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Are we Flipping Coins with the Liberty of Potentially Dangerous Individuals? : A
Comparative Analysis

by

Sébastien D. Martineau

Submitted in partial fulfillment of the requirements
for the degree of Master of Laws

at

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ABSTRACT

The concept of dangerousness in Canadian and French criminal law is a central component in the development of prophylactic measures, such as section 810.1 and 810.2 of the *Criminal Code* and similar French provisions. The imposition of preventive measures to control the risk of future behaviour of potentially dangerous individuals relies on inexact science to determine and assess dangerousness. In the last decades, several risk assessment tools have been developed, notably some in Canada, but their reliability in predicting dangerousness varies. The objectivity and reliability of a determination of dangerousness can be affected not only by the type of risk assessment tool used by clinicians in the assessment of dangerousness, but also by factors such as the procedural setting in which the evidence is treated. When compared to the Canadian scheme, the French non-adversarial setting offers new alternatives and procedural safeguards in determining and controlling dangerousness.

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Sebastien D. Martineau

Are we Flipping Coins with the Liberty of Potentially Dangerous Individuals? : A Comparative Analysis

CHAPTER I - INTRODUCTION

This thesis proposes to explore the concept of dangerousness in criminal law, through a comparative analysis of specific preventive measures, also known as prophylactic measures, in effect in Canada and France. More specifically, given the controversial nature of the concept of dangerousness and its repercussions on civil liberties, it tries to determine which approach contains the best procedural safeguards. As will be shown, there are various preventive measures geared toward the prevention of crime and the control of dangerousness. Dangerous offenders and long term offender legislation, as well as high risk offender judicial restraints orders (also known as recognizance orders) constitute a great example of how the state controls and assess dangerousness. However, for the purpose of this thesis, the comparative analysis will be limited to high risks recognizance orders in Canada and similar legislative provisions in France, under the rubric *mesures de sûretés* (preventive measures).¹ As it will be demonstrated, recognizance orders allow the State to impose restrictive conditions on an individual who demonstrates a particular risk of future dangerousness. These preventive measures are also non-punitive in nature. Thus, a comparative analysis of this nature should offer suitable grounds for determining which system is in a better position to assess and control dangerousness, in the specific context of recognizance orders and restrictive conditions. Indeed, it will be argued that the French system of assessing dangerousness, combined

¹ It is worth pointing out that the French word "*sûreté*" connotes safety, security and protection.

with the explicit limited applicability of preventives measures and restrictive conditions, provides for more procedural safeguards than the Canadian scheme.

Evidently, a comparative analysis of this nature requires a clear understanding of the underlying principle at the heart of virtually all preventive measures, namely the concept of dangerousness. At the outset, it will be noted that dangerousness is not a straightforward notion. Its definition and understanding has varied greatly throughout the years due to the influence of various theoretical fashions and social movements. As the thesis will show, the prevailing concept of dangerousness is intimately related to corresponding preventive measures such as recognizance orders.

In addition, the thesis will show that the assessment and determination of an individual's dangerousness is a prerequisite for justifying and imposing preventive detention and restrictive measures, even in cases where no crime has been committed. For example, in enacting high risk judicial restraint orders under sections 810.1 and 810.2 of the *Criminal Code of Canada*,² the Parliament relied heavily on the notion of dangerousness and re-introduced in legislative form the common law power of the court to impose restrictive conditions upon the liberty of a potentially dangerous individual. Thus, a determination of dangerousness, whether by mental health professionals or by the court, can have far-reaching consequences on the liberties and freedom of a targeted individual. Consequently, it is important to understand and analyze the various methods of determination of dangerousness used by mental health professionals, since they usually form the evidential basis for judicial decisions. It will be shown that the quality of the evidence presented by clinicians may strongly influence the decision of the trier of fact.

² *Criminal Code of Canada*, R.S.C. 1985, c. C-46 [*Criminal Code*].

The thesis will also demonstrate how the various assessment tools used by Canadian and French mental health professionals are plagued with accuracy problems. Inaccuracy in conclusively predicting dangerousness can have serious detrimental impacts upon the liberty of an individual subjected to a recognizance order application.

Furthermore, the comparative analysis will show that procedural differences between the Canadian adversarial system and the French investigatory system not only have a differential effect on the determination of dangerousness by mental health professionals, but also on judicial treatment of the evidence. It is argued that the procedural setting in which the evidence is heard can affect the quality and objectivity of the evidence pertaining to the alleged dangerousness of an individual. In fact, an adversarial setting may prove to be detrimental to the rights of an individual subjected to a recognizance order application. The predominance of conflicting evidence in an adversarial setting may sometimes be beneficial to “discovering the truth”, but may also entail risks of bias from experts. On the other hand, an investigatory model may favour a more concerted and objective approach from all the parties involved in the determination of dangerousness and in a sense, may offer a better alternative. With these caveats in mind, it is then possible to compare the Canadian and French system of preventive measures.

Through a thorough analysis of recognizance orders under sections 810.1 and 810.2 of the *Criminal Code*, and their French equivalent, this thesis will show that at the very least, the French system provides for more procedural safeguards than the Canadian system in its application of the notion of dangerousness. It will be demonstrated that recognizance orders under sections 810.1 and 810.2 of the *Criminal Code* enable the

State to supervise potentially dangerous individuals in society, “before” the commission of a crime. While it appears that Canadian recognizance orders are generally used against convicted offenders upon their release from prison, the legislation does not expressly limit the applicability of the restrictive measure to convicted offenders. This is a fundamental difference between the two regimes. In other words, Canadian recognizance orders can theoretically be imposed upon individuals who have no criminal record, provided that a particular risk of future dangerousness is demonstrated. This contrasts sharply with the French equivalent legislative scheme which provides for a system of exceptionality with respect to the imposition of restrictive conditions upon a potentially dangerous individual.³ In fact, the French system generally limits the applicability of restrictive measures to convicted dangerous offenders and multi-recidivists.

All in all, the main difference between the two systems, other than procedural aspects and protocols for determining dangerousness, appears to be the inapplicability of *ante delictum* restrictive conditions, except in the case of convicted dangerous offenders who present a risk of future dangerousness upon their release from prison. In practice, however, it appears that Canadian prosecutors implicitly are limiting the applicability of recognizance orders under sections 810.1 and 810.2 of the *Criminal Code* to multi-recidivists and convicted dangerous offenders.

When looked at in its entirety, the French system seems to offer numerous tools for targeting and identifying potentially dangerous individuals. For example, as we will reveal, the role of the Mayor has been transformed into that of “sheriff”, who helps in the

³ See generally the *Loi n° 2008-174 du 25 février 2008 relative à la rétention de sûreté et à la déclaration d'irresponsabilité pénale pour cause de trouble mental*, J.O., 26 February 2008, 3266 [*Loi sur la rétention de sûreté*].

coordination of sensitive information concerning at-risk populations. The French system focuses on the identification and treatment of the potentially dangerous individual, notably by the imposition of social-judicial probation and detention in hospital-prisons. On the other hand, the Canadian system appears to be more concerned with the eradication and control of potentially dangerous actors, and puts less emphasis on effective treatment of dangerousness.

CHAPTER II - PLAN

Chapter III of the thesis will seek to justify a comparative analysis of preventive measures in Canadian and French criminal law.

Chapter IV will give a brief general overview of the concept of preventive measures and potentially dangerous individuals. In this chapter, the necessary groundwork for tackling the notion of dangerousness with a clear understanding as to its origins will be undertaken.

Chapter V will examine the concepts of dangerousness both in Canada and in France, as well as their assessment and determination process. As a starting point, we will look at the context in which preventive measures have developed. We will examine the concept of dangerousness as it evolved progressively through the influence of various justice models. In this regard, we will explore the influence of the clinical, justice, and community protection models in Canada. These three models, identified mainly by Petrunik, have significantly contributed to the enactment of preventive legislation such as recognizance orders.⁴ These models have shaped our perception of what constitutes a danger, and what tools should be used to prevent dangerousness. In fact, it will be demonstrated that the emergence of the community protection model contributed directly to the development of the notion of prevention and control of dangerousness, which gave rise to specific recognizance orders, such as sections 810.1 and 810.2 of the *Criminal Code*. As for France, the influence of the concept of social defence and, more recently,

⁴ See generally Petrunik, Micheal, *Models of dangerousness : a cross jurisdictional review of dangerousness legislation and practice* (Ottawa : Solicitor General Canada, Ministry Secretariat, 1994) [Petrunik, *Models of dangerousness*].

repressive prevention, will be examined. These concepts have also greatly influenced the development of preventive legislation targeting potentially dangerous individuals.

We will also focus attention on the various methods for predicting dangerousness, as these are widely used by the judiciary to determine the risk of future behaviour of a particular individual. Moreover, we will critically assess various methods for predicting dangerousness since their accuracy varies significantly from one another. The differences in the interpretation of these risk assessment methods given by mental health experts and judges will also be examined. As we will demonstrate, some predictions of dangerousness may be biased due to the influence of external factors, such as the procedural setting in which the mental health professional practises.

Following from the previous discussion, in Chapter VI particular attention will be given to the procedural distinctions between the two systems. Differences between the Canadian adversarial system and the judge-centred investigatory system in France are noted, since they indirectly affect the court's treatment of scientific evidence in the determination of dangerousness, as well as the availability of procedural safeguards. As noted earlier, an adversarial system favours conflicting evidence and the assumption that in all likelihood, one party is right, while the other one is wrong. This approach can influence mental health professionals in their determination of dangerousness depending on which side they must prepare their report. At the least, it may also influence the party presenting the report only to choose or use experts known to favour their positions. By contrast, an investigatory system favours a judicially co-ordinated team approach, where multiple specialists work together to determine the dangerousness of an individual. The possibility of bias is, therefore, reduced in the French model. Given the potential

constitutional infringements caused by the imposition of restrictive conditions upon potentially dangerous individuals, the availability of procedural safeguards is paramount to the respect of fundamental principles of justice. This chapter will therefore seek to identify the influences of each system on the determination of dangerousness.

Chapter VII will then present an in-depth analysis of peace bond provisions and recognizance orders in Canada. This will enable us to look at a very specific piece of legislation dealing with the concept of dangerousness in Canada. To ground the analysis of recognizance orders, we will begin with a historical and critical analysis of such orders in Canada. It will show that recognizance orders owe their origins to peace bond provisions, which were originally common law powers. Moreover, particular attention will be devoted to the development and judicial treatment of recognizance orders under sections 810.1 and 810.2 of the *Criminal Code*, since these provisions infringe on fundamental principles of justice, such as the right to freedom. As noted earlier, sections 810.1 and 810.2 are preventive measures that allow the State to control potentially dangerous individuals by the imposition of restrictive conditions. It is, therefore, important to understand Parliament's motivation in enacting these provisions, as well as the position of the courts with respect to the possibility of restricting the liberties of individuals who have yet to commit a crime.

Chapter VIII will examine similar preventive and restrictive measures in French criminal law. This chapter will enable us to examine how the French Legislature dealt with the concept of dangerousness. As we will reveal, there are no peace bond provisions or recognizance orders in French criminal law. However, France has enacted several pieces of legislation aimed at identifying, controlling, and neutralising potentially dangerous

individuals. Thus, some parallels can be drawn with section 810's recognizance orders. Though most French preventive measures only apply to convicted offenders, some measures can be used to identify individuals who may demonstrate a risk of future dangerousness even if they do not have a criminal record. The chief difference between the French and the Canadian system remains the fact that the French system of controlling dangerousness is specifically designed to target convicted dangerous offenders and is generally inapplicable to individuals who have no criminal record and who have never been convicted of a crime. As we will see, the limited applicability of restrictive conditions upon potentially dangerous individual, coupled with the advantages of a judge-centred investigative system, places the French scheme in a better position when considering the respect of fundamental principles of justice.

Chapter IX will offer various hypotheses which may explain the absence of recognizance orders in French criminal law. While the French system does not contain any express legislative provision with respect to recognizance orders or peace bonds, it does allow for preventive measures to control dangerousness. This chapter goes beyond simple comparison between the Canadian and French systems and offers various potential explanations with respect to the main differences and similarities between the two schemes which might help explain the absence of peace bond provisions or recognizance orders in French criminal law. As we will see, factors such as the nature of the French scheme which is fundamentally based on the civil law, coupled with the pervasive influence of the criminological and social movement called *Defense sociale*, are part of the reason why there are no peace bond provisions or recognizance orders in the *Code pénal de France*. All in all, the absence of express peace bond provisions or recognizance

orders in French criminal law does not mean that the State has chosen not to control dangerousness; it is simply a different approach that takes into account some of the constitutional pitfalls normally associated with preventive measures.

Finally, in Chapter X, we conclude our discussion with a reflection on the need for recognizance orders in a system geared toward the prevention of crime. We look critically at the approach taken by Canadian and French legislators in determining and controlling potential dangerousness. Overall, the French system which also deals with the notion of prevention of dangerousness, albeit in a different way, appears to offer a better alternative than the Canadian scheme in controlling and treating the risk of dangerousness. The French system indirectly acknowledges the problem of inaccuracy in determining dangerousness by limiting the applicability of restrictive measures and by creating an innovative procedure by which various experts work together to determine and assess the dangerousness of an individual.

CHAPTER III – JUSTIFICATION

Despite the controversial nature of preventive measures, such as recognizance orders under sections 810.1 and 810.2 of the *Criminal Code*, there has been insufficient judicial or doctrinal attention focusing on the constitutionality of these measures, their applicability, and their justification in a free and democratic society. Hence, it is important to compare the Canadian approach in determining dangerousness and preventing a risk of future behaviour with a foreign approach in order to foster new ideas in the treatment of potentially dangerous individuals.

As we will see, sections 810.1 and 810.2 of the *Criminal Code* (Peace Bonds and High Risk Offender Judicial Restraints Orders) are powerful tools in the state's preventive measure arsenal. These sections allow virtually anybody to file for an order from the court to restrain the freedom of an individual, based on a reasonable fear that he or she might commit a crime. For example, under section 810.1 of the *Criminal Code*, where a person has a reasonable fear that another person will commit a sexual offence on a minor, and the judge is "satisfied by the evidence adduced" that the fear is reasonable, he or she can impose a recognizance order upon the potentially dangerous individual for a period of twelve months.⁵ The recognizance order may include several restrictive conditions. Moreover, the types of offences targeted by section 810.1 include sexual offences such as incest and/or sexual assault.⁶

⁵ See section 810.1 of the *Criminal Code*. It is also important to note that under section 810.1(3.01) of the *Criminal Code*, the duration of the recognizance order can be extended to a total of two years.

⁶ *Ibid.*

As for section 810.2, its wording is essentially the same as section 810.1. However, section 810.2's main focus is on recognizance orders that target potential offenders who might commit a serious personal injury offence, such as assault, torture or hostage taking.⁷

It is also worth pointing out that section 810.2 has received virtually no attention from legal scholars. Additionally, its constitutionality has not been examined in detail, other than by the Court of Appeal of Ontario in the case of *R. v. Budreo*,⁸ and by the Quebec Court of Appeal in *Noble v. Teale*.⁹ Remarkably, almost 12 years after its enactment, it has never been examined by the Supreme Court of Canada.

One could also argue that the applicability of a recognizance order is rare in Canadian criminal law, and that the actual benefits of giving the State the ability to control and monitor the whereabouts of a potentially dangerous individual surpasses the interest of the accused in protecting his or her civil liberties, especially in the context of the community protection model. In a sense, a comparative analysis would prove to be futile if we were to stop our analysis there. However, in response to that argument, it can be said that whether recognizance orders are used or not on a regular basis is irrelevant, since even one application can lead to unreasonable constitutional infringements.

One could also argue that section 810.2 of the *Criminal Code* is primarily used to target convicted dangerous criminals who are on the verge of being released from prison, but

⁷ See section 810.2 of the *Criminal Code*.

⁸ *Budreo v. R.*, 46 O.R. (3d) 481, 142 C.C.C. (3d) 225, 183 D.L.R. (4th) 519 [*Budreo* cited to O.R.].

⁹ *Noble v. Teale*, 2005 CarswellQue 10567, 36 C.R. (6th) 258, [2006] R.J.Q. 181, 67 W.C.B. (2d) 851 [*Noble* cited to C.R.].

are still considered potentially dangerous.¹⁰ Proponents of this view could also suggest that though under sections 810.1 and 810.2 any person can lay information before the court if he or she has a reasonable fear that an individual will commit a serious sexual or violent offence, “informants” are generally members of the police or members from correctional facilities. Therefore, once again, the apparent “restrictive” applicability of the measure to the worst class of criminals, namely dangerous offenders and potential multi-recidivists, could militate against a critical analysis of the measure. Nevertheless, it is important to look at the real consequences of the preventive and restrictive measure as this can have serious detrimental effects on the reintegration of an offender.

Furthermore, that an individual subjected to restrictive conditions under a recognizance order need not have a criminal record introduces the issue of punishment before a crime is committed. In fact, under sections 810.1 and 810.2, a simple reasonable apprehension that a crime may be committed in the future, demonstrated on a balance of probabilities, is sufficient to trigger a restraint order from the court. This inevitably brings in the question of the normally required evidentiary burden of proof in Canadian criminal law procedure; namely, a proof beyond a reasonable doubt. As we will see, courts consider the recognizance orders scheme as non-punitive in nature, but rather preventive.¹¹

Moreover, like the French *mesures de sûreté*, recognizance orders are not considered

¹⁰ In this regard, one should note the case of *Noble*, *ibid.* in which the Crown sought a section 810.2 recognizance order to impose restrictive conditions upon the defendant, Karla Teale (former Karla Homolka). Mrs. Teale, along with Paul Bernardo, now a designated dangerous offender, made the headlines in the early 1990s because of their participation in the sordid murders of at least two young girls.

¹¹ Courts have also confirmed the preventive nature of this section on numerous occasions. For example, in *R. v. Baker*, 1999 CarswellBC 615, 64 C.R.R. (2d) 126 (B.C. S.C.) [*Baker* cited to Carswell], the British Columbia Supreme Court states at para. 15 that : “[s]everal courts have held that a s. 810 hearing does not create an offence, nor does it bring about a conviction or a sentence. Section 810 prevents rather than punishes crime.”

offences. This enables the State to circumvent the normally required burden of proof and to impose restrictive measures which effectively curtail the freedom of its citizens. When we add the fact that a determination of dangerousness by expert testimony, let alone by a judge, is a rather difficult task subject to false positives, questions concerning the appropriateness of procedural safeguards inevitably arise, thereby justifying a thorough comparative analysis of such preventive measures.

In the end, it is our hope that our comparative analysis will shed some light on a controversial piece of legislation that is part of the Canadian *Criminal Code*. By analyzing similar preventive and restrictive measures in France, it may be possible to better understand the Canadian recognizance orders scheme and to propose alternatives.

The reasons underpinning the choice of France as a measure of comparison are also worth discussing in their own right. From the onset, the potential procedural influences of the French investigative system on the determination of dangerousness open up the possibilities of comparisons. The influence of “*Defense sociale*” and “repressive prevention” on the development of preventive measures is also of importance from a comparative standpoint.

Finally, France’s current legislative context also militates in favour of a comparative analysis with the Canadian system of preventive measures. In fact, the French legislature has enacted several preventive and restrictive measures in recent years, as well as social-judicial probation. For instance, the recent enactment of the controversial *Loi sur la rétention de sûreté*,¹² which addresses the potential dangerousness of certain convicted

¹² *Loi sur la rétention de sûreté*, *supra* note 3.

offenders, together with the enactment of the *Loi sur le traitement de la récidive*,¹³ which enables a judge to impose restrictive conditions upon the multi-recidivist, are also good examples of the place reserved to preventive measures in French legislation.

¹³ *Loi n° 2005-1549 du 12 décembre 2005 relative au traitement de la récidive des infractions pénales*, J.O., 13 December 2005, 19152 [*Loi sur le traitement de la récidive*].

CHAPTER IV – A BRIEF OVERVIEW OF HOW CANADA AND FRANCE DEAL WITH POTENTIALLY DANGEROUS INDIVIDUALS AND PREVENTIVE MEASURES

This chapter begins by describing generally how Canada and France are dealing with potentially dangerous individual by enacting preventive measures. As will be demonstrated, preventive measures are designed to prevent the commission of crimes by individuals who present a potential risk to society. These measures normally include restrictive conditions that can significantly limit the freedom of potentially dangerous individuals. In the following paragraphs, we will first analyze briefly what society considers to be potentially dangerous individuals before delving into some of the measures that target them.

i) Preventive Measures are Primarily Designed to Deal with Potentially Dangerous Individuals

In Canadian and French criminal law, there is a class of citizens to whom special preventive laws apply. This class can be purportedly identified as potentially dangerous individuals or individuals presenting a high risk of committing an offence in the future. In democratic societies, “potentially dangerous individuals” generally refers to suspected terrorists, designated dangerous offenders and long-term offenders, sexual offenders, individuals on bail, as well as individuals who are considered to pose an imminent danger to others. The common thread between these individuals, labelled potentially dangerous, is the risk they pose to other members of society. These individuals may or may not have a history of committing criminal offenses, but the State considers them potentially dangerous. Therefore, in order to maintain a sense of security and to protect vulnerable

people, states have enacted various restrictive measures to target these individuals before they commit a criminal act.

Preventive measures stem from the “prevention principle” which “...refer[s] to the explanation of the state's ability to act proactively or pre-emptively in order to safeguard or protect the public from serious harm”.¹⁴ In recent years, preventive justice has been at the forefront of many countries’ political agendas, including Canada and France.

The controversial nature of preventive measures, which restrict the liberty of individuals who have yet to commit a crime, gives impetus to the importance of understanding their use and *raison d’être*, more so in societies where fundamental principles of justice are paramount. As we will demonstrate throughout the following comparative analysis, preventive measures inevitably enter into conflict with freedom and liberty of individuals, all in the name of the protection of society.

ii) Examples of Preventive Measures– The Case of High Risk Offender Judicial Restraint Orders and Other Restrictive Measures

The identification and categorization of potentially dangerous individuals is a component of one of the criminal law’s numerous objectives; namely, the prevention of crime. In 1982, Canada’s Department of Justice identified the various objectives of Canadian criminal law as follows:

1. security goals – the preservation of the peace, prevention of crime, protection of the public
and

¹⁴ Cohen, Stanley A., “Policing Security: The Divide Between Crime and Terror” (2004) 15 Nat’l J. Const. L. 405 [Cohen], at 409.

2. justice goals – equity, fairness, guarantees for the rights and liberties of the individual against the powers of the state and the provision of a fitting response by society to wrongdoing.¹⁵

As for the French criminal law system, it puts emphasis on the rehabilitation of offenders and their safe reintegration into society.¹⁶ Crime prevention, by the enactment of various preventive measures aimed at identifying and controlling dangerousness, as well as the importance of the rehabilitation of potentially dangerous individuals, appear to be two key concepts in the recent development of French criminal law.¹⁷

It should, therefore, come as no surprise that Canadian criminal law, and to some extent French criminal law, are both concerned with various objectives including the prevention of crime and management of potentially dangerous individuals.

It is also worth noting that there are various ways of preventing crime and eliminating risk factors. Crime prevention can be achieved through social development measures which include the implementation of programs and policies targeting at-risk populations, more effective police enforcement and presence, and education.¹⁸ These preventive

¹⁵ Canada, Department of Justice Canada, *The Criminal Law in Canadian Society, Appendix: B – Background Material Principles to Guide Criminal Law Reform*, by Vicki Schmolka, online: Department of Justice Canada <<http://74.125.93.132/search?q=cache:i0XtijGZ5wYJ:justice.gc.ca/eng/cons/rt-tr/nov102/annexb.html+Schmolka,+Vicki.+%22Principles+to+Guide+Criminal+Law+Reform&cd=1&hl=en&ct=clnk&gl=ca>>[Canada, *The Criminal Law*].

