PREVENTIVE JUSTICE

Criminal Code's General Peace Bond (Part 1)

David C. Day, QC

Overview

Not least of the engines which drive preventive justice initiatives are legal processes. These processes involve one or other peace and security mechanisms. They are intended to discourage uninvited and unwanted incursions against peaceful enjoyment of life by persons and families and to deter unlawful trespasses on, damage to, and conversion of property. Preventive justice is the hallmark of these processes. They rely on the conviction that persons made subject to their decrees will submit to the traces of judicial order; persuaded by the prospects of punishment and prohibitions which they otherwise risk.

A frequently applied process is the general "peace bond" provision of the Criminal Code (the "Code") section 810 (considered in this article).

Supplementing the Code "peace bond" are residual "peace bond" jurisdiction, reserved to courts under common law, together with a special "bonding" remedy in section 810.1 and other peace-fostering provisions. (These measures will be addressed in a second article). Provincial legislation furnishes several prophylactics to disturbance of personal, familial and proprietary peace and security; including harassment protection orders. (A third article will treat these processes).

"Peace Bond" – Section 810

Nature of "Peace Bond"

A "peace bond" application under Criminal Code section 810[1] is unique in Canada's penal law. Designed as a special preventive proceeding, section 810 is invoked without "laying" a charge[2] or engaging the panoply of criminal law process (although some of the Code's procedural provisions are accessed).[3] On hearing of the application, a plea is not required. If successful, the application does not involve a finding of guilt or conviction.[4] If unsuccessful, the adjudicating forum may, in factually-warranted circumstances, nonetheless grant a remedy under common law (treated in the second commentary). (An offence provision which appears to contemplate misbehaviour comparable to that addressed by this preventive justice provision, is "uttering threats" contrary to section 264.1.)[5]

Application: Generally

A peace bond application is commenced by written Information;[6] sworn by an applicant – the informant – before a justice.[7]

The application must be instituted no more than six months after "the time when the subject matter of the proceedings arose.[8]

- The applicant must be either (i) a fearing person or (ii) someone on behalf of the fearing person; and
- the Information must allege that the informant:

(a) fears

(b) another person

(c) will

(c.i) cause personal injury to the

– informant

or

– informant's spouse

or

– informant's child

or

(c.ii) damage informant's property.[9]

Although not defined in the Code as pertains to section 810, "spouse" probably includes a *de facto* spouse and "child" probably includes an adopted, out-of-wedlock and *in loco parentis* child.[10]

Unlike most Informations received under the Code, an Information under section 810 does not constitute a criminal charge.

Application: Particulars

The Information is at risk of dismissal, when the parties appear for hearing, if lacking in particulars. For example, the Information sworn under Criminal Code section 745 (now section 810) before a justice in *R. v. Thoen*[11] alleged that:

> [the husband] ... on or about the 31st day of October, A.D. 1983 at Saskatoon ... did put ... [the wife] in fear that he would cause her and her children personal injury ...

Having found that the "defendant is not given enough basic information to identify the basis of complaint being made against him and consequently [the Information] does not put him on notice of the case he will have to meet," Gagne J. referred to sections 510 and 512 (now sections 581 and 583) of the Criminal Code[12] in relation to sufficiency of Informations and dismissed the Information.

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[1] R.S.C. 1985, c. C-34.

[2] *Re Dhesi and The Queen* (1993) 9 C.C.C. (3d) 149 (B.C.S.C.).

[3] For example, see: Criminal Code, R.S.C. 1985, c. C-34, s. 795.

[4] *D.(J.M.) v. P.(J.G.)*, (1991), 290 A.P.R. 44 (N.S. Fam. Ct.).

[5] Criminal Code, R.S.C. 1985, c. C-34.

[6] Supra note 3, ss. 788(1); paragraph 789(1)(*a*), and Part XXVIII, Form 2.

