

Provincial-Territorial and Parens Patriae Remedies (Part 3)

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Overview

Provision for preserving the peace is not restricted, in law, to ancient strains of common law and contemporary sections of Canada's Criminal Code (considered in parts 1 and 2 of this series). Legislation enacted by all provinces and territories and the equitable *parens patriae* multi-purpose authority (outlined in this third – final – part of the series) are additional partners in law's peace-preserving initiatives.

Whatever the legal vehicles deployed to preserve peace – or, at least, to diminish prospects of, or to curtail, peace breaches – the circumstances causing, or threatening, interference with public – or private – peace have well-identified origins.

Perhaps foremost among them is the abnormal quest for power and its unreasonable exercise to control another (or others). Control, in turn, is exhibited by behaviours identified in the Duluth, Minnesota "Domestic Abuse Intervention Project."¹ These include

- (i) use of intimidation, emotional and/or economic abuse, isolation, gender (usually male) privilege, or coercion/threats;
- (ii) minimizing, blaming and/or denying; and
- (iii) manipulating children (such as by threatening to abduct or using child access to harass).

Other origins of circumstances occasioning or portending peace violations include organic or personality disorder, misuse of

drug liquids-solids, and goading (sometimes in combination).

Principal interests threatened or trespassed by peace-menacing or peace-breaching circumstances are (i) public entitlements of safety, passage and expression; (ii) private rights-privileges of privacy, independence, security, parenting and property enjoyment.

Law's well-intentioned designs to prevent or to protect persons (and their families and property) from, hindrances with quiet enjoyment often encounter spanners to expeditious, efficient and effective implementation. Not least are:

- (i) public perception that justice is either unresponsive, discriminatory, mistrusting, and/or unsympathetic;
- (ii) vulnerability and lack of personal esteem and, thus, inadequate confidence of many persons to invoke prevention or protection legal proceedings;
- (iii) overburdened – occasionally impatient, curt, disbelieving – courts and administrative staffs; not to mention some barristers; and
- (iv) barriers of time and of entree to representation (such as where one side, only, can obtain counsel – either paid or *pro bono*).

Besides these catholic impediments to accessing the law there are others unique to those situations in which peace remedy seekers allege the risk or reality of domestic abuse. In its stellar report for discussion on *Domestic Abuse: Toward An Effective Legal Response*, the Alberta Law Reform Institute² recognizes that "there are numerous systemic barriers to victims [and alleged victims] of domestic abuse accessing the legal system" (such as "dependency or lack of ability of one or both of the parties to unilaterally leave the relationship"³). Furthermore, the report assumes that "individuals experiencing abuse in non-domestic relationships will not experience the same kinds of barriers to escaping the perpetrator [or alleged perpetrator] or accessing legal remedies ..."⁴

¹ Minnesota Program Development Inc., 206 W. 4th St. Duluth, Minn. 55806.

² Edmonton, (June) 1995, 93.

³ Ibid. at 94.

⁴ Ibid. at 93.

When resorted to, peace-promoting and preserving legal processes under criminal law (parts 1 and 2) and civil law (this part) are not required to operate in isolation from one another. Neither criminal nor civil law affords all-encompassing remedies. While "criminal proceedings on their own will be appropriate and sufficient" in some instances,⁵ the Alberta Law Reform Institute report for discussion states that "in many cases, civil remedies will be undertaken in conjunction with criminal proceedings."⁶ Moreover, the Institute suggests⁷ "processes and solutions constructed outside the [adversarial] legal arena may be most effective."

Arguably, any circumstance that threatens or torments the peace is more likely to be permanently resolved by mediation or other non-adversarial processes between parties and by treatment (for example, therapy or counselling) of the alleged miscreant. This is because legal edicts set on punishment, deterrence, rehabilitation and/or retribution⁸ most often attack symptoms and results, rather than address and seek to correct causes, of problems which hold potential for or generate peace breaches and more serious misbehaviour.

Provincial-Territorial Legislation

Some of the more significant civil peace-preserving remedies authorized by provincial and territorial legislation are summarized in the accompanying table. Their focus is, primarily, regulation by judicial order, of behaviour among members of family units and of fractured families, to encourage preservation of the peace. Many of the tabularized provisions are dedicated to preserving peace towards children and protecting them from peace breaches.

