# CONSTITUTIONAL DEFLATION AND THE REBOUND EFFECT: THE *CHARTER* AND THE ENHANCEMENT OF STATE POWER

**ABSTRACT**

It is commonplace that the *Charter* has limited State power in important ways. This article addresses a less recognized phenomenon – that the *Charter* has also been a vehicle for enhancing State power. According to the author, it has done so in two ways. The first is through "constitutional deflation" which occurs where courts define *Charter* rights narrowly to keep them under control. The implication for courts and legislators is that any State action not prohibited by those narrow rights is acceptable. This has had a deflationary effect on common law rights. For example, neither the principle of *mens rea*, nor even the presumption of innocence has the influence they had prior to the *Charter*. The second way in which the *Charter* has increased State rights is through the rebound effect. Fully two thirds of the successful challenges to legislation have inspired legislative responses, often with enactments that give the State more authority than it had prior to the *Charter* challenge. In an effort to keep *Charter* claims in check, even courts have recognized police powers not provided for by legislation. The author argues that the tendency of the *Charter* to increase State power should have been anticipated and should now be recognized by those who engage in *Charter* litigation.

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It is common to think of the *Charter* as "a vehicle for restraining rather than enhancing state power"[1] or to caution that "the… legal rights provisions… are not the sources of police powers."[2] While the *Charter* has indeed imposed significant limits on state authority in its first quarter-century, the truth is that in important respects the *Charter* has also enhanced state power. Indeed, the *Charter* has facilitated the expansion of the criminal law by broadening the scope of crimes, confining the moral force of the presumption of innocence, and it has inspired whole new police powers. With the benefit of hindsight this was perhaps to be expected. It is the product of two related phenomena I call "constitutional deflation" and "the rebound effect."

## Constitutional deflation

"Constitutional deflation" is the process through which common law principles lose their currency or moral suasion as a result of constitutional adjudication. Where this happens, governments and courts are more inclined to compromise those principles than they were prior to the *Charter*. This phenomenon of constitutional deflation is a consequence of the complex role the *Charter* plays as a tool for achieving a just or civil society. After all, a civil society is not created simply by guaranteeing rights and freedoms. More than 250 years ago, Blackstone identified three elements that civil society requires: 1) sovereign powers, 2) individual rights, and 3) a rule of law to mediate between sovereign power and individual rights. It is, of course, the sovereign power that is relied on to define and enforce the criminal law, as the prosecution of offences is the "means by which a civilized society defends itself from within." At the other extreme, the *Charter* is the primary agent for securing those oppositional individual rights that a civil society needs. Yet, the *Charter* operates to achieve the third element of a civil society as well by mediating between individual rights and the sovereign power to prosecute. As the Supreme Court of

Canada has said in more general terms, the *Charter* is "a yardstick of reconciliation between the individual and the community and their respective rights."[4]

This "third element" role for the *Charter* makes it self-deluding to think of the *Charter* only as a rights-conferring instrument or a vehicle for restraining state power. In reality, it is impossible to make binding decisions about the balance between individual and community rights without defining the legitimate reach of state power and, in the process, giving that state power some measure of constitutional imprimatur. Where constitutional principles do not meet the majesty of common law principles or practices – and they will not because morally persuasive common law principles can be defined with far less reserve than constitutionally limiting ones – the result can be that the restraining impact of those principles is dulled. State agents and courts alike, having been told that it is constitutionally valid for the state to have authority, are emboldened and readily claim that authority, hence the phenomenon of "constitutional deflation."

The "rebound effect" occurs where Charter litigation generates new state powers or breeds practices that ultimately reduce the rights of those accused of crime.