¹⁶ Ingraham, Barton L., *The Structure of Criminal Procedure: Laws and Practice of France, the Soviet Union, China and the United States* (New York: Greenwood Press, 1987) at 7.

¹⁷ See generally the *Loi sur la rétention de sûreté*, *supra* note 3, and the *Loi sur le traitement de la récidive*, *supra* note 13.

¹⁸ See Wanda Jamieson & Liz Hart, "Compendium of Promising Crime Prevention Practices in Canada" (June 2003), online: <<http://www.caledoninst.org/Publications/PDF/42ENG.pdf>> [Jamieson] at 8: "[t]he social development approach attempts to address the root causes of crime in society. It recognizes that crime stems from a variety of critical experiences in people's lives: family violence; poor parenting; negative school experiences; poor housing; a lack of recreational, health and environmental facilities; inadequate social support; peer pressure; unemployment; and lack of opportunity and poverty. It emphasizes investing in individuals, families and communities by providing social, recreational, educational and economic interventions and support programs for those Canadians, mainly young people, who are most at risk of becoming involved in crime, before they come into conflict with the law. Social

measures are generally well received by the population and have been proven to be particularly efficient in reducing the crime rate as they are designed to address “...the root causes of crime in society”.¹⁹

There are also preventive measures which can be more appropriately categorised as a product of the political and social context. An example of these measures, which often hide behind the noble blanket of crime prevention, are “tough on crime statutes” which too often serve the interest of political populism and sometimes translates into immediate electoral gain.²⁰ This situation is particularly alarming especially when we consider the fact that political populism does not necessarily equate to sound evidence based criminal justice policies. In this context, tough on crime legislation are enacted in reaction to the population’s fear. These measures are not so much concerned with the *root causes* of criminality; rather, they are pre-emptive tools against potential threats and dangerousness. While at first glance, these “populist” measures may appear as a sign that the State is actively committed to crime prevention, they sometimes strip and circumvent fundamental rights. It is one thing to pursue crime prevention by educating the at-risk population about the pitfalls and consequences of criminal activity; it is another to place restrictions on an individual’s freedom or to detain him or her preventively.

development also includes investing in rehabilitative interventions for people who are already involved with the criminal justice system”.

¹⁹ *Ibid.*

²⁰ See Petrunik, “*Models of Dangerousness*”, *supra* note 4 at 10, where he states the following: “[d]angerous offender legislation in many of the jurisdictions where it has been enacted can be better understood as a largely symbolic attempt to appease an angry and fearful populace and serve special interests (for example, politicians seeking re-election, criminal justice and mental health professionals seeking additional resources) than a concerted instrumental effort to reduce the incidence of serious harm to the public”.

However, preventive measures, such as high-risk offender's judicial restraint orders, certainly serve the criminal law security goals by protecting society from potentially dangerous individuals, at least in the eye of some policy makers. As we will see, these measures fit neatly in the community protection model which has gained popularity in Canadian criminal law during the last decades.²¹ In fact, the community protection model has influenced the addition of new offences and restraining orders which effectively curtail the freedom of potential offenders.²² Nevertheless, the fact that high-risk offender judicial restraint orders generally apply in cases where there is likelihood that a particular individual will commit a crime, or pose a risk to society, does not address legitimate questions as to the potential legal effects on the liberty and freedom of a person that has yet to commit a crime. Preventive measures give the State a means to detain or control the liberties of citizens on mere suspicions of dangerousness.²³ In a post 9-11 world, where anti-terrorism legislation has been enacted in democracies around the globe,²⁴ preventive measures are at the forefront of an ongoing debate on the role of the State in

²¹ Petrunik, "Models of Dangerousness", *ibid.* See also Sébastien Martineau, (Methodological Prospectus, Dalhousie University, 2009)[unpublished] [Martineau, Methodological Prospectus].

²² *Ibid.* See also generally Melissa Dahabieh, *An Examination of the Risk Management of High-Risk Sex Offenders under a Section 810.1 or 810.2 Order in British Columbia, Canada* (Thesis, Simon Fraser University, 2005)[Dahabieh].

²³ See Craig Forcese, "Preventive detention is not the real issue", University of Ottawa (Feb. 23, 2007), online: University of Ottawa

<http://www.commonlaw.uottawa.ca/index.php?option=com_content&task=view&id=2210&contact_id=38&lang=en&Itemid=26>: where it is explained that opponents of the newly enacted preventive measures under section 83.3 of the *Criminal Code* have condemned detention based on mere suspicions:

"[o]pponents view the provision as a travesty allowing the imposition of significant constraints on liberty on the basis mere suspicions, not concrete proof. While it has not been used to date, the power could produce serious injustice: as the Arar debacle demonstrates, the suspicions of police may be ill-placed..."

²⁴ See for example *Anti-terrorism Act*, S.C. 2001, c. 41 and *Anti-terrorism, Crime and Security Act* 2001(U.K.), 2001, c.24. See also generally Roach, Kent, *September 11, Consequences for Canada* (Montreal, Qc: McGill-Queen's University Press, 2003) and Hor, Michael Yew Meng, Victor Vridar Ramraj & Kent Roach, *Global anti-terrorism law and policy* (Cambridge: Cambridge University Press, 2005).

assessing and managing potential risks and threats posed by particular individuals.²⁵ It seems that “...in spite of legal, scientific and humanistic criticism”, preventive legislation aiming at the eradication of violent and dangerous behaviour or the threat of it is still enacted.²⁶

As explained by the Right Honourable Beverley McLachlin “...history and the law teach us that in times of crisis and fear, states are apt to resort to preventive detention”.²⁷ It is as if the State needs to show the populace its need to react to a threat by implementing concrete measures that are “tough” on crimes. However, states can “overreact”, and hence the importance of putting in place numerous safeguards which help protect civil liberties from unjustified state control.²⁸

It is argued that preventive measures can take many forms in Canadian criminal law. Bail provisions, anti-terror provisions such as preventive arrest of suspected terrorists under section 83.3 of the *Criminal Code*,²⁹ medical confinement, dangerous offender legislation

²⁵ Jamieson, *supra* note 18 at 11. Jamieson also notes the following at 11: “[t]he National Crime Prevention Strategy is a federal initiative that is the shared responsibility of the Department of Justice Canada and the Ministry of the Solicitor General of Canada. Phase I of this Strategy was launched in 1994, with the support of police, other criminal justice agencies and communities across Canada. **The Strategy is based on research which shows that reactive measures – the apprehension, sentencing, incarceration and rehabilitation of offenders – are not enough to prevent crime**”. [Emphasis added].

²⁶ Worsmith J.S. & Monika Ruhl, “Preventive Detention in Canada” (1986) 1 J. Interpers. Violence 399, available online: < <http://jiv.sagepub.com/cgi/content/abstract/1/4/399>>, at 400.

²⁷ See Hon. Beverley McLachlin, “Remarks of the Right Honourable Beverley McLachlin, P.C. Chief Justice of Canada” (Symons Lecture -2008 delivered at Charlottetown, 21 October 2008), online: Supreme Court of Canada < <http://www.scc-csc.gc.ca/court-cour/ju/spe-dis/bm2008-10-21-eng.asp>>.

²⁸ *Ibid.*

²⁹ Section 83.3 of the *Criminal Code* provides the following:

“83.3 (1) The consent of the Attorney General is required before a peace officer may lay an information under subsection (2).

(2) Subject to subsection (1), a peace officer may lay an information before a provincial court judge if the peace officer

(a) believes on reasonable grounds that a terrorist activity will be carried out; and

(b) suspects on reasonable grounds that the imposition of a recognizance with conditions on a person, or the arrest of a person, is necessary to prevent the carrying out of the terrorist activity”.

and long-term offender legislation,³⁰ long-term supervision orders,³¹ as well as high risk offender judicial restraint orders applicable under sections 810.1 and 810.2 of the *Criminal Code* are all forms of preventive measures. In the case of recognizance orders, we have witnessed in recent years the development of a wide variety of orders applicable to potentially dangerous individuals, including paedophiles, violent offenders, and suspected members of organized crime or potential terrorists.³² In France, special preventive legislation has also been created for minors and at-risk populations.³³

In all circumstances, these preventive measures touch upon two important points: first, as we have seen, they inevitably affect fundamental principles of justice, such as the right to liberty. If a State detains an individual or restricts his liberty based on a risk of future dangerousness, the freedom of the individual is automatically curtailed.

Secondly, these preventive measures are intrinsically related to the concept of dangerousness. In a society where community protection is of utmost importance, potentially dangerous individuals are considered to be threatening to social order and everything in the State's arsenal is put into place to eliminate the threat. Dangerousness is, therefore, an important tool in justifying the imposition of restrictive and preventive orders.

It is worth pointing out that the concept of dangerousness, or the risk of committing a crime, is difficult to define, and such conduct is even more difficult to predict. What

³⁰ See for example sections 752 and 753 of the *Criminal Code*.

³¹ See section 753.2(1) of the *Criminal Code*.

³² Cohen, *supra* note 14 at 425-426.

³³ See for example the *Loi n° 98-468 du 17 juin 1998 relative à la prévention et à la répression des infractions sexuelles et à la protection des mineurs*, J.O., 18 June 1998, 9255 and the *Loi sur le traitement de la récidive*, *supra* note 13.

constitutes danger in one situation may not equate to danger in another situation. What one person may consider a subjective threat to his or her safety may not objectively be viewed as dangerous. Furthermore, as we will explain later, the risk of false positives is inherent in the process of a determination of dangerousness. If there are problems in predicting a future behaviour, how can preventive measures which curtail the freedom of potentially dangerous individuals be accepted in democratic societies? According to Petrunik, "...whether we decide to retain or abolish legislation based on the dangerousness standard, ultimately the question is a moral one and a social policy one...".³⁴ Moreover, as Petrunik notes, one has to ask: "...[w]here do we draw the line in establishing a balance between individual rights and social protection?"³⁵ As we will see in the next chapters, the "line" has been drawn differently in Canada and in France.

³⁴ See Petrunik, Michael G., "The politics of dangerousness" (1982) 5 Int. J. Law Psychiatry 225 at 246, cited in Leong, Gregory B., "Revisiting the Politics of Dangerousness" (2008) 36:3 J. Am. Acad. Psychiatry Law 278, available online:<<http://www.jaapl.org/cgi/content/short/36/3/278>> [Leong], at 278.

³⁵ *Ibid.*

CHAPTER V – AN OVERVIEW AND A DEFINITION OF THE CONCEPT OF DANGEROUSNESS

The following section explores the theme of dangerousness and the development of prediction methodologies. It describes some of the chief problems associated with the various assessment tools used by mental health professionals to predict a risk of future behaviour. It also looks at how courts in Canada and in France make use of these tools to decide upon the potential dangerousness of a particular individual in the context of dangerous offender legislation and recognizance orders. This analysis will serve as the foundation for our argument that preventive measures designed to control dangerousness, such as recognizance orders, ought to offer greater procedural safeguards in order to ensure the fair treatment of individuals and to take into account, the inaccuracy problem in predicting dangerousness.

i) **Dangerousness: A Concept Intrinsically Related to Criminal Law**

Dangerousness, as a term used to describe the state of a particular individual, has not always been a politically correct term among probation officers, psychiatrists and judges.³⁶ Nevertheless, it lies at the very foundation of many new policies and legislation pertaining to crime prevention. It should be cautioned that in recent years “... a turn away from the utilization of “dangerousness” terminology in the mental health sciences” has been observed to the profit of the “...adoption of “risk” discourse”.³⁷ The concept of dangerousness is however intrinsically connected to criminal law. In fact, “[t]he notion of dangerousness has long been used in civil and criminal legislation to refer to the capacity

³⁶ See Walker, Nigel, *Dangerous People* (London: Blackstone Press Limited, 1996) [Walker] at vii. For example, Walker notes at vii that “...[p]sychiatrists preferred to talk of “vulnerable” patients”.

³⁷ MacAlister, David. “Use of Risk Assessments by Canadian Judges in the Determination of Dangerous and Long-Term Offender Status, 1997-2002” in Law Commission of Canada ed., *Law and Risk* (Vancouver: University of British Columbia Press, 2005) 20, at 20.

of persons to harm themselves or others, physically, psychologically, or morally, and their likelihood of doing so”.³⁸

Dangerousness and the risk of future behaviour are concepts that can easily be mistaken for one another. The literature distinguishes the two concepts as follows:

It is useful to distinguish dangerousness from risk. The latter simply refers to the likelihood of a person’s committing any future harmful act, while the former combines the perceived likelihood of a future act’s being committed with a perception of how serious that harm is considered to be. To give an example, a person considered to be at an 80% risk of shoplifting will be considered to be less dangerous than a person considered to be at 20% risk of committing sexual assault.³⁹

When we look at the language used in sections 810.1 and 810.2, it is clear that recognizance orders are concerned with future dangerous behaviour (such as violent sexual offences) and not necessarily with “non-dangerous” acts.

Indeed, according to Petrunik, the concept of dangerousness refers to “...perpetrators of selected allegedly harmful acts rather than to the entire range of acts that might be considered harmful”, such as violent sex offenders.⁴⁰ Dangerousness also refers “...to a state of being of individuals which predisposes them to engage in harmful acts...” and is “oriented more to the future than to the past”.⁴¹

³⁸ Ancel, M., *Social Defence: A Modern Approach to the Criminal Problem* (New York: Schocken, 1965) [Ancel], at 15, cited in Michael G. Petrunik, “The Hare and the Tortoise: Dangerousness and Sex Offender Policy in the United States and Canada” (2003) 45:1 Can. J. Crim. Jus. 43, at 45 [Petrunik, *The Hare and the Tortoise*]. (Footnotes omitted).

³⁹ Petrunik, “The Hare and the Tortoise”, *ibid.* at 45.

⁴⁰ Petrunik, “Models of Dangerousness”, *supra* note 4 at 4.

⁴¹ *Ibid.* at 4.

Far from being a “juridical concept”, dangerousness is considered a “criminological notion”.⁴² In civil and criminal law, the notion of dangerousness has been applied to “certain kinds of acts and persons” and has been used in the following three major contexts according to Petrunik: “...civil mental health law, European positivist writings, and legislation for violent offenders”.⁴³

In civil mental health law, the concept of dangerousness is associated with “involuntary civil commitment”, while positivist writings gave rise to the notion of *l'état dangereux* and the development of habitual offender legislation.⁴⁴ The third context in which the concept appears is in legislation pertaining to violent offenders, who are considered as “...persons who pose a risk because of their alleged proclivity for violent offences or non-consensual sexual offenses”.⁴⁵ In the legislative context, dangerous offender and long term offender legislation, under sections 753 and 754 of the *Criminal Code*, are good examples of the assessment of dangerousness in the case of violent offenders.

According to Petrunik, most statutes incorporating the concept of dangerousness are aimed at dealing with “...four categories of risk creators: sex offenders, violent offenders, recidivists, and persons considered to have a mental illness or personality disorder”.⁴⁶ Petrunik also explains that due to the usual overlapping of these categories, dangerousness legislation has typically focused on “...recidivist violent sex offenders who

⁴² Danet, Jean, “La dangerosité, une notion criminologique, séculaire et mutante” (2008) Vol. V Champ pénal, New International Journal of Criminology, available online : Champ pénal <<http://champpenal.revues.org/document6013.html> >[Danet].

⁴³ Petrunik, Michael. *The Makings of Dangerous Offenders: The Origins' Diffusion and Use of Legislation for Dangerous Offenders in Europe and North America*, No. 1984-74, Programs Branch User Report, Ministry of the Solicitor General of Canada, at 2 [Petrunik, “*The Makings of Dangerous Offenders*”].

⁴⁴ *Ibid.* at 2-3. See also Leong, *supra* note 34 at 278.

⁴⁵ Petrunik, “*The Makings of Dangerous Offenders*”, *ibid.* at 3.

⁴⁶ Petrunik, “*Models of dangerousness*”, *supra* note 4 at 8.

are considered to have a mental illness, personality disorder, or other mental abnormality”.⁴⁷

Furthermore, dangerousness is not a novel concept.⁴⁸ Indeed, as early as the 19th century, dangerousness of certain individuals was at the heart of an intense debate concerning habitual offenders.⁴⁹ Harkening back to the 19th century postulates of Lombroso concerning “*l’individu dangereux*” or “*l’état dangereux*”, the concept of dangerousness is once again at the center stage of policy making.⁵⁰ In modern criminal law, the concept of dangerousness is now best understood as referring to “...an offender's potential to commit acts of violence or those of a sexual nature”.⁵¹

Throughout the years, Canadian criminal law, as well as French criminal law, has developed various preventive measures to deal with the potential dangerousness of certain individuals. All in all, however, Petrunik notes that the development of dangerousness legislation has been motivated by various societal objectives, such as “...community protection, equality under the law, and individual treatment or rehabilitation”.⁵²

⁴⁷ *Ibid.*

⁴⁸ Joy Irving, *Implications of Indeterminacy in Canada’s Dangerous Offender Provisions* (Master of Arts, Thesis, Carleton University, 2001)[Irving, “*Thesis*”] at 7.

⁴⁹ Rhenter, Pauline. “La présomption de dangerosité et la figure du fou dangereux”, Mediapart (14 November 2008), online: Mediapart <<http://www.mediapart.fr/club/edition/les-invites-de-mediapart/article/141108/la-presomption-de-dangerosite-et-la-figure-du-f>>[Rhenter].

⁵⁰ Delphine, Cavallo, “La prise en compte de la dangerosité en droit pénal dans les Etats européens” Calenda (19 June 2009), online : revue.org <<http://calenda.revues.org/nouvelle12623.html>>.

⁵¹ John Howard Society of Alberta. “Dangerous Offenders Legislation Around the World”, online: John Howard Society <<http://www.johnhoward.ab.ca/PUB/C20.htm>> [John Howard, “Dangerous Offenders”].

⁵² Petrunik, “*Models of dangerousness*”, *supra* note 4 at 10.

ii) The Concept of Dangerousness in Canadian Criminal Law and the Influences of the Clinical, Justice and Community Protection Models on its Evolution

A review of the literature demonstrates that three models have influenced the evolution of legislation based on the concept of dangerousness in Canadian criminal law: the clinical model, the justice model and the community protection model.⁵³ The following sections will briefly discuss the development of each model.

a) The Influence of the Clinical Model

The clinical model is primarily concerned with "...the diagnosis and treatment of the criminal psychopath or criminal man".⁵⁴ This model is at the root of the first dangerous offender legislation in Canada, that is, the enactment of a criminal sexual psychopath statute in 1948.⁵⁵

The various sources of the clinical model have been identified by Foucault⁵⁶ in 1978, and summarised by Petrunik in 1994.⁵⁷ As Petrunik notes, Foucault extended the definition of the "individual who committed a crime" given by the Italian Positivist Garofalo⁵⁸ in the 19th century, to a "criminal man" considered "...as a person who by his very nature is driven to commit the most violent of crimes against the most vulnerable of victims".⁵⁹ The 19th century concept of "homicidal monomania" used by psychiatrists to explain

⁵³ Petrunik, "*Models of dangerousness*", *ibid.* at 10-12. See also John Howard, "*Dangerous Offenders*", *supra* note 51.

⁵⁴ Petrunik, "*Models of dangerousness*", *ibid.* at 13, referring to Foucault, M. "About the Concept of the 'Dangerous Individual' in 19th- Century Legal Psychiatry" (1978) 1 *International Journal of Law and Psychiatry*, 1 [Foucault].

⁵⁵ Petrunik, "*Models of dangerousness*", *ibid.* at 19.

⁵⁶ See generally Foucault, *supra* note 54.

⁵⁷ See generally Petrunik, "*Models of Dangerousness*", *supra* note 4.

⁵⁸ For a summary of Garofalo's work, see Lilly, J. Robert, Francis T. Cullen & Richard A. Ball, *Criminological theory: context and consequences* (Thousand Oaks, CA: Sage, 2007), at 21-24.

⁵⁹ Petrunik, "*Models of Dangerousness*", *supra* note 4 at 14.

certain violent and bizarre crimes is also cited as a source of the clinical model.⁶⁰

Petrunik also refers to Foucault in explaining that:

...psychiatrists were able to justify their right to intervene in the case of “mentally abnormal”, but legally sane, dangerous offenders on the basis of a clinical model that stressed not just individual treatment but public hygiene. The psychiatrist as a diagnostician and caretaker of the dangerous individual took on the role of public protector just as practitioners of physical medicine diagnosed and quarantined individuals who were actual or potential carriers of contagious disease.⁶¹

According to Petrunik, Foucault and Ancel, the notion that an individual posing a risk to society should be held accountable found its way into criminal legislation “...through the concepts of “criminal man” and “*l’état dangereux*”, and was used to advocate that social control should be proportionate, not to the seriousness of the offence, but to the offender’s “dangerousness his “capacity for and probability of doing harm””.⁶² Petrunik in referring to Ancel, notes that social control measures took various forms including non-punitive measures aimed at neutralising the dangerousness of the offender and that were “...designed simply to neutralize the offender, either by his removal or segregation or by...remedial or educational methods”.⁶³ There were also, as noted by Petrunik and Ancel, indeterminate measures that were “...not fixed in terms of estimates of the nature and seriousness of the crime”.⁶⁴ Therefore, within the clinical model, the fundamental rights of law, liberty and due process are subordinated to the “...State’s duty to ensure public protection”.⁶⁵

⁶⁰ Petrunik, “*Models of dangerousness*”, *ibid.* Petrunik refers to Foucault, *supra* note 54 at 6-7.

⁶¹ Petrunik, “*Models of Dangerousness*”, *ibid.* at 14-15 (Footnotes omitted). Petrunik refers to Foucault, *supra* note 54 at 6.

⁶² Petrunik, “*Models of dangerousness*”, *ibid.* at 14. Petrunik cites Foucault, *supra* note 54 at 17 and Ancel, *supra* note 38 at 15. (Footnotes omitted).

⁶³ Petrunik, “*Models of Dangerousness*” *ibid.* at 15. Petrunik cites Ancel, *supra* note 38 at 25.

⁶⁴ *Ibid.*

⁶⁵ *Ibid.* at 16.

As one might expect, the clinical model was the object of intense criticism over the years.⁶⁶ Petrunik identifies these criticisms as follows:

(1) the circularity of some of its key concepts, (2) the low reliability of diagnoses of personality disorder, (3) inaccuracy in predictions of violence, and (4) the generally low success levels of treatment programs.⁶⁷

As early as in the 1970's, the Law Reform Commission of Canada "...recommended avoiding clinical evaluations of dangerousness".⁶⁸ Nevertheless, in assessing dangerousness, Petrunik notes that in recent years, there has been some improvement, including the demonstrated usefulness of the Hare's Psychopathy Checklist ("PCL" and "PCL-R") in assessing the risk of dangerousness of a particular individual, and the combined use of clinical and actuarial techniques, of contextual information, and the development of "cognitive-behavioural" approaches.⁶⁹ Some of these assessment techniques will be briefly discussed later in this section.

b) The Influence of the Justice Model

While the 19th century and the first half of the 20th century saw the emergence of the clinical model emphasising the treatment of the individual's dangerousness, the second half of the 20th century was marked by social control measures concerned with individual right, hence the development of the justice model.⁷⁰ In fact, beginning in the 1970s, the justice model progressively replaced the clinical model.⁷¹ According to

⁶⁶ See generally Monahan, J., *The clinical prediction of violent behaviour* (Rockville (MD): National Institute of Mental Health, 1981). See also Ewing, C. P., "Preventative detention and execution: The constitutionality of punishing future crimes" (1991) 12 Am. J. L. & Med. 139.

⁶⁷ Petrunik, "Models of Dangerousness", *supra* note 4 at 22.

⁶⁸ John Howard, "Dangerous Offenders", *supra* note 51.

⁶⁹ Petrunik, "Models of Dangerousness", *supra* note 4 at 25-26.

⁷⁰ *Ibid.* at 41.