Either because expressly mandated by the governing legislation, or pursuant to inherent authority in the case of proceedings in a provincial or territorial superior court, terms and conditions may be appended to these provincial/territorial civil remedies. As with judicial interim release, recognizances, and probation orders under the federal Criminal

Code,⁹ however, terms and conditions attached to these remedies must comport with the *Canadian Charter of Rights and Freedoms*.¹⁰ Thus, terms and conditions of such remedies must be confined to "reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."¹¹ Furthermore, the authorizing provisions of provincial-territorial statutes, if "inconsistent with the provisions of the Constitution" (including the Charter), may be declared of no force or effect under section 52(1) of the Charter "to the extent of the inconsistency."

Other provisions of the tabularized legislation as well as statutes dedicated to provincial-territorial summary proceedings or provincial offences (or comparable legislation) constitute provincial offences (sometimes described as "penal offences") for breaches of peace-preserving remedies which have been granted. Contempt proceedings (civil or criminal) may, alternatively or additionally, be warranted.¹²

Parens Patriae Authority

Remedies to preserve peace toward children and mentally-challenged persons may be exercised by provincial-territorial superior courts under the auspices of their *parens patriae* authority. The authority is canvassed, in respect of children, in *Beson v. Director of Child Welfare (Nfld.)*¹³ and, respecting mentally-challenged persons, in *Re Eve*.¹⁴

Reform

Voluminous published material – judicial decisions, law reform reports, doctoral theses, government policy papers, books, and press commentaries – continuously advocate reforms to enhance both legal and non-legal processes and programs to preserve – and to protect from breaches of – the peace.

Among the most recently-published is the pragmatic and judicious report for discussion of the Alberta Law Reform Institute: *Domestic*

⁵ Ibid. at 2.

⁶ Ibid.

⁷ Ibid.

⁸ *R. v. M.(C.A.)*, S.C.C. File No. 24027, 21 March 1996.

⁹ R.S.C. 1985, c. C-46, as amended; e.g.: ss. 515(4); 732.1; 810; 810.1.

¹⁰ *Constitution Act*, 1982, Part I.

¹¹ Ibid. at s. 1.

¹² See, e.g. annotation under section 9 of The Criminal Code, R.S.C. 1985, c. C-410, in *Martin's Annual Criminal Code 1997* (Canada Law Book Inc., Aurora, Ont, 1996).

¹³ [1982] 2 S.C.R. 716.

¹⁴ (1986), 185 A.P.R. 273 (S.C.R.).

*Abuse: Toward An Effective Legal Response.*¹⁵ Among the report's recommendations and questions for discussion, in the Province of Alberta domestic abuse context, are the following. (Many of the selected recommendations and questions hold considerable potential for inclusion, as terms or conditions, in mediated and other agreements and in orders resulting from exercise of courts' civil jurisdiction, within all provinces and territories, without their necessarily first being incorporated in legislation.)