Perhaps the most poignant example of constitutional deflation is the common law "principle of fault," the notion that to make it just to harm the accused by punishing him, he must have an "evil mind" or subjective *mens rea*. It is not enough that the accused causes harm by being clumsy or acting unreasonably. He must be "morally blameworthy." Prior to the *Charter*, this was one of the key organizing principles of criminal law.[5] While there were pre-*Charter* negligence offences, courts operating under the heavy influence of common law principle purported to look for an evil mind even for these crimes. To be sure, the reasoning was often fashioned creatively, at times paying mere lip service to *mens rea* while finding ways around it. However, the practice acted as a governor or brake on initiatives to grow the criminal law to capture irresponsible as opposed to malevolent conduct. Not so after the constitutional decisions. The brakes are now off.

Ironically, the devaluation of the principle of fault began with its own stellar victory in the *B.C. Motor Vehicle Reference case*.[6] There the Supreme Court of Canada held that absolute liability – the imposition of liability based solely on the commission of the prohibited act – contravenes the constitutional principle of moral fault for offences that carry the risk of incarceration. Inspired by the decision, defense lawyers began to challenge those criminal offences that did not appear to respect *mens rea* principles. Initially, there was success as "constructive" or "felony" murder provisions fell.[7] Even in those early decisions, though, the implications of accepting "moral fault" as a wholesale limit on Parliamentary authority caused the Court to hesitate. To keep it from running roughshod through the law, the Court imposed limits on the operation of the principle by confining it to offences that carry serious stigma and unremitting penalties, such as murder-based crimes.[8] The implication was that objective fault is appropriate in other cases. This led ultimately to an overt endorsement of the use of objective standards of criminal liability. For those offenders with anything but the lowest levels of capacity, it was declared to be appropriate for criminal liability to follow if the negligence is serious enough, amounting to a marked as opposed to simple departure from the standards a prudent person would use.[9]

Not surprisingly, downgrading the principle of fault in constitutional litigation diminished its influence. The moral suasion the principle had exercised at common law waned. We have now become acculturated to objective fault, accepting it as a principled basis for liability in manslaughter,[10] criminal negligence,[11] motor vehicle[12] and firearm offences[13] (including where a minimum penalty applies),[14] and through the creation of what are clearly offences of negligent sexual assault[15] and negligent possession of child pornography.[16] Some appellate courts have even rejected the long-standing interpretive presumption that criminal offences should be read as requiring subjective *mens rea*; in *R. v. Ludlow*[17] the B.C.C.A. accepted that a negligent failure to attend court is criminal. Why? The Court reasoned that "the authority of those earlier cases [in requiring subjective fault]

has been shaken by the trend of [constitutional] authorities in the Supreme Court of Canada."[18] Without question, as a result of constitutional litigation the common law principle of *mens rea* is not what it once was.

To a less dramatic extent the very presumption of innocence, the "one golden thread that is always to be seen" in criminal cases, has also fallen victim to constitutional deflation. The most manifest symptom of this is the proliferation of reverse onus and mandatory presumptions that put the risk of loss for failing to persuade on the accused instead of the Crown. Courts have routinely if not systematically upheld these provisions using section 1, often after summary reasoning. The cultural acceptance of reversing criminal onuses generated in *Charter* litigation has led the Court to create its own mandatory presumption "out of thin air" [19] in sexual breach of trust cases, as well as to reverse the onus on extreme intoxication[20] and automatism[21] defenses.

Meanwhile, the scope of operation of the presumption of innocence has been confined as a result of *Charter* litigation. In *R. v. Pearson*[22], the accused sought to rely on the presumption of innocence to challenge a provision that put the onus on him to show why he should be released pending his trial. The Court upheld the provision and in doing so made overt what had previously been left unspoken – that the presumption of innocence has a different, less intense meaning where the issue before a criminal court "does not involve determinations of guilt," even where individuals are being deprived of their liberty. This enabled the Ontario Court of Appeal to uphold a criminal restraining order provision[23] that imposes what amounts to probationary terms on individuals who have created no offence, provided there are reasonable grounds to fear that they will commit a child sexual offence in the future.[24]

