

Drawing Boundaries

Monitoring Preventive

Justice

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* "Tracking bracelets too costly" *The [Toronto] Globe and Mail* (6 March 1997) A4.

1 Bill C-55, An Act to amend the Criminal Code (high risk offenders), the Corrections and Conditional Release Act, the Criminal Records Act, the Prisons and Reformatories Act and the Department of the Solicitor General Act, 2nd Sess., 35th Parl., 1996.

2 A. McLroy, "Rock proposes electronic tracking device" *The [Toronto] Globe and Mail* (18 September 1996) A1 & A6

3 *Canadian Charter of Rights and Freedoms*, Part 1 of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11.

4 This role will likely be delegated to Crown attorneys. McLroy, see note 2 at A6.

5 "Serious personal injury offence" is defined in section 752 of the *Criminal Code*, R.S.C. 1985, c. C-46 as:

(a) an indictable offence, other than high treason, treason, first degree murder or second degree murder, involving

(i) the use or attempted use of violence against another person, or

(ii) conduct endangering or likely to endanger the life or safety of another person or inflicting or likely to inflict

Editor's Note: Just prior to publication, the Standing Committee on Justice and Legal Affairs voted to strike from Bill C-55 the provisions which would allow judges to impose electronic monitoring on potential violent offenders. The high cost of electronic monitoring technology, and not concerns regarding civil liberties, was cited as the reason for the decision.*

The imprisonment of an innocent person for a crime that he or she did not commit is generally regarded as a failure of our legal system to protect the rights of those subject to its sanctions. It undermines our confidence in those who make and enforce the law, and in the inviolability of our personal liberty. Yet on September 17, 1996, Justice Minister Allan Rock introduced a bill to Parliament that would allow the state to electronically monitor persons who have committed no crime, but who simply might do so in the future.¹ This "judicial restraint" proposal is part of a package of amendments aimed at tightening state control over violent and sexual offenders (both actual and potential), while allowing low-risk offenders to serve their sentences in the community. Minister Rock calls the package one of "the most significant initiatives in recent memory in relation to the criminal justice system."² However, perhaps more significant is the federal government's desire to identify and electronically tag potential offenders in a manner that may violate their right to liberty, and their right not be deprived thereof except in accordance with the principles of fundamental justice, as guaranteed by section 7 of the Charter.³

I. Bill C-55's "Judicial Restraint" Provision

If passed in its present form, the "judicial restraint" provision in Bill C-55 would amend the Criminal Code to include section 810.2. This section would allow provincial Attorneys-General⁴ who believe that there are reasonable grounds to fear that a person will commit a serious personal injury offence⁵ to lay an information to that effect before a provincial court judge.⁶ After a hearing, the judge may require the defendant⁷ to enter into a recognizance to keep the peace and be of good behaviour.⁸ The judge may also impose additional conditions, most notably the requirement that the defendant comply with a program of electronic monitoring, if

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such a program is available where the defendant resides.⁹ The period of monitoring may last as long as twelve months;¹⁰ refusal or failure to enter into the recognizance would result in a prison term of the same duration¹¹ and breach of the terms of the recognizance would be an offence punishable on summary conviction.¹² The defendant need never be charged with, nor convicted of, a criminal offence in order for the section to be invoked.

Despite statistics indicating a recent decline in levels of violent crime,¹³ the federal government has identified a growing public perception that Canada's communities are no longer safe places to live.¹⁴ In an attempt to address this fear, the government has pledged to "protect the basic right of all citizens to live in peaceful and safe communities" and to introduce measures to improve community safety and crime prevention.¹⁵ The proposed section 810.2 is such a measure. Minister Rock claims that the goal of judicial restraint is to better ensure public safety by allowing police to monitor the movements of currently sentenced violent and sexual offenders, following their release from prison and expiry of parole.¹⁶ However, the Crown could also invoke the provision against persons suspected of stalking, or criminal harassment, "where there is not enough evidence to lay a charge or get a conviction, but there is reason to fear for someone's safety."¹⁷

II. Section 7 Analysis

Minister Rock has publicly affirmed the government's confidence in the constitutionality of the electronic monitoring provision.¹⁸ That confidence, however, may be misplaced. The judicial restraint proposal builds on Criminal Code section 810.1, a similarly structured provision that allows

severe psychological damage upon another person,

and for which the offender may be sentenced to imprisonment for ten years or more, or

(b) an offence or attempt to commit an offence mentioned in section 271 (sexual assault), 272 (sexual assault with a weapon, threats to a third party or causing bodily harm) or 273 (aggravated sexual assault).

