93</sup> Put simply, a Canadian citizen who is believed to be a threat to national security cannot be deprived of their liberty by way of detention or restriction.

The House of Lords in *A* identified an obvious deficiency in relying upon immigration law to give effect to a security purpose: its scope. Immigration law is, by its very nature, underinclusive. It applies only to non-citizens. When used as anti-terrorism law, immigration legislation has the effect of excluding from control citizens who are similarly suspected of involvement in terrorism. As Lord Bingham noted matter-of-factly in *A*, “the choice of an immigration measure to address a security problem [has] the inevitable result of failing adequately to address that problem.”<sup>94</sup> The bombing attacks in London on July 7, 2005 provided unfortunate confirmation that the threat posed by citizens is not qualitatively different from that of foreign nationals.<sup>95</sup> Terrorists may be home-grown.

As in the United Kingdom, events in Canada have confirmed that the threat of terrorism is not posed by non-citizens alone. On October 29, 2008, Mohammed Momin Khawaja, a Canadian citizen, was found guilty of five charges under the *Anti-terrorism Act*, including knowingly participating in activities of a terrorist group and facilitating terrorist activity.<sup>96</sup> Mr. Khawaja had developed a remote-controlled detonator as part of an international plot to bomb a number of targets in the United Kingdom. On September 25, 2008, the first of eleven

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<sup>90</sup> Roach, *supra* note 83 at 143.

<sup>91</sup> *Anti-terrorism Act*, *supra* note 87, s. 4. The preventive arrest and detention provisions were subject to a sunset clause, which provided that the powers would expire on the fifteenth sitting day after December 31, 2006 unless extended by a resolution passed by both Houses of Parliament. On February 27, 2007, the House of Commons elected not to extend the provisions by a vote of 159 to 124. Accordingly, the provisions lapsed on March 1, 2007. On the failure of Canada to use these powers, see Canada, Public Safety Canada, *Annual Report Concerning Recognizance with Conditions: Arrests Without Warrant (2007)*, online: <[http://www.publicsafety.gc.ca/abt/dpr/at/aww\\_07-eng.aspx](http://www.publicsafety.gc.ca/abt/dpr/at/aww_07-eng.aspx)>.

<sup>92</sup> *Anti-terrorism Act*, *ibid.*

<sup>93</sup> See Bill C-18, *An Act respecting Canadian citizenship*, 2nd Sess., 37th Parl., 2002; and Bill C-16, *An Act respecting Canadian citizenship*, 2nd Sess., 36th Parl., 1999.

<sup>94</sup> *A*, *supra* note 16 at para. 43.

<sup>95</sup> U.K., Intelligence and Security Committee, *Report into the London Terrorist Attacks on 7 July 2005* (London: The Stationery Office, 2006) at 11. Three of the four individuals who carried out the attacks were citizens of the United Kingdom.

<sup>96</sup> *R. v. Khawaja* (2008), 238 C.C.C. (3d) 114 (Ont. Sup. Ct. J.).

individuals accused of a separate, domestic plot to bomb several Canadian targets was also found guilty under the *Anti-terrorism Act*.<sup>97</sup> These cases reinforce what Canada ought to have already learned from the October Crisis: Canadian citizens plan and participate in terrorist activities.<sup>98</sup> Recent experience makes it even more clear that there is absolutely no reason to think that the problem of terrorism arises only from foreigners.<sup>99</sup>

The decision in *A* highlighted a second flaw in adapting immigration legislation to address a security problem – the exportation of terrorism. The ultimate object of immigration law is deportation. However, given the demonstrated reach of terrorism, reliance upon immigration remedies may have the effect of simply displacing the problem. In *A*, Lord Bingham openly questioned how “a terrorist, if a serious threat to the UK, cease[d] to be so on the French side of the English Channel or elsewhere.”<sup>100</sup> The House of Lords was not alone in its criticism. In its earlier review of the *Anti-Terrorism, Crime and Security Act*, the Newton Committee had also observed that, while deportation might free up police and intelligence resources in the United Kingdom, “it would not necessarily reduce the threat to British interests abroad, or make the world a safer place more generally.”<sup>101</sup>

The Supreme Court of Canada has already acknowledged that terrorism is a global enterprise. In *Suresh*, a decision punctuated by the events of September 11, 2001, the Supreme Court of Canada candidly admitted that, while it may have once made sense to claim that terrorism in one country did not implicate the security of another, such an approach was no longer valid.<sup>102</sup> Canada has nonetheless continued to subscribe to the dated conception of terrorism dismissed by the Supreme Court of Canada in *Suresh*, relying on a mechanism conceived long before al-Qaeda showed that terrorism recognizes no borders. It remains committed to a policy of removing “non-Canadians ... who pose a serious risk to Canada and Canadians.”<sup>103</sup> Given the international nature of terrorism, however, it is far from clear that the deportation of terror suspects will actually increase security.<sup>104</sup> Canada, to date, has provided no answer to the fundamental question raised by Lord Bingham in *A*: why does a terrorist, if considered to be a threat to Canada, cease to be so when outside of Canada? Until that question is answered, terrorism will continue to be a potential Canadian export.

<sup>97</sup> *R. v. Y.(N.)*, 2008 CarswellOnt 5964 (Sup. Ct. J.) (WeC).

<sup>98</sup> The October Crisis refers to the abduction of British Trade Commissioner James Cross and the murder of Québec Labour Minister Pierre Laporte in October of 1970 by members of the Front de libération du Québec (FLQ), a terrorist organization based in the Canadian province of Québec. The crisis resulted in the only peacetime invocation of the *War Measures Act*, R.S.C. 1970, c. W-2, which conferred sweeping powers of preventive arrest and detention. Between 1963 and 1970, the FLQ was responsible for more than two hundred violent acts in Canada, including bombings, robberies, kidnappings, and killings.

<sup>99</sup> *A*, *supra* note 16 at para. 228, per Baroness Hale.

<sup>100</sup> *Ibid.* at para. 44.

<sup>101</sup> U.K., Privy Councillor Review Committee, *Anti-terrorism, Crime and Security Act 2001 Review: Report* (London: The Stationery Office, 2003) at 54.

<sup>102</sup> *Suresh*, *supra* note 26 at para. 87.

<sup>103</sup> Canada, Public Safety Canada, *Security Certificates*, online: <<http://www.publicsafety.gc.ca/prg/ns/seccert-eng.aspx>>.

<sup>104</sup> See Roach, *supra* note 86 at 528.

## Liberty Interests of Non-citizens are no less Deserving of Protection than Those of Citizens

In the United Kingdom, the House of Lords has made it clear that there is no system of “two-track justice,” where citizens and non-citizens are subject to different human rights standards.<sup>105</sup> The right not to be deprived of liberty is enjoyed by everyone. Canada, on the other hand, has continued to insist that the protections owed to citizens under section 7 of the *Charter* are different from those due to non-citizens. The decision in *A* and the subsequent review of control orders by the House of Lords in *JJ* and its related cases provide a critical lesson for Canada: the liberty interests of non-citizens are no less deserving of protection than those of citizens.

In *A*, Lord Bingham observed that the *Convention* required contracting states to secure the enumerated rights “to everyone within their jurisdiction.”<sup>106</sup> The nationality of those detained under the *Anti-Terrorism, Crime and Security Act* therefore did not preclude them from claiming the protection of Article 5 of the *Convention*. While Lord Bingham accepted that differential treatment on the basis of nationality might be justified in “an immigration context,” such distinctions were found to be unacceptable in “a security context.”<sup>107</sup> The Home Secretary was not entitled to treat the liberty right of non-citizens as being different than that enjoyed by British citizens.<sup>108</sup> Foreigners, while present in the United Kingdom, were held to have the “same human rights as everyone else.”<sup>109</sup> In *JJ*, *E* and *MB*, the House of Lords continued to insist upon a uniform application of Article 5 of the *Convention*.