Without question, these constitutional outcomes have made putting the onus on the accused more culturally acceptable in the criminal context than was once the case. Post-*Charter* we have seen a cavalcade of measures that do everything from reversing the onus in bail release cases on all drug traffickers[25] and on those charged with criminal organization offences[26], terrorism offences[27] or designated *Security of Information Act offences*,[28] to reversing the onus on the public interest defense available to persons permanently bound to secrecy who leak protected information.[29] We have also seen a dramatic growth in resorting to criminal restraining order provisions available if there are reasonable grounds to fear that individuals *will* commit the offences we most fear, including personal injury offences,[30] sexual offences against children,[31] computer solicitation offences with children,[32] organized crimes offences[33] and terrorism offences.[34] Meanwhile, reversing the onus has become a favoured strategy for law and order reform proposals. Proposed Bill C-27 will reverse the onus for bail release for those charged with firearm offences.[35] Bill C-35 proposes to reverse the onus in dangerous offender proceedings,[36] and if passed, Bill C-25 will reverse the onus in money-laundering cases.[37] The legal culture that has encouraged these initiatives was *Charter* born. During Parliamentary Debates, for example, the Honourable Peter Milliken defended the government's initiative to reverse the onus in dangerous offender proceedings by chiding an opposition member that "He is fully aware that reverse onus provisions in the code have already been challenged and upheld as constitutionally strong."[38]

## The rebound effect

The "rebound effect" occurs where *Charter* litigation generates new state powers or breeds practices that ultimately reduce the rights of those accused of crime.

## The dialogue rebound

The most notorious rebound effect of *Charter* litigation is "dialogue," where, in an effort to confine or even abridge the effect of *Charter* "victories," legislative reform occurs. In 1997, Hogg and Bushnell discovered that in more than two-thirds of the 66 *Charter* cases where statutes were struck down, rebound legislation occurred.[39] In the criminal law context dialogue, legislation does not simply operate to replace *Charter*-defective provisions with less intrusive ones. It has often meant the creation of new or expanded police powers or the creation of statutory provisions that can frustrate tactics the accused might otherwise have used in responding to state allegations. Unreasonable search challenges, for example, have led to[40] the creation of whole new warrant powers, including DNA warrants;[41] body impression warrants;[42] warrants to place tracking devices on vehicles;[43] general warrants to use investigative devices, techniques or procedures;[44] warrants to enter dwelling houses to affect arrests,[45] and powers of warrant less searches available in exigent circumstances[46] The successful constitutional challenge

to the "rape shield" provisions in *R. v. Seaboyer* led to legislation that extended rape shield protection to prior sexual experiences between the complainant and the accused,[47] and the decision in *R. v. O'Connor*[48] giving the accused access to third party records was followed by legislation that makes it so complex and prohibitively expensive to try to get records in sexual offence cases that it will often be pointless or impractical.[49] *Charter* litigation striking down a seldom-used power to deny bail to persons charged with crime[50] inspired the development of a statutory provision that has proven effective in achieving the pretrial detention, even of those persons who are likely to attend court and avoid re-offending pending their trials; detention is justified based solely on public perception.[51] *Charter* litigation[52] has also inspired extreme intoxication legislation that accepts the hitherto discreditable proposition that individuals can be criminalized for their involuntary actions. [53]

## Judicial rebound

A less notorious but more problematic form of rebound effect occurs where courts, attempting to achieve a balance, find ways to affirm previously non-existent or controversial police powers. The most striking example is investigative detention. Even though the common law did not permit detention short of arrest,[54] *Charter* challenges to police stops led the Supreme Court of Canada to recognize in *R. v. Mann*[55] that the police have the authority to detain individuals for a "brief duration" if there are "reasonable grounds to suspect in all of the circumstances that such an individual is connected to a particular recent and ongoing crime, and that such a detention is necessary."[56] And in *R. v. Godoy*[57], it was the judiciary that gave the police the power to enter homes in response to emergency calls.