6 Bill C-55, see note 1 at s. 810.2(1).

7 The term "defendant" is used throughout this article to refer to an individual who would be subject to electronic monitoring under the judicial restraint provision of Bill C-55. The term "offender" refers to an individual who is subject to electronic monitoring as a penal sentence upon conviction for an offence.

8 Bill C-55, see note 1 at s. 810.2(3).

9 Bill C-55, see note 1 at s. 810.2(6).

10 Bill C-55, see note 1 at s. 810.2(3).

11 Bill C-55, see note 1 at s. 810.2(4).

12 Bill C-55, see note 1 at s. 811.

13 After average annual increases of 4% in the rate of violent crime from 1978 to 1992, statistics indicate that the incidence of violent crime is declining. In 1993, violent crime rates dropped less than one percent. In 1994, however, the violent crime rate dropped 3%, the largest drop since 1962. Specifically, the homicide rate dropped 6%, the attempted murder rate dropped 8%, the rate of "serious assaults" dropped 4%, the sexual assault rate dropped 10%, and the rate of "other sexual assaults" dropped 10%. Statistics Canada and Canadian Centre for Justice Statistics, *Canadian Crime Statistics 1994* (Ottawa: Minister of Industry, 1995) at 5, and Statistics Canada and Canadian Centre for Justice Statistics, *Canadian Crime Statistics 1993* (Ottawa: Minister of Industry, 1994) at 8.

14 Canada Department of Justice and Solicitor General Canada, *Towards Safer Communities: A Progress Report on the Safe Homes, Safe Streets Agenda*, at 1. [1996] LNCR No. 68 (QL) at p. 1.

15 "Toward Safer Communities", see note 14 at 1; His Excellency the Right Hon. Romeo LeBlanc, G.-G.(Can.), "The Speech from the Throne" (February 27, 1996). Found at http://www.parl.gc.ca/english/hansards/001_96-02_27/001G01E.html on Feb. 23, 1997.

16 Bill C-55 also creates the category of "Long-Term Offender", which provides for the mandatory supervision of sexual offenders for a period of up to ten years after the completion of their sentence. However, persons sentenced prior to the passing of Bill C-55 cannot be designated "Long-Term Offenders", as the legislation would not have retroactive effect. See note 1 at s. 753.1.

17 McIlroy, see note 2 at A6.

18 McIlroy, see note 2 at A6.

provincial courts to compel persons who might commit sexual offences against children to enter into recognizances prohibiting them from attending places where children are reasonably expected to be present.¹⁹ However, the constitutionality of section 810.1 was recently considered in *R. v. Budreo*,²⁰ a decision of the Ontario General Division (currently on appeal to the Ontario Court of Appeal) that explores the extent to which such preventive recognizances are permissible under section 7 of the Charter.²¹ Considered together with the Supreme Court of Canada's recent section 7 jurisprudence, *Budreo* raises issues regarding the limitations placed on such recognizances by the requirements of fundamental justice that may ultimately prove fatal to the judicial restraint provision of Bill C-55.

A. Liberty of the Person

As Justice Then notes in *Budreo*, the imposition of a preventive recognizance unquestionably violates the liberty interest protected by section 7.²² Prior to the advent of the Charter, the Supreme Court of Canada held in *R. v. McKenzie* that to “restrain the liberty of a subject where there has been no crime committed is, beyond question, an interference with a civil right.”²³ Similarly, the Supreme Court's post-Charter decision in *R. v. Heywood* held that a prohibition against convicted sex offenders “loitering” in school grounds, playgrounds, public parks or bathing areas was also a restriction of liberty that would trigger section 7.²⁴