Canada has generally advanced two justifications for its view that individuals named in security certificates are not entitled to the protections normally extended by section 7 of the *Charter*. First, Canada has argued that the detention and control of non-citizens under the *Immigration and Refugee Protection Act* is strictly an immigration matter and therefore section 7 of the *Charter* is not engaged. This is said to reflect the decision in *Medovarski*, where the Supreme Court of Canada observed that “[t]he most fundamental principle of immigration law is that non-citizens do not have an unqualified right to enter or remain in Canada.”<sup>110</sup> Second, Canada has emphasized that security certificate proceedings are civil – not criminal – in nature. The principles applied in penal matters are therefore said to be inapplicable. On this point, Canada has relied on the decision in *Blencoe*, where the Supreme Court of Canada “cautioned against the direct application of criminal justice standards in the administrative law

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<sup>105</sup> When the United Kingdom introduced the *Anti-Terrorism, Crime and Security Act*, the European Commissioner for Human Rights expressed concern that it was ushering in a system of “two-track justice.” See Council of Europe, Office of the Commissioner for Human Rights, *Opinion 1/2002* (28 August 2002) at para. 40, online: <<https://wcd.coe.int/ViewDoc.jsp?id=980187>>.

<sup>106</sup> *A*, *supra* note 16 at para. 48.

<sup>107</sup> *Ibid.* at para. 54.

<sup>108</sup> *Ibid.* at para. 105.

<sup>109</sup> *Ibid.* at para. 229, per Baroness Hale.

<sup>110</sup> *Medovarski*, *supra* note 22 at para. 46.

area.”<sup>111</sup> As Canadian courts begin to consider whether the existing conditional release orders offend the principles of fundamental justice, they will no doubt be faced with the question of whether the ordinary strictures of section 7 of the *Charter* ought to be applied. A principled review of the justifications relied upon by Canada reveals that no departure is warranted.

Different legal contexts legitimately require different constitutional protections.<sup>112</sup> Immigration is one such context. However, the mere placement of a measure within the immigration category must not dictate what substantive protections are applicable. Judicial scrutiny is necessary. The question must be asked whether the choice of context is defensible. The danger in blindly accepting “context-shopping” is that measures properly belonging in another context may be subject to less exacting standards of constitutional review.<sup>113</sup> For this reason, courts must first investigate the motives behind a stated categorization and determine whether it is in fact justifiable. Only after this scrutiny can the protections accepted in a particular context be applied safely – not before.

In the area of immigration, Canadian courts have accepted that section 7 of the *Charter* is conditioned by the fact that non-citizens do not have an unqualified right to enter or remain in Canada. In other words, the principles of fundamental justice must be tempered by section 6(1) of the *Charter*.<sup>114</sup> The decision in *Medovarski*, however, is nothing more than a restatement of this “fundamental principle.”<sup>115</sup> The mere fact that conditional release orders form part of the *Immigration and Refugee Protection Act* does not mean that they are forever immune from *Charter* scrutiny. In *Charkaoui*, the Supreme Court of Canada acknowledged that, in A, section 23 of the *Anti-Terrorism, Crime and Security Act* “lost its character as an immigration provision” when the possibility of deportation disappeared.<sup>116</sup> At a certain point, the claim that Canada is pursuing an immigration purpose is no longer justifiable. Section 7 of the *Charter* ought to be applied with its usual vigour.

Canada also relies on the seemingly principled distinction between civil and criminal proceedings, insisting that the protections found in a penal matter are not applicable in an obviously administrative one. While the distinction appears on its face to be unproblematic, the deceptive clarity between the two types of proceedings risks allowing the government to side-step substantive requirements that ought to otherwise apply.<sup>117</sup> To apply the protections found in administrative matters simply because a measure is so labelled is to risk allowing the government to “change lanes” into less demanding constitutional avenues.<sup>118</sup> That in itself

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<sup>111</sup> *Blencoe*, *supra* note 23 at para. 88.

<sup>112</sup> Zedner has similarly noted that different legal contexts properly attract different procedural safeguards. See *Zedner*, *supra* note 4 at 265.

<sup>113</sup> *Ibid.*

<sup>114</sup> Section 6(1) of the *Charter* provides that “[e]very citizen of Canada has the right to enter, remain in and leave Canada.”

<sup>115</sup> *Medovarski*, *supra* note 22 at para. 46.

<sup>116</sup> *Charkaoui*, *supra* note 46 at para. 126.

<sup>117</sup> Zedner has made a similar observation in the context of due process. See *Zedner*, *supra* note 4 at 264-267.

<sup>118</sup> *Ibid.* at 267.

should be seen as a threat to Canadian security. In order to determine what standards ought to be applied in a particular proceeding, the court must look at the interests at stake rather than the legal sticker attached. Courts must peel back the labels affixed by government.

The question of whether the constitutional guarantees found in section 7 of the *Charter* ought to be applied does not turn on any distinction between administrative and criminal matters. Rather, it depends on the consequences for an individual's protected rights: life, liberty, and security.<sup>119</sup> As Stewart has observed, the principles of fundamental justice apply not because of the type of proceeding involved but because of the nature of the interests engaged:

Many of the principles of fundamental justice were developed in criminal cases, but their application is not restricted to criminal cases: they apply whenever one of the three protected interests is engaged. Put another way, the principles of fundamental justice apply in criminal proceedings, not because they are criminal proceedings, but because the liberty interest is always engaged in criminal proceedings.<sup>120</sup>

Conditional release orders engage every aspect of an individual's liberty. The principles of fundamental justice ought to be applied without condition.

Any claim that non-citizens are not entitled to the full protection of section 7 of the *Charter* when they are deprived of their liberty for a purpose other than determining admissibility is also incompatible with Canada's international commitments, which have been accepted as playing an important role in informing the content the *Charter* and ascertaining the constitutional obligations of government.<sup>121</sup> The *International Covenant on Civil and Political Rights*, to which Canada has subscribed, requires that each state ensure that "all individuals within its territory" are extended the rights recognized under the *Covenant* "without distinction of any kind."<sup>122</sup> The right to liberty is so recognized. The United Nations Human Rights Committee has emphasized that the rights set forth in the *Covenant* apply to "everyone" irrespective of their nationality.<sup>123</sup> While the Committee has acknowledged that the *Covenant* does not recognize any right on the part of non-citizens to enter a state and that the admission of non-citizens is a matter for each state to determine, it has nonetheless made it clear that,

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<sup>119</sup> *Charkaoui*, *supra* note 46 at para. 18. See also *Charkaoui v. Canada (Minister of Citizenship and Immigration)*, [2008] 2 S.C.R. 326 at para. 53.

<sup>120</sup> Hamish Stewart, "Is Indefinite Detention of Terrorist Suspects Really Constitutional?" (2005) 54 U.N.B.L.J. 235 at 242.

<sup>121</sup> See e.g. *Suresh*, *supra* note 26 at paras. 46 and 60.

<sup>122</sup> 19 December 1966, 999 U.N.T.S. 171, Can. T.S. 1976 No. 47 (entered into force 23 March 1976), Art. 2(1) [*Covenant*].

<sup>123</sup> United Nations, Office of the High Commissioner for Human Rights, Human Rights Committee, *General Comment No. 15: The Position of Aliens under the Covenant*, 27th Sess., UN Doc. CCPR/C/21/Add. 5 (9 April 1986) at para. 1.

once a decision as to admissibility is made, non-citizens are entitled to all the rights set out in the *Covenant*.<sup>124</sup> That includes, in the words of the Committee, “the full right to liberty.”<sup>125</sup>

Like Article 5 of the *Convention*, section 7 of the *Charter* extends the right of liberty to everyone. While the *Charter* expressly limits “the right to enter, remain in and leave Canada” only to citizens, no such limitation is placed on the liberty guarantee.<sup>126</sup> Any temptation to consider liberty as divisible must be avoided. Ignatieff has highlighted the danger in accepting that the liberty interests of foreigners are somehow different from those of citizens:

The moral temptation to resist is to consider liberty divisible; that is, to defend the liberty of citizens by extinguishing the liberties of all others, especially foreign strangers within our gates. If we succumb to this temptation, we shall give terrorism precisely the victory over democracy it was seeking.<sup>127</sup>

To retain its fundamental character, liberty must remain a right to which citizens and non-citizens are equally entitled. There cannot be liberty for some and liberty-light for others.