[7] Defined under Criminal Code, R.S.C. 1985, c. C-34, s. 2, to include a justice of the peace or a provincial court judge.

[8] Criminal Code, R.S.C. 1985, c. C-34, ss. 786(2).

[9] Ibid. s. 810.

[10] Compare: Criminal Code, s. 214.

[11] (1983), 32 Sask, R. 81 (Sask. U.F.C.).

[12] R.S.C. 1985, c. C-34.

> Particulars will not save an Information that is a nullity. Particulars may only be given to add to a valid Information. The defect is apparent on the face of ... [this Information]. [T]he Information is a nullity and cannot be cured by particulars or by amendment.[13]

In other words, the Information commencing an application under section 810 must contain specifics of the date, time, place and nature of events grounding the application.

Court's Obligations on Receiving Application

The justice "may" receive the information[14] presumably after s(he) makes inquiries (often described as the "pre-inquiry") to be satisfied there is some credible evidence to warrant doing so. (Where, in contrast, an Information is being sworn to "lay" a criminal charge, rather than to apply for a "peace bond," a justice shall receive the Information, and then conduct the "pre-inquiry;" after, rather than before, receiving the Information.)[15]

If a justice decides to receive the Information, the justice "shall," under subsection 810 (2), take whatever steps are necessary to have the informant and the respondent (described as "defendant" in section 810) to the informant's complaint appear before her (him) or before a summary conviction court (usually a provincial court judge). The means of obtaining defendant's appearance (and, presumably, applicant's appearance if events require) are either a summons or a warrant of arrest.[16] The justice appears not to have any discretion to decline to bring informant and defendant before her (him). (In comparison, a justice does possess discretion to decide whether or not to permit a criminal charge to proceed beyond receiving the information.)[17]

Appearing to Application

Section 800 of the Criminal Code contemplates "counsel or agent" appearing for a person charged with a summary conviction offence under the Criminal Code unless the summary conviction court requires personal attendance of the charged person. This provision does not appear to apply to summary proceedings under section 810. Informant and defendant to a proceeding under section 810 must appear in person (accompanied, if desired, by counsel or agent).

A person appearing, whether in response to a summons or under warrant of arrest, to the Information, may be admitted to judicial interim release until the proceedings on the Information are concluded.[18]

Preliminary Responses to Application

Be alert to an informant who misuses section 810 (or offence provisions) of the Criminal Code. Motivated by revenge or prompted by overreaction, s(he) may, by Information, disingenuously apply for a "peace bond" (or "lay" a criminal charge), as a ploy to have her (his) spouse brought before a court and placed on judicial interim release. Until the Information against defendant is dismissed when heard weeks or months later (an outcome the informant probably anticipates), the judicial interim release may impose conditions that enjoin contact with the informant by his or her defendant spouse (hence preventing, perhaps, informant's spouse from having access to their children residing in informant's custody). If a practitioner identifies misuse of the Criminal Code, s(he) should counter with (i) an application to strike the Information as not being founded on reasonable grounds or (ii) a request for an early date for hearing of the Information on its merits.[19]

"Showing Cause" in Response to Application

The defendant to the information is not required to plead. Rather, explains Steinberg J. of Ontario Unified Family Court, Hamilton, the defendant should, by virtue of subsection 810(2):

> be asked to show why an order should not be made against him directing him to enter into a recognizance ...[20]

What subsection 810(2) presumably means, as pertains to section 810, is that if a defendant indicates her (his) intent to show

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[13] *R. v. Thoen* (1983), 32 Sask. R. 81 (Sask. U.F.C.), at 83.
[14] Supra note 3. paragraph. 788(2)(*a*).
[15] Ibid. ss. 504; 507-511.
[16] Ibid. paragraph. 788(2)(*b*).
[17] Ibid. c. C-34, ss. 507-511.
[18] Supra note 3, ss. 810(5); 515; *R. v. Wakelin* (1991), 71 C.C.C. (3d) 115 (Sask. C.A.).
[19] See, e.g., *R. v. Wakelin* (1992), 71 C.C.C. (3d) 115 (Sask. C.A.).
[20] *Family Law In The Family Court*, H.T.G. Andrews, ed. (Carswell, Toronto, 1973), chap. 6 at 123.