B. Fundamental Justice

a. Preventive justice

However, a restriction of the liberty interest does not constitute a breach of section 7 unless it also fails to accord with the principles of fundamental justice. In *Reference Re: s.94(2) of the Motor Vehicle Act*, Supreme Court Justice Lamer defined those principles as those “found in the basic tenets and principles, not only of our judicial process, but also of the other components of our legal system.”²⁵ This definition is not, in itself, particularly helpful. However, as S.J. Whitley writes, “history will provide a key to accepted norms.”²⁶ The history of the preventive power of the judiciary is set out in the Supreme Court of Canada's decision in *MacKenzie v. Martin*, which indicates that the “immemorial exercise” of the common law power to issue preventive recognizances, or peace bonds, has been the province of lower courts since early Saxon times.²⁷ The decision in *Budreo* affirms that this long-standing power is “part of the fabric of our law,” and its exercise is not inherently contrary to fundamental justice.²⁸

b. Overbreadth

The state's imposition of a preventive recognizance is not unconstitutional; however it may be rendered so if some aspect of it violates the principles of fundamental justice. Section 7 of the Charter requires individual rights to life, liberty and

19 R.S.C. 1985, c. C-46. See also McLroy, note 2 at A6.

20 (1996), 104 Canadian Criminal Cases (3d) 245 (Ontario General Division).

21 *Budreo* also challenged s.810.1 under ss. 9, 11(d), 11(h), and 15 of the Charter, and certain of those arguments may also be applicable to the consideration of the judicial restraint provision in Bill C-55. However, for the purposes of this paper, only the section 7 arguments will be analysed.

22 *Budreo*, see note 20 at 265.

23 (1945), 85 Canadian Criminal Cases 233 at 240 (Supreme Court of Canada).

24 [1994] 3 Supreme Court Reports 761 at 789. This case considered the constitutionality of *Criminal Code* s.197(1)(b).

25 [1985] 2 Supreme Court Reports 486 at 512.

26 S. J. Whitley, *Criminal Justice and the Constitution*, (Toronto: Carswell, 1989) at 182.

27 (1954), 108 Canadian Criminal Cases 305 (Supreme Court of Canada) at 316-17. See also R.C. Hunter, Q.C., “Common Law Peace Bonds: the Power of Justices of the Peace to Administer ‘Preventive Justice’” (1978), 1 Canadian Reports (3d) 70.

28 *Budreo*, see note 20 at 271. See also *Heywood*, note 24 at 790.

security of the person to be balanced against the state's need to limit those rights under certain circumstances. The means employed to do so must not be overly broad; they may not exceed those strictly necessary to achieve the state's objective. The rationale is explained in *Heywood*: "If the state, in pursuing a legitimate objective, uses means that are broader than necessary to accomplish that objective, the principles of fundamental justice will be violated because the individual's rights will have been limited for no reason."²⁹ In the operation of the overbreadth analysis, section 7 of the Charter internalises the "minimal impairment" test normally found in a section 1 analysis.³⁰

The overbreadth analysis in *Heywood* focused on a blanket restriction against persons previously convicted of sexual offences against children "loitering" in public parks and bathing areas. The Supreme Court of Canada found that this was "a significant limit on freedom of movement" that did not further the objective of protecting children unless children actually frequented the location. The court held that such a limit was overbroad in the absence of a requirement that children be reasonably expected to be present in those places.³¹

The court in *Budreo* followed the *Heywood* approach in considering the aspect of a recognizance imposed under Criminal Code section 810.1 which prohibits attendance at "a public park or swimming area where persons under the age of fourteen years are present or can reasonably be expected to be present, or in a daycare centre, schoolground, playground or community centre." Although the court held that these restrictions met the state's objective of protecting children from sexual offenders, it found the blanket prohibition against attendance at community centres to be overly broad. While community centres do provide programs for children, there may be times when no children are present. Therefore, the court held, without a requirement that children are reasonably expected to be present, the section's object of protecting children was not enhanced by that blanket restriction on the defendant's freedom.³²

III. Is Electronic Monitoring Overly Broad?

The proposed section 810.2 does not specify the format of the electronic monitoring program contemplated by its drafters, nor the extent of the restrictions such a program might place on the liberties of those ordered to comply with them.³³ A Department of Justice official has stated that judges in individual cases will simply utilize the programs and technology that exist in their jurisdictions.³⁴ Currently, there are two models of electronic monitoring that might serve the purposes of Bill C-55. Each model has distinct constitutional and practical flaws when employed in the judicial restraint context.