Most often the rebound effect is achieved not by the creation of new common law police powers, but rather through creative construction that reads unstated authority into legislation. It was judges in *Charter* litigation, for example, that identified the power of police to enter homes to install listening devices,[58] or to detain suspected customs violators in drug-loo facilities,[59] or to question drivers detained about their sobriety and request that they perform sobriety tests, all without providing a right to counsel.[60]

Judge-made *Charter* balancing holdings provoked by constitutional claims can impede the interests of the accused even where police powers are not being claimed. The judicially created right to compel production of private third party records in *R. v. O'Connor* [61] inspired the precedent for giving victims previously unheard of standing rights in criminal trials and rights of appeal,[62] and inspired judicial recognition of privacy rights in therapeutic and personal records that the common law had previously denied.

## Conclusion

While it is widely said that the *Charter* is not intended to be a source for promoting state prosecutorial interests or police powers, "constitutional devaluation" and the "rebound effect" ensure that this will often be the outcome of asserting *Charter* claims. This is a phenomenon that requires recognition if we are to have a full appreciation of the role the *Charter* plays and of the broader implications of undertaking constitutional challenges.

While the *Charter's* role in enhancing state powers may have been the greatest surprise in the first quarter century of *Charter* litigation, in truth it should have surprised none of us. "Constitutional devaluation" is a natural but regrettable corollary of asserting mandatory limits on state power using an instrument that functions by moderating individual rights claims through the identification of permissible limits. Nor should dialogue rebound have come as a surprise. It, too, is natural, and so long as legislators respond to constitutional decisions by passing laws that respect indicated *Charter* limits, it is not in the least regrettable; if constitutional litigation reveals or creates important gaps in the law contrary to the broader public interest, those gaps should be filled to the extent the *Charter* tolerates.[63] In contrast, the "judicial rebound" effect that occurs where judges take it upon themselves to achieve balance by creating state powers either from whole cloth or using creative construction is far more controversial. It has long been considered unseemly for judges, responsible for enforcing constitutional limits, to create state powers,[64] and it has been demonstrated powerfully that judges are not particularly good at performing what is in truth a legislative function.[65] More importantly, there is no need for this kind of balancing. One thing that has been demonstrated during the first quarter century of the *Charter* era is that where *Charter* litigation leaves important competing state interests unattended to, legislators will respond, so courts should not have to. It is unavoidable that the Charter will enhance state powers. It is entirely avoidable that judges do the enhancing.

## Notes

[1] Don Stuart, *Charter Justice in Canadian Criminal Law* (4th ed.), (Carswell: Toronto, 2005) at 140.

[2] James Stribolpolous, "In Search of Dialogue: The Supreme Court, Police Powers and the *Charter*" (2005), 31 Queen's Law Journal 1 at 17.

[3] Stuart James Whitely, *Criminal Justice and the Constitution* (Carswell: Toronto, 1989) at 29.

[4] *L.S.U.C. v Skapinke*r [1984] 1 S.C.R. 357 at 366-67.

[5] See *R. v City of Sault Ste. Marie* [1978] 2 S.C.R. 1299.

[6] *Reference re Section 94(2) Motor Vehicles Act* (B.C.) (1986), 48 C.R. (3d) 289 (S.C.C.).

[7] *R. v. Vaillencourt* (1987), 69 C.R. (3d) 289 (S.C.C.); *R. v. Martineau* (1990), 79 C.R. (3d) 129 (S.C.C.); *R. v. Logan* [1990] 2 S.C.R. 731.

[8] *R. v. DeSousa* [1992] 2 S.C.R. 944.

[9] *R v Hundal* [1993] 1 S.C.R. 867; *R. v. Creighton* [1993] 3 S.C.R. 3; *R. v. Finlay* [1993] 3 S.C.R. 103.

[10] *R. v. Creighton* [1993] 3 S.C.R. 3.

[11] *R. v Creighton* [1993] 3 S.C.R. 3 accepts objective fault for criminal negligence causing death.

[12] *R. vHundal* [1993] 1 S.C.R. 867 accepts objective fault for dangerous driving.

[13] *R. v. Finlay* [1993] 3 S.C.R. 103.