Recommendations

- **Recommendation 2 (page 75):** Physical assault should be identified as the sort of conduct which entitles an applicant to apply for an order. It should be broadly defined and should include threat of physical assault and conduct which creates a reasonable apprehension of imminent physical harm. There should be no qualification that the assault cause a specific degree of physical harm.
- **Recommendation 3 (page 77):** The legislation should specify that sexual contact of any kind that is coerced by force or threat of force should be included in the kind of conduct that triggers the entitlement to apply for an order. Threats to make unwanted sexual contact by force should also be included.
- **Recommendation 4 (page 78):** Damage to any property that is done with the intention of intimidating or threatening the applicant or which would reasonably be interpreted as a threat to the applicant should also be included as giving rise to an entitlement to apply for an order.
- **Recommendation 5 (page 79):** The sort of conduct which entitles an individual to apply for an order should include the forcible or unauthorized entry of the respondent into the residence of the applicant without the applicant's consent where the respondent and the applicant do not occupy the same residence.
- **Recommendation 6 (page 81):** Compelling another against their will to perform an act which that person has the right not to perform or compelling another against their will to refrain from doing an act which that person has a right to perform should be included in the conduct which entitles an individual to apply for an order under the legislation.
- **Recommendation 7 (page 83):** Harassment consisting of making repeated telephone calls to the applicant's home or workplace; keeping a person under surveillance by following them or looking in their windows; repeatedly coming to the applicant's house, workplace or school; following the applicant in public places and so on should be included in the sort of conduct that gives rise to the entitlement to apply.
- **Recommendation 8 (page 87):** Emotional abuse should trigger the entitlement to apply for an order. Emotional abuse should be defined so as to include: subjecting an individual to degradation and humiliation including repeated insult, ridicule or name calling, making repeated threats in relation to the individual's children, family or friends, and consistently exhibiting obsessive possessiveness or jealousy in relation to the individual which is such as to constitute a serious invasion of the individual's privacy.
- **Recommendation 10 (page 108):** The legislation should empower the court to make an order prohibiting the respondent from making direct or indirect contact with the applicant. For further clarity and to assist in compliance with and enforcement of the order the meaning of "no-contact" should be explained. The order should give examples of the sorts of things that it includes in the meaning of contact. It should not, however, limit the meaning of "no-contact" to the examples set forth in the order. Things listed in the meaning of "no-contact" should include:
 - telephoning the applicant at the applicant's residence, place of employment or school;
 - going to the applicant's place of employment, school or residence;

¹⁵ Edmonton, June 1995. The Report was prepared by Professor Annalise Acorn. A Report Project Committee, which provided thoughtful and constructive review, is comprised of C. W. Dalton, Nancy A. Flatters, Justice B. L. Rawlins, and Margaret A. Shone.

- approaching the applicant if the respondent accidentally sees the applicant in a public place;
 - watching the applicant or the applicant's residence, place of employment or school from a distance,
 - communicating with the applicant in any other way including but not limited to mail, fax, telegram, or any other form of written communication; and
 - communicating or attempting to communicate with the applicant in any of the above ways by enlisting the help of any other person.
- **Recommendation 11 (page 110):** Where the circumstances of the case lead to the inference that a protection order is needed but where, as a matter of practical necessity or at the request of the applicant, the parties must, or could potentially desire to, have safe contact with one another, the order should be very specific[;] structuring the terms of that contact in order to ensure that it does not:
 - a) provide an opportunity for continued abuse; or
 - b) make it impossible for the police to effectively enforce the order.

Thus, orders should be required to set out in detail the logistics of how and when contact should take place to fulfil parenting or other family responsibilities, or to discuss reconciliation or other aspects of the relationship. Where possible it should be specified that such contact take place through an intermediary.

It should be specified that orders with a blanket exception for contact with the applicant in connection with the children should not be given.

- **Recommendation 12 (page 112):** Because of the difficulties of enforcement of orders restricting the use of a residence, it is recommended that a power to grant such orders should not be created by the legislation.
- **Recommendation 13 (page 114):** The legislation should provide for the possibility of persons other than the applicant to be included in the order. The best

procedure for this would be to allow others to consent to being included in the no-contact provisions of the order where the evidence indicates that they are also at risk of injury or harassment by the respondent.

- **Recommendation 15 (page 145):** The legislation should empower the court to order a police officer to accompany the applicant to a specified residence to collect specified personal property.

The court should also be empowered to order that the respondent refrain from converting or damaging the applicant's property or property in which the applicant may have an interest.

The court should also be empowered to grant a temporary order giving the applicant possession of any assets in which the applicant has or may have an interest that are necessary to the applicant's ability to live independently of the respondent.

- **Recommendation 16 (page 147):** The court should ... be empowered to order the respondent to pay a sum, that the court would consider fair, to the applicant which would reflect the cost of separation from the respondent and would reasonably assist the applicant in setting up a household independently of the respondent.
- **Recommendation 17 (page 150):** The court should be empowered to make an order as to costs, including any fees associated with the filing of the application as well as full reimbursement for lawyers fees.