cause (rather than consent to the application), the informant is required to prove the allegations in the Information at a hearing prescribed by subsection 801(3). The informant must, likewise, prove his or her allegations if the defendant does not appear and the Court, rather than postponing in order to compel defendant's appearance, proceeds *ex parte*.[21] (Note, however, that subsection 810(2) appears to make mandatory the appearance of both informant and defendant; a requirement not infrequently honored in the branch))

On hearing of the application under subsection 810(3), the informant calls and/or gives evidence. Most, although not all, rules of evidence which govern criminal trials apply. An exception is provided by *R. v. Patrick*.[22] On hearing of an application under section 810, the Court received and considered testimony of defendant's previous disposition for violence. Per Ryan J.:

> The reason for excluding evidence of disposition or propensity of an accused at a criminal trial [*Morris v. R.* (1983), 7 C.C.C. (3d) 97 (S.C.C.)] is not that it is irrelevant but that the trier of fact may place too much weight on the evidence, thus undermining the presumption of innocence. The rules of evidence at a criminal trial are designed to safeguard the interests of an accused to protect him from wrongful conviction and punishment. But this reason for excluding evidence of disposition has less significance in a proceeding which by its very nature seeks to predict and to prevent the commission of a crime.
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> Subsection 810(3) should be interpreted as requiring an objective rather than a subjective assessment of the informant's grounds for fearing the defendant. The fears must be placed in context. If the person threatening the informant has on other occasions assaulted others, then this is a matter that the trial judge ought to consider in determining whether the informant's fears are well placed. To limit the court to an investigation of matters known only to the informant could in many cases defeat the purpose of the section. The actions of the defendant in the past, whether he is a peaceable or violent man, may well assist the court in determining the reasonableness of the informant's fears and the likelihood that the defendant will carry through his threats.[23]

Defendant may be excluded from hearing of the application; such as where a 14-year-old daughter was reluctant to testify in defendant's presence or where defendant has misconducted himself at the hearing: *R. v. Haney*.[24]

Following the informant, defendant has an opportunity to call and/or to give evidence. By evidence or by closing argument, or both, defendant may seek to discredit, diminish the weight deserved by, or explain away informant's allegations.

Legal Burden on Application

Having heard the evidence of and on behalf of the parties, and their respective submissions, the presiding justice or summary conviction court must, under subsection 810(3), be "satisfied by the evidence adduced that the informant has reasonable grounds" for the fear alleged in the information.

By "satisfied," Handrigan P.C.J. in *Miller v. Miller*[25] (perhaps the only reported case to address this issue in detail) interpreted subsection 810(3) to require that the informant prove the allegations in the information on a balance of probabilities (that is, a preponderance of evidence) in order to meet the persuasive (that is, legal) burden of proof.

Per Handrigan P.C.J.[26] (followed in *R. v. Budreo*)[27]

> 1. Proceedings under section 810 are at best quasi-criminal in nature and even where there is a finding that the accused is required to enter into a recognizance this is not a conviction and no penalty flows directly there from.
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> 2. The wording of section 810 of the Criminal Code is to the effect that an application can be taken out by any person "who fears," and that the court must be satisfied on the evidence adduced that the applicant has "reasonable grounds for his fears." The use of the words "fears," "satisfied," and "reasonable grounds" do not suggest the same severity or significant degree of proof

[21] *R. v. Wheeler* (1984), 149 A.P.R. 62 (Nfld. Dist. Ct.).
[22] (1990) 75 C.R. (3d) 222 (B.C. Co. Ct.), at 228.
[23] *R. v. Patrick* (1990) 75 C.R. (3d) 222 (B.C. Co. Ct.), at 228.
[24] (1976), 29 R.F.L. 155 (Alta. Prov. Ct.).
[25] (1990), 271 A.P.R. 250 (Nfld. P.Ct.).
[26] (1990), 271 A.P.R. 250 (Nfld. P.Ct.), at 254-255.
[27] Ont. Ct. Gen. Div. No. U1626/94, 04 January 1996, Then J.

attendant upon the prosecution in bona fide criminal proceedings.