### **Conditions of Release may still Amount to a Deprivation of Liberty**

The United Kingdom relies on its system of control orders to restrict and monitor the activities of terror suspects. In Canada, no express legislative provision exists for such orders. However, exercising their power under the *Immigration and Refugee Protection Act* to release terror suspects on “appropriate” conditions, the designated judges of the Federal Court have crafted a similar preventive mechanism in form of conditional release orders. The recent scrutiny of control orders by the House of Lords in *JJ*, *E*, and *MB* therefore provides an important lesson for Canadian courts: the release of terror suspects on conditions, while seemingly less drastic than detention, remains a severe intrusion upon liberty and deserving of constitutional scrutiny. The mere fact that an individual is no longer detained in an institution does not preclude a finding that they are being deprived of their liberty.

Control orders were introduced in the United Kingdom in the immediate wake of the decision in *A* and the finding by the House of Lords that indefinite detention of terror suspects was incompatible with the *Convention*. The timing was such that the restrictions imposed by control orders may be seen as an alternative to indefinite detention.<sup>128</sup> However, it is necessary to guard against viewing conditional release as an alternative to detention. Doing so has the undesirable effect of making what is otherwise an extraordinary mechanism appear better simply because it is less drastic.<sup>129</sup> While the restrictions imposed by conditional release

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<sup>124</sup> *Ibid.* at paras. 5-6.

<sup>125</sup> *Ibid.* at para. 7.

<sup>126</sup> *Charter*, *supra* note 3, s. 6(1).

<sup>127</sup> Michael Ignatieff, “Paying for Security with Liberty” *Financial Times* (13 September 2001).

<sup>128</sup> See e.g. *Almrei*, *supra* note 52 at para. 156, where Mr. Justice Mosley described control orders “as an alternate to indefinite detention.” However, an unconstitutional mechanism cannot be said to be an alternative mechanism.

<sup>129</sup> Roach, *supra* note 82 at 240.

orders in Canada appear, on their face, to be less intrusive than detention, the experience of the United Kingdom demonstrates that conditions of release can nonetheless amount to a deprivation of liberty.

The extraordinary range of conditions that can be placed on terror suspects in the United Kingdom has very real consequences for individual liberty. In *JJ*, the House of Lords described the curfew period as a form of daily solitary confinement and found that the restrictions imposed by the Home Secretary regulated nearly every aspect of the lives of controlled persons. These findings echoed the observations of Lord Carlile in his earlier review of the *Prevention of Terrorism Act*, where he noted, with considerable restraint, that the conditions in control orders “inhibit[ed] normal life considerably” and “[fell] not very short of house arrest.”<sup>130</sup> It is important to recognize, however, that controlled persons are subject to not just substantive obligations. Control orders also impose considerable psychological burdens and have significant collateral effects.<sup>131</sup> In the simplest terms, the effect of a control order can be “devastating for individuals and their families.”<sup>132</sup>

The extensive restrictions imposed by control orders result in considerable psychological stress. In addition to being labelled terror suspects, controlled persons are continually faced with the prospect of imprisonment. Attempting to abide by every condition has been said to result in much anxiety, which is only exacerbated by the imprecise nature of some conditions.<sup>133</sup> The impact of control orders on the lives of controlled persons has been described as “disturbing” by the Joint Committee on Human Rights.<sup>134</sup> Submissions to the Committee have included numerous examples of individuals suffering from isolation, humiliation, and illness.<sup>135</sup> One controlled person in the United Kingdom has even asked to be returned to custody so as to free himself from the control order experience.<sup>136</sup>

Control orders, which empower government officials to intercept mail, record telephone calls and search residences at any time, also have significant collateral effects.<sup>137</sup> Family members of controlled persons find themselves stigmatized, isolated from the community, and without any sense of privacy in their own homes.<sup>138</sup> The atmosphere of fear and apprehension

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<sup>130</sup> U.K., *First Report of the Independent Reviewer Pursuant to Section 14(3) of the Prevention of Terrorism Act 2005* by Lord Carlile of Berriew, Q.C. (London: The Stationery Office, 2006) at 13.

<sup>131</sup> Lucia Zedner, “Preventive Justice or Pre-Punishment? The Case of Control Orders” (2007) 60 C.L.P. 174 at 179-183.

<sup>132</sup> Arthur Chaskalson, “The Widening Gyre: Counter-terrorism, Human Rights and the Rule of Law” [2008] C.L.J. 69 at 86.

<sup>133</sup> Zedner, *supra* note 4 at 181.

<sup>134</sup> U.K., Joint Committee on Human Rights, *Twelfth Report of Session 2005-2006* (London: The Stationery Office, 2006) at 10.

<sup>135</sup> *Ibid.* at 37-96. See also K.D. Ewing & Joo-Cheong Tham, “The Continuing Futility of the Human Rights Act” [2008] P.L. 668 at 674-678.

<sup>136</sup> Owen Bowcott, “Tagged Terror Suspect Sent Back to Jail” *The Guardian* (29 April 2005).

<sup>137</sup> Zedner, *supra* note 4 at 182.

<sup>138</sup> U.K., *supra* note 134 at 72-73.

that exists within the domestic prisons created by control orders has resulted in a number of controlees and their family members being referred to psychiatrists.<sup>139</sup> It is therefore clear that the damage caused by preventive control may extend well beyond the intended target. The intrusions authorized by control orders have obvious consequences on the quality of life enjoyed by the family members of controlled persons.

Evidence as to the effect of restrictive conditions on the psychological health of terror suspects and their families is not exclusive to the United Kingdom. A similar body of evidence is beginning to develop in Canada. In 2008, Mohammed Zeki Mahjoub, who had then been subject to a conditional release order for approximately one year, went so far as to ask to be returned to detention, saying that he had reached his “breaking point” and could no longer handle the constant surveillance.<sup>140</sup> According to Mr. Mahjoub, the effect of the order was to put his whole family in detention.<sup>141</sup> This echoed an earlier finding by the United Nations Working Group on Arbitrary Detention, who concluded, after a visit to Canada in 2005, that the release of Adil Charkaoui on strict conditions “disrupt[ed] the life of his entire family.”<sup>142</sup>

The experiences of those subject to control orders in the United Kingdom demonstrate the real and sometimes devastating consequences of preventive control. That experience ought not to be ignored by Canadian courts. Rarely is the court provided with such an opportunity to see into the future: strict conditions of release have serious physical and psychological side-effects. The decision of the House of Lords in *JJ* serves as an important reminder that preventive restrictions, while falling short of detention, may still deprive an individual of their liberty. Any mechanism imposing similar restrictions in Canada therefore ought to attract exacting scrutiny under section 7 of the *Charter*. Canadian courts must ensure that preventive control remains an exercise in necessity – not convenience. A conditional release order may in fact be much worse than it sounds.

### **Effect of all the Conditions must be Considered and any Temptation to Draw Lines Resisted**

The decision of the House of Lords in *JJ* was a divided one. The majority, while agreeing that the control orders in question resulted in unlawful deprivations of liberty, disagreed as to whether it was appropriate to identify the precise point at which the right to liberty was infringed. Lord Bingham and Baroness Hale, for their part, insisted that the “whole situation” had to be considered, finding that it was necessary to consider the effect of *all* the restrictions

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<sup>139</sup> Zedner, *supra* note 131 at 182.

<sup>140</sup> Colin Freeze, “Ex-detainee Asks for Jail Rather than Surveillance” *The Globe and Mail* (24 November 2008). On March 18, 2009, Mr. Mahjoub was returned to detention after the sureties named in his conditional release order indicated that they would no longer perform their supervisory functions. See *Mahjoub*, *supra* note 54.

<sup>141</sup> Freeze, *ibid.* See also Colin Freeze, “Reluctant Judge Orders Security Certificate Arrestee Back to Prison” *The Globe and Mail* (19 March 2009).

<sup>142</sup> United Nations, Economic and Social Council, *Report of the Working Group on Arbitrary Detention – Visit to Canada*, UN Doc. E/CN.4/2006/7/Add.2 (5 December 2005) at para. 86.

on the liberty of the controlled person.<sup>143</sup> While acknowledging that the curfew period was an important aspect of that assessment, both concluded that, given the individualized nature of control orders and the various situations that might arise in the future, it was inappropriate to suggest what length of confinement would trigger Article 5 of the *Convention*. No line was drawn. Lord Brown, in contrast, saw no reason to leave the Home Secretary guessing, finding that a curfew of sixteen hours was an “acceptable limit.”<sup>144</sup> Confinement beyond that period, according to Lord Brown, would constitute a deprivation of liberty and be vulnerable to challenge under the *Convention*.