Questions

- **Question 1 (page 88):** Should financial abuse consisting of the coercive control over financial assets and means of subsistence with a view to ensuring the financial dependency of the [alleged] victim be included in the sort of conduct which entitles an individual to apply for protection?
- **Question 3 (page 118):** Should the court be empowered to grant a mutual order where only one party has applied for an order and one party has proved that the other has engaged in the conduct identified by the legislation?

Or, should an application by both parties and proof of abusive conduct by both

parties be required before a mutual order may be granted?

- **Question 4 (page 126):** Should the legislation create a presumption that, where it is necessary to make a temporary and limited order as to custody in the protection order, the best interests of the child are served by an award of custody to the non-abusive parent?
- **Question 5 (page 139):** Where an application for a protection order is made, should the judge be given discretion to order that firearms or other weapons in the respondent's possession be temporarily surrendered to a police officer?
- **Question 6 (page 142):** Should the legislation provide that the court may make an order granting the applicant exclusive possession of the residence regardless of whether the residence is owned or leased jointly or solely by one of the parties?

Should the fact that the respondent is the sole owner or lessor of the residence be a bar to the granting of the order?

If it is determined that the legislation should provide for such a remedy, should it be accompanied by a provision allowing the court to order the police to remove the respondent from the residence?

- **Question 9 (page 151):** Should the court be empowered to order a respondent to take counselling and to pay for that counselling where it appears that it would be helpful to provide an opportunity for the respondent to reflect upon and attempt to change the abusive behaviour with the aid of professional help, or where it appears that the respondent may need help in coping with the trauma of dealing with separation from those upon whom the respondent may be emotionally dependent?

Where the respondent has sufficient resources to pay for counselling, should the court be empowered to order that the respondent pay the costs of such counselling?

- **Question 10 (page 152):** Should the court be empowered to grant an order directing the respondent to pay the costs of counselling for the applicant with an appropriate professional service where the applicant has so requested?
- **Question 11 (page 153):** Should the court be given the power to grant other relief necessary for the protection of the applicant or the success of the applicant's attempt to become independent of the respondent?

If so, should such further relief be granted at the sole discretion of the court or only with the consent of the applicant?

One aspect of Britain's current efforts to preserve public and private peace focuses on stalking.¹⁶ In response, *The Times* suggested in its leading article on 19 October 1996 that cards be issued to those alleged to have been stalking before further action is embarked upon. *The Times* rationalized that "[this] would have the merit of avoiding the cumbersome machinery of the court, while alerting ... [those against whom allegations are being made] that, even if they [such as "lovesick" persons] mean no harm, [the person complaining against her/him] is suffering as a consequence of their actions. In cases of false accusations, it would give the person concerned a chance to break contact... [before being unfairly civilly sued or criminally prosecuted]."

¹⁶ Introduced, 18 October 1996, into the House of Commons, Westminster, by the Home Office Minister. For other recent commentary and developments in relation to preserving the peace, see, e.g. Bala, Nicholas, "Spousal Abuse and Children of Divorce" (1966) 13 *Can J Fam L* 215; and on the Internet: <http://www.ultra.ca/hwabuse.htm>.

TABLE: PROTECTION ORDERS
(selected provisions from legislation of provinces/territories)

<i>Jurisdiction</i>	<i>Legislation</i>
Alberta	<p>¶ <i>Child Welfare Act</i>, S.A. 1984, c. C-8.1 as amended:</p> <p>s. 28: order, for period not exceeding 6 months, restraining residence or contact or association with child who has been apprehended or is subject of order for supervision or temporary/permanent guardianship, by a person who either has physically/emotionally injured or sexually abused child or is likely to do so.</p> <p>¶ <i>Matrimonial Property Act</i>, R.S.A. 1980, c. M-9 as amended:</p> <p>s. 19(1)(a): order granting spouse exclusive possession of matrimonial home.</p> <p>s. 19(1)(b): order evicting spouse from matrimonial home.</p> <p>s. 19(1)(c): order restraining spouse from entering or from attending at or near matrimonial home.</p>
British Columbia	<p>¶ <i>Child Family and Community Service Act</i>, S.B.C. 1994, c. 27:</p> <p>s. 16(4): order the person (i) not enter premises where child resides in custody of person or state or (ii) not contact, endeavour to contact, or otherwise interfere with child or person having custody of or access to child.</p> <p>¶ <i>Family Relations Act</i>, R.S.B.C. 1979, c. 121 as amended:</p> <p>s. 36.1: order restraining attempted or actual harassment, etc., of person, child in person's custody, or both.</p> <p>s. 37: order (i) prohibiting entry of premises, including premises ordered person owns or has right to possess, where child residing; (ii) that person not make contact or attempt contact with child or person having custody of or access to child; and (iii) that person enter into recognizance with conditions including requirement to report to court, to better ensure compliance with above (i) or (ii).</p>