[14] In *R. v. Morrisey* (2000), 36 C.R. (5th) 85 (S.C.C.) the Court accepted the constitutional validity of a 4 year minimum sentence for criminal negligence causing death with a firearm for negligent conduct.

[15] Section 273.2(b). The provision was upheld in the face of constitutional challenge in *R. v. Darrach* (1998), 122 C.C.C. (3d) 225 (Ont. C.A.), aff'd on other grounds [2000] 2 S.C.R. 443.

[16] Section 163.1(5).

[17] *R. v. Ludlow* [1999] B.C.J. No. 1359 (B.C.C.A.), followed *R. v. Custance* ]2005] M.J. No. 30 (Man C.A.).

[18] *R. v. Ludlow* [1999] B.C.J. No. 1359 at para 34 (B.C.C.A.); And see *R. v. Smillie* [1998] B.C.J. No. 2082 (B.C.C.A.).

[19] Don Stuart, *Charter Justice in Canadian Criminal Law* (4th ed.), (Carswell, Toronto, 2005) at 397, referring to *R. v. Audet* (1996), 48 C.R. (3d) 1 (S.C.C.).

[20] *R. v. Daviault* (1994) 33 C.R. (4th) 165 (S.C.C.), now codified in s.33.1 of the *Criminal Code of Canada* R.S.C. 1985, C-46.

[21] *R. v. Stone* (1999), 24 C.R. (5th) 1 (S.C.C.).

[22] *R. v. Pearson* [1992] 2 S.C.R. 665 at 685.

[23] *Criminal Code of Canada*, R.S.C. 1985, c. C-46 at s.810.1.

[24] *R. v. Budreo* (2000), 32 C.R. (5th) 127 at 138 (Ont. C.A.).

[25] *Criminal Code of Canada*, R.S.C. 1985, c. C-46 at s.515(6)(d).

[26] *Criminal Code of Canada*, R.S.C. 1985, c. C-46 at s.515(6)(a)(ii).

[27] Criminal Code of Canada, R.S.C. 1985, c. C-46 at s.515(6)(a)(iii).

[28] *Anti-Terrorism Act,* S.C. 2001, c.41, s.19(4), Criminal Code of Canada, R.S.C. 1985, c. C-46 at s.515(6)(a)(iv) and (v).

[29] *Anti-Terrorism Act*, S.C. 2001, c.41, s. 15(1).

[30] *Criminal Code of Canada*, R.S.C. 1985, c. C-46 at s.810.2.

[31] *Criminal Code of Canada*, R.S.C. 1985, c. C-46 at s.810.1.

[32] *Criminal Code of Canada*, R.S.C. 1985, c. C-46 at s.810.01(a).

[33] *Criminal Code of Canada*, R.S.C. 1985, c. C-46 at s.810.01(a).

[34] *Criminal Code of Canada*, R.S.C. 1985, c. C-46 at s.810.01.

[35] Bill C-27 (First Session, Thirty-ninth Parliament 55 Elizabeth II, 2006).

[36] Bill C-35 (First Session, Thirty-ninth Parliament 55 Elizabeth II, 2006).

[37] Bill C-25 (First Session, Thirty-ninth Parliament 55 Elizabeth II, 2006).

[38] The Hon. Peter Milliken, House of Commons Debates, Official Report (Hansard) Thursday, Nov. 29, 2006 at 1629 referencing Bill C-27 during the second reading debate.

[39] Peter. W. Hogg, "Discovering Dialogue" 3 at 3, citing Peter Hogg and Allison Bushnell, "The *Charter* Dialogue between Courts and Legislatures" (1997, 35 Osgode Hall L.J. 75.

[40] I am indebted to James Stribolpolous, "In Search of Dialogue: The Supreme Court, Police Powers and the *Charter*" (2005), 31 Queen's Law Journal 1 at 66, fn. 13 for having so conveniently catalogued these changes.

[41] *An Act to Amend the Criminal Code and the Young Offender's Act (forensic DNA analysis)* S.C. 1995, c. 27, s1, in response to R. v. Borden [1994] 3 S.C.R. 145.