3. While it may be argued that a respondent entering into a recognizance has his liberty restricted, or that a very real consequence will result to those directed to but who refuse to enter into a recognizance, essentially the existence of a recognizance is no penalty or burden for a respondent to bear, simply because he is only binding himself to what do all law-abiding citizens are required to do. It is true that he attracts the risks of further penalty for breaching the peace or failing to be of good behaviour but this is not such an unreasonable burden or expectation for him, such that his exposure to it should be supportable only by proof beyond a reasonable doubt.

4. The recognizance contemplated by section 810 of the Criminal Code may be in form 32 of the Criminal Code and this is the type of form suggested as being the form of a recognizance to be entered into by a person released by the court under the judicial interim release provisions of the Criminal Code. It is a well established fact that the burden on the applicant under the judicial interim release provisions is not beyond a reasonable doubt but on a balance of probabilities. Hence, it would follow a fortiori that the burden contemplated by section 810 of the Criminal Code is on the same standard, proof on a balance of probabilities.

Remedy Discretionary

If the informant establishes (i) her (his) alleged fears and (ii) reasonable grounds for her (his) alleged fears, the court "may," under section 810(3), after mandatorily complying with subsection 810(3.1) and 810(3.2), order the respondent to enter into a recognizance, with or without sureties. Neither the order nor the recognizance constitutes a criminal record.

The court may, instead, exercise its discretion to decline to make any order. Whether the court makes an order will be governed by the facts and circumstances of each case. (For example, if a proven threat is an isolated occurrence of fleeting moment and transitory, superficial effect, an order may be declined.)

A recognizance is an obligation undertaken by a person, before a judge or other court officer, in writing, to do or omit to do certain specified things. If ordered, under paragraph 810(3)(*a*), the recognizance – to keep peace and be of good behaviour – can obtain for any period not exceeding 12 months and include provision requiring respondent to additionally comply with "such ... reasonable conditions ... as the court considers desirable for securing the good conduct" of the defendant and, thereby, enhance the likelihood of future protection of the recipients of defendant's threats. Conditions may include those contemplated by subsections 810(3.1) and 810(3.2); conditions a court must consider.

Under subsection 810(3.1), a court may, where "desirable, in the interests of the safety of the defendant or of any other person," include, as a condition of the recognizance, provisions relating to possession/use of firearms/firearms acquisition certificates by the defendant to the proceeding.

Under subsection 810(3.2), a court may, where "desirable, in the interests of the safety of the informant, of the person on whose behalf the information was laid or of the person's spouse or child" ("the informants"), include, as conditions of the recognizance, either or both of the following: (i) an injunction against defendant being at or within a specified distance from the place where the informants are "regularly found" and (ii) an injunction against defendant communicating with the informants "in whole or in part, directly or indirectly."

A recognizance is, not infrequently, authorized to apply to cohabiting informant and defendant on the assumption they will continue to cohabit. Alternatively, the recognizance may enjoin them from doing so, by including a contact-prohibiting condition in the recognizance (under paragraph 810 (3.2)(*a*)).

Costs may, under section 809, be ordered: *R. v. Power*.[28]

Failure to Enter into Recognizance

Failure, or refusal, of a defendant to comply with an order that he (she) enter into a recognizance "may," under paragraph 810(3)(*b*), result in the court committing defendant to a term of imprisonment not exceeding 12 months.