A. The "Curfew Compliance" Model

The electronic monitoring technology presently employed as a penal sanction in British Columbia enforces "curfew compliance."³⁵ The convicted offender must wear an electronic anklet containing a transmitter that sends a signal to a

²⁹ *Heywood*, see note 24 at 792-3.

³⁰ *R. v. Oakes*, [1986] 1 Supreme Court Reports 103 at 139.

³¹ *Heywood*, see note 24 at 795.

³² *Budreo*, see note 20 at 273.

³³ Bill C-55, see note 1. Section 810.2(6) merely states that, "Before making an order under subsection (3), the provincial court judge shall consider whether it is desirable to include as a condition of the recognizance that the defendant...comply with a program of electronic monitoring, if such a program is available in the place in which the defendant resides".

³⁴ Telephone interview with Mr. Troy Demers, Communications and Executive Services Officer, Department of Justice, Ottawa (31 October 1996).

³⁵ K. Unland, "Electronic monitoring has its limits" *The [Toronto] Globe and Mail*, (19 Sept. 1996) at A10.

Overstating the risk that a person poses to the public is an evasion of the overbreadth test: it allows the state to severely restrict the liberty of an individual for no reason other than its inability to predict the harm that such a person might cause.

36 Offenders may be granted permission to attend appointments and run errands if application is made in advance. [Interview with Mr. Tom Larsen, Corrections Officer, Corrections Branch, Ministry of the Attorney-General, Province of B.C. (February 5, 1997) Vancouver Island Regional Correctional Centre].

37 See generally, "British Columbia Corrections Branch Electronic Monitoring Program", and "B.C. Corrections Branch Manual of Operations Adult Institutional Services: Electronic Monitoring Program", K. Schultz, ed., *Electronic Monitoring and Corrections: The Policy, the Operation, The Research* (Vancouver: Simon Fraser University, 1995) at 53 - 78.

38 In addition to the other conditions listed above, this condition is included in the Temporary Absence Authorization Permit issued to offenders enrolled in the Electronic Monitoring Program by the Corrections Branch, Ministry of Attorney General, Province of B.C. The Permit also forbids offenders from entering any premises where the prime commodity for sale is alcohol.

39 *Heywood*, see note 24 at 792-3.

40 Bill C-55, see note 1 at s. 810.2(1).

41 (1992), 75 Canadian Criminal Cases (3d) 287 (Supreme Court of Canada) at 314.

receiver unit installed in the offender's home. This signal is transmitted through the defendant's telephone line to a central computer, which confirms that the offender is at home during stipulated hours. Random telephone calls and spot checks provide further confirmation of the offender's presence. Except for approved employment, educational and rehabilitative commitments, the offender is confined to his or her home at all times.³⁶ Additional mandatory conditions of such a sentence require offenders to:

- abstain from the use of drugs and alcohol;
- submit to drug or alcohol testing at any time;
- provide Corrections officials with their residential and employment or school addresses and times when they will be there (making allowance only for travel between those places);
- permit Corrections officials or the RCMP to enter their homes to verify equipment operation and compliance;³⁷ and
- refrain from operating a motor vehicle.³⁸

When the overbreadth test set out in *Heywood*³⁹ is applied to the "curfew compliance" model of electronic monitoring in the context of judicial restraint, the means employed by the state in achieving its objective appear to be overbroad in both the scope of the geographic restriction imposed, and its intrusive nature. The decisions in *Budreo* and *Heywood* indicate that absolute geographic restrictions will be upheld only where it is found that the probable victim of the feared offence is reasonably expected to be present in the specified location at any time. The judicial restraint provision would allow the Attorney-General to lay the information and does not require that the person or class of persons deemed to be at risk be named;⁴⁰ therefore, the "probable victim" is effectively deemed to be every member of the public. Because it is reasonable to expect that some member of the public may be anywhere that the defendant may be, at any time, the confinement of the defendant to his or her home when not at work or school appears justifiable.