[42] *DNA Identification Act*, S.C. 1998, s.37, in response to *R. v.Stillman* [1997] 1 S.C.R. 607.

[43] *An Act to Amend the Criminal Code, the Crown Proceedings Act and the Radiocommunications Act,* S.C. 1993, c.40, s.18, in response to *R. v. Wise* [1992] 1 S.C.R. 527.

[44] *An Act to Amend the Criminal Code, the Crown Proceedings Act and the Radiocommunications Act*, S.C. 1993, c.40, s.15, in response to *R .v. Duarte* [1990] 1 S.C.R. 30 and *R. v Wong* [1990] 3 S.C.R. 36.

[45] *An Act to Amend the Criminal Code and the Interpretation Act (powers to arrest and enter dwellings)*, S.C. 1997, c.39, s.2 in response to *R. v. Feeney* [1997] 2 S.C.R. 13.

[46] *Criminal Law Improvement Act*, S.C. 1997, c.18, in response to R. v. Silviera [1995] 2 S.C.R. 297.

[47] *Criminal Code of Canada*, R.S.C. 1985, c. C-46, s.276.

[48] *R. v. O'Connor* (1995), 44 C.R. (4th) 1 (S.C.C.).

[49] *Criminal Code of Canada*, R.S.C. 1985, c. C-46, s.278.1.

[50] *R. v. Morales* (1992), 17 C.R. (4th) 74 (S.C.C.).

[51] *Criminal Code of Canada,* R.S.C. 1985, c. C-46, s.515(10)(b).

[52] *R. v. Daviault* (1994) 33 C.R. (4th) 165 (S.C.C.).

[53] *Criminal Code of Canada*, R.S.C. 1985, c. C-46, s.33.1. The constitutionality of this legislation remains controversial.

[54] See *R v Dedman* [1995] 2 S.C.R. 2 at 10-13, and Don Stuart, *Charter Justice in Canadian Criminal Law* (4th ed.), (Carswell: Toronto, 2005) at 308.

[55] (2004), 21 C.R. (6th) 1 (S.C.C.).

[56] (2004), 21 C.R. (6th) 1 at para 45 (S.C.C.).

[57] [1999] 1 S.C.R. 311.

[58] *R. v Lyons* [1984] 2 S.C.R. 633, and *Reference re Judicature Act* (Alberta) [1984] 2 S.C.R. 697.

[59] *R. v. Monney* [1999] 1 S.C.R. 652.

[60] *R. v. Orbanski* (2005), 29 C.R. (6th) 205 (S.C.C.).

[61] (1995), 103 C.C.C. (3d) 1 (S.C.C.)

[62] *L.L.A. v A.B. (sub nom. L.L.A. v Beharriell)* (1995), 103 C.C.C. (3d) 92 (S.C.C.).

[63] This kind of directory dialogue is appropriate. The kind of diplomatic dialogue evident in *R. v. Mills* (1999) 28 C.R. (5th) 207 (S.C.C.) and *R. v. Hall* (2002) 4 C.R. (6th) 197 (S.C.C.) and the *Daviault* legislation where Parliament rejects constitutional limits proclaimed by courts in the hope that the Court will retreat is not. It is detrimental to the constitutional message. For similar views see Don Stuart, *Charter Justice in Canadian Criminal Law* (Toronto: Carswell, 2005) at 7-13; Stephen Coughlan, Annotation to *Suave*, 5 C.R.(6th) at 209; Jamie Cameron, "Dialogue and Hierarchy in Charter Interpretation: A Comment on *R. v. Mills*" (2001) 38 Alta. L. Rev. 1051; and Kent Roach, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue* (Toronto: Irwin Law, 2001) at 278-281.

[64] See, for example, R.J. Delisle, "Judicial Creation of Police Powers" (1993), 20 C.R. (4th) 29.

[65] See James Stribopolous, "In Search of Dialogue: The Supreme Court, Police Powers and the Charter" (2005), 31 Queen's L. J. 1.