The separate reasons of the majority in *JJ* highlight the tension between flexibility and certainty that is bound to confront Canadian courts when they consider whether conditional release orders engage the right to liberty under section 7 of the *Charter*. On the one hand, there is the holistic – but arguably less predictable – approach adopted by Lord Bingham and Baroness Hale. On the other hand, there is the narrow – but arguably more certain – approach taken by Lord Brown. The division of the House of Lords in *JJ* and its consequences for those subject to control orders in the United Kingdom provides an important lesson for Canadian courts: in deciding whether conditions of release constitute a deprivation of liberty, the nature and effect of all the restrictions must be considered and the temptation to draw lines resisted.

The approach taken by Lord Brown in *JJ* is attractive on its face. It appears to be clear, predictable, and easy to apply. No one is left guessing. However, when the approach is considered in light of the proper role of the court in resolving constitutional disputes and the tendency of the government to overestimate security concerns, it becomes clear that any temptation to identify the specific point at which the right to liberty is infringed must be resisted. The holistic approach of Lord Bingham and Baroness Hale is the appropriate one.

In resolving constitutional disputes, the role of the court is to test the lines drawn by government – not to draw new ones. The government decides what measures will address its needs and interests, and the court decides whether those measures are compatible with the fundamental rights that society has resolved to protect.<sup>145</sup> The task of the court is not to initiate anti-terrorism measures, but rather to assess their constitutionality. As Chief Justice McLachlin of the Supreme Court of Canada has noted, the role of the court in fighting terrorism is to review “the balance” that government has struck between its objects and the guaranteed rights of individuals.<sup>146</sup> In Canada, the court is specifically charged with the responsibility of identifying the areas in which a particular measure falls short of the

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<sup>143</sup> *JJ*, *supra* note 41 at paras. 16 and 63.

<sup>144</sup> *Ibid.* at para. 105.

<sup>145</sup> Rt. Hon. Baroness Hale of Richmond, “Human Rights in the Age of Terrorism: The Democratic Dialogue in Action” (2008) 39 *Geo. J. Int’l L.* 383 at 405.

<sup>146</sup> Rt. Hon. Chief Justice Beverley McLachlin, “National Security and Civil Liberties – Canada’s Response to Terrorism” (Symons Lecture on the State of Confederation, delivered at the Confederation Centre of the Arts, Prince Edward Island, Canada, 21 October 2008) at 7-8. While commonly used in Canadian constitutional jurisprudence, the balancing metaphor can be problematic in the context of national security. Zedner has cautioned against any notion of balancing interests in security matters, advocating instead for a principled approach. See Lucia Zedner, “Securing Liberty in the Face of Terror: Reflections from Criminal Justice” (2005) 32(4) *J.L.S.* 507.

*Charter*.<sup>147</sup> The court is not, however, responsible for suggesting remedies to those deficiencies. That is the job of government.

While certainty is a legitimate aspiration on the part of courts, the well-known tendency of governments to overestimate security concerns cannot be ignored.<sup>148</sup> Drawing a line has the inevitable result of encouraging the government to adopt the most restrictive permissible course. The effect of the line drawn by Lord Brown in *JJ* was to encourage the Home Secretary to strengthen existing control orders by increasing the curfew period of those being confined for less than sixteen hours.<sup>149</sup> Notwithstanding the view of the Joint Committee on Human Rights that the reasons of Lord Brown offered only a “very slender legal basis” for such a position, the ceiling which he proposed was viewed by the government as a license to extend confinement.<sup>150</sup> In four cases, the Home Secretary increased the curfew period from twelve hours to sixteen hours.<sup>151</sup> The experience of the United Kingdom provides a clear example of the perils of line drawing. Any pursuit of greater certainty must not come at the expense of greater liberty.

It may be argued that the decisions in *JJ*, *E* and *MB*, far from providing support for the adoption of a holistic approach, actually illustrate the inconsistency that results from its application. Admittedly, the law in relation to control orders is in an unsatisfactory state. A curfew of eighteen hours is a deprivation of liberty, a curfew of twelve or fourteen hours is not, and a curfew of sixteen hours might be. It all appears to be quite arbitrary.<sup>152</sup> However, the findings of the House of Lords must be considered in light of the unqualified nature of the right to liberty in the United Kingdom. The protection in Article 5 of the *Convention* is absolute: an individual cannot be deprived of their liberty. There is no mechanism for testing whether a particular deprivation is aimed at a legitimate public purpose. The result has been “unsatisfactorily impressionistic judgments” as to what length of curfew ought to be free from *Convention* scrutiny.<sup>153</sup> By contrast, a deprivation of liberty alone is not sufficient to violate section 7 of the *Charter*. The deprivation must also be inconsistent with the principles of fundamental justice. An individual can be deprived of their liberty in Canada for the purpose

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<sup>147</sup> *Charter*, *supra* note 3, s. 24(1).

<sup>148</sup> This tendency has been acknowledged on a number of occasions. See Hale, *supra* note 145 at 404; David Feldman, “Human Rights, Terrorism and Risk: The Roles of Politicians and Judges” [2006] P.L. 364 at 379; and McLachlin, *supra* note 146 at 20.

<sup>149</sup> Clare Dyer, “Lords Back Terror Law Orders on Suspects, but Give Them New Rights” *The Guardian* (1 November 2007).

<sup>150</sup> U.K., Joint Committee on Human Rights, *Tenth Report of Session 2007-08* (London: The Stationery Office, 2008) at 14.

<sup>151</sup> *Ibid.* In the four cases noted, the Home Secretary had previously reduced the curfew period from eighteen hours to fourteen hours and, finally, to twelve hours following the earlier judgments of the lower courts. In other words, the Home Secretary imposed the ceiling considered permissible by the court in each instance.

<sup>152</sup> See David Feldman, “Deprivation of Liberty in Anti-Terrorism Law” [2008] C.L.J. 4 at 7-8. Following the decisions by the House of Lords in *JJ*, *E* and *MB*, Feldman posed an obvious question: “[w]hy is a person subject to a 12-hour curfew not said to be deprived of liberty for 12 hours a day?” The reason, he noted, was the absence of any mechanism in the *Convention* for justifying a deprivation of liberty for legitimate preventive purposes.

<sup>153</sup> *Ibid.* at 8.

of protecting the public, provided the requisite constitutional hurdles are cleared. The legitimacy of every deprivation of liberty – no matter how long or short – is therefore open to scrutiny by Canadian courts. There is no reason to insulate any period of confinement from *Charter* review.

An assessment of all the restrictions imposed by a conditional release order not only accords with the recognized role of Canadian courts, but ensures that the implements of control continue to be tailored on an individual basis. Curfews will not be one-size-fits-all. A holistic approach, while obviously flexible enough to take account of the myriad of restrictions that might be imposed in a particular case, need not be unduly impressionistic. Elements of certainty may form part of the analysis. That a curfew is a *prima facie* deprivation of liberty is one such element. An individual who is required by the government to remain in a particular place is deprived of their liberty. As Baroness Hale noted in *JJ*, it is beyond doubt that controlled persons are “deprived of their liberty during the curfew hours.”<sup>154</sup> Where a curfew forms part of a conditional release order, section 7 of the *Charter* ought to require that the deprivation of liberty be in accordance with the principles of fundamental justice. Similarly, where an order carries the possibility of detention for breach of its terms, the substantive protections contained in section 7 of the *Charter* ought to be satisfied.<sup>155</sup> These elements of certainty increase the predictability of the liberty assessment without losing sight of the constitutional limits of judicial authority and the political tendencies of government. No longer is the question of deprivation a matter of pure opinion.

## TOWARD RESOLVING THE CLASH OF THE TITANS

The burden of ensuring security in Canada is not shouldered by one institution alone. The government is responsible for enacting and enforcing measures to prevent terrorism, and the court is charged with the task of protecting fundamental rights. It is the presence of these different but equally legitimate institutions that gives Canada its strength in the fight against terror. Any tension between the government and the court in matters of security is not an unwelcome consequence of democracy, but rather a sign that it is functioning properly.<sup>156</sup> That tension serves as an important check against arbitrary intrusions on individual rights. Left unchecked, the pursuit of security would have the ironic effect of increasing protection against one threat – terrorism – while diminishing security against a second – government.<sup>157</sup> The genius of democracy thus lies in its division of labour between the government and the court. Each has a critical role in the fight against terrorism.