<i>Jurisdiction</i>	<i>Legislation</i>
Manitoba	<p>¶ <i>Child And Family Services Act</i>, S.M. 1985-86, c. 8 as amended:</p> <p>s. 20(1)(a); (3): order, for period not exceeding 6 months, that person who has subjected child to abuse or is likely to do so (i) cease residing in same premises as child resides and/or (ii) refrain from any contact or association with child; subject to conditions court determines to be appropriate.</p> <p>s. 80: on application of person having care or custody of child, order that another person not molest, annoy or harass child.</p> <p>¶ <i>Family Maintenance Act</i>, R.S.M. 1987, c. F20 as amended:</p> <p>s. 10(1)(c): order that spouse not enter premises where other spouse is living separate and apart.</p> <p>s. 10(1)(d): order that spouse not molest, annoy or harass other spouse or any child in custody of other spouse.</p>
New Brunswick	<p>¶ <i>Family Services Act</i>, S.N.B. 1980, c. F-2.2 as amended:</p> <p>s. 58: protective intervention order, for period not exceeding 6 months, directed to any person that in court's opinion is "source of danger to a child's security or development," restraining residence and/or contact or association, by such person, with that child.</p> <p>s. 128: order (i) restraining spouse of separated other spouse from molesting, annoying, harassing or interfering with other spouse or children in other spouse's lawful custody and (ii) requiring the restrained spouse to enter into such recognizance that court considers appropriate.</p> <p>¶ <i>Marital Property Act</i>, S.N.B. 1980, c. M-1.1 as amended:</p> <p>s. 23: order granting exclusive possession to spouse of part or all of marital home for period court directs if "in the best interests of the child" to make such order.</p>

<i>Jurisdiction</i>	<i>Legislation</i>
Newfoundland	<p>¶ <i>Family Law Act, R.S.N., 1990, c. F-2:</i></p> <p>s. 15: order granting exclusive possession to spouse and/or child of part or all of matrimonial home for life or lesser period that court decides if "in the best interests of the child to make the order" or if other provision for shelter "not adequate in the circumstances."</p> <p>s. 81(1): order restraining spouse from molesting, annoying or harassing other spouse or children in other spouse's lawful custody or from communicating with other spouse or children, except as order provides, and may require ordered spouse to enter into recognizance that court considers appropriate.</p>
Northwest Territories	<p>¶ <i>Matrimonial Property Act, R.S.N.W.T. 1988, c. M-6 as amended:</i></p> <p>s. 27(2): subject to written agreement to contrary, order transferring specified property from one to another spouse or to a child of either or both of the spouses.</p> <p>¶ <i>Domestic Relations Act, R.S.N.W.T. 1988, c. D-8 as amended:</i></p> <p>s. 16: where spouse obtains judicial separation judgment, court may "for benefit of that spouse or the children of the marriage" order settlement of any property to which other spouse is otherwise entitled.</p>
Nova Scotia	<p>¶ <i>Children and Family Services Act, S.N.S. 1990, c. 5 as amended:</i></p> <p>s. 30(1): protective intervention order, where court satisfied that contact of person, who is subject of order, with a child "is causing, or is likely to cause, the child to be a child in need of protective services"; which order may provide that ordered person (i) cease to reside with child, subject to appropriate terms and conditions and/or (ii) not contact or associate with child in any way, subject to appropriate terms and conditions.</p> <p>¶ <i>Matrimonial Property Act, R.S.N.S. 1989, c. 275 as amended:</i></p> <p>s. 11: order granting exclusive possession to spouse of part or all of matrimonial home, for life or lesser period, if "in the best interest of the child to make such an order" or if other provision for shelter "not adequate in the circumstances."</p>