It is unrealistic, however, to suppose that a person who has not been convicted of an offence, and who is merely judged to be at risk of doing so, poses a real threat to every member of the public and should be segregated from them when not engaged in a state-approved activity. The evidence that would establish reasonable grounds to fear that such an offence might occur would likely indicate that perhaps only one person, such as a former spouse, or a class of persons, such as children, appear to be at risk, or that the risk of harm is greater under certain circumstances, such as the use of drugs or alcohol. In such cases, the conditions of a recognizance may be narrowly tailored to address the risk presented, as is done by existing Criminal Code sections 810 and 810.1.

In cases where no such person or persons are identified, however, the state cannot rely upon "the protection of the public" to confine legally innocent people to their homes. In *R. v. Parks*,⁴¹ Supreme Court Justice Sopinka expressed "grave doubts as to whether a [preventive judicial] power that can be exercised on the basis of

‘probable ground[s] to suspect future misbehaviour’ without limits to the type of ‘misbehaviour’ or potential victims, would survive Charter scrutiny.” Overstating the risk that a person poses to the public is an evasion of the overbreadth test: it allows the state to severely restrict the liberty of an individual for no reason other than its inability to predict the harm that such a person might cause.

Supporters of the “curfew compliance” model may argue, however, that electronic monitoring is a minimal restriction of liberty that does not outweigh the state’s interest in protecting the public. After all, the defendant remains in the community and is able to continue working, going to school, maintaining social and family relationships and enjoying a measure of freedom. Such an argument stems from the public perception that electronic monitoring, as compared to incarceration, is a “soft” or “lenient” sentencing option.⁴² Saskatchewan Court of Appeal Justice Vancise disputes this “illusion of liberty” in *R. v. McLeod*, where he upholds the trial judge’s characterisation of electronic monitoring as “a very...realistic alternative to jail [which] has all of the elements of punishment, rehabilitation, deterrence, individual and general, built into it.”⁴³

In *Budreo*, Justice Then cautions that where no offence has been committed and only a likelihood of harm proven, the history of preventive justice demands that the restrictions imposed be relatively slight. Acceptable restrictions imposed by the state are “moderate and circumscribed” and “would not prevent a person from leading a reasonably normal life.”⁴⁴ The “curfew compliance” model of electronic monitoring appears more closely to resemble a “realistic alternative to jail” than a “reasonably normal life.” Under the judicial restraint program, the defendant’s activities both inside and outside the home would be constantly monitored and severely restricted to those approved by the state, with penalties for any derivation from the strict schedule. The state will also be authorised to enter the defendant’s home at any time. While the receiver unit is in operation, the defendant’s ability to use the telephone is severely curtailed.⁴⁵ This model of electronic monitoring may also prevent the defendant’s family members from leading a normal life: research on offenders sentenced to electronic monitoring indicates that persons confined to their homes may direct the resulting anger and frustration at their families, thereby putting their spouses and children at risk.⁴⁶

It may be argued that the electronic monitoring of potential offenders can be made less restrictive than the penal sanction applied to convicted offenders by relaxing some or all of the punitive mandatory conditions outlined above. However, while these conditions are punitive both in purpose and effect, they are also functional; all of the mandatory conditions are necessary to ensure that the electronic monitoring technology serves its purpose, and that geographic restrictions are not casually or unintentionally breached. A curfew must be set in order to define a consistent time when monitoring will begin each night, at which time the defendant must be at home to avoid penalty. Furthermore, because the device cannot tell what

42 *R. v. McLeod* (1993), 81 Canadian Criminal Cases (3d) 83 (Saskatchewan Court of Appeal) at 99.

43 *McLeod*, see note 42 at 90.

44 *Budreo*, see note 20 at 275.

45 Larsen, see note 36.

46 S. Mainprize, “Social, Psychological and Familial Impacts of Home Confinement and Electronic Monitoring: Exploratory Research Findings from B.C.’s Pilot Project”, see Schultz, note 37, 141-188 at 151-3.