### Role of the Government

The powers conferred by the *Immigration and Refugee Protection Act* are broad, but they are not unlimited. They remain subject to the purpose for which they are granted. That

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<sup>154</sup> *JJ*, *supra* note 41 at para. 61.

<sup>155</sup> Any measure that carries the possible sanction of detention is ordinarily required to comply with the principles of fundamental justice. See *Malmo-Levine*, *supra* note 24 at para. 84.

<sup>156</sup> Feldman, *supra* note 148 at 383.

<sup>157</sup> See Zedner, *supra* note 146 at 532.

purpose is to assess the admissibility of non-citizens to Canada. The power to detain an individual is a necessary component of the *Immigration and Refugee Protection Act*; it allows an admissibility decision to be given effect. However, the power vested in the Minister of Citizenship and Immigration is not a license to deprive non-citizens of their liberty indefinitely. It is exercisable only with a view to deportation; that is, removal must be pending. This limitation ensures that the deprivation remains related to the object of the legislation and consistent with the principles of fundamental justice. Any deprivation lacking a real connection to the true purpose of the *Immigration and Refugee Protection Act* would be arbitrary and contrary to section 7 of the *Charter*.<sup>158</sup>

This is not to say that the *Immigration and Refugee Protection Act* is without a role in contributing to the security of Canada. It is one of the stated objects of the legislation.<sup>159</sup> However, as the statute itself recognizes, that contribution is inextricably linked to admissibility; to “denying access to Canadian territory to persons who are ... security risks.”<sup>160</sup> The exclusion and removal of non-citizens on the basis that they constitute a threat to security, while arguably ineffective in the context of international terrorism, has nonetheless been accepted as permissible under section 7 of the *Charter*.<sup>161</sup> Detention for the purpose effecting deportation is similarly allowed.<sup>162</sup> However, it is important to note that the resulting deprivation is definite: no longer than “reasonably necessary for deportation purposes.”<sup>163</sup> Denying entry to, and effecting removal of, non-citizens who present a security risk is a legitimate exercise of Canada’s gate-keeping power.

The Supreme Court of Canada was careful to point out in *Charkaoui* that the issue before it was the fairness of detention *pending* deportation under the security certificate scheme. The record did not establish that the detentions in question were no longer related to the goal of deportation; they had not yet become unhinged from their stated purpose. The circumstances in *Charkaoui* were held to be distinguishable from those confronting the House of Lords in *A* because, unlike the *Anti-Terrorism, Crime and Security Act*, the *Immigration and Refugee Protection Act* did not expressly provide for indefinite deprivations of liberty. It did not go *beyond* the concerns of immigration. However, in practice, that is what has occurred.

At a certain point, the fiction that Canada is pursuing an immigration purpose must end. One of those currently named in a security certificate was detained for more than eight years before being placed under a conditional release order; another has been subject to restrictive conditions amounting to house arrest for nearly three years. Each individual faces a risk of

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<sup>158</sup> *Chaoulli v. Quebec (Attorney General)*, [2005] 1 S.C.R. 791 at paras. 129-134 and 232-233.

<sup>159</sup> *Immigration and Refugee Protection Act*, *supra* note 48, s. 3(1)(h).

<sup>160</sup> *Ibid.*, s. 3(1)(i).

<sup>161</sup> *Suresh*, *supra* note 26.

<sup>162</sup> *Charkaoui*, *supra* note 46.

<sup>163</sup> *Ibid.* at para. 124. Similarly, in the United Kingdom, non-citizens can be deprived of their liberty “only for as long as deportation proceedings are in progress.” Such proceedings must also be prosecuted with due diligence. See *Chahal*, *supra* note 34 at para. 113.

torture if returned to their country of nationality.<sup>164</sup> It can no longer be said that deportation is pending. The prospect of removal has disappeared; the context has changed. What began as detention for the purpose of deportation has become retention for the purpose of security. Any further deprivation of liberty relates to protecting national security – not assessing admissibility. If Canada remains of the view that those currently subject to conditional release orders present a risk to security, a new mechanism of control is needed. Its gate-keeping power is suspended.<sup>165</sup>

The response of the United Kingdom was to enact security legislation in the form of the *Prevention of Terrorism Act*. Seeking to address the shortcomings identified by the House of Lords in *A*, the *Prevention of Terrorism Act* introduced a system of control orders applicable to any individual suspected of being involved in terrorism, regardless of citizenship. While questions remain as to whether such orders are actually necessary, its nationality-neutral approach to security does provide an inherent political safeguard. Resistance and scrutiny naturally result when the risk of rights being curtailed is shared by everyone. No longer is it a question of “the majority’s security and *other* peoples’ rights.”<sup>166</sup>

Selectivity is a common characteristic of legislation aimed at increasing security.<sup>167</sup> It makes good sense to target those individuals who are the most threatening. However, the danger of selectivity is that, by imposing restrictions on only a section of the population, it is less likely to give rise to the political resistance that is usually generated by measures which affect the rights of everyone.<sup>168</sup> When those benefiting from the restrictions are greater in number than those bearing the burden of them, effective opposition is unlikely. As Sunstein has noted, if there is no cost for individuals to indulge in fear because the consequences of that fear are borne by others, the question of whether those burdens are justified is not likely to be asked:

People are likely to ask, with some seriousness, whether their fear is in fact justified *if* the steps that follow from it impose consequences on them. But if indulging in fear is costless, because other people face the relevant burdens, then the mere fact of ‘risk’, and the mere presence of fear, will seem to provide a justification.<sup>169</sup>

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<sup>164</sup> Amnesty International Canada, *Canada: Security Certificates – Time for Reform* (14 February 2006), online: <[http://www.amnesty.ca/take\\_action/actions/canada\\_certificates.php](http://www.amnesty.ca/take_action/actions/canada_certificates.php)>.

<sup>165</sup> The gate-keeping power of the United Kingdom is similarly limited. Article 5(1)(f) of the *Convention* cannot be relied upon to justify depriving a non-citizen of their liberty when there is no longer any prospect of removal. This is so even where the non-citizen is considered to be a threat to national security. See *A*, *supra* note 16 at para. 9.

<sup>166</sup> Ronald Dworkin, “Terror and the Attack on Civil Liberties” (2003) 50(17) *The New York Review of Books* 37.

<sup>167</sup> Zedner, *supra* note 4 at 272.

<sup>168</sup> *Ibid.*

<sup>169</sup> Cass Sunstein, *Laws of Fear: Beyond the Precautionary Principle* (Cambridge: Cambridge University Press, 2005) at 204-205.

By contrast, when security legislation is applied to everyone, fear is no longer free. The legitimacy of any restriction on liberty is more likely to be questioned.

### Requirements of the Charter

When the designated judges of the Federal Court accepted the invitation under the *Immigration and Refugee Protection Act* to release individuals detained under security certificates on appropriate conditions, the resulting orders were not intended to be indefinite. Rather, the restrictions were aimed at neutralizing any risk to national security *pending* removal. Conditional release orders were not meant to be a system of preventive control whereby Canada could deprive non-citizens of their liberty after the prospect of deportation had disappeared. That, however, has been their effect. Canadian courts must now face the difficult issue that they have, to date, been able to avoid: what does the *Charter* permit the government to do with a suspected terrorist who cannot be deported but has committed no crime in Canada?

The principles of fundamental justice reflect the shared assumptions upon which the Canadian legal system is based. They are found in its basic tenets. Derived from the legal traditions which have long guided the relationship between individual and government, the principles represent the essential elements of justice. That an individual cannot be deprived of their liberty without lawful justification is one such element. This fundamental principle is an expression of the most basic liberty that the law accords every person in a free and democratic society. It may be traced to Magna Carta and the ancient writ of habeas corpus. In Canada, the principle is firmly entrenched in the substance and procedure of the *Charter*.<sup>170</sup>

Outside the context of immigration, an individual may be preventively deprived of their liberty only in exceptional circumstances. Under the *Criminal Code*, an individual who is found to be a dangerous offender can be detained for an indeterminate period of time.<sup>171</sup> Similarly, an individual who has been accused of a criminal offence can be deprived of their liberty pending trial.<sup>172</sup> In both cases, the deprivation is aimed at protecting the public and justified, at least in part, on the basis that the individual is likely to commit a wrongful act in the future. The principles of fundamental justice require in each case that certain substantive hurdles be cleared before the deprivation of liberty can be said to be consistent with section 7 of the *Charter*. Those safeguards provide a useful starting point for Canadian courts as they seek to determine what the *Charter* requires of the government before an individual can be deprived of their liberty on the ground that they pose a risk to national security.