⁷¹ Durham, Alexis M., "Correctional Privatization and the Justice Model: the Collision of Justice and Utility" (1987) 3:2 Journal of Contemporary Criminal Justice, 57, at 58 (abstract).

Petrunik, the justice model focuses on the offense and “...principles of individual civil rights, equality under the law, and the least restrictive alternative take precedence over community protection and offender rehabilitation”.⁷² Criticising the notion of psychopathy which was the trademark of the clinical model, the justice model influenced the “use of the term dangerous offender” as opposed to “sexual psychopath” in various statutes.⁷³

Concerns with the assessment and prediction of dangerousness by clinicians under the clinical model were also characteristic of the justice model.⁷⁴ In some instances, like in the United States, the shift toward a justice model caused the abolition of certain “...civil sexual psychopath and sexually dangerous persons’ statutes”.⁷⁵ Indeterminate sentences imposed on some dangerous individuals in the United States, which were once the hallmark of the clinical model, were progressively replaced by determinate sentences.⁷⁶ The protections offered by the law to the offenders’ benefit became preeminent with the emergence of the justice model.⁷⁷

Insofar as the justice model responded to some of the flaws of the clinical model, by “....avoid[ing] potential abuses of the rights of offenders and mental patients” and by “encourag[ing] respect for fundamental principles such as the rule of law”, it was criticised for “...the lack of safeguards for the community”.⁷⁸ Consequently, the 1980s

⁷² Petrunik, “*Models of Dangerousness*”, *supra* note 4 at 42.

⁷³ *Ibid.* at 43.

⁷⁴ *Ibid.*

⁷⁵ *Ibid.* at 44-46.

⁷⁶ *Ibid.* at 46.

⁷⁷ *Ibid.*

⁷⁸ *Ibid.* at 51, and 47.

saw the emergence of a new model of social control concerned with public protection, namely, the community protection model.⁷⁹

c) The Influence of the Community Protection Model

Concerns with public protection triggered the development of the community protection model, which puts emphasis on the rights of victims and potential victims, and on the need to have "... strict and comprehensive measures of control".⁸⁰ According to Petrunik, in response to the potential threat of violent sexual offenders, the community protection model emerged to address some of the flaws of the clinical and justice models. Under the community protection model, the risk to public safety is a major concern.⁸¹ Petrunik explains that the development of a community protection model can be attributed to the following factors:

- (1) Predatory sexual and violent offenders pose a serious and pervasive danger to women and children. Even if the number of such offenders is not very large the amount of damage - physical and psychological - they do can be very great.
- (2) Politicians and bureaucrats have given insufficient attention to victims of violent and sexual offences and their families and too much attention to the rights of offenders. Too little has been done to address issues of public safety from violent crime.
- (3) Attempts to rehabilitate or treat sexual and violent offenders have had little success with the result that such individuals are being released from a prison are still a great risk to the public. Violent and sexual offenders should be kept locked up until it is clear that they no longer pose a serious threat to the public.
- (4) The justice and mental health systems have failed to adequately monitor dangerous individuals who have been released from custody. In addition, these two systems provide inadequate information about such individuals to

⁷⁹ Petrunik, "*Models of Dangerousness*", *ibid.* at 54.

⁸⁰ Saleh, Fabian M. *et al.*, *Sex Offenders: Identification, Risk Assessment, Treatment, and Legal Issues* (New York: Oxford University Press, 2009), at 412.

⁸¹ Petrunik, "*Models of Dangerousness*", *supra* note 4 at 53.

communities with the result that community members neglect to take or are unable to take measures to protect themselves.⁸²

The community protection model emerged also because of serious concerns from “...social movements advocating victims’ rights and greater protection for women and children from sexual violence”.⁸³ This model, therefore, shifted the focus on to protection of vulnerable persons.⁸⁴ As Vess explains, the community protection model can be distinguished from the clinical and justice models as follows:

In contrast to the justice model, the community protection approach is less concerned about due process, the proportionality of punishment to the crime, and the protection of offender’s liberty or privacy rights. In contrast to the forensic-clinical model, it is less concerned about treatment or rehabilitation of offenders intended to reduce recidivism or facilitate community reintegration. The primary goal of the community protection model is the incapacity of sexual offenders for the sake of public safety.⁸⁵

It can be argued that the community protection model favoured the enactment of preventive measures to control the risk posed by potentially dangerous individuals. Consequently, in Canada, preventive measures, such as high risk judicial restraint orders, and new dangerous offender and long-term offender provisions, are a direct result of this new movement which focuses on the protection of the community, rather than on the rights of the offender or his rehabilitation.⁸⁶

⁸² *Ibid.* at 54-55.

⁸³ *Ibid.* at 108.

⁸⁴ *Ibid.*

⁸⁵ Vess, James, “Preventive Detention Versus Civil Commitment: Alternative Policies for Public Protection in New Zealand and California” (2005) 12:2 *Psychiatry, Psychology and Law*. 357, at 360, cited in Connolly, Marie & Tony Ward, *Morals, rights and practice in the human services* (London: Jessica Kingsley Publishers, 2008), at 90.

⁸⁶ For example, it is worth noting the recent enactment of presumption of dangerousness under section 753 (1.1) of the *Criminal Code* which deals with the dangerous offender designation. This measure facilitates the designation of a dangerous offender as it automatically presumes his or her dangerousness if he or she has committed three serious personal injury offences. It is argued that in a society concerned with the risk posed by potentially dangerous individuals, a presumption of dangerousness fits neatly with

In France, a shift toward a system emphasising the protection of the community by the enactment of preventive measures, and aimed at identifying and controlling dangerousness, has also been observed. However, as will be explained, the French scheme appears to put more emphasis on the rehabilitation of the offender while also being concerned with due process when determining dangerousness. The next section will discuss the influence of the social defence movement and repressive prevention in France on the determination of dangerousness.

iii) The Evolution of the Concept of Dangerousness in France

The concept of dangerousness evolved throughout the 19th century around the notions of “*dégradation*”, “*périculosité*”, “*redoutabilité*” and later under “*l’état dangereux*” which was first formulated by Garofalo.⁸⁷ According to Bertrand, these notions were used to justify the internment of abnormal individuals who could jeopardise the social equilibrium.⁸⁸ Bertrand notes the first signs of the notion of “*l’état dangereux*” in French criminal law with the adoption of the *Loi du 30 juin 1838*, which gave the prefect the authority to intern any person whose mental state might compromise public order and the protection of the community.⁸⁹ At around the same time, the notion of “*classe dangereuse*”, a category of individuals considered to be dangerous because of their vices,

the community protection model described by Petrunik. See generally Petrunik, “*Models of Dangerousness*”, *supra* note 4.

⁸⁷ Bertrand, Valérie, “La mendicité et l’état dangereux : l’historicité des représentations sociales dans le discours juridique”, (2003) 80:2 *Connexions* 137, available online : Cairn info <<http://www.cairn.info/revue-connexions-2003-2-page-137.htm>> [Bertrand].

⁸⁸ Bertrand, *ibid.*

⁸⁹ We will see later that the recent enactment of the *Loi n°2007-297 du 5 mars 2007 relative à la prévention de la délinquance*, J.O., 7 March 2007, 4297 [*Loi sur la prévention de la délinquance*] has given more power to mayors in indentifying potentially dangerous individuals.

ignorance, and hardships, is described by the *Académie des sciences morales et politiques*.⁹⁰

Also, in the 19th century, the concept of *dangerosité* was at the heart of a debate in the treatment of habitual offenders.⁹¹ The idea of punishing “incorrigible” individuals who did not belong to mental health facilities or prisons, but were considered “socially abnormal”, also saw the light during this period.⁹² Drastic measures were eventually enacted to deal with these multi-recidivists, including the *relégation de sûreté* in 1885.⁹³ The *relégation de sûreté* was a preventive measure aimed at deporting habitual offenders to remote territories where they would pose a minimal risk of dangerousness, or merely cause danger to people who “didn’t count”.⁹⁴

However, it is the emergence of the social defence movement in France that is widely credited as being at the heart of the development of legislation dealing with the concept of *l’état dangereux*, or dangerousness. The social defence movement is concerned not only with punishment, but also with the protection of persons and society: “[i]l ne s’agit plus de punir, mais d’assurer de la meilleure façon possible la protection de la personne, de la vie, du patrimoine et de l’honneur des citoyens”.⁹⁵ To achieve this goal, the judicial

⁹⁰ Rhenter, *supra* note 49.

⁹¹ *Ibid.*

⁹² *Ibid.*

⁹³ *Ibid.*

⁹⁴ See generally Sanchez, Jean-Lucien, “La relégation (loi du 27 mai 1885)” (2005) *Crimino Corpus*, La Revue, Dossier no.2, available online: *Crimino Corpus* <<http://www.criminocorpus.cnrs.fr/article43.html>>. See also Kaluszynski, Martine “Le retour de l’homme dangereux. Réflexions sur la notion de dangerosité et ses usages” (2008) *New International Journal of Criminology*, Vol V, available online : *Penal Field* <<http://champpenal.revues.org/6183#bodyftn25>>, at para. 25.

⁹⁵ Rappard, P., “La fin du non-lieu judiciaire et son incidence sur le but des institutions psychiatriques médico-légales” (2008) 166 :7 *Annales Médico-psychologiques, revue psychiatrique* 569, available online through Science Direct : <www.sciencedirect.co> [Rappard], at 571.

notion of *état dangereux* is progressively used to justify *ante delictum* detention of potentially dangerous individuals, all in the name of the protection of society.⁹⁶

For example, the social defence movement fostered two preventive statutes legislations in the 1950s to deal with two forms of potential dangerousness: alcoholism and drug addiction.⁹⁷ In the words of Ancel, it is in the latter legislation dating from 1954 (*Loi du 15 avril 1954 sur le traitement des alcooliques dangereux*)⁹⁸ that "...the idea of dangerousness first received explicit legislative recognition".⁹⁹ The *Loi sur le traitement des alcooliques dangereux* enabled the preventive and sanitary detention of dangerous alcoholics.¹⁰⁰

From that point on, the concept of dangerousness in French criminal law gained considerable momentum. In fact, the social defence movement gradually extended its influence and contributed to the "...establishment of a system of social prevention in what may be called the "pre-criminal" stage...".¹⁰¹ According to Ancel, social defence premises allow for the implementation of a preventive system which strikes a balance between the rule of law and a "system of social prevention" if the following conditions are met:

First, a **special kind of dangerousness** needs to be clearly distinguished and carefully defined. Secondly, the boundaries of this socially dangerous condition must be **delimited by means of a legal formula which should be worked out**

⁹⁶ Rappard, *ibid.*

⁹⁷ Ancel, *supra* note 38 at 171. Rappard, *supra* note 95 at 571 also notes that the *Loi n° 7443 du 30 juin 1838 sur les aliénés*, Bulletin des lois, Vol. 16, n°581, July 1838, 1005, which dealt with persons suffering from mental incapacity, is one of the first legislation influenced by the social defence movement.

⁹⁸ *Loi n°54-439 du 15 avril 1954 sur le traitement des alcooliques dangereux pour autrui*, J.O., 21 April 1954, 3827.

⁹⁹ Ancel, *supra* note 38 at 171.

¹⁰⁰ Godfryd, Michel, *Le droit de la santé mentale par les textes* (Thoiry : Éditions Heures de France, 2000), at 53. See also Tribolet, Serge & George Desous, *Droit et psychiatrie* (Thoiry: Éditions Heures de France, 1995), at 220-222.

¹⁰¹ Ancel, *supra* note 38 at 171.

with the greatest possible precision. Thirdly, there ought to be statutory **recognition of the State's right to intervene for purposes of prevention**, such right to be exercised only within narrow limits strictly defined by statute. Fourthly, the specific conditions in which the State may exercise its right to intervene should form part of a system of judicial and **procedural safeguards** which ought, in principle, to be those laid down by the general law.¹⁰²[Emphasis added].

Thus, just as it was in Canada, the concept of dangerousness in France evolved toward a system focusing on the prevention of dangerousness in the name of the protection of society. The concept of *dangerosité* in French criminal law is now considered a "measurement of a probability of recidivism".¹⁰³ According to Danet, France progressively applied various alternatives in the treatment of potentially dangerous offenders.¹⁰⁴ It is not just a question of incarcerating potentially dangerous offenders and releasing them into society once their debt is paid to society. In fact, French law now focuses on offering alternatives to incarceration, in the hope of rehabilitating potentially dangerous offenders.

Danet explains that there are now numerous alternatives for controlling dangerousness which can be applied progressively depending on the seriousness of the case: "1) punishment and treatment (*injonction de soins*) for all individuals subjected to a social-judicial probation (*suivi socio-judiciaire*), 2) punishment, treatment and supervision through the social-judicial probation or through other supervision methods such as the *surveillance de sûreté*, 3) finally, punishment, treatment, detention and treatment until the risk of future dangerousness is decreased to levels justifying a release into society, but also a possibility of re-imposing a *rétenion de sûreté* should there be a high probability

¹⁰² *Ibid.*

¹⁰³ Danet, *supra* note 42.

¹⁰⁴ *Ibid.*

of dangerousness or recidivism”.¹⁰⁵ These are all punitive measures with a preventive follow-up aimed at controlling the risk of future dangerousness of a particular individual.

As we will explain later, the social defence model encouraged the development of various *mesures de sûreté* (or measures aimed at controlling dangerousness). However, in the context of French criminal law, these so-called *mesures de sûreté* are only applicable to convicted offenders who present a risk of dangerousness upon their release from prison. On this note, it could be argued that the Canadian scheme of recognizance orders is also generally used to restrain the liberties of convicted offenders. However, as we will later explain, the chief difference between the two systems resides in the fact that the Canadian scheme leaves the door wide open to impose recognizance orders on potentially dangerous individuals, whether they have been convicted or not in the past for criminal offenses.¹⁰⁶ Before examining the French scheme of preventive measures in more detail, we will look at the concept of prediction of dangerousness, which is a key component in the imposition of preventive measures.

iv) Reliability and Accuracy Issues in Prediction of Dangerousness

The following section will examine in greater detail the ongoing debate among clinicians and members of the legal community on the reliability of prediction of dangerousness. There has been an evolution towards a mixed approach combining clinical and actuarial

¹⁰⁵ *Ibid.* “Translated by author”. The noted paragraph is a translation of Danet’s text: “La dangerosité s’affiche désormais comme la mesure d’une probabilité de récidive. Le législateur sort alors de l’alternative enfermer/ « laisser sortir la dette payée » et il gradue les réponses : 1) punition et traitement avec injonction de soins pour tous ceux qui encourent un suivi socio-judiciaire, 2) punition, traitement et surveillance par le suivi socio-judiciaire ou par la surveillance de sûreté, et enfin 3) punition, traitement, rétention et traitement jusqu’à abaissement de la dangerosité susceptible de justifier le retour à la situation précédente, mais aussi retour à la rétention en cas d’augmentation de la dangerosité, de la probabilité de récidive”.

¹⁰⁶ See generally section 810.1 and 810.2 of the *Criminal Code*.

tests in determining dangerousness. However, the literature generally demonstrates that even the best approach is subject to false positives. Consequently, the reliability issue in the determination of a risk of future behaviour should be a concern in the development of new policies pertaining to the control of dangerousness.

In a society where the rule of law is paramount, the assessment of dangerousness, which can lead to the alienation of certain liberties by the imposition of recognizance orders or preventive detention, presents a moral dilemma.¹⁰⁷ As Walker suggests:

[w]e want to prevent the harm such people may do to others, yet we feel guilty when prevention entails drastic interference with their lives. The horns of the dilemma are sharpest when the harm feared is of a kind that destroys life or the quality of life, and when the only effective means of prevention is detention. The horns are blunter when the harm is merely financial and the risk of it can be reduced by non-custodial measures, such as disqualification or supervision.¹⁰⁸

Criminal sanctions, at least in common law systems, have been invoked on the basis of “explicit predictions of dangerousness” since the 16th century.¹⁰⁹ Over the years, the criminal justice system has seen the development of anticipatory interventions targeting potential criminals despite the lack of “...jurisprudential justifications for such interventions and knowledge of their efficacy”.¹¹⁰

In the context of dangerous offender legislation, as well as in other dangerousness legislation (such as bail and recognizance orders for potentially dangerous individuals), judges have to make a determination on the potential dangerousness of the individuals.

¹⁰⁷ Walker, *supra* note 36 at 1.

¹⁰⁸ *Ibid.*

¹⁰⁹ Morris, Norval & Marc Miller, “Predictions of Dangerousness” (1985) 6 Crime and Justice 1, available online through HeinOnline, [Morris & Miller], at 7. For example, at 7-8, Morris & Miller, *ibid.* refers to the *Vagrancy Acts* and the *Habitual Offenders Laws* in England and in the United States.

¹¹⁰ *Ibid.* at 6.

They will often rely on evidence from expert witnesses (i.e. psychiatrists and psychologists) to assess the dangerousness of the individual. However, as Menzies *et al.* explain, “[t]he clinical prediction of dangerousness is currently among the most controversial issues in the areas of medico legal research and practice”.¹¹¹ This issue inevitably raises the following question: if clinicians are unable to predict dangerousness accurately, how are judges supposed to make findings on the potential dangerousness of individuals? Hence one must look into the different forms of prediction of future behaviour and their flaws, as well as at the various challenges faced by mental health professionals in determining dangerousness. The discussion also explores the standards used by the court in making a determination of dangerousness.

v) An Overview of Various Risk Assessment Tools Used in the Determination of Dangerousness

It has been said that “[t]he ability to predict future behaviour has long been an elusive goal”.¹¹² Furthermore, a cursory review of the doctrine pertaining to the prediction of dangerousness by mental health professionals quickly reveals an unsettled and controversial debate.¹¹³ This is not to say that clinicians have not, over the years, tried to develop assessment tools to evaluate the risk of future behaviour and dangerousness of an individual. In fact, multiple assessment and prediction tools are used by clinicians.¹¹⁴ In the clinical community, there are essentially three forms of prediction of future behaviour, which enable an assessment of dangerousness.

¹¹¹ Menzies, Robert J., Christopher D. Webster & Diana S. Sepejak, “The Dimensions of Dangerousness: Evaluating the Accuracy of Psychometric Predictions of Violence among Forensic Patients” (1985) 9:1 Law and Human Behavior, 49, available online through JSTOR, [Menzies] at 50.

¹¹² MacAlister, *supra* note 37 at 27.

¹¹³ Melton, Gary B. et al., *Psychological Evaluations for the Courts*, 2nd ed., (New York: The Guilford Press, 1997) [Melton] at 277.

¹¹⁴ Slobogin, Christopher, *Proving the Unprovable: The Role of Law, Science, and Speculation in Adjudicating Culpability and Dangerousness* (Oxford: Oxford University Press, 2007) [Slobogin] at 101.

Morris & Miller identify them as *anamnestic* prediction, actuarial prediction, and clinical prediction.¹¹⁵ By looking into the behavioural history of an individual in a particular circumstance, clinicians use *anamnestic* predictions to indicate future behaviour.¹¹⁶ Actuarial predictions are concerned with how a given class of individuals behave in a given set of circumstances.¹¹⁷ As for clinical prediction, it is based on professional judgment and involves some of the “elements of the first two” forms of prediction.¹¹⁸ Other researchers, such as MacAlister, also identify three forms of risk of future behaviour assessment approaches similar to the ones identified by Morris & Miller, but classify them under different labels: the early clinical approaches, the actuarial risk assessment, and structured clinical judgment.¹¹⁹

Before the 1980s, most, if not all, predictions of risk of future behaviour made by mental health practitioners was purely clinical in nature.¹²⁰ The typical clinical judgment process is explained as follows: “[t]ypically, a mental status exam of the subject and a review of file data led an assessor to identify the behavioural and psychological dynamics present in the individual. These findings would often result in a clinical diagnosis over which assumptions regarding dangerousness prevailed”.¹²¹ Early clinical approaches, which “...tended to be based upon the clinical judgment of the mental health practitioner”,

¹¹⁵ Morris & Miller, *supra* note 109 at 13-14. It is also worth pointing out that *The Canadian Oxford Dictionary*, 2nd ed., s.v. “anamnesis”, defines anamnesis as follows: “1. [the recalling of things past; reminiscence. 2. A patient’s account of his or her medical history...”.

¹¹⁶ *Ibid.*

¹¹⁷ *Ibid.* at 14.

¹¹⁸ *Ibid.*

¹¹⁹ MacAlister, *supra* note 37 at 27. See also Slobogin, *supra* note 114 at 101. However, Slobogin adds another prediction methodology, namely the “adjusted actuarial assessment”. According to Slobogin, at 101, the adjusted actuarial assessment “....begins with an actuarial assessment that the professional then adjusts, based on individualized factors not considered in the actuarial formula”.

¹²⁰ Slobogin, *ibid.* at 101.

¹²¹ MacAlister, *supra* note 37, at 27.

presented numerous reliability issues.¹²² Over the years, clinicians were able to refine their techniques in predicting a risk of future behaviour by using the clinical approach. However, the non-existence of “...professional standards in psychology or other mental health disciplines for the assessment of risk for violence” continues to plague the early form of clinical approach.¹²³ As MacAlister points out, this particularity opened the door for the development of alternative approaches to the assessment of future violence.¹²⁴

One of these alternatives, which has been widely used in Canada in the assessment of future violence, is the actuarial risk assessment.¹²⁵ Actuarial risk assessment tools rely, for the most part, on “...on a finite number of preidentified variables that statistically correlate to risk and that produce a definitive probability or probability range of risk” and are more structured than clinical prediction methodologies.¹²⁶

Since the 1980s, several actuarial tools have been developed, including the SIR scale (Statistical Information on Recidivism); the DBRS (Dangerous Behavior Rating Scheme); the VRAG (Violence Risk Appraisal Guide) and its key component, the PCL-R (Hare Psychopathy Checklist).¹²⁷ The development of these risk assessment tools and their increasing use by mental health practitioners has contributed to increase the reliability of the prediction of future behaviour. However, actuarial tools are not without

¹²² MacAlister, *ibid.*

¹²³ *Ibid.*

¹²⁴ *Ibid.*

¹²⁵ *Ibid.* In this regard, MacAlister, *ibid.* points out at 27 that “[n]owhere has the development of risk assessment tools been more prolific than in this country”, namely Canada. Moreover, as will be discussed later, France differs from the Canadian approach since mental health practitioners are still widely making use of psychoanalysis in assessing the risk of future violence and relying on unstructured clinical judgment. See Xavier Bébin, “Comment améliorer l’évaluation de la dangerosité en France?”, Institut pour la Justice (avril 2009), online: Institut pour la justice < <http://www.publications-justice.fr/publications/notes-syntheses/comment-ameliorer-l-evaluation-de-la-dangerosite-en-france> > [Bébin].

¹²⁶ Slobogin, *supra* note 114 at 101-102.

¹²⁷ MacAlister, *supra* note 37 at 28.

flaws. They are valuable when used in relation to a group, but their accuracy “...is not of much value if the question concerns a particular individual”.¹²⁸ In other words, actuarial tools are unable to predict what type of crime is going to be committed by a particular individual. Nevertheless, these tools can be used with some effectiveness in predicting a risk of future behaviour.

Another alternative identified by MacAlister is the structured clinical judgment, which combines “...actuarial methods with clinical or professional expertise to form risk assessment”.¹²⁹ It is now the dominant approach in the assessment of future behaviour in Canada. Once again, on this point, we will demonstrate later that such is not the case in France currently.

The structured clinical judgment approach has seen the emergence of several assessment tools which have the particularity of combining actuarial elements with clinical judgment.¹³⁰ MacAlister identifies them as being the “PCL-R, the VRAG, the Sex Offender Risk Appraisal Guide (SORAG), the Rapid Risk Assessment for Sex Offender Recidivism (RRASOR), and the STATIC-99,...[as well as]...the Violence Prediction Scheme (VPS), the Historical/Clinical/Risk Management guide (HCR-20), the Spousal Assault Risk Assessment guide (SARA), and the Sexual Violence Risks guide (SVR)”.¹³¹

Slobogin considers the HCR-20 as one of the best examples of structured clinical judgement and describes it as “...consist[ing] of twenty items relating to three categories

¹²⁸ Walker, *supra* note 36 at 119.