Electronic surveillance is not an effective means of controlling the risk to society presented by persons prone to violent behaviour. It is simply a means of punishing those who pose no such risk by restricting their liberty at little cost to the state.

the defendant is doing while away from home during the day, the opportunity to do harm can only be limited by restricting the defendant's activities to those approved by the state. The device cannot tell what the defendant is doing when he or she is at home, whether it be tampering with the monitoring equipment or committing an offence; therefore, spot checks are necessary to ensure compliance with the conditions of the program. The prohibition against consumption of alcohol ensures that the defendant is aware of and responsible for his or her whereabouts at all times. The very limitations of electronic monitoring technology require that the surveillance it imposes be constant and intensive.

Furthermore, the criteria used by Corrections officials to determine which convicted offenders are appropriate candidates for electronic monitoring indicate that such measures will not be effective in the preventive context. In British Columbia, only those offenders who are voluntarily willing to comply with the conditions of the program, show no pattern of violent behaviour, have no record of sexual offences, and pose no apparent threat to the community are considered eligible for electronic monitoring.⁴⁷ Such criteria indicate that electronic surveillance is not an effective means of controlling the risk to society presented by persons prone to violent behaviour. It is simply a means of punishing those who pose no such risk by restricting their liberty at little cost to the state. In addition, because electronic monitoring requires a high degree of self-enforcement,⁴⁸ eligible offenders must be willing and motivated to comply with the conditions of the program. As Justice Vancise notes,

The authorities recommend that a maximum of six months' electronic monitoring be assessed. Any period longer than six months dramatically increases the likelihood of a breach of the condition because of the difficulty of completing such a term.⁴⁹

Where the subject of electronic monitoring has not committed an offence, he or she is unlikely to be willing or motivated to comply with its conditions; the response of such persons is more likely to be a sense of outrage and defiance at the restriction of their liberty. Coupled with the judge's discretion under the judicial restraint provision to assess a period of electronic monitoring six months in excess of the recommended maximum,⁵⁰ the chance of a breach resulting in summary conviction is very high. Therefore, the state will do indirectly what it cannot do directly: imprison an innocent person for a crime that he or she has not yet committed.

B. The "JurisMonitor" Model

Another model of electronic monitoring, currently employed in the United States as a penal measure and marketed under the name "JurisMonitor," also requires the convicted offender to wear a wrist or ankle transmitter that allows his or her movements to be monitored. However, rather than enforcing a curfew that confines the offender to his or her home, the police are only alerted when the offender gets too close to places that have been designated as off-limits and equipped with a receiver,

⁴⁷ British Columbia Corrections Branch Electronic Monitoring Program", Schultz, see note 37 at 54. Violent offenders may be eligible for electronic monitoring in limited circumstances, i.e. to take advantage of rehabilitation programs available only outside of prison (Larsen, see note 36).

⁴⁸ Unlike an incarcerated offender, an electronically monitored offender must personally ensure that the terms and conditions of his or her sentence are respected. For instance, the offender is personally responsible for being at home at the designated times, and must resist the temptation to engage in activities which have not been approved. The offender must also resist the temptation to consume drugs and alcohol, which may be readily available to him or her in the home. In contrast, prison life relieves the incarcerated offender from these responsibilities.

⁴⁹ McLeod, see note 42 at 104. This is only a recommended maximum; offenders are sentenced to terms of electronic monitoring in excess of six months in limited cases. It is noted, however, that the risk of reoffending increases with the length of the sentence (Larsen, see note 36).

⁵⁰ Bill C-55, see note 1 at s.810.2(3).

such as a school, or the home of a former spouse whose safety has been threatened.⁵¹

This model of electronic monitoring does not appear to run afoul of the overbreadth analysis in terms of its geographic restrictions. The device only prevents the defendant from attending places where the specified potential victim(s) of attack is reasonably expected to be present at all times.