While section 6(1) of the *Charter* specifically permits differential treatment between citizens and non-citizens in immigration matters, that allowance does not extend to matters of security. When an individual is preventively deprived of their liberty for a purpose other than deportation, section 7 of the *Charter* ought to be interpreted as guaranteeing, at a minimum, the substantive safeguards that ordinarily apply when individuals are detained on the basis that

<sup>170</sup> See *Charter*, *supra* note 3, ss. 7, 9, 10(c), and 11(e).

<sup>171</sup> R.S.C. 1985, c. C-46, ss. 753(4)(a) and 753(4.1) [*Criminal Code*].

<sup>172</sup> *Ibid.*, ss. 515(1) and 515(10)(b).

they present a risk to the public. In both instances, the object of the deprivation is to protect Canadians.

In *R. v. Morales*, the Supreme Court of Canada was faced with the question of whether “the protection or safety of the public” provided a lawful justification for preventively depriving an individual of their liberty in the context of bail.<sup>173</sup> After examining the prescribed elements of public safety, the Supreme Court of Canada concluded that depriving an individual of their liberty on the ground that they presented a risk to the public did not offend the *Charter* because it was permitted only in a narrow set of circumstances. The Supreme Court of Canada emphasized that detention was justified when it was “necessary” for public safety and not merely when convenient or advantageous.<sup>174</sup> The Supreme Court of Canada also made it clear that detention was allowed only where there was a substantial likelihood that a criminal offence would occur if the individual was released and, even then, only where that likelihood endangered the public.<sup>175</sup> While the Supreme Court of Canada acknowledged that exact predictions of future behaviour were impossible to make, it noted that the deprivation of liberty was not indefinite – only pending trial.<sup>176</sup> An individual so detained was entitled to a decision on the merits within a reasonable time. According to the Supreme Court of Canada, these substantive conditions ensured that any deprivation of liberty was not random and remained consistent with the *Charter*.

The decision in *Morales* reflected the earlier findings of the Supreme Court of Canada in *R. v. Lyons*, where it considered whether the detention of dangerous offenders for an indeterminate period infringed the *Charter*.<sup>177</sup> In concluding that preventive detention was not inconsistent with the *Charter*, the Supreme Court of Canada stressed that the conditions for triggering its use were narrowly defined so as to ensure that it applied only when “necessary.”<sup>178</sup> The Supreme Court of Canada was also careful to note that the period of detention, while indeterminate, was not indefinite. The deprivation of liberty was permissible “only for as long as the individual case require[d].”<sup>179</sup>

The decisions of the Supreme Court of Canada in *Morales* and *Lyons*, while determined principally under sections 9, 11 and 12 of the *Charter*, are nonetheless illustrative of the substantive protections required by section 7 of the *Charter*. As the Supreme Court of Canada made clear in *BC Motor Vehicle Act*, the specific guarantees found in sections 8 through 14 of the *Charter* are not separate and distinct from those contained in section 7 of the *Charter*.<sup>180</sup> Rather, they serve as examples of instances where the right to liberty may be deprived in a

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<sup>173</sup> *R. v. Morales*, [1992] 3 S.C.R. 711 [*Morales*].

<sup>174</sup> *Ibid.* at 737.

<sup>175</sup> *Ibid.*

<sup>176</sup> *Ibid.* at 740.

<sup>177</sup> *R. v. Lyons*, [1987] 2 S.C.R. 309 [*Lyons*].

<sup>178</sup> *Ibid.* at 339.

<sup>179</sup> *Ibid.* at 341.

<sup>180</sup> *BC Motor Vehicle Act*, *supra* note 21 at paras. 28-30.

manner that is not in accordance with the principles of fundamental justice. Thus, the decisions in *Morales* and *Lyons* are an expression of what the principles of fundamental justice require before an individual can be deprived of their liberty in the name of public protection. Any mechanism that deprives an individual of their liberty for the purpose of national security – a clearly public and protective purpose – ought to be subject to the same constitutional standard.

An individual who is deprived of their liberty on the ground that they present a risk to Canadian security is not a dangerous offender or a criminal accused. They have been charged with no offence nor convicted of any wrongdoing. While these obvious differences exist, the interest engaged – liberty – and the basis for its deprivation – prevention – remain the same in each case. The substantive protections ordinarily required by section 7 of the *Charter* can therefore be distilled from the decisions in *Morales* and *Lyons*. Any mechanism of preventive control which deprives an individual of their liberty must be necessary; that is, it must be permitted only in narrow and exceptional circumstances. Those circumstances exist when: (i) a specific allegation of future wrongdoing is levied; (ii) the risk to the public is demonstrated on a balance of probabilities; and (iii) the deprivation of liberty is for a definite period. These substantive protections ensure that any deprivation is not without lawful justification and consistent with the principles of fundamental justice.

It is clear that an individual can be preventively deprived of their liberty in Canada on the ground that it is necessary in order to protect the public. However, to demonstrate that necessity, the government is ordinarily required to point to an identifiable offence that is likely to occur if the individual is not detained. By contrast, under the *Immigration and Refugee Protection Act*, a non-citizen may be deprived of their liberty without any specific allegation of future wrongdoing. There is no requirement to identify any wrongful act that is likely to occur if the non-citizen is not so deprived. A non-citizen can be deprived of their liberty simply on the basis they are believed to be a member of an organization which has engaged in terrorism, notwithstanding that such membership is not a criminal offence in Canada.<sup>181</sup> Any element of specificity is absent under the *Immigration and Refugee Protection Act*. While such sweeping grounds for liability are acceptable in the context of immigration, they ought not to form the bases for deprivations of liberty in the context of security. Terrorist activities, while serious in nature, are nonetheless criminal offences.<sup>182</sup> There is no principled reason for departing from the specificity requirement.

Preventive deprivations of liberty are also generally justifiable only where the risk to the public is probable. However, under the *Immigration and Refugee Protection Act*, a non-citizen may be deprived of their liberty where there are “reasonable grounds to believe” that they are a danger to Canadian security. That standard of proof requires “something more than mere suspicion, but less than the standard applicable in civil matters of proof on the balance of probabilities.”<sup>183</sup> In other words, reasonable grounds exist when there is at least some

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<sup>181</sup> Similarly, no specific offence must be alleged in order for a non-citizen to constitute a “danger to the security of Canada” and, thus, be named in a security certificate. See *Suresh*, *supra* note 26 at paras. 83-90.

<sup>182</sup> *Criminal Code*, *supra* note 171, ss. 83.01(1), 83.02-83.04, and 83.18-83.23.

<sup>183</sup> *Mugesera v. Canada (Minister of Citizenship and Immigration)*, [2005] 2 S.C.R. 100 at para. 114.

objective evidentiary basis for the belief in question. It is therefore clear that the standard of proof required in order to preventively deprive a non-citizen of their liberty under the *Immigration and Refugee Protection Act* falls below that required outside the admissibility context. While concerns about confidentiality have been accepted as justifying changes to the manner in which evidence is presented in matters involving national security, they ought not to affect the level of evidence required. The burden on the government remains the same. It must justify depriving an individual of their liberty in the interest of public safety.