¹²⁹ MacAlister, *supra* note 37 at 28.

¹³⁰ *Ibid.* at 29.

¹³¹ *Ibid.* (Footnotes omitted). See also for example Hanson, R. Karl, *The Development of a Brief Actuarial Risk Scale for Sexual Offense Recidivism*, 1997-04, online: Department of the Solicitor General of Canada <http://ww2.pssp.gc.ca/publications/corrections/199704_e.pdf>, at 14. An example of the RRASOR developed by Karl R. Hanson is also included in Appendix C of the present document.

of information: historical, clinical, and risk management”.¹³² Slobogin also points out that while the HCR-20 may appear similar to actuarial methodology, it differs from it since “...the examiner arrives at risk ratings of low, moderate, or high based on his or her clinical assessment of the various items in the protocol.”¹³³

No matter which approach is preferred in assessing risk of future behaviour, no methodology can be deemed “perfect”. However, Slobogin notes the advantage of actuarial and structured clinical judgment over the early clinical approaches as being more objective, and more reliable.¹³⁴ MacAlister points out that the objectivity of the tests used in actuarial assessment is “[l]ending an air of mathematical precision to the dangerousness assessment [which] is intuitively desirable for mental health experts, judges, and lawyers alike”.¹³⁵ In comparison, an unstructured clinical judgment is much more influenced by the subjectivity of the assessor:

An unstructured clinical prediction, in contrast, “must ultimately be based upon an overall subjective impression which is based upon an understanding of the interrelatedness of many facts.” Because “subjective impressions” may differ from clinician to clinician, and even from case to case for the same clinician, each clinical prediction will probably be based on a different constellation of factors, some of which may be irrelevant or based on erroneous stereotypes and prejudices.¹³⁶

The development of a variety of approaches in the assessment of risk of future behaviour is said to have increased the reliability of risk assessments tool. Overall, it appears that “[t]he common wisdom that expert predictions about violence risk are wrong more often

¹³² Slobogin, *supra* note 114 at 104.

¹³³ *Ibid.*

¹³⁴ *Ibid.*

¹³⁵ MacAlister, *supra* note 37 at 28.

¹³⁶ Slobogin, *supra* note 114 at 105. (Footnotes omitted).

than they are right is probably not true”.¹³⁷ Nevertheless, it is important to take into consideration that some risk assessment tools are more reliable than others in predicting dangerousness. It is a fundamental consideration because it ultimately affects the quality of the evidence presented to the judge.

Today, the predominance of the structured clinical judgment tool in psychiatric assessment of risk of future behaviour is clearly apparent in Canada.¹³⁸ However, as we will demonstrate, the situation is different in France.

vi) Predictions of Dangerousness in the French Context and the Predominance of Psychoanalysis in the Determination of Dangerousness by French Mental Health Experts

While the aforementioned actuarial and structured clinical judgment tools, such as the HCR-20, are widely used by Canadian mental health professionals, the same cannot be said of their French colleagues. The most reliable tools for predicting a risk of future behaviour are under used in France by mental health professionals.¹³⁹ Experts have vehemently denounced the fact that France has yet to codify evaluation methods for individuals who have committed serious, complex and serial crimes.¹⁴⁰ Bébin adds that assessment tools, such as the HCR-20 and the VRAG, have not been validated nationally

¹³⁷ Slobogin, *ibid.* at 114.

¹³⁸ MacAlister, *supra* note 37 at 28.

¹³⁹ Bébin, *supra* note 125 at 2.

¹⁴⁰ Bénézech, M., T.H. Pham B. & P. Le Bihan, “Les nouvelles dispositions concernant les criminels malades mentaux dans la loi du 25 février 2008 relative à la rétention de sûreté et à la déclaration d’irresponsabilité pénale pour cause de trouble mental : une nécessaire évaluation du risque criminel” (2009) 167 *Annales Médico-Psychologiques* 39, at 47.

in France.¹⁴¹ He also notes that the Hare's Psychopathy Checklist is not used at all by French mental health practitioners.¹⁴²

In fact, in evaluating the risk of future behaviour, French mental health professionals are still widely using unstructured clinical judgment, despite its deficient reliability.¹⁴³ One has to wonder why actuarial tools and structured clinical judgment tools are not part of the French clinician's regular arsenal in determining dangerousness. In this regard, Bébin offers some possible explanations asserting that psychoanalysis, a practice which has fallen out of favour in other developed countries, is still widely used in France.¹⁴⁴ Bébin points out that traditionally, psychoanalysis is hostile to prediction tools which are not geared toward understanding the individual.¹⁴⁵ All in all, the lack of uniformity and national validation of risk assessment tools has led to numerous conflicts between experts in the *Cours d'assises* in France.¹⁴⁶ However, perhaps one of the explanations for the lack of use of actuarial and structured clinical judgment by French mental health experts resides in the fact that the particular legislative context does not give rise to an extensive use of dangerousness assessments. There are no peace bonds or recognizance orders in France and the imposition of preventive measures such as the *mesures de sûreté* is limited and exceptional for the most part. In other words, since the imposition of restrictive conditions based upon a positive assessment of dangerousness constitutes an exception in France, the need for these assessment tools may not be as pronounced.

¹⁴¹ Bébin, *supra* note 125 at 2, citing Lamanda, Vincent, *Amoindrir les risques de récidive criminelle des condamnés dangereux* (Paris : Présidence de la République, 2008), at 15.

¹⁴² Bébin, *ibid.* at 2.

¹⁴³ *Ibid.*

¹⁴⁴ *Ibid.*

¹⁴⁵ *Ibid.*

¹⁴⁶ *Ibid.* at 3.

It appears that French clinicians have not emulated Canada's mental health practitioners in their shift towards the use of actuarial and structured clinical judgment in assessing the risk of future behaviour. Even so, the risk of false positives in the determination of dangerousness remains a common problem that plagues both systems, no matter what methodology is preferred. The following paragraphs will examine the problem of false positives and false negatives in the use of risk assessment tools.

vii) The Pitfalls of Erroneous Predictions of Dangerousness: The Case of False Positives and False Negatives

Although some authors have questioned the following assertion, the fact remains that clinical predictions of dangerousness are often considered inaccurate and over-predicting.¹⁴⁷ This is particularly true when one reviews the abundant literature on prediction of dangerousness:

... dangerousness is governed by a discretionary system involving probability rather than certainty, and estimations based on moral, interpersonal, political, and sometimes arbitrary criteria.[...] It is abundantly clear that forensic assessments of dangerous behaviour, even under the most advantageous conditions, will never approach perfect accuracy.¹⁴⁸ [Emphasis added].

This is a particularly alarming situation when we consider that judges rely in part on clinical assessment of dangerousness to impose recognizance orders, or to designate dangerous offenders, which may lead to an indeterminate-indefinite period of incarceration. The judiciary appears to be aware of the problems in predicting dangerousness, at least in the dangerous offender legislation context. A clear example

¹⁴⁷ Walker, *supra* note 36 at 13. See also generally Cocozza, J.J. & Steadman, H.J., "Prediction in Psychiatry: an Example of Misplaced Confidence in Experts" (1978) 25 Social Problems 265; Steadman, H.J. & Morrissey, J.P., "The Statistical Prediction of Violent Behaviour: Measuring the Cost of a Public Protectionist Versus a Civil Libertarian Model" (1981) 5 Human Behaviour, 263. But see Slobogin, *supra* note 114 at 117.

¹⁴⁸ Menzies, *supra* note 111 at 67.

where a court has acknowledged the inaccuracy of psychiatric evidence in assessing the risk of future behaviour is in the case of *R. v. Lyons*.¹⁴⁹

Examining the dangerous offender scheme under Part XXIV of the *Criminal Code*, the Supreme Court of Canada in *Lyons* addressed the false positive issue and described it as “[...]a statistical term representing the erroneous over-prediction of future violence”.¹⁵⁰

Despite the consequences and reality of false positives, the majority in *Lyons* held that “[t]his problem does not appear to undermine the utility and fairness of the scheme so much as to fortify the conclusion that the procedural protections accorded the offender, especially on review, ought to be very rigorous”.¹⁵¹

All in all, complete accuracy appears to be a utopian dream in the prediction of risk of future behaviour. Consequently, false positives constitute an inherent risk to a scheme relying on prediction of future behaviour. It is true, however, that new prediction tools, such as actuarial and structured clinical judgment, have decreased the risk of false positives.¹⁵² Moreover, the risk of false positives can be reduced (but not eradicated) through the help of procedural safeguards. MacAlister cautions members of the Canadian judiciary in these words:

Given the grave risk of false positive predictions of dangerousness, members of the judiciary must be cautious, particularly when faced with actuarial risk assessments, cloaked as they are in the terminology of mathematical precision.

¹⁴⁹ *R. v. Lyons*, [1987] 2 S.C.R. 309, 44 D.L.R. (4th) 193 [*Lyons* cited to S.C.R.], at 365-366. In the landmark decision of *R. v. Lyons*, the Supreme Court of Canada ruled that Part XXI (now XXIV) of the *Criminal Code* did not violate the rights guaranteed under section 7, 9, 11 and 12 of the Charter. The Supreme Court also affirmed the need for dangerous offender legislation which serves the purpose of protecting society. In this regard, see *Lyons, ibid.* at 321-323, 372. See also Martineau, Methodological Prospectus, *supra* note 21 at 8.

¹⁵⁰ *Lyons, ibid.* at 367. See also Martineau, Methodological Prospectus, *ibid.* at 12.

¹⁵¹ *Lyons, ibid.* at 368.

¹⁵² Slobogin, *supra* note 114 at 114.

They must be careful not to lose sight of the fact that probabilistic assessments are being made based on group behaviour, while they are dealing with real individuals appearing before them.¹⁵³ [Emphasis added].

The possibility of false positives in prediction of risk of future behaviour inevitably brings in the question of false negative. In a false negative scenario, an individual assessed as being at a low-risk of committing a crime or being dangerous actually commits an offense. As Petrunik explains, false negatives occur when “...individuals [are] diagnosed as insufficiently dangerous to confine (or as safe enough to release) ...[and] are later convicted of serious acts of personal violence or sexual offences”.¹⁵⁴

Petrunik remarks that the media tends to focus on the problem of false negatives, “...often dramatically”.¹⁵⁵ False negatives can, therefore, have a major impact on the public’s perception of the efficacy of dangerousness legislation and its ability to accurately predict a risk of future behaviour. Therefore, false negatives are not viewed favourably by the public which generally prefers “...to believe that all dangerous offenders have been labelled and sentenced...”.¹⁵⁶ Consequently, as we will briefly demonstrate later, it should come as no surprise that false negatives can have an impact on the subjectivity of clinicians when assessing the risk of future behaviour. The “low societal tolerance for false negatives”, combined with the repercussions linked to the release of an individual who later commits a crime, can push a clinician towards over-prediction.¹⁵⁷ This

¹⁵³ MacAlister, *supra* note 37 at 38.

¹⁵⁴ Petrunik, “*The Makings of Dangerous Offenders*”, *supra* note 43 at 65.

¹⁵⁵ *Ibid.*

¹⁵⁶ Irving, “*Thesis*”, *supra* note 48 at 125.

¹⁵⁷ *Ibid.* at 123. But see Poletiek, Fenna H., “How Psychiatrists and Judges Assess the Dangerousness of persons with Mental Illness: An ‘Expertise Bias’” (2002) 20:1-2 Behav. Sci. & L. 19 [Poletiek], at 19: [i]n assessing the seriousness of the danger, experts tend to be more tolerant with regard to false negatives, as the type of behaviour is more familiar to them”.

situation, coupled with the influences of an adversarial setting, may have detrimental effects on the results of a dangerousness assessment of an individual.

viii) The Various Challenges Faced by Mental Health Professionals in Determining Dangerousness

It could be argued that the objectivity of actuarial and structured clinical judgment offers a shelter from critics who argue that clinicians tend to alter their judgment based on subjective findings. The “...air of mathematical precision” offered by actuarial and structured clinical judgment decreases the subjectivity of the clinician.¹⁵⁸ However, errors in the application of these prediction tools can still affect their reliability, and eventually, the weight given by courts. For example, in the recent case of *Noble v. Teale*,¹⁵⁹ the Quebec Superior Court dismissed the evidence provided by a psychiatrist who had misapplied the H.A.R.E. test.¹⁶⁰

The task of mental health professionals in applying prediction of future behaviour tools is challenging because of “...definitional problems, the dearth of useful research on prediction, unconscious and conscious judgment errors and biases, and the political consequences of an erroneous prediction”.¹⁶¹ The definitional problems that clinicians face are amplified by the fact that what constitutes “dangerousness” and a “legally relevant risk” is variable depending on the context.¹⁶² Since there is no clear definition, there is a risk that “...clinicians may turn to definitions in other areas of statutory or case law, or they may apply their own value judgments as to what constitutes dangerous behaviour. In either case, they risk failing to address the question the court wants

¹⁵⁸ MacAlister, *supra* note 37 at 28.

¹⁵⁹ *Noble*, *supra* note 9.

¹⁶⁰ *Ibid.* at para. 107.

¹⁶¹ Melton, *supra* note 113 at 277.

¹⁶² *Ibid.*

answered”.¹⁶³ In the case of sections 810.1 and 810.2, it is not clear what legally constitutes a risk of dangerousness. The provisions only provide that the court can impose a recognizance order if it is “... satisfied by the evidence adduced that the informant has reasonable grounds for the fear” that an offense will be committed.¹⁶⁴ The type of evidence that is to be considered by the court is not prescribed in the legislation. It is, therefore, an open invitation for the court to consider any evidence it deems reasonable, and clinicians may not have enough guidance. Floud explains the elusiveness of the concept of dangerousness and the importance of clinicians’ assessments in the context of English criminal law: “[i]n short, the concept of dangerousness in English criminal justice is prevalent but elusive. It is not used consistently or with any precision and the nature of the risk to which it refers is never clearly defined”.¹⁶⁵ Arguably, the same can be said in Canada. All in all, it is important to consider the fact that the difficulties associated with defining clearly what constitutes dangerousness in the case of recognizance orders is not an isolated problem. Fagan & Guggenheim states the following in the context of preventive detention statutes and their lack of definition of what constitutes dangerousness:

Preventive detention involves a short-term prediction of dangerousness, or the prediction of some future harm. However, many statutes fail to use precise definitions of pre-trial danger; the absence of definitional standards makes it difficult to determine what is being prevented, what is the type and magnitude of the harm predicted, and what is the predicted level of risk and the rate of that harm. The product of these variables constitutes “dangerousness”.¹⁶⁶

¹⁶³ *Ibid.* (Footnotes omitted).

¹⁶⁴ See sections 810.1 and 810.2 of the *Criminal Code*.

¹⁶⁵ Floud, Jean, “Dangerousness and Criminal Justice” (1982) 22 *Brit. J. Criminology* 213, at 215.

¹⁶⁶ Fagan, Jeffrey & Martin Guggenheim, “Preventive Detention and the Judicial Prediction of Dangerousness for Juveniles: A Natural Experiment” (1996) 86:2 *J. Crim. L. & Criminology*, 415, at 419.

Despite these difficulties, assessments of dangerousness performed by mental health experts constitute relevant evidence for the trier of facts who must determine if a preventive measure, such as a recognizance order, should be imposed based on a risk of dangerousness. As Parry & Drogin note: "...actuarial data still are likely to be considered important sources of evidence for fact finders making dangerousness determinations related to bail or sentencing because, although flawed in many ways, it typically represents the best predictive information that is available".¹⁶⁷ Moreover, in the context of dangerous offender legislation, MacAlister observes that courts will rely on actuarial tools to assess the risk of dangerousness of an offender and declare them dangerous: "[o]f the various DO [Dangerous Offender] applications in which the court refused the DO designation and found the offender to be a long-term offender, several involved judgments that specifically pointed out a low score on the PCL-R".¹⁶⁸ MacAlister adds: "[w]hile individual variation among judges exists, there does not appear to be any preference regarding risk assessment methodology among most judges. They appear equally happy with clinical judgments, actuarial assessments, or some combination in a structured clinical judgment".¹⁶⁹ Therefore, the results obtained by clinicians in assessing the dangerousness of a potential offender can ultimately influence the trier of fact.

It is also worth pointing out that the unreliability of some forms of prediction of dangerousness does not deter the court from hearing testimony from mental health experts, especially in the context of an imprecise definition in the law of what constitute dangerousness. In this regard, Parry & Drogin note the following: "[r]egardless of the

¹⁶⁷ Parry, John & Eric York Drogin, *Mental Disability Law, Evidence and Testimony* (Chicago: American Bar Association, 2007)[Parry] at 279.

¹⁶⁸ MacAlister, *supra* note 37 at 31. (Footnotes omitted).

¹⁶⁹ *Ibid.* at 32.

problems inherent in making dangerousness assessments of any kind, courts are likely to continue to admit this type of expert testimony, absent a determination that the experts lack the proper qualifications or are acting in an unprofessional manner when making their assessments”.¹⁷⁰

Furthermore, the definition of dangerousness, as it is understood by clinicians, is equally applicable to judges who rely on risk assessments tools and expert testimony in imposing preventive measures. This contrasts with the insanity defence context in which psychiatrists’ opinion is not to be taken “blindly”, with respect to the possibility that an individual may or may not suffer from a “disease of the mind”.¹⁷¹ In the insanity defence context, the question of the “disease of the mind” is a legal issue surrounded by a history of considerable scepticism concerning the adequacy and/or accuracy of expert opinion.¹⁷² In the case of dangerousness, while it is true that the court is ultimately responsible for imposing preventive measures on potentially dangerous individuals, the fact remains that it relies heavily on the evidence provided by mental health experts with respect to the dangerousness of an individual.

Another challenge faced by clinicians specialising in the prediction of risk of future behaviour is the large amount of literature on the subject and its complexity.¹⁷³ This has

¹⁷⁰ Parry, *supra* note 167 at 280.

¹⁷¹ See section 16 of the *Criminal Code* which states the following: “16. (1) No person is criminally responsible for an act committed or an omission made while suffering from a mental disorder that rendered the person incapable of appreciating the nature and quality of the act or omission or of knowing that it was wrong”. In *R. v. Parks* [1992] 2 S.C.R. 871, 95 D.L.R. (4th) 27 [*Parks* cited to S.C.R.], at 899, the question of the “disease of the mind” was examined by the Supreme Court of Canada which stated: [b]ecause “disease of the mind” is a legal concept, a trial judge cannot rely blindly on medical opinion”.

¹⁷² See for example *R. v. Fontaine*, 2004 SCC 27, [2004] 1 S.C.R. 702.

¹⁷³ Melton, *supra* note 113 at 278.

proven to be “...a blessing and a curse”.¹⁷⁴ It has enabled the identification of certain characteristics found in potentially dangerous individuals but has also showed serious methodological limitations in several studies.¹⁷⁵

Clinicians also face the possibility of errors and biases in their judgment. For example, clinicians may forget to take into account factors that are “...known to influence the accuracy, or validity, of predicting dangerousness...”. Amongst these factors, Campbell notes “...the type of violence (e.g., physical assault, sexual assault, homicide); the perpetrator’s relationship to the victim (e.g., history of violence, mental health issues); and the time period of the prediction (e.g., acute danger or chronic danger”.¹⁷⁶

As pointed out by Melton, some researchers have demonstrated that clinicians may put too much emphasis on the nature of the charge in determining dangerousness without an adequate rational analysis.¹⁷⁷ The stigma attached to a charge for a violent offense may subjectively affect the assessment of dangerousness. Other possibilities of errors and biases cited by Melton include unfounded correlations between two variables despite empirical data to the contrary (i.e. making a deduction that a mentally ill individual is violent), and personal biases, due to “...cultural differences between the examining clinician and the person being assessed”.¹⁷⁸

Moreover, as we will see later, procedural characteristics of a particular judicial system can also affect a clinician’s determination of dangerousness. An adversarial system may

¹⁷⁴ Melton, *ibid.*

¹⁷⁵ *Ibid.*

¹⁷⁶ Campbell, Jacquelyn C., ed., *Assessing dangerousness: violence by batterers and child abusers*, 2nd ed. (New York : Springer Publishing, 2007) [Campbell], at 9.

¹⁷⁷ Melton, *supra* note 113 at 278.

¹⁷⁸ *Ibid.* at 278-279.

actually increase the risk of biases in clinical prediction of dangerousness,¹⁷⁹ while an investigatory system may actually favour neutrality. The reality of “...collaborative but potentially apprehensive relationship” between law and psychology may also affect the determination of dangerousness.¹⁸⁰ The conservativeness of the law sometimes clashes with creativity-driven psychology.¹⁸¹ As Young explains, this situation can prove to be particularly problematic in the context of an adversarial system. In that system:

[a]ttorneys function ... with the obligation to present the best case possible for their clients, whereas psychologists function in terms of adequately finding and describing the most parsimonious explanation of an individual's symptoms, irrespective of the side that has retained them in a legal dispute. Inevitably, the psychologist is exposed to biases, and the best manner in dealing with them is to conduct an impartial, comprehensive assessment in which she or he evaluates all reasonably likely factors that can influence conclusions offered to the court.¹⁸²

The numerous challenges faced by psychologists in an adversarial system are pointed out by Young: “[t]hey need to attempt to remain impartial, evidence-based, and scientific in their reasoning and methodology, despite the pushes and pulls from attorneys and a host of other biasing factors”. As we will examine later, the French investigatory system may favour a “collegial” approach among clinicians, thereby reducing biasing factors such as pressure from attorneys.

¹⁷⁹ Young, Gerald, *et.al.*, *Causality of Psychological Injury* (New York, Springer, 2007) [Young] at 36.

¹⁸⁰ *Ibid.*

¹⁸¹ *Ibid.* Young examines the differences between psychology and law and their potential effects on psychological assessment in the judicial context. At 36, Young explains the following: “Haney and Smith (2003) differentiate between law and psychology. For example, law is authoritarian and conservative, whereas psychology is creative and empirical (data-driven). In seeking facts-truths, the methodology of psychology is scientific, but for the law it is adversarial. Psychologists are trained to be objective, but lawyers, in their adversarial stance, function from a built-in biased perspective. Law emphasizes certainty, predictability, and finality; psychology deals in probability, and attaching qualifiers and conditionals to statements. To better deal with legal matters, psychologists need to adhere to the standards and norms of their discipline, “not the dictates of the court” (Haney & Smith, 2003, p.198). Miller (2003) concurs that psychologists may be subject to the biases of the side that retains their services”.

¹⁸² *Ibid.*

Finally, Melton points out the negative impact of an erroneous prediction by clinicians, especially in the context of false negative: “[i]f the client is released on the basis of the clinician’s prediction and subsequently commits a violent act, the clinician can expect extensive negative publicity in connection with media coverage...”.¹⁸³ On the other hand, the possibility of false positives has fewer consequences for the clinician as Melton remarks:

..., there are typically no legal or reputational consequences if a client is predicted to be dangerous, whether the client is subsequently confined or released (at least if it is a court that ignores the clinical prediction). The obvious incentive created by these facts is to lean in the direction of a “dangerous” finding in borderline cases.¹⁸⁴

On this note, it is important to underline the fact that in the case of false positives and preventive detention, there is virtually no way of determining whether a prediction of dangerousness was accurate or not since the potential offender is not released into society. In that case, the potential offender cannot “test” the reliability of the prediction.

Thus, clinicians risk falling into the “over-predicting trap” when assessing the risk of future behaviour due to political and social pressures.¹⁸⁵ In the end, it may be argued that the various challenges faced by mental health practitioners in the prediction of risk of future behaviour, combined with the problems of reliability of assessment tools, pose a further challenge to the judiciary who bears the responsibility of weighing the evidence.