Appeal

A party to a "peace bond" application under Criminal Code section 810 may appeal

[28] (1902), 6 C.C.C. 378 (N.S. T.D.).

under Criminal Code subsection 830(1), from determination of the application. The appeal is limited to grounds involving errors of law; excesses of jurisdiction, and refusals or failures to exercise jurisdiction.

Breach of Recognizance

Breach of a recognizance is a dual procedure offence: punishable, as an indictable offence, by imprisonment not exceeding two years[29] or punishable, as a summary conviction offence, by a maximum of six months imprisonment, $2,000 fine, or both.[30] (A person convicted of the summary conviction offence may, instead or in addition, be sentenced to a maximum three years' probation. A person convicted of the indictable offence may, in addition to or in place of being sentenced to a maximum two years' imprisonment, be sentenced to a fine of (in theory) any amount and/or a maximum three years' probation. If a person is convicted of the summary conviction offence or the indictable offence and sentenced to not more than three months' imprisonment, the imprisonment may be ordered to be served intermittently. If, instead of being found guilty and convicted, a person is found guilty but not convicted of the summary conviction offence or the indictable offence, the person will be sentenced under discharge provisions of the Criminal Code.)[31]

A person required to enter into a recognizance may (infrequently) be required to support the recognizance by one or more sureties (guarantors). (All persons with an interest in a matrimonial home would have to "go surety" if the home represents most or all of the net worth being pledged by proposed sureties, if they are required, to support a recognizance.)

Further, breach of a recognizance may result in an order of estreatment; that is, an order under Part XXV of the Criminal Code requiring the defendant and/or his (her) sureties to pay to the Crown, or risk execution proceedings, for some or all of the amounts which they promised to pay – by virtue of signing the recognizance – if breach of the recognizance is found.

[29] Supra note 3, ss. 811(*a*).
[30] Ibid. ss. 811(*b*); 787(1).
[31] R.S.C. 1985, c. C-34, ss. 737(1); 787(1); 736.

Social Considerations

Dismissal of an application under section 810 of the Criminal Code, where the parties are spouses, (i) may heighten the informant spouse's fear for personal safety because of concerns the defendant spouse will retaliate; or (ii) may further diminish the informant spouse's self-esteem, thus her (his) ability to deal on an equal emotional footing with the defendant spouse in other separation-driven issues. Other considerations include apprehension about court process; rancor of confronting the defendant; fear of not being believed, and distress over securing and paying for legal advice if the Crown does not represent the informant on hearing of the information. Due to concerns such as these, many are reluctant to resort to this – or any – provision of the Criminal Code. They take this position despite the merit of their complaints; despite the measured and encouraging advice of their counsel (if affordable or provided by the Crown), and despite the possible adverse consequences of acquiescing in violation of their dignity, person, or property.

Constitutional Validity

Section 810 is *intra vires* Parliament of Canada[32] and its application has survived scrutiny under the lenses of the *Canadian Charter of Rights and Freedoms*.[33]

Reforms

When amendments to the Criminal Code (regarding sentencing reform), enacted 13 July 1995, are proclaimed in force, section 810 will be altered by addition of subsection (4.1):

> The justice or summary conviction court may, on application of the informant or the defendant, vary the conditions fixed in the recognizance.[34]

If enacted, clause 110 of Bill C-118, read a first time on 14 December 1995, would amend subsection 786(2) of the Code whereby proceedings under section 810 may be instituted more than six months after the time when the subject-matter of the proceedings arose, if the parties agree.

[32] *Re Dhesi and The Queen* (1983), 9 C.C.C. (3d) 149 (B.C.S.C.).
[33] *Constitution Act, 1982*; Part I; *Dixon v. Genge* (1990), 286 A.P.R. 157 (Nfld. T.D.); *R. v. Patrick* (1990), 75 C.R. (3d) 222 (B.C. Co. Ct.).
[34] S.C. 1995, c. 22, s. 8.