While the circumstances facing an accused pending trial are different than those confronting a dangerous offender following conviction, both individuals are certain of one thing: the deprivation of their liberty will not be indefinite. An accused is entitled to a trial within a reasonable time, and a dangerous offender can be detained for only as long as their particular case requires. Indefinite detention on the basis of future wrongdoing is not permitted.<sup>184</sup> A non-citizen named in a security certificate, while also deprived of their liberty in the name of prevention, is not so certain. The *Immigration and Refugee Protection Act* sets no express limit on the length of time a non-citizen can be deprived of their liberty. The deprivation is indeterminate. While the Supreme Court of Canada has now confirmed that the deprivation is not indefinite, carefully insisting in *Charkaoui* that detention is permissible only pending deportation, a similar limitation is needed outside the context of immigration. However, as the experience of those currently named in security certificates makes clear, any limitation, in order to be effective, must be explicit. The period of time that an individual can be deprived of their liberty in the name of collective security must be fixed at a certain point, after which they must be charged and prosecuted or released without conditions.<sup>185</sup>

Given the unique challenges presented by terrorism, it may be suggested that a departure from the usual requirements of section 7 of the *Charter* is necessary. The Supreme Court of Canada itself has acknowledged that societal interests may be taken into account when determining the content of the principles of fundamental justice.<sup>186</sup> However, the substantive safeguards distilled above find support in the *Anti-terrorism Act* itself. When in force, the *Anti-terrorism Act* allowed the preventive detention of an individual to be continued beyond the initial arrest period where it was necessary for the protection of the public. Detention was permissible for an additional forty-eight hours if the court was shown that a terrorist activity would likely be carried out if the individual was released.<sup>187</sup> A “terrorist activity” was defined to include a number of specific offences, including participation in activities of a terrorist group and any conspiracy, attempt, or threat to commit an offence.<sup>188</sup> Thus, when Canada introduced its “Act of prevention” to protect Canadians after September 11, 2001, there was no departure from the elements relied upon by the Supreme Court of Canada in *Morales* and

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<sup>184</sup> *Lyons*, *supra* note 177 at 328. See also *Charkaoui*, *supra* note 46 at para. 106.

<sup>185</sup> See Canada, *supra* note 45 at 14.

<sup>186</sup> *Charkaoui*, *supra* note 46 at para. 20.

<sup>187</sup> An individual could be detained for up to seventy-two hours in total. While an individual could also be required to enter into a recognizance for one year, the *Anti-terrorism Act* did not expressly provide for curfews or restrictions amounting to house arrest. The prescribed conditions were, in essence, reporting obligations. See *Anti-terrorism Act*, *supra* note 87, s. 4. See also *Criminal Code*, *supra* note 171, s. 810(4) and Form 32.

<sup>188</sup> *Anti-terrorism Act*, *ibid.*

*Lyons*.<sup>189</sup> The future wrongdoing was clearly identified, the risk of harm was more likely than not, and the length of detention was expressly limited. Despite its recognition of the “sophisticated and trans-border nature” of terrorism, Canada continued to adhere to the substantive requirements found in section 7 of the *Charter*.<sup>190</sup>

While the decision in *Charkaoui* makes it clear that some disparity in the level of constitutional protection is permissible when Canada is pursuing a legitimate immigration purpose, it cannot be so when the object is no longer related to admissibility. When the prospect of removal has disappeared and deportation is no longer pending, section 7 of the *Charter* requires that the government adhere to certain substantive conditions before preventively depriving an individual of their liberty. At a minimum, the *Charter* requires that the allegation of wrongdoing be specific, the risk to the public be probable, and the deprivation of liberty be definite. Security concerns cannot be used to excuse compliance with the principles of fundamental justice.<sup>191</sup> While societal interests may be properly taken into account, the interests at stake for the individual cannot be ignored. The principles of fundamental justice have withstood the test of time for good reason, and history shows the error of casting them aside in the name of greater security.<sup>192</sup>

## Role of the Court

The fundamental right of every individual not to be deprived of their liberty without lawful justification, while firmly entrenched in the *Charter*, is not self-executing; it depends upon a willing judiciary for protection. However, in matters involving security, there has been a general tendency on the part of courts to defer to those “persons whom the people have elected and whom they can remove.”<sup>193</sup> Dworkin himself has conceded that, in times of heightened threat, “it would be a terrible mistake for those who worry about civil rights and liberties to pin too much hope on the judiciary.”<sup>194</sup> This deferential attitude of the court has traditionally been

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<sup>189</sup> Parliament may be taken as aware of the requirements of the *Charter*. See Ruth Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4th ed. (Markham, Ontario: Butterworths, 2002) at 367.

<sup>190</sup> *Anti-terrorism Act*, *supra* note 87, Preamble.

<sup>191</sup> See *Charkaoui*, *supra* note 46 at para. 23.

<sup>192</sup> Preventive detention and control has an unfortunate history in Canada. Between 1914 and 1920, Canada interned approximately five thousand persons of Ukrainian origin as “enemy aliens”. Canada has since expressed its “deep sorrow” for the event. See *An Act to acknowledge that Persons of Ukrainian origin were interned in Canada during the First World War and to provide for recognition of this event*, S.C. 2005, c. 52. Between 1942 and 1949, Canada detained approximately twenty-two thousand persons of Japanese origin on the basis that they were “enemy aliens.” Canada has since issued a formal apology. See Canada, *House of Commons Debates*, vol. XV (22 September 1988) at 19499-19501 (Rt. Hon. Brian Mulroney). In 1970, Canada declared the FLQ to be an “unlawful association” and extended sweeping powers of search, arrest, and detention to police authorities. A subsequent commission of inquiry revealed that members of the Royal Canadian Mounted Police engaged in improper and illegal activities. See Canada, Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police, *Third Report: Certain R.C.M.P. Activities and the Question of Governmental Knowledge* (Hull, Québec: Supply and Services Canada, 1981).

<sup>193</sup> *Secretary of State for the Home Department v. Rehman*, [2001] UKHL 47 at para. 62, per Lord Hoffman.

<sup>194</sup> Dworkin, *supra* note 166.

justified on a number of grounds. When those justifications are examined, however, it is clear that the role of the court is not diminished in the security context. In fact, it is heightened.

Deference is often justified on the basis that courts are ill-equipped to make decisions in relation to national security. Such decisions are said to require special expertise that the court is without. However, the sweeping nature of this justification not only overlooks the various components of security decisions, but also the expertise that the court does possess. Courts are “specialists in the protection of liberty.”<sup>195</sup> While the court is without expertise in gathering intelligence or infiltrating terrorist networks, the court is vested with special expertise in defining fundamental rights and testing the limitations placed upon them. Even in the context of security, the court remains the guardian of human rights.<sup>196</sup> It cannot abdicate this responsibility. A legitimate and realistic concession that judicial competence is not boundless does not mean that matters involving national security are beyond review. Any suggestion to the contrary is, as Zedner observes, a “judicial sleight of hand.”<sup>197</sup>

Deference is also sometimes justified on the ground that decisions involving national security are political in nature and therefore properly subject to popular – not judicial – accountability. Decisions touching upon security are said to require a legitimacy that only democracy can bring. However, this view of accountability ignores the fact that the concept of democracy is much broader than the simple notion of majority rule.<sup>198</sup> One of the reasons for entrenching fundamental rights in documents like the *Charter* is “to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities ... and to establish them as legal principles to be applied by the courts.”<sup>199</sup> There is no conflict between the democratic principle and courts insisting that fundamental rights be respected. The court is specifically charged under the *Charter* with the responsibility of guarding the right to liberty from unjustified intrusion, even where the majority may believe that the public interest requires it.

This constitutional mandate of courts to protect fundamental rights takes on particular importance in the context of terrorism. While the government may be unduly pressured by popular sentiment, the court, being one step removed from the ballot box, is capable of questioning the need for, and the scope of, powers infringing on the right to liberty.<sup>200</sup> In times of threat, be it real or imagined, there are inevitably calls for measures to protect against *the enemy*. When the enemy refers to non-citizens, this popular pressure is particularly dangerous. The Supreme Court of Canada has already acknowledged that “non-citizens are an example

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<sup>195</sup> *RJR MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199 at para. 68, per La Forest J. (dissent), cited with approval in *Libman v. Attorney-General of Quebec*, [1997] 3 S.C.R. 569 at para. 59.

<sup>196</sup> *A*, *supra* note 16 at para. 41, per Lord Bingham.

<sup>197</sup> Zedner, *supra* note 146 at 526.

<sup>198</sup> *A*, *supra* note 16 at para. 42, per Lord Bingham. See also Jeffrey Jowell, “Judicial deference: servility, civility or institutional capacity?” [2003] P.L. 592; and Feldman, *supra* note 148 at 374-377.