¹⁸³ Melton, *supra* note 113 at 279. (Footnotes omitted). See also Irving, “*Thesis*”, *supra* note 48 at 123, citing Grant, L. “Legislating public safety: the business of risk” (1998) 3:2 Can. Crim. L. Rev.177. But see Poletiek, *supra* note 157, at 19.

¹⁸⁴ Melton, *ibid.* (Footnotes omitted).

¹⁸⁵ Irving, “*Thesis*”, *supra* note 48 at 123.

Because of these challenges, the quality of the evidence presented by mental health professionals can vary and this inevitably affects the trier of facts.¹⁸⁶

In the next paragraphs, we will look at some of the standards used in Canadian and French criminal courts to assess dangerousness. As we will demonstrate, the Canadian legislator has given more flexibility to judges in imposing various conditions on potentially dangerous individuals. In France, while there are no recognizance orders, the legislator has, nevertheless, enacted preventive measures, or pre-emptive legislation, aimed at reducing the risk of dangerousness of offenders. For example, under the restrictive conditions that can be imposed with a social-judicial probation, a French judge is bound by the conditions enumerated in the *Code penal*. Therefore, French judges have virtually no flexibility for imposing restrictive conditions beyond what has been provided for by the legislation. In contrast, the Canadian scheme appears to rely on jurisprudence to define the limits of available restrictive measures under recognizance orders.

ix) Judicial Standards and Methodology in Assessing Dangerousness

a) The Canadian Approach

While there are unresolved issues in the determination of dangerousness among clinical experts, the truth of the matter is that Canadian courts must assess dangerousness during dangerous offender designation and recognizance order hearings.

With respect to peace bonds and recognizance orders, they constitute exceptions to the underlying principles of punishment as a response to a past behaviour in Canadian criminal law, to the extent that they restrict liberties based on a risk of future

¹⁸⁶ Melton, *supra* note 113 at 301.

behaviour.¹⁸⁷ The analysis and understanding of the proclivity to commit a dangerous crime by a particular individual, therefore, becomes of utmost importance for a judge weighing protection of the society on one hand, and civil liberties on the other.

The inability to predict a risk of future behaviour with complete accuracy has not hindered the development of jurisprudence supporting dangerousness legislation, such as dangerous offender legislation or recognizance orders under sections 810.1 and 810.2 of the *Criminal Code*. In fact, courts consider psychiatric evidence as "...probably relatively superior in this regard to the evidence of other clinicians and lay persons".¹⁸⁸ Slobogin argues that in court, prediction testimony can be "probative and helpful".¹⁸⁹ He explains that "[i]t is probative whenever it is derived from a methodology that produces predictions that are better than chance, and it is helpful whenever it is based on the literature about violence risk and avoids ultimate issue language".¹⁹⁰

Canadian courts are aware that assessments of future behaviour by mental health professionals are not entirely reliable, and, are flawed in some respects.¹⁹¹ However, the Supreme Court of Canada considers that the unreliability of the evidence affects the weight of psychiatric predictions of future dangerousness, "[rather than]...the admissibility of such evidence".¹⁹² In the words of the Supreme Court of Canada, "[t]he test for admissibility is relevance, not infallibility".¹⁹³ In the case of *R. v. Jones*, [1994] 2

¹⁸⁷ MacAlister, *supra* note 37 at 20.

¹⁸⁸ Lyons, *supra* note 149 at 366. See also Menzies, *supra* note 111 at 66, and Martineau, *Methodological Prospectus*, *supra* note 21 at 12.

¹⁸⁹ Slobogin, *supra* note 114 at 115.

¹⁹⁰ *Ibid.*

¹⁹¹ Lyons, *supra* note 149 at para. 366.

¹⁹² *R. v. Langevin* 1984 CarswellOnt 50, 11 C.C.C. (3d) 336, Lacourcière J.A. at 355 cited in Lyons, *ibid.* at 366.

¹⁹³ Lyons, *ibid.* at para. 366.

S.C.R. 229, the Supreme Court of Canada confirmed the importance of psychiatric evidence for the determination of risk of future behaviour in the context of dangerous offender legislation.¹⁹⁴

In terms of that legislation, the prevailing rule in assessing the dangerousness of an individual is a "...likelihood of specified future conduct occurring".¹⁹⁵ As we will explain later, judges are also influenced by the same rule when determining the potential dangerousness of an individual under a section 810 recognizance order.¹⁹⁶ It is, therefore, worthwhile to discuss briefly the state of the law in terms of determination of dangerousness in the context of a dangerous offender designation, as this has direct consequences on recognizance orders.

In the context of Dangerous Offender ("DO") legislation, MacAlister points out as follows:

"[t]he statutory scheme for DO declarations requires a judge to determine a "likelihood" of future risk to re-offend. To most of us, likelihood is a mathematically linked concept. Something is "likely" if it is "probable" that it will occur. Probability speaks to mathematical chance or certainty, which is typically a greater than even chance that something will occur".¹⁹⁷

In the landmark decision of *Lyons*, the Supreme Court examined the use of psychiatric evaluations and the required standard of proof in the determination of dangerousness under the dangerous offender legislation. It explained the accepted standard as being a likelihood of future risk in these terms:

¹⁹⁴ *R.v.Jones*, [1994] 2 S.C.R. 229, 114 D.L.R. (4th) 645 [*Jones* cited to S.C.R.] at para.46-47.

¹⁹⁵ *Lyons*, *supra* note 149 at 364-365.

¹⁹⁶ *Budreo*, *supra* note 8 at para. 43-44.

¹⁹⁷ *MacAlister*, *supra* note 37 at 29.

...The criminal law must operate in a world governed by practical considerations rather than abstract logic and, as a matter of practicality, **the most that can be established in a future context is a likelihood of certain events occurring.** [...]

[...] It seems to me that a "likelihood" of specified future conduct occurring is the finding of fact required to be established; it is not, at one and the same time, the means of proving that fact. **Logically, it seems clear to me that an individual can be found to constitute a threat to society without insisting that this require[s] the court to assert an ability to predict the future.** I do not find it illogical for a court to assert that it is satisfied beyond a reasonable doubt that the test of dangerousness has been met, that there exists a certain potential for harm. That this is really only an apparent paradox is aptly captured by Morden J. in *R. v. Knight* (1975), 27 C.C.C. (2d) 343 (Ont. H.C.), at p. 356:

I wish to make it clear that when I refer to the requisite standard of proof respecting likelihood I am not imposing on myself an obligation to find it proven beyond a reasonable doubt that certain events will happen in the future—this, in the nature of things would be impossible in practically every case—but I do refer to the quality and strength of the evidence of past and present facts together with the expert opinion thereon, as an existing basis for finding present likelihood of future conduct.¹⁹⁸ [Emphasis added].

Therefore, Canadian courts consider “the likelihood of future risk of behaviour” when assessing the potential dangerousness of an offender, in the context of dangerous offender legislation. Despite the qualification in *Lyons*, MacAlister found that “[i]n several cases, judges seemed to adopt a mathematical approach to the DO requirement of “likely” to re-offend violently. They appeared to equate likelihood to re-offend with “probability” or a greater than 50 percent chance”.¹⁹⁹

¹⁹⁸ *Lyons*, *supra* note 149 at 364-365.

¹⁹⁹ MacAlister, *supra* note 37 at 32. On this note, MacAlister, *ibid.* also points out at 32 that “[t]he following cases appeared to involve judges who were moved to declare an offender dangerous, at least in part because of a risk assessment showing a greater than 50 percent chance of violent re-offending: *R. v. L.C.W.*, [2000] S.J. No. 422 (Q.B.); *R. v. Berikoff*, [2000] B.C.J. No. 1373 (S.C.); *R. v. L.D.A.*, [1999] B.C.J. No. 1781 (S.C.); and *R. v. R.E.L.*, [1998] B.C.J. No. 1440 (P.C.).

MacAlister remarks that most judges will declare an individual dangerous if an actuarial tool, such as the PCL-R, demonstrates a “high risk to offend”.²⁰⁰ While it appears that the PCL-R risk assessment tool is often used in court in the case of a dangerous offender designation, judges “...appear to be equally happy with clinical judgments, actuarial assessments, or some combination in a structured clinical judgment”.²⁰¹

In fact, according to MacAlister, judges will “...work with whatever information is provided to them” when assessing the potential dangerousness of an individual under the dangerous offender legislation.²⁰²

The above risk assessment tools are relied upon by judges across the nation. The next logical question is to determine which tests courts apply when determining the risk of future harm and reasonableness of a fear under a recognizance order application pursuant to sections 810.1 and 810.2 application.

As we will see, recognizance orders under these sections require the judge to assess, on a balance of probability, the reasonableness of an informant’s fear of future harm by a particular offender. In other words, what the judge is asked to do is to predict the likelihood that the individual will commit a sexual offense (section 810.1 of the *Criminal Code*) or a serious personal injury on another person (section 810.2 of the *Criminal Code*). Moreover, while it could be argued that sections 810.1 and 810.2 are not considered as offences, but rather as preventive measures falling under the summary conviction part of the *Criminal Code*, the reality is that these provisions were created to

²⁰⁰ *Ibid.* at 29.

²⁰¹ *Ibid.* at 32.

²⁰² *Ibid.*

target past offenders who are being released from prison but still constitute a potential danger to society.²⁰³ In these cases, it is argued that judges will often have in hand a multitude of clinical assessments on the risk of future violent behaviour of the individual, due to past criminal activities and time served in the penitentiary system. Consequently, it is argued that in most cases, judges will rely on risk assessment tools that were applied to the individual while he or she was sojourning in the penitentiary, before determining whether or not a recognizance order should be imposed.

In this regard, it should be noted that the two most important cases dealing with recognizance orders under sections 810.1 and 810.2, namely *Budreo* and *Teale*, clearly illustrate the use by judges of all information available in determining the offender's proclivity for committing crimes in the future, including risk assessment tools normally used in dangerous offender designation. These cases, along with other relevant ones dealing with sections 810.1 and 810.2 recognizance orders, will be examined in the next chapter.

b) The French Approach

In the context of determination of dangerousness by the French courts, one could argue that the most fundamental difference between the Canadian and French system is the fact that members of the French judiciary benefit from a concerted approach of various mental health professionals. The *Loi sur la rétention de sûreté*, which will be examined later, provides the foundation for a system of determination of dangerousness. This system is primarily based on an assessment of the particular risk of future dangerousness

²⁰³ In *Budreo*, *supra* note 8, at para. 60, the Court of Appeal explained that: "...s. 810 is in Part XXVII dealing with summary convictions".

of an individual by a multidisciplinary committee. As we will see, the committee formulates a recommendation to a panel of judges who must determine whether the individual can be released into society after completing his mandatory prison sentence; or whether he must be imposed a *mesure de suivi socio-judiciaire* (social-judicial probation) or if he must be kept in a *rétenion de sûreté*. In the case of a social-judicial probation, the Court can impose restrictive conditions upon the potentially dangerous individual. As for a *rétenion de sûreté*, it offers a social-judicial approach, coupled with various treatment options, in a specially created “hospital-prison” with the objective of lowering the particular dangerousness of the individual to acceptable levels.²⁰⁴

French judges are, therefore, not confronted with potentially biased opinions from mental health professionals retained by one side or the other in a case, as it is arguably the case in an adversarial setting. However, as we explained earlier, risks assessment techniques used by French mental health professionals to determine dangerousness are not without flaws, and in most cases, still rely on unstructured clinical judgment.²⁰⁵

Before delving into a historical and critical analysis of the development of peace bonds and recognizance orders in Canadian criminal law, and similar preventive measures in France, it is imperative to take a brief look at some of the key differences and similarities between the Canadian adversarial system and the French investigatory system. It is argued that the procedural differences between the two systems have an impact on the determination of dangerousness.

²⁰⁴ See generally the *Loi sur la rétenion de sûreté*, *supra* note 3.

²⁰⁵ Bébin, *supra* note 125.

CHAPTER VI – CHARACTERISTICS OF THE CANADIAN ADVERSARIAL SYSTEM AND THE FRENCH INVESTIGATORY SYSTEM AND THEIR RESPECTIVE INFLUENCES ON THE DETERMINATION OF DANGEROUSNESS

i) A Brief Overview of the Adversarial and the French Investigatory Models

A comparative analysis focusing on procedural differences in the treatment of potentially dangerous individuals would not be complete without exploring the chief differences between the adversarial system and the French investigatory system, and their respective influences on the adjudication process. It is argued that different processes of adjudicating and finding the truth can have an influence on the determination of dangerousness; thus, a comparative analysis of these two systems is deemed necessary.

Before venturing into the potential influences of each system on the determination of dangerousness in Canada and in France, it is important to define their respective characteristics. At the outset, it is worth pointing out that both the adversarial system and the French investigatory system borrow and incorporate features from one another's system.²⁰⁶ For example, Hodgson notes that the French system:

...is better described as 'mixed', rather than 'inquisitorial' in that it retains some of the inquisitorial principles and structure, but is not conducted entirely in secret such that there is some opportunity for parties to participate.²⁰⁷

²⁰⁶ Jacqueline Hodgson, "The Investigation and Prosecution of Terrorist Suspects in France, An Independent Report Commissioned by the Home Office" Security Home Office UK (November 2006), online: <<http://ssrn.com/abstract=1321868>> [Hodgson], at 8. Hodgson notes that there is no "pure" adversarial or inquisitorial system. As we will see later, the term "inquisitorial" is often used by common law scholars to describe the French system, but an appropriate terminology would rather describe it as a "judge centered investigatory system".

²⁰⁷ *Ibid.* at 9. See also Delmas-Marty, Mireille & J.R. Spencer, eds., *European criminal procedure* (Cambridge: Cambridge University Press, 2002) [Delmas-Marty], at 11 where the authors describe briefly the evolution of the French procedural scheme in these terms: "[t]o the French, this was not a return to the old inquisitorial system, but the introduction of a new system that was neither accusatorial nor inquisitorial, and which they called (and still call) 'mixed'".

Hodgson also explains that recent changes in French criminal methodology have given the defence “...a greater role in both the pre-trial and trial procedure”.²⁰⁸ This shift towards a system that incorporates adversarial procedures has been influenced by the jurisprudence of the European Court of Human Rights (ECtHR) and by putting greater emphasis on the “principle of *contradictoire*”.²⁰⁹ The incorporation of adversarial elements into the non-adversarial model has been observed not only in France, but also throughout Continental Europe.²¹⁰ However, despite the metamorphosis of the French system into a “mixed system”, some common law authors have argued that the defence still has a diminished role in the French investigatory model.²¹¹ Despite the incorporation of elements from both models, it is argued that the process of adjudicating and the determination of dangerousness are clearly influenced by the procedural differences between the two systems.

It is worth pointing out that the literature often identifies two principal models of adjudication, namely the “adversarial” model, which influences the Canadian adjudication process²¹² and the “inquisitorial” model, which can be found in continental Europe.²¹³ The common law doctrine sometimes refers to the French system as being

²⁰⁸ Hodgson, *ibid.* at 9.

²⁰⁹ *Ibid.* at 9.

²¹⁰ Van Koppen, Peter J. & Steven D. Penrod, eds., *Adversarial versus Inquisitorial Justice: Psychological Perspectives on Criminal Justice Systems, Perspectives in Law and Psychology* vol. 17, (New York: Kluwer Academic/Plenum Publishers, 2003)[Van Koppen], at 1.

²¹¹ Hodgson, *supra* note 206 at 10.

²¹² Cochran, Doug, Mary Ann Kelly & Michael Gulczyn, *Rules of Evidence: A Practical Approach* (Toronto: Emond Montgomery, 2007)[Cochran], at 6: “[i]n Canada, as in most other countries whose legal system is based on the British common-law system, the judicial process is adversarial”.

²¹³ See Block, Micheal K. *et al.*, “An Experimental Comparison of Adversarial versus Inquisitorial Procedural Regimes” (2000) 2:1 Am. L. & Econ. Rev. 170 [Block], at 171. See also Hodgson, *supra* note 206, at 8. For a discussion on the characteristics of an adversarial system and a non-adversarial system, see also Elisabetta Grande, “Dances of Justice: Tango and Rumba in Comparative Criminal Procedure” (2009) 9:4 Global Jurist(Frontiers), Article 6, available online: <<http://www.bepress.com/gj/vol9/iss4/art6>>.

“inquisitorial” in nature. However, the modern French system is better described as being a “judge centered investigatory system” rather than purely “inquisitorial”. This description circumvents more appropriately the negative connotation associated with the Inquisition.²¹⁴

In this regard, it is worth pointing out that the early days of the “inquisitorial” procedure in France were marked by numerous abuses of process and the fact that the accused had virtually no rights while being potentially subjected to torture.²¹⁵ As Stefani & Levasseur points out, the early form of the French “inquisitorial” model was not even able to adequately serve the defense interest of society.²¹⁶ While there is no doubt that the French system can no longer be qualified as being purely “inquisitorial” in nature, some procedural aspects have been influenced by the inquisitorial model. Thus, the following paragraphs will examine some of the characteristics of the adversarial model and the inquisitorial model in general, as both have had influences on the procedural system of Canada and France. Subsequently, some of the particularities of the French investigatory model will be examined in more detail. The term “investigatory” system will be used to describe the modern procedural model in France.

Generally, in an adversarial model, emphasis is put on “...the contesting parties’ autonomy and control of legal proceedings”.²¹⁷ An adversarial system also “...puts

²¹⁴ See Guinchard, Serge & Jacques Buisson, *Procédure Pénale* (Paris: Litec, 2000) [Guinchard], at 44, where it is noted that the Inquisition was originally founded in 1231 as an “ecclesiastic tribunal” for the repression of heresy.

²¹⁵ Stefani, G. & G. Levasseur, *Procédure Pénale*, 9th ed., Tome II (Paris: Dalloz, 1975) [Stefani & Levasseur], at 57.

²¹⁶ *Ibid.* at 58.

²¹⁷ Block, *supra* note 213 at 171.

emphasis on public procedures [and] oral hearings...”.²¹⁸ In an adversarial setting, the judge hears the evidence as gathered and presented by both parties. The judge does not participate actively in the search for evidence.

On the other hand, in a non-adversarial model, the judge is at the center of the investigation process. Stefani & Levasseur notes that the ancient inquisitorial models favoured a secret and non-contradictory procedure.²¹⁹ As for Elliot, she explains that an “inquisitorial” system

...is characterised by a process that is not open to the public, the parties do not automatically have a right to be heard, the judges play an important and active role in collecting the evidence and an emphasis is placed on collecting written documentation to prove or disprove the case.²²⁰

Stefani & Levasseur also describes the judge as being a central actor in finding the truth and who will take all the measures to find it.²²¹ Furthermore, as explained by Dammer *et al.*, a non-adversarial model is also generally characterised by the emphasis put on pre-trial proceedings (including investigation and interrogation) “...that are designed to ensure that no innocent person is brought to trial”.²²² The downside, as identified by Stefani & Levasseur, is the fact that the rights of the defense at the pre-trial level were in the past often limited.²²³ In fact, the older inquisitorial procedure often led to the non

²¹⁸ Elliott, Catherine, French Criminal Law (Uffculme: Willan Publishing, 2001)[Elliott], at 13.

²¹⁹ Stefani & Levasseur, *supra* note 215 at 52-53.

²²⁰ Elliot, *supra* note 218, at 13.

²²¹ Stefani & Levasseur, *supra* note 215 at 53.

²²² Dammer, R., Erika Fairchild & Jay S. Albanese, Comparative Criminal Justice Systems, 3rd ed. (Belmont, CA: Wadsworth, 2006)[Dammer *et. al.*], at 143.

²²³ Stefani & Levasseur, *supra* note 215 at 53.

respect of the rights of a suspect and, in some cases, led to the condemnation of innocent individuals.²²⁴

Furthermore, authors have identified the advantage of the adjudication process in an adversarial system as being “...the superior information of the parties”.²²⁵ On the other hand, they have also identified “neutrality” in the process as an advantage of the “inquisitorial” system.²²⁶ We will see that in the latter case, neutrality has played a role in shaping the determination of dangerousness process in the French investigatory system of France.

In the next paragraphs, the French investigatory system will be examined in more detail to determine if there are any other features that might influence the neutrality of experts in assessing dangerousness and, ultimately, the court’s decision. As will be explained, the role of the French magistrate is to gather evidence and pass judgment. Therefore, he or she does not necessarily have to hear evidence from opposing parties which could be tainted with bias.

ii) The Features of the French Investigatory System

A chief difference between the Canadian adversarial system and the investigatory system of France is the role of the judge, or the examining magistrate (*magistrat*), who conducts

²²⁴ Guinchard, *supra* note 214 at 42. This is a flaw which is also characteristic of the adversarial system in Canada as the series of inquiries into wrongful convictions, such as in the cases of Donald Marshall Jr. and Thomas Sophonow attest. See for example “Canada’s wrongful convictions”, CBC News (23 October 2009), online: CBC News <<http://www.cbc.ca/canada/story/2009/08/06/f-wrongfully-convicted.html>>.

²²⁵ Froeb, Luke M. & Bruce H. Kobayashi, “Evidence Production in Adversarial vs. Inquisitorial Regimes” (2001) 70:2 Economics Letters, 267, available online through Social Science Research Network Electronic Paper Collection: SSRN< http://papers.ssrn.com/paper.taf?abstract_id=179182>, [Froeb cited to SSRN], at 1.

²²⁶ Froeb, *ibid*.

the investigation and gathers the evidence.²²⁷ Hodgson explains that the *magistrat* has the public interest in mind and “...is charged with searching for the truth”.²²⁸

The *magistrat* uses neutral investigative procedures for “...gathering evidence which might exculpate as well as incriminate the suspect”.²²⁹ This is a clear distinction from the adversarial setting in which opposing parties present their most favourable evidence to an impartial judge.²³⁰ However, the role of the magistrate has been criticised due to “...the secrecy and length of the proceedings, the sweeping powers enjoyed by the magistrates, and cases of abuse of powers”.²³¹ When considering the determination of dangerousness made by a French magistrate, it is important to keep in mind that they are influenced by investigatory principles, such as participating actively in the process of finding the truth.

iii) Other General Characteristics of an Adversarial and Investigatory Systems that May Influence a Determination of Dangerousness

There are other characteristics that must be taken into account when comparing the adversarial and non-adversarial regime such as the French investigatory system, especially with respect to how the court gathers the information. In an adversarial model, which favours cross-examination of witnesses, it has been argued that the “...setting contributes to the concealment of information”.²³² The adversarial system divides parties

²²⁷ Investigation powers are usually given to members of the judiciary in France. In this regard, Hodgson, *supra* note 206 at 13-14, notes that members of the judiciary are composed of several actors: “[i]n France, ..., the judicial function is a more broadly defined concept, encompassing as it does, the trial judge, the *juge d’instruction* and the *procureur*. These three are all *magistrats*, referred to collectively as the *magistrature*”. Hodgson, *ibid.* remarks, however, that the investigative role of the magistrate has been progressively shifted to the police, “..., under the supervision of either the *procureur* or the *juge d’instruction*”.

²²⁸ Hodgson, *ibid.* at 10.

²²⁹ *Ibid.*

²³⁰ Cochran, *supra* note 212 at 6.

²³¹ Dammer, *supra* note 222 at 146.

²³² See Roger C. Park, *Adversarial Influences on the Interrogation of Trial Witnesses* in Van Koppen, *supra* note 210 at 152.

and forces them to present their most favourable evidence. As Park notes, witnesses who are called upon by the parties are, therefore, prepared for direct examination by the lawyers and this situation "... creates subtle incentives for otherwise neutral witnesses to be part of the team".²³³

On the other hand, a non-adversarial model relies on a "neutral investigation and interrogation" of the witness, thereby minimising the risk of bias with expert witnesses.²³⁴ Courts generally rely on pre-screened and competent experts who have been identified by the court as such, and not by the parties.²³⁵ In this regard, article 157 of the French *Code de procedure pénale* prescribes the following:

Experts are chosen from the natural persons or legal persons registered either on a national list drafted by the office of the Court of Cassation, or on one of the lists drafted by the appeal courts under the conditions provided for by Law no.71-498 of 29 June 1971 relating to judicial experts .