<i>Jurisdiction</i>	<i>Legislation</i>
Ontario	<p>¶ <i>Child and Family Services Act</i>, R.S.O. 1990, c. C.11:</p> <p>s. 80(1): where child in need of protection, order restraining or prohibiting a person's access to or contact with child; which order may include appropriate directions for implementing order and protecting child.</p> <p>¶ <i>Family Law Act</i>, R.S.O. 1990, c. F-3 as amended:</p> <p>s. 24: order granting exclusive possession to spouse of part or all of matrimonial home for specified period, taking into account "the best interests of the child affected" and other factors,</p>
Prince Edward Island	<p>¶ <i>Family Law Act</i>, S.P.E.I. 1995, c. 12:</p> <p>s. 25: order granting exclusive possession to spouse of part or all of matrimonial home for life or lesser period, taking into account "the best interest of a child to do so" and other factors.</p> <p>s. 45(1): order restraining spouse (or former spouse) from molesting, annoying, or harassing other spouse or children in other spouse's lawful custody or from communicating with other spouse or child; which order may include appropriate directions for implementing order and protecting child.</p> <p>¶ <i>Family And Child Services Act</i>, R.S.P.E.I. 1988, c. F-2 as amended:</p> <p>s. 50(4): order restraining any person from harassing, visiting or communicating with or otherwise interfering with child who is subject of agreement or order under <i>Act</i>, and may require ordered person to enter into recognizance that court considers appropriate.</p>
Québec	<p>¶ <i>Civil Code of Québec</i>, S.Q. 1991, c. 64:</p> <p>Art. 410: order awarding right of use of family residence to spouse having court-ordered custody of child.</p>

<i>Jurisdiction</i>	<i>Legislation</i>
Saskatchewan	<p>¶ <i>The Child And Family Services Act, S.S. 1989-90, c. C-7.2 as amended:</i></p> <p>s. 16(3): protective intervention order, that may require named person to refrain from any contact or association with child, where court determines contact between child and named person would cause child to be in need of protection.</p> <p>¶ <i>Matrimonial Property Act, S.S. 1979, c. M-6.1:</i></p> <p>s. 5(1): order of exclusive possession to a spouse of part or all of matrimonial home for life or shorter period as court directs having regard for factors (s. 7) such as "needs of any children" (s. 7(a)) and "conduct of the spouses towards each other" (s. 7(b)).</p>
Yukon	<p>¶ <i>Children's Act, R.S.Y. 1986, c. 22 as amended:</i></p> <p>137(4)(a), (5): Director has authority to determine who can have, and conditions of, access to child between time child taken into care and the making of permanent/temporary care and custody order.</p> <p>¶ <i>Family Property and Support Act, R.S.Y.T. 1986, c. 63 as amended:</i></p> <p>s. 27(1): order of exclusive possession to a spouse of part or all of matrimonial home for life or lesser period as court directs if "in the best interest of the child to do so."</p>

Notes to Table: Protection Orders

1. Not all forms of protection orders from provincial-territorial legislation are included. Descriptions of orders chosen for inclusion are summaries and may be affected by other provisions of the same statutes or by provisions of other statutes.
2. References to "child" or "children" usually mean:
 - in Alberta – under 18 years;
 - in British Columbia – under 19 years;
 - in Manitoba – under 18 years;
 - in New Brunswick – under 19 years *or* actually or apparently under 16 years *or* disabled person actually or apparently under 19 years;
 - in Newfoundland – actually or apparently under 16 years *or* until 17 years;
 - in Northwest Territories – apparently under 18 years *or* beyond 18 years but not beyond 19 years;
 - in Nova Scotia – under 16 years;
 - in Ontario – actually or apparently under 16 years *or* under 18 years;
 - in Prince Edward Island – actually or apparently under 18 years;
 - in Quebec – under 18 years *or* beyond 18 years until 21 years;
 - in Saskatchewan – actually or apparently under 16 years *or* until 18 years; and
 - in Yukon – under 18 years.