<sup>199</sup> *West Virginia State Board of Education v. Barnette* (1943), 319 U.S. 624 at 638, per Jackson J.

<sup>200</sup> See generally Aharon Barak, “A Judge on Judging: The Role of a Supreme Court in a Democracy” (2002) 116 Harv. L. Rev. 16 at 150.

without parallel of a group of persons who are relatively powerless politically, and whose interests are likely to be compromised.”<sup>201</sup> Given the independence of the court, it plays a critical role in scrutinizing “decisions concerning those most easily posited as outsiders.”<sup>202</sup> The court provides an important check against viewing security as simply a matter of *us* versus *them*.

The court is responsible for ensuring that the rule of law is respected. That responsibility cannot be delegated. In matters involving national security, Canadian courts have an important role in making sure that extraordinary measures do not become ordinary.<sup>203</sup> Insisting upon compliance with the principles of fundamental justice ensures that any claim by the government that it is acting in accordance with the rule of law is a legitimate one. To borrow the words of Dyzenhaus, it prevents “legal black holes” from being disguised.<sup>204</sup> If the government wishes to depart from the rule of law, the *Charter* provides it with a mechanism for doing so.<sup>205</sup> By insisting that pre-emptive measures be necessary and definite, the court reinforces their exceptional character and guards against them becoming a normal and unremarkable part of everyday life in Canada.

The special responsibility of the court to protect the innocent is also clearly engaged in the security context.<sup>206</sup> Any mechanism of preventive control is grounded in an assessment of risk. It is, in essence, a prediction. As Zedner observes, “[w]e may speculate, respond to warning signs, or catalogue unusual levels of ‘chatter’ among suspect groups, but we cannot know precisely what will occur, when, or to whom.”<sup>207</sup> The decision to deprive an individual of their liberty is therefore made in conditions of uncertainty. This uncertainty gives rise to another, though often overshadowed, risk of injustice.<sup>208</sup> While such miscarriages of justice may not take the form of wrongful convictions, as in the criminal context, the effect for the individual is nonetheless the same: an unjustified denial of liberty. Any time the potential exists for liberty to be lost, Canadian courts must insist upon strict compliance with the principles of fundamental justice:

At the heart of a free and democratic society is the liberty of its subjects.  
Liberty lost is never regained and can never be fully compensated for; therefore,  
where the potential exists for the loss of freedom for even a day we, as a free

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<sup>201</sup> *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143 at para. 195.

<sup>202</sup> Zedner, *supra* note 146 at 527.

<sup>203</sup> David Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency* (Cambridge: Cambridge University Press, 2006) at 2.

<sup>204</sup> *Ibid.* at 3.

<sup>205</sup> See *Charter*, *supra* note 3, s. 33, which provides that Parliament may derogate from section 7 of the *Charter* by making an express declaration to that effect.

<sup>206</sup> The Supreme Court of Canada has spoken of a “special responsibility” on the part of the judiciary to protect the innocent. See *United States v. Burns*, [2001] 1 S.C.R. 283 at para. 71 [*Burns*].

<sup>207</sup> Zedner, *supra* note 146 at 512.

<sup>208</sup> See generally Kent Roach & Gary Trotter, “Miscarriages of Justice in the War on Terror” (2005) 109 Penn. St. L. Rev. 967.

and democratic society, must place the highest emphasis on ensuring that our system of justice minimizes the chance of an unwarranted denial of liberty.<sup>209</sup>

Only with robust judicial scrutiny can the risk of injustice be lessened and the special responsibility of the court discharged.

Events in Canada have only served to confirm that intelligence is fallible and that miscarriages of justice do occur.<sup>210</sup> In 2002, Maher Arar, a Canadian citizen, was detained in the United States and then renditioned to Syria on suspicion that he was a member of al-Qaeda. Mr. Arar was confined and tortured for more than ten months before being returned to Canada. A subsequent public inquiry concluded that American officials very likely relied upon inaccurate information provided by Canadian authorities in deciding to detain and remove Mr. Arar, including unfounded suspicions linking him to an Islamic extremist group.<sup>211</sup> The inquiry found no evidence that Mr. Arar was a threat to national security. It is thus clear that the government does make mistakes.<sup>212</sup> As Mr. Justice Binnie of the Supreme Court of Canada has observed, “recent events have put the credibility of security agencies in doubt.”<sup>213</sup> For this reason, Canadian courts, before accepting any restraint on liberty in the name of greater security, must insist that the substantive protections ordinarily found in section 7 of the *Charter* are satisfied. The protection of the innocent – a basic tenet of the Canadian legal system – demands nothing less.<sup>214</sup>

## CONCLUSION

Preventive control has become an enduring part of the Canadian legal landscape since September 11, 2001. Conditional release orders, while conceived under the *Immigration and Refugee Protection Act*, have emerged as a critical component of Canada’s security apparatus. Canadian courts are now charged with the difficult task of defining the boundaries of these pre-emptive measures. They are not, however, alone in this pursuit. With its common legal roots and relative experience in controlling terror suspects, the United Kingdom provides a

<sup>209</sup> *R. v. Hall*, [2002] 3 S.C.R. 309 at para. 47, per Iacobucci J. (dissent).

<sup>210</sup> Feldman has made a similar observation in the United Kingdom, noting that executive institutions, as assessors of risk, have taken “a number of bad knocks.” See Feldman, *supra* note 148 at 377.

<sup>211</sup> Canada, Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, *Report of the Events Relating to Maher Arar: Analysis and Recommendations* (Ottawa: Public Works and Government Services, 2006) at 30. See also Canada, Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, *Report of the Events Relating to Maher Arar: Factual Background*, vol. 1 (Ottawa: Public Works and Government Services, 2006) at 113.

<sup>212</sup> In 2008, the conduct of Canadian security officials was again called into question. An internal inquiry concluded that Canadian authorities indirectly contributed to the torture of three citizens who had been detained abroad for allegedly having links to al-Qaeda. Officials were found to have shared intelligence information without taking steps to ensure that it was accurate and properly qualified. See Canada, Internal Inquiry into the Actions of Canadian Officials in Relation to Abdullah Almalki, Ahmed Abou-Elmaati and Muayyed Nureddin, *Final Report* (Ottawa: Public Works and Government Services, 2008).

<sup>213</sup> Hon. Mr. Justice Ian Binnie, “Entrenched Rights, Counter-Terrorism and the Rule of Law” (Paper presented to the Anglo-Canadian Legal Exchange, Ottawa, Canada, 8 August 2008) at 16.

<sup>214</sup> See *Burns*, *supra* note 206 at para. 95.

number of important lessons. Those lessons ought to serve as guideposts for Canada as it determines its own constitutional course.

The *Charter* expressly provides for different constitutional safeguards in the context of immigration and, to date, Canada has insisted that the substantive protections ordinarily extended by the *Charter* are not owed to those subject to conditional release orders. However, the claim that Canada is pursuing an immigration purpose is not justifiable indefinitely. The *Immigration and Refugee Protection Act* does not contemplate a system of preventive control whereby non-citizens suspected of being threats to Canadian security can be deprived of their liberty after the prospect of removal has disappeared. There comes a time when it can no longer be said that deportation is pending. At a certain point, the fiction must end. The rules of the game must change.<sup>215</sup>

Section 7 of the *Charter* demands that any deprivation of liberty be a just and principled one, no matter how grave the fear or how menacing the threat. Where an individual is preventively deprived of their liberty for the purpose of protecting the public, the *Charter* requires that certain substantive requirements be satisfied: the allegation of future wrongdoing must be specific; the risk to the public must be probable; and the deprivation of liberty must be definite. In the fight against terrorism, these safeguards cannot be discarded. It is precisely in such times of fear and threat that Canada must hold fast to the basic tenets enshrined in section 7 of the *Charter*. Failing to do so would only undermine the democratic values that security measures aim to protect. The final lesson for Canada is therefore a simple one. The path toward resolving the clash of the titans is that charted by the principles of fundamental justice.

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<sup>215</sup> While the context in which it is used is obviously different, the phrase is lifted from the remarks of Tony Blair, former Prime Minister of the United Kingdom, following the bombing attacks in London on July 7, 2005. See U.K., Office of Prime Minister, *PM's Press Conference* (5 August 2005), online: <<http://www.number10.gov.uk/Page8041>>.