In exceptional cases, the courts may by means of a reasoned decision choose experts not registered on any of these lists.²³⁶

Arguably, this national list of experts favours the neutrality and independence of expert testimony.²³⁷

Furthermore, a non-adversarial system permits experts to view the evidence from every angle. In this regard, Saks explains that: "[e]xpert witnesses are more able to gain all (not half) of the picture of the evidence in the case, and give all of the evidence they feel is important to resolving the issues before the court (rather than being limited to answering

²³³ *Ibid.* at 152-153. At 152, Parks, *ibid.*, notes that the preparation of "the witness for direct examination...facilitates the slanting of testimony so that it reveals information helpful to the proponent while concealing information helpful to the cross-examiner".

²³⁴ *Ibid.*

²³⁵ *Ibid.* at 240.

²³⁶ See Article 157 of the *Code de procédure penale*. See also Delma-Marty, *supra* note 207 at 260.

²³⁷ See Micheal J. Saks, *Expert Witnesses in Europe and the United States*, [Saks], in Van Koppen, *supra* note 210 at 240.

the questions posed by partisan counsel)”.²³⁸ Saks also points out that a non-adversarial model favours the accountability of expert witnesses to their own field, “...rather than to police or parties or lawyers...”.²³⁹

In assessing dangerousness, mental health experts play a crucial role in influencing members of the judiciary in their decision of imposing restrictive conditions upon the liberties of a potentially dangerous individual. While it is true that some predictions of dangerousness remain inaccurate, it is argued that at the very least, the procedural setting should favour the objectivity and neutrality of mental health experts in their assessment and subsequent testimony in court. For the reason described above, it is argued that the French investigatory system favours the objectivity of mental health experts by stripping away the use of conflicting evidence and the indirect necessity to answer the needs of the party they represent.

An adversarial system can have several pitfalls, including the risk that an expert may be tempted to tweak his or her opinion to satisfy the parties’ overall position before the court from fear of not being hired again by the party. Kaye *et al.* asserts that “[a]t the extreme, expert witnesses may go beyond shading their testimony to fit the side who pays them”.²⁴⁰ In such a system, a party can canvass several experts and only retain the one who sounds likely to be sympathetic. Of course, no system can eliminate the possibility of biased opinion given by experts. However, based on the above, it appears that a non-

²³⁸ *Ibid.*

²³⁹ *Ibid.*

²⁴⁰ Kaye, David H., David E. Bernstein & Jennifer L. Mnookin, *The New Wigmore, A Treatise on Evidence* (New York: Aspen Publishers, 2004) [Kaye], at 342. Kaye *et al.*, *ibid.* at 330 also notes some of the “..., most frequently heard criticisms” about the use of experts include the following: “...[they] are unduly partisan, identifying too strongly with the parties who pay their bills and shading their testimony accordingly...., [and] [a]ttorneys choose those experts with effective courtroom demeanor and a willingness to testify favorably, rather than those who are most knowledgeable or most evenhanded...”.

adversarial system minimises that risk. All in all, the procedural setting of an investigatory system is important to take into consideration, especially when most of the evidence given is based on an imprecise science. It is argued that the procedural setting can limit and control the possibility of subjectivity while emphasising neutrality.

iv) The Influence of Each Procedural Model on Scientific Evidence

When determining dangerousness, judges in both the Canadian adversarial and the French investigatory systems have the difficult task of assessing the risk that a particular individual may pose to society. As explained in the previous chapter, tests administered by mental health professionals involved in the assessment of risk of future behaviour are far from faultless. Furthermore, despite improving techniques, the assessment of a future risk of behaviour remains a controversial procedure. Yet, members of the judiciary have to weigh the evidence and decide on its merit before reaching conclusions about the potential dangerousness of an offender.

The procedural scheme, whether adversarial or investigatory in nature, can influence the determination of dangerousness achieved through the evidence from mental health professionals. In an adversarial model, it can be argued that the judge must surmount an additional obstacle when weighing the evidence. Traditionally, in an adversarial model, “[t]he purpose of expert testimony is to provide the trier of fact with useful, relevant information”.²⁴¹ In some instances, however, the judge must weigh “...conflicting evidence of partisan experts”.²⁴² In the case of conflicting psychiatric and psychological evidence, judges are therefore confronted “...with an often difficult, sometimes a virtually

²⁴¹ Kaye, *ibid.* at 2.

²⁴² McKillop, Bron, *Anatomy of a French Murder* (Sydney: Hawkins Press, 1997)[McKillop], at 101.

impossible, job to do in deciding scientific issues on the evidence before them”.²⁴³ Furthermore, as noted by Frankel, “[c]ourts are increasingly faced with litigation that presents complex issues of science and technology... In light of this increasingly complex litigation, questions have been raised about the ability of judges or juries to make reasoned decisions”.²⁴⁴ This difficulty in dealing with expert evidence is metaphorically evoked by Kaye *et al.* who cite this passage found in a legal journal: “[t]he summoning of expert witnesses by plaintiff and defendant, like the collision of opposing rays of light, ends only in darkness”.²⁴⁵

Moreover, in an adversarial and non-adversarial system, members of the judiciary must rely on fields of knowledge which develop independently from the system.²⁴⁶ For example, it could be argued that the development of risk of future behaviour tests, such as the VRAG, have been developed by actors outside of the judiciary; namely, mental health professionals with clinical purposes in mind. Members of the judiciary in an adversarial system rely on those tests to issue recognizance orders and to assess the potential dangerousness of an individual. If there are inconsistencies or problems in the reliability of those tests, lawyers should pinpoint those flaws to the court. However, lawyers and judges do not always possess sufficient knowledge on controversial developments in certain fields. In this regard, Saks points out that one of the major weaknesses of the adversarial model is the following:

²⁴³ McKillop, *ibid.* See also for example the case of *R. v. Fontaine*, *supra* note 172, where the Supreme Court of Canada examined the question of mental disorder automatism and the appropriate evidential burden.

²⁴⁴ Mark S. Frankel, “The Role of Science in Making Good Decisions” (10 June 1998), online: American Association for the Advancement of Science, Testimony before the House Committee on Science <<http://www.aaas.org/spp/sfrr/projects/testim/mftest.htm>>. On this note, arguably, judges in a non-adversarial setting also face “increasingly complex litigation”.

²⁴⁵ Kayes, *supra* note 240 at 336, citing *Juries of Experts*, 5 Alb. L.J. 227 (1872).

²⁴⁶ Saks, in Van Koppen, *supra* note 210 at 236.

If a field falls short of the law's expectations, the system assumes that attorneys motivated to win will draw that failing to the attention of the court. But most lawyers have terribly limited knowledge of most fields, which puts them in poor position to raise such challenges. To be fair, how can lawyers or judges or anyone be sufficiently knowledgeable about a multitude of fields that they can point out the weaknesses of those fields over the protestations of asserted experts?²⁴⁷

Therefore, an adversarial system affects "...the capability of the attorneys—both prosecutors and defence counsel—to present and to attack scientific evidence".²⁴⁸

In an adversarial setting, while it might be assumed that in theory, each party is equal and is competing in a neutral arena,²⁴⁹ the reality is that criminal defendants are often at a disadvantage when confronting the resource rich prosecution.²⁵⁰ Once again, this problem is clearly illustrated by Saks:

Few defendants have comparable experts of their own to double check, detect errors, and challenge bad science or erroneous applications or interpretations—all of the theory of the adversary process expects and intends will happen. But without such resources on both sides, it cannot.²⁵¹

On this issue, the advantage of the French investigatory model is evident given that the judge or the magistrate conducts the investigation and directs the inquiry. However, the disadvantage of such a model becomes the question of impartiality of the judge who "... must also balance previous knowledge gained by the investigation that he or she guided, with the need to retain impartiality".²⁵²

²⁴⁷ *Ibid.* at 236-237.

²⁴⁸ *Ibid.* at 237. Arguably, in a non-adversarial system, the judge faces the same challenges.

²⁴⁹ Hodgson, *supra* note 206 at 8, explains the following: "[a]dversarial procedure assumes a broad equality between the opposing parties – prosecution and defence – each of whom is responsible for gathering evidence to support their case and advocating it before a neutral judge".

²⁵⁰ Saks, in Van Koppen, *supra* note 210 at 239.

²⁵¹ *Ibid.*

²⁵² Dammer, *supra* note 222 at 143.

Finally, another disadvantage to the adversarial model with respect to the treatment of scientific evidence, and identified by Saks, is the “distortion of science” by interested parties. Scientific evidence can be distorted when emphasis is put on one opposing view rather than the other.²⁵³ In other words, when opposing parties present evidence to the judge, they will generally agree on certain facts and have diverging views on others. For example, in the case of risks of future behaviour tests, opposing counsel and expert witnesses in an adversarial setting may agree that actuarial predictions are superior to unstructured clinical judgement in terms of reliability, but disagree on the interpretation given to test results. Emphasis may be put on certain technical aspects of a test in order to favour the respective position of the party. Saks describes the distortion of scientific evidence by distributing the facts of a case on a continuum (agreed facts are in the middle and opposing facts are at the opposite ends of the continuum):

Different fact-assembling procedures will draw from different parts of that distribution. The adversary system will emphasize the tails of such a distribution to the extent that it is advantageous to the parties to take opposing positions on scientific propositions (Saks & Van Duizend, 1983). This contrasts sharply with systems that seek consensus among those holding diverse views (e.g., medical consensus conferences). Those systems tend to draw from the center of the information distribution posited above.²⁵⁴

On this particular issue, the French investigatory model looks advantageous. As will be demonstrated in Chapter VIII, the “collegial” approach used by mental health experts in the French model when assessing dangerousness, favours a consensus. Furthermore, it could be argued that consensus among the experts will render the judge’s task easier in determining dangerousness. In this regard, McKillop explains that:

²⁵³ Saks, in Van Koppen, *supra* note 210 at 239.

²⁵⁴ *Ibid.* at 239.

The French system of official, essentially neutral, experts allows those issues to be resolved by those better qualified to do so, preserving to the accused the right to a counter-expertise but aiming, in the event of a difference of expert opinion, at an eventual consensus among the experts. The logic of the adversary system as regards lay witnesses does not necessarily entail the same treatment of expert witnesses.²⁵⁵ [Emphasis added].

However, in a non-adversarial setting, the judge must “gather evidence for himself”, rather than “...rely on the reports of interested parties”, which could arguably prove to be a tedious task.²⁵⁶

These characteristics have to be taken into account when comparing procedural differences in the determination of dangerousness in France and Canada, because they can influence how the evidence is treated in court.

In the next section, the analysis will focus on the development of peace bonds and recognizance orders in Canadian criminal law, as well as similar preventive measures in France. As will be explained, these preventive measures constitute great examples of the state’s willingness to control dangerousness and the risk of future behaviour. Thus, they are ideal for a comparative analysis, especially when we consider that these measures are controversial in nature and could prove to be detrimental to upholding fundamental principles of justice.

²⁵⁵ McKillop, *supra* note 242 at 101.

²⁵⁶ Froeb, *supra* note 225 at 1-2.

CHAPTER VII – PREVENTIVE MEASURES: THE CASE OF PEACE BONDS AND RECOGNIZANCE ORDERS IN CANADIAN CRIMINAL LAW

i) A Brief Historical Overview Of Peace Bonds Provisions and Recognizance Orders in Canadian Criminal Law

Peace bonds provisions and high risk judicial restraint orders (or recognizance orders) are generally available in the *Criminal Code* under Section 810.²⁵⁷ For ease of reference, the full text of section 810 is included in Appendix A of the present thesis. Peace bonds provisions under section 810 are normally “...used to protect an identified victim, a person already harmed, from further harm where evidence points to the likelihood of danger to the victim from continuing contact with another person”.²⁵⁸ Generally speaking, recognizance orders under sections 810.1 and 810.2 are similar but were enacted to target sexual and violent offenders respectively.

However, there are differences between peace bonds and recognizance orders. The main difference can be attributed to “...the group of likely victims and the breadth of restrictions that may be imposed” under recognizance orders.²⁵⁹ Section 810 is limited to identifiable parties, normally two known individuals. It allows for an individual to personally seek the court’s protection against another potentially dangerous individual. By contrast, sections 810.1 and 810.2 are really remedies emanating from public law, since these sections have been created to allow any person to apply for a recognizance order on behalf of another individual who might be at risk. For example, in essence, section 810.1 provides for the protection of children under the age of 16, while section

²⁵⁷ It is worth pointing out that there are other sections in the *Criminal Code* that allow for the imposition of recognizance orders. For instance, section 83(3) of the *Criminal Code* allows the Court to issue a recognizance order against an individual suspected of being linked to terrorist activities.

²⁵⁸ *Budreo, supra* note 8 at para. 31.

²⁵⁹ *Ibid.* at para. 32.

810.2 focuses on the protection of potential victims of serious and violent personal injury.²⁶⁰ The following paragraphs will examine the development of recognizance orders in Canadian criminal law and will demonstrate its origins attributable to peace bonds provisions.

In 1997, the Liberal Government of Jean Chrétien introduced Bill C-55 to Parliament to amend several provisions of the *Criminal Code*. One of these amendments, namely the addition of section 810.2, made it possible for the court to issue high risk offender judicial restraint orders or recognizance orders in cases where it is feared that an individual might commit a serious personal offence.²⁶¹ Section 810.2(1) provides as follows:

810.2 (1) Any person who fears on reasonable grounds that another person will commit a serious personal injury offence, as that expression is defined in section 752, may, with the consent of the Attorney General, lay an information before a provincial court judge, whether or not the person or persons in respect of whom it is feared that the offence will be committed are named.²⁶² [Emphasis added]

Section 810.2 can be distinguished from section 810.1 since it is intended primarily to target individuals who are likely to commit a serious personal injury offence, as opposed to violent sexual offenders (section 810.1). More specifically, section 810.1, added to the *Criminal Code* in 1993:

...requires the court, where satisfied on reasonable grounds of the fear that the individual will commit a sexual offence against a child, to order the individual to agree to be bound by specific conditions that restrict the person's movements and

²⁶⁰ Budreo, *Ibid.*

²⁶¹ Dahabieh, *supra* note 22, abstract.

²⁶² *Criminal Code*, *supra* note 2 at s. 810(2).

behaviour, especially in areas where children are known to be present such as playgrounds and schools.²⁶³

The federal government considers these recognizance orders as “...preventative court orders requiring an individual to agree to specific conditions to keep the peace”.²⁶⁴ In other words, the court can “... restrict the freedom of individuals identified as [at] high-risk to commit a violent and/or sexual crime by imposing a set of conditions, often beyond their warrant-expiry date”.²⁶⁵

In the case of potential sexual offenders, the court can impose the following conditions under section 810.1 (3.02) in order to secure their good conduct:

- (a) prohibit the defendant from engaging in any activity that involves contact with persons under the age of 16 years, including using a computer system within the meaning of subsection 342.1(2) for the purpose of communicating with a person under that age;
- (b) prohibit the defendant from attending a public park or public swimming area where persons under the age of 16 years are present or can reasonably be expected to be present, or a daycare centre, schoolground or playground;
- (c) require the defendant to participate in a treatment program;
- (d) require the defendant to wear an electronic monitoring device, if the Attorney General makes the request;
- (e) require the defendant to remain within a specified geographic area unless written permission to leave that area is obtained from the provincial court judge;
- (f) require the defendant to return to and remain at his or her place of residence at specified times; or
- (g) require the defendant to abstain from the consumption of drugs except in accordance with a medical prescription, of alcohol or of any other intoxicating substance.²⁶⁶

Under section 810.1(3.03), the court can also “...prohibit the defendant from possessing any firearm”.²⁶⁷ A restrictive condition requiring the potential sexual offender to report to authorities may also be imposed under section 810.1(3.05).²⁶⁸

²⁶³ See Public Safety Canada, Peace Bonds, online: Public Safety Canada <<http://www.publicsafety.gc.ca/prg/cor/tls/sec810-eng.aspx>> [Public Safety].

²⁶⁴ Public Safety, *ibid.*

²⁶⁵ Dahabieh, *supra* note 22 at 1.

²⁶⁶ *Criminal Code*, *supra* note 2 at s. 810.1(3.02).

A court can also impose restrictive conditions upon a potentially dangerous individual who is at risk of committing a serious personal injury offense. In this regard, the conditions available under section 810.2 (4.1) include requiring the individual:

- (a) to participate in a treatment program;
- (b) to wear an electronic monitoring device, if the Attorney General makes the request;
- (c) to remain within a specified geographic area unless written permission to leave that area is obtained from the provincial court judge;
- (d) to return to and remain at his or her place of residence at specified times; or
- (e) to abstain from the consumption of drugs except in accordance with a medical prescription, of alcohol or of any other intoxicating substance.²⁶⁹

Again, under section 810.2(5), the court can impose restrictive conditions with respect to the possession of firearms.²⁷⁰ As for section 810.2(6), it allows the judge to impose a condition requiring the potential offender to “...report to the correctional authority of a province or to an appropriate police authority”.²⁷¹

It is important to note that the judge possesses a discretion under both sections 810.1(3.02) and 810.2(4.1) to “...add any reasonable conditions to the recognizance that [he or she] considers desirable to secure the good conduct of the defendant...”²⁷²

Despite this discretion, courts will typically impose restrictive conditions such as: “...regular reporting requirements to police or correctional authorities; weapon prohibitions; close monitoring of the individual's activity [including electronic monitoring] and prohibitions against being within a specific distance of any place such as

²⁶⁷ *Ibid.* at s. 810.1 (3.03).

²⁶⁸ *Ibid.* at s. 810.1(3.05).

²⁶⁹ *Ibid.* at s. 810.2(4.1).

²⁷⁰ *Ibid.* at s. 810.2(5).

²⁷¹ *Ibid.* at s. 810.2(6).

²⁷² *Ibid.* at s.810.1(3.01)and s.810.2(4.1).

schools”.²⁷³ There is also case law to the effect that the words “including conditions that require the defendant” which immediately precedes the list of conditions provided under section 810.1(3.02) and 810.2(4.1) limits the imposition of restrictive conditions at odds with the ones already enumerated.²⁷⁴

Recognizance orders under s.810.1 and 810.2 are, therefore, preventative and restrictive tools intended to target potential offenders before they commit a crime, all in the name of the protection of the public.²⁷⁵ Despite the recent enactment of these recognizance orders, it is important to note that the idea of imposing restrictive conditions on individuals who have yet to commit a crime is not novel in Canadian criminal law. In fact, judicial restraint orders and peace bonds provisions have been part of the Canadian criminal law arsenal since the late 19th century.²⁷⁶ Moreover, when the federal government included peace bonds provisions in the *Criminal Code of Canada* in 1892, it simply codified “...the common law peace bond available to magistrates to order individuals likely to commit property offences to “keep the peace””.²⁷⁷

When former Minister of Justice and Attorney General of Canada, the Hon. Allan Rock, introduced section 810.2 of the *Criminal Code* to the Standing Committee on Justice and Legal Affairs, he noted the long common law tradition of Peace Bonds in Canadian

²⁷³ Public Safety, *supra* note 263.

²⁷⁴ See *Budreo*, *supra* note 8 and *Noble*, *supra* note 9.

²⁷⁵ Public Safety, *supra* note 263.

²⁷⁶ In this regard, section 959(2) of the *Criminal code*, 1892, 55-56 Victoria, chap. 29, together with *An act to amend the Canada Temperance Amendment Act*, 1888, being chapter 26 of the same session, provided the following: “Upon complaint by or on behalf of any person that on account of threats made by some other person or on any other account, he, the complainant, is afraid that such other person will do him, his wife or child some personal injury, or will burn or set fire to his property, the justice before whom such complaint is made, may, if he is satisfied that the complainant has reasonable grounds for his fears, require such other person to enter into his own recognizances, or to give security, to keep the peace, and to be of good behaviour, for a term not exceeding twelve months”. See also Public Safety, *supra* note 263.

²⁷⁷ Public Safety, *ibid*.

criminal law.²⁷⁸ The former Minister took time to explain that the courts had had for a very long time an inherent power to “...require someone to keep the peace, to enter into a recognizance or a bond...”, failure to do so would result in an offense.²⁷⁹ He also remarked that peace bonds were in fact: “...an ancient power which courts in an organized and civil society have possessed, not depending upon somebody committing a crime but rather in order to achieve the important objective of maintaining a peaceful society”.²⁸⁰

Through the years, the courts have also noted the long history of peace bonds provisions in common law jurisdictions. Of importance to our discussion is the Supreme Court of Canada’s decision in *MacKenzie v. Martin*.²⁸¹ In that case, our highest court examined the development of peace bond provisions and confirmed a court’s common law jurisdiction to require an individual to maintain the peace.²⁸² The Supreme Court, in quoting Blackstone, defined the nature of peace bonds as follows:

[t]his preventive justice consists in obliging those persons, whom there is probable ground to suspect of future misbehaviour, to stipulate with and to give full assurance to the public, that such offence as is apprehended shall not happen; by finding pledges or securities for keeping the peace, or for their good behaviour.²⁸³

The minority judgment rendered by Judge Rand in *MacKenzie* is also insightful for our historical analysis of peace bond provisions and recognizance orders in common law:

²⁷⁸ Standing Committee on Justice and Legal Affairs, Tuesday, December 3, 1996, Comments from Honourable Allan Rock, online:<http://www.parl.gc.ca/35/Archives/committees352/jula/evidence/88_96-12-03/jula88_blk101.html>[Standing Committee, Allan Rock].

²⁷⁹ Standing Committee, Allan Rock, *ibid*.

²⁸⁰ *Ibid*.

²⁸¹ *MacKenzie v. Martin*, [1954] S.C.R. 361 [*MacKenzie*].

²⁸² Standing Committee, Allan Rock, *supra* note 278. See also generally *MacKenzie*, *supra* note 281.

²⁸³ *MacKenzie*, *ibid*. at 368, citing *Blackstone*, Vol. iv, at 251. See also *R. v. Parks*, *supra* note 171.

In early Saxon law preservation of the peace was secured in the liability of the freemen of a tithing or a hundred for the conduct of each person within it, which in the time of Edward the Confessor became at least supplemented by an ordinance empowering sureties to be required, administered by conservators of the peace. This capacity was, after the Conquest, incident to certain high offices of state, or based on prescription, or annexed to certain tenures of land. Generally, however, the conservators were elected by the freeholders sitting in full county court before the sheriff. What they were to preserve was the King's peace, **to guard the community and individual life of his subjects against mischievous disturbances and fear of personal injuries and trespasses on or to their possessions.**

The first modification of this general administration was the sending of writs by Edward III in the first year of his reign to every sheriff commanding him

that the peace be kept throughout his bailiwick on pain and peril of disinherittance and loss of life and limb.

This was immediately followed by a statute enacted in the same year which provided that

for the better maintenance and keeping of the peace in every county, good men and lawful who were not maintainers of evil or barretors in the country **should be assigned to keep the peace**": Blackstone, Bk. 1, p. 350-51.

This assignment was construed to be by royal commission and transferred the appointment of conservators from the freemen to the King. Later, by 34 Edward III, c. 1, the name "justice" was introduced, and jurisdiction for the first time was conferred upon two or more of them to try felonies. **As to keeping the peace**, they were charged jointly and severally; but a further authority was vested in them to take of those

that be not of good fame ... **sufficient surety and mainprize of their good behaviour towards the King and his people** ...: Burn's Justice of the Peace, 13th ed. vol. 5, p. 755.²⁸⁴ [Emphasis added].