Where the “JurisMonitor” model may violate section 7 is in its intrusive nature. Both the “curfew compliance” and the “JurisMonitor” models of electronic monitoring require the attachment of a visible and irremovable symbol of state sanction and control to the defendant’s body. The principles that underlie the intentional tort of battery indicate the value that our society places on freedom from such interference with bodily integrity. In *Malette v. Schulman*, the Ontario Court of Appeal found a doctor who treated a Jehovah’s Witness without her consent and against her wishes liable in battery. Justice Robbins stated,

The right of a person to control his or her own body is a concept that has long been recognised at common law. The tort of battery has traditionally protected the interest in bodily security from unwanted physical interference. Basically, any intentional non-consensual touching which is harmful or offensive to a person’s reasonable sense of dignity is actionable.⁵²

It is arguable that the state’s interest in public safety justifies a higher threshold of physical interference than the battery standard. However, even in the criminal context, the judicial interim release provisions of the Criminal Code recognise the presumption of non-interference in the accused’s physical liberty prior to trial, subject to the Crown’s ability to show cause why the accused should be detained.⁵³ Where no grounds exist even to lay a charge, the threshold of physical non-interference should be even lower.

Furthermore, this ongoing and visible interference with the defendant’s bodily integrity does not comply with the requirement in *Budreo* that the conditions of a preventive recognizance be “moderate and circumscribed,” allowing the defendant to lead a “relatively normal life.”⁵⁴ The electronic anklet currently employed as a monitoring device by the B.C. Corrections Branch is approximately three inches long by two inches wide and one inch thick; it is made of thick black plastic and is attached to the offender’s ankle by a wide black strap. It resembles an oversized pager, and despite its location on the ankle is hardly inconspicuous. Convicted offenders forced to wear a bracelet or anklet as part of an electronic monitoring sentence report feeling stigmatised by the visible symbol of state sanction and control attached to their bodies.⁵⁵ While some defendants under the judicial restraint program may be able to conceal the device beneath clothing, others may not. Consider, for example, the impact of such a device upon the waitress who must wear a skirt and short-sleeved shirt to work. Those unable to conceal the device will suffer the stigma of being perceived as a threat to society despite not having been charged with or convicted of an offence. Those who are able to conceal the device must still live with the knowledge

Those unable to conceal the device will suffer the stigma of being perceived as a threat to society despite not having been charged with or convicted of an offence. Those who are able to conceal the device must still live with the knowledge that the eyes of the state are not merely upon them but affixed to them.

51 Unland, see note 35.

52 (1990), 2 Canadian Cases on the Law of Torts (2d) 1 (Ontario Court of Appeal) at 8-9.

53 R.S.C. 1985, c. C-46, s. 515(1).

54 *Budreo*, see note 44.

55 Mainprize, see note 46 at 160-1.

that the eyes of the state are not merely upon them but affixed to them. As a means of preventive justice, the courts may well find such a physically and psychologically intrusive measure to be overbroad.

The “JurisMonitor” model also presents practical difficulties in the judicial restraint context that call its appropriateness into question. As noted above, the proposed section 810.2(1) would not require that a potential victim be named in the information; indeed, it does not require that a potential victim be named at all.⁵⁶ Therefore, where the potential victim cannot be precisely identified by the state, it would be impossible to determine which locations are off limits.

Where the information does identify a potential victim, however, the inability of the “JurisMonitor” model of electronic monitoring to protect that person from harm quickly becomes apparent. While it may be possible to install a receiver in the potential victim’s home that would alert the police to the defendant’s presence, the potential victim is not at home at all times. What about his or her workplace, school, transportation routes, relatives’ homes, or jogging path? The “JurisMonitor” model of electronic monitoring can do nothing to protect the potential victim in these places. Indeed, the potential victim’s safety is not guaranteed even at home; a person determined to do harm may not be deterred by the knowledge that their movements are being monitored. It has been observed that a dangerous offender can do a lot of damage before the police arrive.⁵⁷

IV. Section 1

For the reasons outlined above, the judicial restraint provision in Bill C-55 is likely to be found overbroad by the courts if it is ever passed. As such, the restriction of liberty that it imposes will not be in accordance with the principles of fundamental justice, and will constitute a violation of section 7 of the Charter. As noted earlier, the test for overbreadth internalises the “minimal impairment” test normally undertaken in a section 1 analysis; legislation that is overbroad therefore appears incapable of being upheld under section 1.⁵⁸ In *Reference Re B.C. Motor Vehicle Act*, Lamer expressed doubt that a violation of the right to life, liberty or security of the person that is not in accordance with the principles of fundamental justice can ever be justified in a democratic society, except in times of war or national emergency.⁵⁹ Indeed, a violation of section 7 of the Charter has never been found justified under section 1 by a majority of the Supreme Court of Canada.⁶⁰ Therefore, despite the importance of the state’s objective of protecting society from the risk of harm posed by potential violent offenders, the judicial restraint provision of Bill C-55 as it is currently drafted will almost certainly be struck down under section 1 of the Charter.