Peace bonds provisions have therefore existed in common law jurisdictions since very ancient times. Preventive measures are also the result of precautionary state action. Coupled with the emergence of a community protection model focusing on the prevention of dangerousness, it could be argued that the right conditions were in place for the enactment of recognizance orders targeting potentially dangerous individuals. The

²⁸⁴ Mackenzie, *ibid.* at 371.

following section will examine the importance of the concept of prevention in the development of peace bonds and recognizance orders in Canadian criminal law.

ii) The Prevention Principle and its Influence on the Development of Peace Bonds Provisions and Recognizance Orders

One of the various objectives of Canadian criminal law is the prevention of crime as well as the preservation of the peace.²⁸⁵ Preventive judicial orders such as peace bonds and recognizance orders can be understood as an extension of the prevention principle sought by Parliament. In this regard, Cohen explains: “[p]reventive law enforcement” and the “prevention principle” are shorthand expressions for the state's ability to act proactively or pre-emptively in order to safeguard or protect the public from serious harm”.²⁸⁶ However, when preventive justice is applied in cases where no crimes have been committed, fundamental rights, such as liberty, are undeniably infringed upon. In this regard, Cohen explains that recognizance orders “...stand as an exception to a cardinal tenet of the criminal justice system that, absent a subsisting criminal charge, intrusions on an individual's liberty ordinarily ought not to be countenanced”.²⁸⁷ Therefore, the imposition of restrictive conditions that curtail the liberty of individuals who have yet to commit a crime necessitate a careful balance between the rights of the potential offender and the right to a peaceful and risk-free society. In achieving balance, it is argued that preventive measures must also contain numerous procedural safeguards which take into account the problem of inaccuracy in predicting dangerousness.

In Canada, as we have seen, conflict of preventive justice with fundamental principles of rights has not deterred Parliament from enacting peace bond provisions and recognizance

²⁸⁵ Canada, *The Criminal Law*, *supra* note 15.

²⁸⁶ Cohen, *supra* note 14 at 409.

²⁸⁷ *Ibid.* at 425.

orders under section 810 of the *Criminal Code*, nor did the inaccuracy which plagues some of the assessment tools used by mental health professionals to predict dangerousness inhibit our lawmakers. An analysis of the judicial treatment of sections 810.1 and 810.2, is therefore, necessary to enable us better understand the rationale behind these coercive measures. As we have seen, so far, sections 810.1 and 810.2 have been deemed constitutional in Canada, at least by lower courts. However, the comparative analysis will later demonstrate that the French scheme provides for more procedural safeguards in imposing restrictive conditions based on potential dangerousness.

iii) An Analysis of the Judicial Treatment of Recognizance Orders under Sections 810.1 and 810.2

To date, there has been no judicial treatment on the constitutionality of sections 810.1 or 810.2 at the Supreme Court of Canada level. However, two important decisions from the Court of Appeal of Ontario and the Québec Superior Court are often cited as the leading cases examining sections 810.1 and 810.2 recognizance orders. The case of *R. v. Budreo* from the Court of Appeal of Ontario, and the judgment from the lower court, examined the constitutionality of section 810.1.²⁸⁸ The judgment of the court in *Budreo* laid the groundwork for the legislator to enact section 810.2. In the highly publicised case of *Noble v. Teale* (involving the former Karla Homolka), the Quebec Superior Court examined the reasonability of the conditions imposed on the former offender.²⁸⁹

Before venturing into these judgments in more detail, it is worth mentioning that both leading cases dealt with recognizance orders involving previous offenders, for which the

²⁸⁸ *Budreo*, *supra* note 8.

²⁸⁹ *Noble*, *supra* note 9.

court could rely on past criminal offenses in assessing the risk of future behaviour of the individual. It should not come as a surprise that both leading cases involved past convicted offenders, since an application under section 810.1 or 810.2 is normally made after an information is laid by the police or the Crown prosecutor, rather than a citizen.²⁹⁰ However, it should also be noted that in the cases of *Budreo* and *Noble*, the offender had not committed a “contemporary” crime or had not engaged in any further relevant misconduct. The informant’s fear in both cases was primarily based on the offender’s past history of criminal behaviour and risk of recidivism upon release from prison.

iv) The Seminal Case of *R. v. Budreo*

The first case worth examining is *Budreo*.²⁹¹ As previously mentioned *Budreo* confirmed the constitutionality of recognizance orders under section 810.1 of the *Criminal Code* and paved the way for the enactment of s.810.2. However, as will be explained below, *Budreo* may very well be one of the leading Canadian decisions in terms of analysing sections 810.1, but it fails to analyse in detail the fundamental concept of dangerousness and the problems of inaccuracy that plague various predicting tools. It is almost as if the court simply accepted and trusted the system of determination of dangerousness without investigating potential pitfalls. Evidently, the advantages of the French investigatory system in determining dangerousness were not addressed by the court. However, in all

²⁹⁰See Public Safety, *supra* note 263, where it is stated: “[o]rdinarily, police and/or provincial crown attorneys apply for sections 810.1 and 810.2 of the *Criminal Code*”. See also Government of Alberta, Justice and Attorney General, High risk Offender Judicial Restraint Orders (Sections 810.01, 810.1 and 810.2 of the *Criminal code*), May 20, 2008, online:

<http://www.justice.gov.ab.ca/criminal_pros/default.aspx?id=5684>, where it is stated that policing agency will normally apply for a recognizance order “..., upon receiving a so-called Warrant Expiry Package from Corrections Services (Government of Canada) or Correctional Services Division..., or upon otherwise learning of a high risk offender who is in need of community supervision pursuant to ss. 810.01 or 810.2.”

²⁹¹ *Budreo*, *supra* note 8. For another summary of *Budreo*, see Cohen, *supra* note 14 at 426-428.

fairness, the court of Appeal of Ontario did not have to venture beyond the Canadian legal realm in this case.

On the other hand, the court did provide an excellent historical analysis of peace bonds provisions in Canadian criminal law. More importantly to the present analysis, the court qualified recognizance orders as being “preventive” rather than “punitive” measures.²⁹² In fact, considerable effort was deployed by the Court of Appeal in characterizing a recognizance order as a preventive measure. As we will explain, the distinction between “preventive” and “punitive” measure is extremely important since it almost automatically saves the Canadian legislator from requiring stricter constitutional tests.²⁹³ It would therefore appear that preventive measures are not subject to the same constitutional treatment as punitive measures, since their consequences on the liberty of an individual are not as serious. However, as we will see, conditions attached to a recognizance order can have a devastating effect on the rights of a potential offender in some instances, and may prove to be more coercive than preventive in nature. Moreover, characterization of a restrictive condition as being preventive rather than punitive prevents the court from pushing the analysis further, especially in considering the constitutionality of legislative provisions largely based on controversial assessment of dangerousness.

In *Budreo*, the Court of Appeal confirmed the court’s jurisdiction over maintaining the peace under the common law tradition through the use of preventive tools such as peace bonds and recognizance orders.²⁹⁴ Perhaps the most striking feature of the decision in

²⁹² *Budreo*, *ibid.* at para. 25.

²⁹³ It will be explained later that the French’s *mesures de sûretés* are also considered as preventive measures.

²⁹⁴ *Budreo*, *supra* note 8 at para. 27-31.

Budreo is the court's general approval of the imposition of restrictive conditions on individuals who have never committed a crime. In this regard, the opening statement of the court to the effect that "[a] recognizance may be imposed though the person has not committed an offence and has no previous criminal record", is quite revealing of the court's position towards prophylactic measures and gives the tone to the rest of the judgement.²⁹⁵

In *Budreo*, the court focused its attention on recognizance orders under section 810.1 of the *Criminal Code* and affirmed their constitutionality, despite the infringing nature of the section upon principles of fundamental justice.²⁹⁶ As explained by the Court of Appeal, section 810.1 allows the court to impose "...a recognizance on any person likely to commit any one of a number of listed sexual offences against a child under 14 years of age".²⁹⁷ At the time of the court's decision, the provision was intended to provide for the prevention of sexual offences against a child under "14 years of age". However, the recent enactment of the *Tackling Violent Crime Act* raised the age of consent for sexual activities to 16 years.²⁹⁸

In *Budreo*, restrictive conditions under section 810.1 had been imposed by the judge on a diagnosed paedophile who had a long history of sexual offenses.²⁹⁹ Prior to his release from prison, Mr. Budreo had been examined by a psychiatrist to determine if he could be

²⁹⁵ *Budreo*, *supra* note 8 at para.1.

²⁹⁶ *Ibid.* at para. 53.

²⁹⁷ *Ibid.* at para.1. It should be noted that sections 810.1 and 810.2 of the *Criminal Code* are virtually identical in terms of procedure and application. The only difference is that the former is a preventive measure available to the court to target sexual offenders while the latter focuses on violent offenders who risk committing a serious personal injury offence. Therefore, it can be argued that the reasoning of the Court of Appeal in *Budreo* would be similar under a section 810.2 hearing.

²⁹⁸ See generally *Tackling Violent Crime Act*, R.S., c. C-46.

²⁹⁹ *Budreo*, *supra* note 8 at para. 1.

admitted under the *Mental Health Act*.³⁰⁰ Two different psychiatric assessments determined that Mr. Budreo "...did not pose a sufficient risk of serious harm to himself or to members of the public".³⁰¹ A psychiatric treatment plan was nevertheless prepared for the potential offender which included psychiatric counselling and drug treatment.³⁰²

However, the "negative publicity" and numerous news reports surrounding his release forced the Crown to apply for a section 810.1 recognizance order in the days following Mr. Budreo's release from prison.³⁰³ In fact, the Crown was concerned with the past criminal history of the offender.³⁰⁴ The Crown even admitted that Mr. Budreo had not committed any wrongs upon his release, but sought a recognizance "...because of his criminal record and his diagnosis as a paedophile".³⁰⁵

The Crown was not only motivated by the negative publicity surrounding Mr. Budreo's release, but also by the fear expressed by a member of the Toronto police force. The police's fear was founded on various psychiatric, hospital and parole board reports, some of them dating as far back as the 1960s and which portrayed the offender as a high-risk paedophile.³⁰⁶

The recognizance order sought by the Crown on the basis of the police's fear included several conditions intended to limit Mr. Budreo's liberty, in particular "...in any area

³⁰⁰ *Ibid.* at para. 8. *Mental Health Act*, R.S.O. 1990, c. M.7.

³⁰¹ *Budreo, Ibid.*

³⁰² *Ibid.* at para. 9.

³⁰³ *Ibid.* at para. 10-11.

³⁰⁴ *Ibid.* at para 11.

³⁰⁵ *Ibid.*

³⁰⁶ *Ibid.* at para. 13.

where children were expected to be present”.³⁰⁷ They were drafted upon the conditions that were set for his bail, prior to the section 810.1 hearing and included the following:

- he [should] not engage in any activity involving contact with persons under the age of 14 unless in the presence of and under the supervision of [two adults];
- he not be at or be within 50 metres of a public park, swimming area, daycare, schoolground, playground, community centre or any other place where persons under 14 can reasonably be expected to be found, except in the presence of and under the supervision of [two adults];
- continue to take Luperon (or Provera) at least once a month; and that he continue counselling or treatment at the Clarke Institute.³⁰⁸

The first question considered by the Court of Appeal in *Budreo* was to determine if a recognizance order under section 810.1 was constitutional. More particularly, the Court focused its attention on a potential violation of section 7 of the Canadian Charter of Rights and Freedoms which guarantees “...the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice”.³⁰⁹ It was clear from the outset that the conditions imposed on Mr. Budreo restricted his liberty and freedom. The Crown admitted that these restrictions infringed section 7 of the Charter.³¹⁰ The main discordance was to determine if the “...restrictions on the appellant's liberty [were] in accordance with the principles of fundamental justice...”.³¹¹ As for the crux of the defendant's argument, it revolved around the fact that the violation was contrary to principles of fundamental justice because “...it

³⁰⁷ Cohen, *supra* note 14 at 426.

³⁰⁸ *Budreo*, *supra* note 8 at para. 16.

³⁰⁹ *Canadian Charter of Rights and Freedoms, Schedule B to the Canada Act 1982 (U.K.) 1982, c. 11, [Charter], s. 7.*

³¹⁰ *Budreo*, *supra* note 8 at para. 23.

³¹¹ *Ibid.*

create[d] an offence based on status; it [was] overbroad; and it [was] void for vagueness”.³¹²

Therefore, the first point considered by the Court of Appeal was to determine if a recognizance under section 810.1 created an offence based on status. According to the Court, the status in question was the one attributed to the offender due to his past criminal convictions and medical diagnosis, despite the absence of any “current offending conduct”.³¹³ Because of the preventive nature of recognizance orders and the fact that they involve an assessment of the risk of future behaviour of an individual, they cannot be considered as creating an offense based on status.³¹⁴ The Court explains the aim of section 810.1 in these terms:

...It is a preventive provision not a punitive provision. It aims not to punish past wrongdoing but to prevent future harm to young children, to prevent them from being victimized by sexual abusers. The second answer is that s. 810.1 is not about a person's status. It is about assessing the present risk of a person committing a sexual offence against young children.³¹⁵

If the Court had characterized section 810.1 as being punitive rather than preventive in nature, the provision would have probably been subjected to a stricter preventive constitutional test, due to a lack of adequate constitutional safeguards.³¹⁶ The protection of children from potential paedophiles pushed the Court to consider the restrictive conditions available under section 810.1 as preventive in essence. The court notes, however, that “[s]ome aspects of s. 810.1 are punitive or coercive...”, including “...the availability of an arrest warrant; detention pending a hearing unless the defendant is

³¹² *Budreo, ibid.*

³¹³ *Ibid.* at para. 24.

³¹⁴ *Ibid.* at para. 25 and 33.

³¹⁵ *Ibid.* at para. 25.

³¹⁶ *Ibid.* at para. 26.

released on bail; and jail on the defendant's refusal to enter into a recognizance".³¹⁷ The Court considers these coercive aspects as "necessary" and not sufficient to transform section 810.1 into a punitive provision despite the stigma attached to it.³¹⁸

Furthermore, in citing the reasoning of the Supreme Court of Canada in *R. v. Shubley*³¹⁹ and *R. v. Wigglesworth*³²⁰, the court explains that section 810.1 was not punitive because its purpose was not "to mete out criminal punishment" and it did not have "true penal consequences".³²¹ The Court refers to *Wigglesworth* in which "true penal consequences" was defined as an "...imprisonment or a fine which by its magnitude would appear to be imposed for the purpose of redressing the wrong done to society at large...".³²² Based on the fact that the main objectives of section 810.1 are to prevent the commission of a crime not to "redress a wrong", the recognizance orders were considered as preventive and not punitive by the Court.³²³

The Court then turned to the constitutionality of section 810.1 with respect to the second and third contentions of the defendant, namely the overbroad, and void for vagueness principles under section 7 of the Charter. Generally, in *Budreo*, the court considers recognizance orders under section 810.1 as not overly broad. Citing the decision of *R. v. Heywood*,³²⁴ the Court explains that in determining if a particular piece of legislation is

³¹⁷ *Ibid.* at para. 28.

³¹⁸ *Ibid.* at para. 28.

³¹⁹ *R. v. Shubley* [1990] 1 S.C.R. 3, 52 C.C.C. (3d) 481, 65 D.L.R. (4th) 193 [*Shubley* cited to S.C.R.], at 20-21.

³²⁰ *R. v. Wigglesworth* [1987] 2 S.C.R. 541, 37 C.C.C. (3d) 385, 45 D.L.R. (4th) 235 [*Wigglesworth* cited to S.C.R.], at 561.

³²¹ *Budreo*, *supra* note 8 at para. 29.

³²² *Ibid.*

³²³ *Ibid.* at para. 30.

³²⁴ *R. v. Heywood*, [1994] 3 S.C.R. 761 [*Heywood*].

overbroad, it is important to look at the means used by Parliament to achieve its particular objective.³²⁵ The following statements are of particular relevance to our analysis:

The means chosen must be sufficiently tailored or narrowly targeted to meet their objective. If the means chosen are too broad or too wide, if the law goes further than necessary to accomplish its purpose, the law becomes arbitrary or disproportionate. A person's rights will be limited without good reason. The principles of fundamental justice will be violated.³²⁶

In the case of section 810.1, the objective of the legislation is the protection of children from potential paedophiles. In the Court's view, the preventive nature of the section justifies a measure restricting the liberties of potential paedophiles:

Children are among the most vulnerable groups in our society. The sexual abuse of young children is a serious societal problem, a statement that needs no elaboration. A sizable percentage of the sexual offences against children -- according to the record, approximately 30 percent -- occurs in public places, the very places specified in s. 810.1. The expert evidence shows that recidivism rates for sexual abusers of children are high and that keeping high-risk offenders away from children is a sound preventive strategy. Parliament thus cannot be faulted for its objective in enacting s. 810.1. The state should not be obliged to wait until children are victimized before it acts. The societal interest in protecting children from sexual abuse supports Parliament's use of the preventive part of its criminal law power.³²⁷

It is therefore clear that the Court of Appeal places a high value on the protection of a vulnerable segment of the population, in this case, children. Moreover, it considers that

³²⁵ *Ibid.* at 792. Moreover, in *Heywood*, *ibid.* at 784-785, one of the leading case examining section 7 of the Charter, the Supreme Court of Canada examined the constitutionality and definition of the word "loiter" in section 179(1)(b) of the *Criminal Code*. In applying the principle of fundamental justice of overbreadth, the Supreme Court concluded that section 179(1)(b) of the *Criminal Code* infringed upon section 7 of the Charter and the violation was not reasonable under section 1 of the Charter.

³²⁶ *Budreo*, *supra* note 8 at para. 36.

³²⁷ *Ibid.* at para.37.

the means chosen by Parliament to achieve its objective to protect the children “...were reasonable and in accordance with the principles of fundamental justice”.³²⁸

In considering the defendant’s argument with respect to the overbroad nature of section 810.1, the Court also examined the restrictive conditions imposed on the defendant. Again, the Court came to the conclusion that the restrictive conditions were not overbroad.³²⁹ Essentially, the Court’s reasoning was founded on three main assertions: the restrictions imposed on the defendant were not considered as “detention or imprisonment”, they were proportional to the “...societal interest in s. 810.1, the protection of young children” and they were “...narrowly targeted to meet Parliament’s objective”.³³⁰

In light of the overbreadth argument, the Court also examined the fact that a recognizance order may be sought even in cases where the potential offender has no criminal record.³³¹ The wording in section 810.1 simply requires the judge to be satisfied that “...the informant has reasonable grounds for the fear that the defendant will commit a sexual offence against a child under 14”.³³²

In citing *Lyons*,³³³ *R. v. Morales*,³³⁴ as well as the *Ouimet Report*,³³⁵ the Court restated “the impossibility of precise predictions” and adopted the Supreme Court of Canada’s

³²⁸ *Budreo, ibid.* at para. 38.

³²⁹ *Ibid.* at para. 39.

³³⁰ *Ibid.* at para 39-41.

³³¹ *Ibid.* at para. 42.

³³² *Ibid.* at para. 42. See also *R. v. George*, 2007 CarswellOnt 131, 2007 ONCJ 16, 73 W.C.B. (2d) 45 [*George* cited to Carswell] at para.42, where the Court examined the decision in *Budreo, ibid.* and stated that a “... s.810.2 order may arguably require more than a simple demonstration that the defendant is more likely than not to commit a designated class of offence,”. The Court added the following, again at para 42: “...at a minimum, what is required is proof, on a balance of probabilities, of a reasonably grounded fear of serious and imminent conduct”.

³³³ *Lyons, supra* note 149.

view on the threshold necessary to make a determination of dangerousness as being one of a “likelihood of future dangerousness”.³³⁶ In this regard, the Court of Appeal explains that: “[l]ogically, it seems clear to me that an individual can be found to constitute a threat to society without insisting that this require the court to assert an ability to predict the future”. However, as we will see in the critique below, the Court of Appeal simply took the test of “likelihood of future dangerousness” developed in the context of dangerous offender legislation (*Lyons*) and bail hearings (*Morales*) and applied it to section 810.1 recognizance orders.³³⁷

On the question of the adequacy of procedural safeguards contained in section 810.1, the Court of Appeal was satisfied that they were sufficient to ensure the “overbreadth” doctrine under section 7 of the Charter was not engaged. The procedural safeguards noted by the Court includes the notice of hearing; the conduct of a full hearing as a summary conviction trial before any order is made by the Court that possesses discretion to impose the conditions; the temporary character of the restrictions imposed; and finally, the possibility of appealing the recognizance order.³³⁸

³³⁴ *R. v. Morales*, [1992] 3 S.C.R. 711, 17 C.R. (4th) 74 [*Morales* cited to S.C.R.].

³³⁵ See Canada, Canadian Committee on Corrections, *Toward Unity: Criminal Justice and Corrections* (Ottawa, Queen's Printer, 1969) (Chair: Roger Ouimet)[*Ouimet Report*].

³³⁶ *Budreo*, *supra* note 8 at para. 43-44.

³³⁷ *Ibid.* at para 43-44. It is worth noting that bail provisions, under section 515 of the *Criminal Code*, may appear similar to the recognizance order scheme under section 810. In *R. v. F. (M.)*, 2001 CarswellOnt 1516, 155 C.C.C. (3d) 521 [F.(M.) cited to Carswell] at para. 31, the Ontario Superior Court of Justice notes the similarities between the two provisions of the decision: “... the goal of the two proceedings is to regulate the conduct of the individual in the community and to prevent danger to the community, the oral and evidentiary standard in both proceedings are similar, if not the same, and the consequences of breach of any order granted, exposes the defendant to jail”. However, at para. 33, the court distinguishes the two provisions, stating that in the case of a recognizance orders, the individual is not an accused awaiting trial. Moreover, as stated by the court at para. 33, in the case of a bail hearing, “[e]ntry into the recognizance is predicate to release”. As the court points out, in the case of section 810, a recognizance order can be imposed to an individual who is already in liberty.

³³⁸ *Budreo*, *supra* note 8 at para. 47. See also *George*, *supra* note 332 at para. 4.

The Court of Appeal concludes that section 810.1 is not overbroad since it “...strikes a reasonable balance between the liberty interest of the defendant and the state's interest in protecting young children from harm”.³³⁹ According to the Court of Appeal, section 810.1 reconciles two objectives: “...the interest of likely child sexual abusers in going where they please, including places where young children gather, and the interest of the state in ensuring that young children can go safely and securely to places typically associated with children's activities”.³⁴⁰

On the question of section 7 of the Charter's arguments on “void for vagueness” in relation to section 810.1, the Court of Appeal adopts a similar approach then the one used in the overbreadth analysis. It looks at the “precise means” used by Parliament to achieve its objectives and at the “clarity” of the means to ascertain that the legislation is not “...vague contrary to the principles of fundamental justice”.³⁴¹ The Court looks at the Defendant's argument that the word “fear” of the informant in section 810.1 was too vague. In the Court's opinion, “fear” and “on reasonable ground” must be considered together, which limits the fear to “...a reasonably based sense of apprehension about a future event”.³⁴² However, as the Court points out, there is a second layer in the analysis of the reasonableness of the fear of the informant. The judge must also be “...satisfied by "evidence" that the fear is reasonably based” and he will therefore weigh the evidence

³³⁹ *Budreo, ibid.* at para. 48.

³⁴⁰ *Ibid.* at para. 40.

³⁴¹ *Ibid.* at para. 49.