Recent developments indicate, however, that the judicial restraint provision in Bill C-55 will undergo substantial revisions before it is returned to the House of Commons for third reading. Minister Rock’s confidence in the constitutionality of his

⁵⁶ Bill C-55, see note 1 at 810.2(1).

⁵⁷ Unland, see note 35.

⁵⁸ *Heywood*, see note 24 at 802-3.

⁵⁹ *Re B.C. Motor Vehicle Act*, see note 25 at 518; *Heywood*, see note 24 at 802.

⁶⁰ P.W. Hogg, *Constitutional Law of Canada*, 3d ed. (Toronto: Carswell, 1992) at 886.

proposal seems to be faltering as a result of the harsh criticism it has received in both the House⁶¹ and the media.⁶² Appearing before the Standing Committee on Justice and Legal Affairs on December 3, 1996, the Justice Minister agreed that significant amendments to the judicial restraint provision are necessary, and suggested three approaches that would narrow the provision's application so that electronic monitoring is available only "where there's a particularly serious threat to public safety." The first approach would impose electronic monitoring only on people who have been convicted of violent crimes. Another approach would impose electronic monitoring only on those with a history of violent behaviour. A third approach requires the creation of a list of factors (including criminal records and histories of violence) that judges would consider before deciding whether to apply the provision. He also asked the Committee to consider whether a less restrictive model of electronic monitoring (referred to above as the "JurisMonitor" model) would be more acceptable than the more conventional "curfew compliance" model of monitoring.⁶³

Unfortunately, these suggested amendments fail to address the serious flaws in the Justice Minister's judicial restraint provision. By simply narrowing the groups to which the provision might apply, the amendments do not remedy the above-noted Charter violation that would result from its application. The suggested amendments appear designed to provide a basis under which the provision might be upheld under section 1 as in relation to a "pressing and substantial concern" important enough to justify the violation of a Charter right, as set out in the first test in *R. v. Oakes*.⁶⁴ However, as noted above, the means chosen by Minister Rock to meet this concern are overbroad, and therefore would not pass the "minimal impairment" element of the *Oakes* proportionality test.⁶⁵ The shortcomings of the "JurisMonitor" model of electronic monitoring are several and have been canvassed above. Minister Rock's suggested amendments, therefore, have little substantive merit.

V. Conclusion

Both the perception and the reality of violent crime are serious problems in Canada's communities. However, electronic monitoring of innocent persons does not appear to be the solution. Despite the Justice Minister's confidence in the judicial restraint provision of Bill C-55, the constitutional and practical flaws of electronic monitoring in the preventive context cannot be ignored. Minister Rock's judicial restraint provision is a political response to very pressing public demands for safer communities. However, section 7 of the Charter does not allow public concerns to justify the restriction of an individual's liberty in a manner that violates the principles of fundamental justice. If the judicial restraint provision is passed, the federal government will reap the benefits of tough-on-crime headlines. The Canadian judiciary, however, will be left to repair the damage done to Canadians' Charter rights. In *Heywood* and *Budreo*, the courts have begun to define the strict boundary that section 7 places on preventive justice. It is a boundary that cannot be redrawn by public opinion.

61 House of Commons Debates (3 October 1996) at 5037, (4 October 1996) at 5097, (7 October 1996) at 5174.

62 "Fasten that Collar" *The (Toronto) Globe and Mail* (7 December 1996) D8.

63 Evidence of the Standing Committee on Justice and Legal Affairs, Meeting No.88 (3 December 1996). Found at http://www.parl.gc.ca/committees/352/jula/evidence/88_96-12-03/jula88_blk101.html on 5 February, 1997; see also A. McLroy, "Rock to narrow use of electronic monitor" *The (Toronto) Globe and Mail* (4 December 1996) A4.

64 *Oakes*, see note 30 at 139.

65 *Oakes*, see note 30 at 139.