³⁴² *Ibid.* at para. 51. This reasoning is in accordance with *Then J. of the Ontario General Division Court R. v. Budreo*, 1996 CarswellOnt 24, 45 C.R. (4th) 133, 104 C.C.C. (3d) 245 [*Budreo*, Ont. Gen. Crt, cited to C.R.], where Then J. explained at para. 25 the meaning of the word fear: [i]t is clear then that the use of the word « fear » in a legislative context does not put the judicial process at the mercy of unsubstantiated paranoia **but requires an allegation to be objectively provable**. [Emphasis added].

before him.³⁴³ In other words, if the court is satisfied that the informant's allegation is "objectively provable", it can impose a recognizance order.³⁴⁴

It is worth pointing out the fact that the Court of Appeal in *Budreo* acknowledges the imprecise nature of section 810.1 due to the fact that recognizance orders are based on a "likelihood of future dangerousness", an imprecise determination. However, the Court's contention is to the effect that the lack of precision is not enough to pass the high threshold necessary in "...declaring a law void for vagueness".³⁴⁵

All in all, in *Budreo*, the Court of Appeal confirms the constitutionality of section 810.1 and reiterates its preventive nature and its importance in the protection of children, a particularly vulnerable segment of the population. While the Court gave some compelling reasons for the reasonableness of the measure in a society concerned with protection of the community, it barely touched the problem of determination of dangerousness, a key component at the heart of prophylactic measures in criminal law. The following section will offer a critique of the judgment in *Budreo* on some very specific points, namely the over breadth principle; the detrimental effects of restrictive conditions upon a potential offender and his or her reintegration into society; and finally, the adoption of the "likelihood of future dangerousness" test normally reserved for dangerous offender designation and bail hearings.

v) A Critique of the Overbroad Test as Applied by the Court in *Budreo*

It can easily be argued that the protection of children from potential paedophiles is a noble objective. It does, however, have implications for the rights of a particular class of

³⁴³ *Budreo*, *ibid.* note 8 at para. 52.

³⁴⁴ *Budreo*, Ont. Gen. Ct., *supra* note 342 at para. 25.

³⁴⁵ *Budreo*, *supra* note 8 at para. 53.

individuals, namely, persons considered at risk of committing a crime. Moreover, when the statutory provision enables the imposition of restrictive conditions on an individual to protect a “group of victims”, rather than a particular named individual, it broadens up the applicability of the measure.

Earlier, we explained that sections 810.1 and 810.2 have been crafted by Parliament to encompass unnamed victims, as opposed to a section 810 peace bond provision which involves identified parties. In imposing restrictive conditions on potentially dangerous individuals to protect a particular segment of the society (i.e. children or victims of serious personal injury), as opposed to protecting a known potential victim, a preventive measure can have detrimental effect on the rights and liberties of an individual. It is worth pointing out that the Court of Appeal in *Budreo* made no mention of the reasoning of the Supreme Court of Canada in *Parks*³⁴⁶ in reaching its conclusion to the effect that section 810.1 is not overbroad. In *Parks*, the Supreme Court of Canada made it clear that preventive judicial orders must be limited and not be overbroad. Justice Sopinka expressed concerns as to the constitutionality of preventive judicial orders that do not limit the potential victims:

..., I have grave doubts as to whether a power that can be exercised on the basis of "probable ground[s] to suspect future misbehaviour" without limits as to the type of "misbehaviour" or potential victims, would survive Charter scrutiny. If such a power allowed the imposition of restrictive conditions following an acquittal on the basis of a remote possibility of recurrence, it may well be contrary to s. 7.³⁴⁷

³⁴⁶ *Parks*, *supra* note 171.

³⁴⁷ *Ibid.* at 912. See also Poyner, Errin, “Drawing Boundaries – Monitoring Preventive Justice” (1997) 3 Appeal, Review of Current Law and Law Reform 6, at 10: “[i]n 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... 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”.

While it is true that sections 810.1 and 810.2 limit the type of behaviour (violent sexual offence and serious personal injury), and identify the targeted group of victims (children under the age of 16 in the case of section 810.1; and potential victims of serious personal injuries in the case of section 810.2), the fact remains that potential victims constitute a particularly large group. Consequently, by imposing restrictive conditions prohibiting an individual to enter into contact with a member of a large group, the risk of breaching a condition is exponentially increased. As we will see, this situation can have real detrimental effect on a potential offender's right to liberty, and jeopardize his reintegration into society.

Furthermore, from its conclusion as to the legitimacy of section 810.1, it can be deduced that the Court in *Budreo* relied heavily on expert evidence demonstrating a high risk of recidivism amongst sexual offenders.³⁴⁸ It is worth considering the fact that the reliability of expert evidence appears not to be in question in *Budreo*, despite the important repercussions of a successful section 810.1 application. It may be viewed as a noble objective from the court's perspective to endorse Parliament's legitimate aim to prevent the risk of harm to children, but to rely on controversial evidence without addressing the problem of reliability is questionable.

In this regard, it was argued earlier that the assessment and determination of dangerousness, even by highly qualified mental health professionals, is a difficult exercise prone to inaccuracies, false positives and potential biases. Neither of these aforementioned problems were addressed by the Court in *Budreo* in any detail. The fact that the measure has been characterized as preventive rather than punitive may very well

³⁴⁸ *Budreo*, *supra* note 8 at para. 37.

be part of the explanation. Preventive measures are not subjected to the same stringent considerations, since, theoretically, they are not coercive in nature. On paper, recognizance orders are indeed designed to prevent the commission of a crime and to restrain the liberties of a potentially dangerous individual. Recognizance orders do not seek to punish a future crime, but simply to prevent one. However, just as was the case in *Budreo*, often, the evidence on the dangerousness of the individual is based primarily on past criminal behaviour. It is, at the very least, a good source of motivation for prosecutors to seek recognizance orders for individuals who are just about to be released into society but who have a particular history of criminality. The juxtaposition of the true nature of recognizance orders and this point were not even mentioned in the decision of the Court of Appeal in *Budreo*. In this context, they are used as an additional punishment after the initial punishment. The concept of serving a sentence is tossed away and replaced by a supplementary sentence that operates at the end of the mandatory sentence.

vi) The Application of the “Likelihood of Future Dangerousness” Test in Recognizance Order Hearings

Earlier, it was explained that the Court of Appeal in *Budreo* simply applied the “likelihood of future dangerousness” test confirmed in *Lyons*, to recognizance orders without adapting it to the reality of section 810.1 and their implications for the rights of potential offenders. Currently, in a section 810 hearing, if the judge is satisfied on a balance of probability that the individual is likely to be dangerous, he can impose several restrictive conditions pursuant to a recognizance order. However, in a recognizance order hearing, the individual is not necessarily a convicted criminal, as he or she has either never committed a crime or has already served his or her mandatory prison sentence. This particularity differs from the designation of Dangerous or Long-Term Offenders. In

those cases, the court must be satisfied that the offender has committed a serious offense for which he has been convicted while presenting a "...pattern of repetitive behaviour or persistent aggressiveness".³⁴⁹ The evidence must also demonstrate a "substantial degree of indifference" or "a failure to restrain his behaviour".³⁵⁰ In the case of sexual offenses, "a failure to control his or her sexual behaviour" is also required to designate an offender as dangerous.³⁵¹ Since it is impossible to predict with accuracy the risk of future dangerousness, a simple likelihood of future dangerousness is sufficient to designate an offender as dangerous. Arguably, in the case of dangerous offender legislation, the rationale for imposing a low threshold of a simple likelihood of dangerousness can be understood and justified due to the importance of protecting the community from potentially dangerous individuals. Dangerous offender legislation is aimed at controlling the worst criminals who have consistently shown repetitive violent or sexual behaviour.³⁵²

However, in the case of recognizance orders, it is argued that the court should increase the threshold of required evidence to demonstrate that an individual is potentially dangerous. The threshold should be higher for individuals who have never committed a crime due to the difficulties in assessing the risk of future dangerousness without any historical data. At the very least, recognizance orders should not be applied to individuals who have no criminal records. On that point, the Court of Appeal in *Budreo* did state that the requirement of having a criminal record in all recognizance order hearing "...would

³⁴⁹ *Criminal Code*, *supra* note 2 at s.753(1).

³⁵⁰ *Ibid.*

³⁵¹ *Ibid.* at s. 753.1(b).

³⁵² See generally *Lyons*, *supra* note 149.

undermine the preventive purpose of s. 810.1”.³⁵³ The Court acknowledged the relevancy of criminal records but stopped short of requiring it in all section 810.1 applications because this “...would require a child to be victimized before the Crown could act, even if the Crown had highly reliable evidence of dangerousness”.³⁵⁴ This position is a legitimate one, if one takes into consideration the protection of the community as the only starting point. On the other hand, as previously stated, the Court did not address the problem of inaccuracy in determining dangerousness or the influences of the adversarial system that may affect the objectivity of the evidence presented. As noted earlier, a determination of dangerousness by mental health experts implies an assessment of the risk posed by a particular individual to society. It is a calculation based mostly on a probability that the individual will commit a crime in the future. Since a recognizance order seeks to prevent the commission of crime, based largely on a probability that it will be committed, it is fundamental that the very process by which it is determined is sound. However, one cannot take away the fact that a determination of dangerousness consists in a calculation of a risk, a process that may be flawed by false positives and expert biases. For those reason, a high threshold in imposing restrictive conditions under a recognizance orders should be required. Arguably, the imposition of a recognizance order should also be limited to an individual who has a past criminal history, at least, until such time as science is able to decrease significantly the risk of false positive while improving the accuracy of the various assessment tools.

What the Court failed to address in *Budreo*, that is the importance of having a higher threshold when determining dangerousness, was examined by another court in Quebec,

³⁵³ *Budreo*, *supra* note 8, at para. 44.

³⁵⁴ *Ibid.*

although briefly. We will next examine the case of *Noble v. Teale*³⁵⁵ which dealt with the sufficiency of the evidence in imposing a recognizance order pursuant to section 810.2 of the *Criminal Code*. It would appear that the Court applied a higher threshold than the simple “likelihood of future dangerousness” as adopted in Ontario.

vii) The Case of *Noble v. Teale* and its Interpretation of Recognizance Orders under Section 810.2

The other leading case which dealt with the constitutionality of recognizance orders is *Noble v. Teale*. Mrs. Karla Teale, the former Karla Homolka, was serving a sentence of imprisonment for manslaughter. As she was about to be released from prison, an informant, in this case a police officer, laid an information before the court to seek a recognizance order imposing restrictive conditions under section 810.2 of the *Criminal Code*. The informant’s application was successful and conditions were imposed upon the defendant but were later quashed on Appeal.

The case of *Noble* is particularly relevant to our analysis because it delves into the reasonableness of certain restrictive conditions that were imposed upon Mrs. Teale. Two points in appeal are relevant: the constitutional challenge of section 810.2 and the sufficiency of the evidence in an application for a recognizance order.

In *Noble*, the Quebec Superior Court dealt with the applicability of section 810.2 and defined its limits. Although the Court examined briefly the constitutional challenge raised by the defendant with respect to section 810.2, it did mention that it was inappropriate to do so since the issue was never raised before the hearing judge.³⁵⁶ The Court also stated that constitutional questions should not be dealt with in the absence of relevant facts:

³⁵⁵ *Noble, supra* note 9.

³⁵⁶ *Ibid.* at para. 6.

“Charter decisions should not and must not be made in a factual vacuum”.³⁵⁷ Nevertheless, the Court stated its views on the constitutionality of section 810.2 in the event it was to be challenged on her position not to entertain the constitutional debate due to the lack of relevant facts.³⁵⁸

Consequently, the Court adopted the reasoning of the Court of Appeal in *Budreo*, as to the constitutionality of section 810.2.³⁵⁹ It confirmed again the preventive nature of the provision and the fact that it did not constitute an offence.³⁶⁰ In the Court’s opinion, the constitutionality of section 810.2 in relation to a section 7 overbreadth argument is demonstrated by the following facts:

- the hearing judge [does not have]... an unfettered discretion to impose any type of condition in the order;
- the impossibility of making exact predictions of future dangerousness does not render s. 810.2 Cr. C. overbroad. Both the dangerous offender legislation and the bail system rely on predictions of future dangerousness;
- the procedural safeguards in s. 810.2 are adequate;
- the recourse to hearsay evidence is not objectionable. Ultimately, the order can only issue on evidence that is judged credible and trustworthy;
- the need for the informant to establish a "fear" of future dangerousness does not render s. 810.2 void for vagueness.³⁶¹

In the Court’s opinion, the conclusions reached by the Court of Appeal in *Budreo* as to the constitutionality of recognizance orders were valid. Moreover, in affirming the reasonableness of the scheme, the Court relied heavily on the fact that recognizance

³⁵⁷ *Noble, ibid.* at para. 11, citing *Mackay v. Manitoba*, [1989] 2 S.C.R. 357 at 361.

³⁵⁸ *Noble, ibid.* at para. 22.

³⁵⁹ *Ibid.*

³⁶⁰ *Ibid.* at para. 23, citing *Budreo, supra* note 8 at para. 25.

³⁶¹ *Ibid.* at para. 25.

orders pursuant to section 810.2 can only be imposed on a potential offender if the "...informant establishes on a balance of probabilities that he or she has reasonable grounds to fear that the defendant will commit a serious personal injury offence".³⁶²

The second ground of appeal dealt with by the Quebec Superior Court in *Noble* and relevant to our present analysis is the sufficiency of the evidence. Recognizance orders under section 810.2 require the presiding judge to determine, on a balance of probabilities, if there are reasonable grounds to impose restrictive conditions on a potential offender.³⁶³ In performing an assessment to determine the risk of future dangerousness, the judge must look at evidence presented by both parties. And, of course, in the context of the Canadian adversarial system, the judge must generally decide between opposing evidence.

In *Noble*, the Quebec Superior Court examined how a court should determine the reasonableness of the informant's fear. In the Court's opinion the fear cannot only be based on past criminal activities, it must also "... relate... to the present portrait which is offered of the defendant by the informant".³⁶⁴ An element of immediacy in the risk posed

³⁶² *Noble, ibid.* at para. 3.

³⁶³ The question of the of the required evidence to trigger a recognizance order under section 810.2 (and arguably section 810.1) was examined by the Ontario Court of Justice in *George, supra* note 332 at 41: "[w]hen considering the s.810.2 application, the Court must scrutinize carefully the evidence put before it. As the late Justice Sopinka expressed it in *R. v. Parks* [1992 CarswellOnt 996 (S.C.C.)], "**the law requires a proven factual foundation which raises a probable ground to suspect a future misbehaviour.**" And as Justice Fairgrieve expressed in *R. v. Harding* [1998 CarswellOnt 2426 (Ont. Prov. Div.)], "**the test requires both that the underlying facts be established on a balance of probabilities and secondly, that the harm feared be more likely than not to occur.**" These references are conveniently found with citations in the judgment of Justice Bellefontaine in the *R. v. Tausendfrende* case [2003] O.J. No. 3739 (Ont. C.J.) at paragraphs [14]-[17]". [Emphasis added].

³⁶⁴ *Noble, supra* note 9 at para. 42.

by the potential offender is also required before a recognizance order can be imposed.³⁶⁵

In other words, "...[t]he fear must reflect a risk of serious and imminent danger".³⁶⁶

The Court adopted the reasoning of the Ontario General Division Court in *Budreo*, who had cautioned judges to exercise care before imposing restrictive conditions under section 810.2.³⁶⁷ Moreover, on the question of the required threshold required to demonstrate dangerousness, the Court again cited the decision in *Budreo*³⁶⁸:

Both ss. 810 and 810.1 speak of a reasonably grounded fear that the defendant "will" commit an offence. To my mind, as a matter of legislative construction, this takes the appropriate threshold a notch above a simple demonstration that the defendant is more likely than not to commit an offence. A reasonably grounded fear of a serious and imminent danger must be proved on a balance of probabilities.³⁶⁹

In light of the gloss given by the Court in *Noble*, it would appear that the threshold required for imposing a recognizance order is indeed higher. Not only must it be proven that the defendant "will commit an offence", but the informant must have a "reasonably grounded fear" that the potential offender is imminently dangerous.³⁷⁰

³⁶⁵ *Noble, ibid.* at para. 43-44.

³⁶⁶ *Ibid.* at 43. In *Noble*, the Quebec Superior Court also cited the case of *Nabhan c. Hénault*, 500-09-010514-016, 2003-09-25 (C.A. Qué.), [2003 CarswellQue 2074], where the Court of Appeal of Quebec stated that the fear of the informant must reflect an imminent danger: « [i]l doit s'agir de la crainte raisonnable d'un danger réel et imminent qu'une personne commette l'infraction que l'on cherche à prévenir ». It is also worth mentioning that the above noted reasoning of the Court in *Noble* appears to be in line with the Supreme Court decision in *Parks, supra* note 171 at 911, where the common law power to keep the peace was examined. At 911 of the decision, the Supreme Court stated that "mere speculations" are not sufficient to impose a peace bond. Rather, "...a proven factual foundation which raises a probable ground to suspect of future misbehaviour", must be demonstrated. See also *F. (M.), supra* note 323, where the Ontario Superior Court of Justice applied the principle enunciated in *Parks* to section 810.2 of the *Criminal Code*.

³⁶⁷ *Noble, ibid.* at para.44, citing *Budreo* Ont. Gen. *supra* note 342 at para. 25.

³⁶⁸ *Budreo*, Ont. Gen., *ibid.*

³⁶⁹ *Noble, supra* note 9 at para.44,[Footnotes omitted], citing *Budreo*, Ont. Gen., *ibid.*

³⁷⁰ *Ibid.*

While the Court characterised the threshold as higher than a simple proof of likelihood that an individual will commit a crime, it does not, like *Budreo*, address the problem of inaccuracy in determining dangerousness. While someone may have a reasonable fear of a serious and imminent danger created by a particular individual, it must still be determined at some point that this individual actually poses a risk to society. Again, if the very process by which the court bases its decision can potentially be flawed, due to problems of inaccuracy or biases in the assessment of dangerousness, there is a risk that an individual may be unjustly exposed to restrictive conditions.³⁷¹ In the case of convicted criminals, that risk may be acceptable. However, in the case of individuals with no previous criminal record, the risk may not be acceptable, since science is incapable of predicting the future with accuracy. The assessment of dangerousness, although a key element at the base of preventive measures, such as recognizance orders under sections 810.1 and 810.2 of the *Criminal Code*, is once again not considered by the Court in *Noble*.

The Quebec Superior Court in *Noble* did, nonetheless, look at the evidence that was presented to the presiding judge and determined that it did not demonstrate a “real and imminent danger”.³⁷² Both parties had provided various psychological assessments to the presiding judge.³⁷³ Acknowledging that the powers of an appellate court are limited when examining evidence already considered by the trial judge, the Court, nevertheless, rejected the informant’s contention that the evidence demonstrated a reasonable fear of an

³⁷¹ In *Budreo*, *supra* note 8 at para. 53, the Court stated that the problem of inaccuracy in predicting dangerousness is not enough to render the legislation “void for vagueness”.

³⁷² *Noble*, *supra* note 9 at para. 46.

³⁷³ *Ibid.* at para. 47.

imminent danger posed by the defendant.³⁷⁴ In the Court's opinion, the evidence demonstrated that there might be a risk of recidivism but she was not imminently dangerous.³⁷⁵ The Court was satisfied that the risk of reoffending was minimal and that the conditions imposed on Mrs. Teale should be quashed.³⁷⁶

Nevertheless, the Court decided to examine the reasonableness of the conditions that were imposed upon Mrs. Teale in case it had made an error in quashing them.³⁷⁷ The Court examined the breadth of statutory conditions provided in section 810.2 and pointed out that these include the following:

- statutory obligation to impose a condition to keep the peace and be of good behaviour;
- such other reasonable conditions;
- prohibition, in general terms, to possess weapons;
- obligation, in general terms, to report to correctional or police authorities.³⁷⁸

The Court also looked at the breadth of peace bonds and recognizance orders available under section 810 generally. It explains that section 810 is normally used in cases "...where domestic violence is feared".³⁷⁹ According to the Court, restrictive conditions that can be imposed under section 810 include "prohibition of possessing weapons" and "restraining conditions, prohibiting the defendant from entering into contact" with identified victims.³⁸⁰

³⁷⁴ *Noble, ibid.* at para. 52-53.

³⁷⁵ *Ibid.* at para. 82.

³⁷⁶ *Ibid.* at para. 119.

³⁷⁷ *Ibid.* at para. 121.

³⁷⁸ *Ibid.* at para. 130.

³⁷⁹ *Ibid.* at para. 134.

³⁸⁰ *Ibid.* at para. 134 and 136. See also *Criminal Code*, *supra* note 2 at s. 810(3.1) and s. 810(3.2).

As for section 810.01, the Court explains that this provision is used where there is “...fear of organized crime and terrorist activities”.³⁸¹ The restrictive conditions that can be imposed under that section includes “...the prohibition of possessing weapons”.³⁸²

The Court also looked at the breadth of restrictive conditions that can be imposed under section 810.1 which targets paedophiles who would commit sexual offences against persons under the age of sixteen.³⁸³ The Court noted that section 810.1 enables a judge to order restrictive conditions, such as prohibiting the defendant to engage “...in any activity that involves contact with persons under the age of fourteen years”, and attending places where these persons could “...reasonably be expected to be present”.³⁸⁴

As for section 810.2, which is available in cases where it is feared that an individual might commit a serious personal injury offense, the Court explains that the restrictive conditions that can be imposed by the presiding judge include the “prohibition of possessing weapons” and “...the obligation to report to correctional or police authorities”.³⁸⁵

In all cases, namely sections 810, 810.01, 810.1 and 810.2, the Court in *Noble* remarks that the presiding judge can also impose any other reasonable conditions similar to the ones prescribed in the specific provision.³⁸⁶ In the case of section 810.2, the Quebec Superior Court stated that other reasonable conditions which can be imposed have to be

³⁸¹ *Noble, ibid.* at para. 137.

³⁸² *Ibid.* at para. 139. See also *Criminal Code, supra* note 2, at s. 810.01(5).

³⁸³ *Noble, ibid.* at para. 140.

³⁸⁴ *Ibid.* at para. 141.

³⁸⁵ *Ibid.* para. 143.

³⁸⁶ *Ibid.* at para. 149.

similar in essence to the “prohibition of possessing weapons” and the obligation to report to authorities.³⁸⁷

Thus, due to the lack of similarity with the specified conditions in section 810.2, the Court concluded that some of the conditions imposed on Mrs. Teale were not reasonable. These conditions included a prohibition to enter into contact with violent offenders or families of past victims; possession of illicit substances; prohibition to work where she “...would be placed in a position of trust vis-à-vis persons under the age of sixteen”; as well as an obligation to give a DNA sample or to follow a therapy with a mental health professional.³⁸⁸ Therefore, the Court clarified the breath of the restrictive conditions available under a recognizance order pursuant to section 810.2 of the *Criminal Code*.

In conclusion, the Quebec Superior Court adopted the reasoning of the Court in *Budreo* as to the reasonableness of the breadth of the conditions available under a section 810.2 recognizance order. Perhaps the most relevant comment of the Court to our analysis resides in the judge’s caution as to the use of recognizance orders to prevent crime. In this regard, the Court restated the findings of the Ontario General Division Court in *Budreo* to the effect that “...where there has been no offence and only a likelihood of harm proven, the restrictions imposed in the name of preventive justice can only be relatively slight”.³⁸⁹ As we explained earlier, however, courts may actually impinge upon the rights of a potential offender when imposing recognizance orders.

³⁸⁷ *Noble, ibid.*

³⁸⁸ *Ibid.* at para. 153. See also conditions 7 to 14 as cited in the Appendix of the decision in *Noble*.

³⁸⁹ *Ibid.* at para. 145, citing *Budreo*, Ont. Gen. Crt., *supra* note 342 at para. 69.

viii) Other Relevant Case Law Pertaining to Recognizance Orders Under Sections 810.1 and 810.2 of the *Criminal Code*

The Courts in the cases of *Budreo* and *Noble* have examined the constitutionality of sections 810.1 and 810.2 of the *Criminal Code*. They have confirmed the constitutionality of the scheme, its preventive nature, as well as the fact that recognizance orders are not to be considered as offences. In these decisions, the court also clarified the breadth of restrictive conditions: the presiding judge can only impose reasonable conditions which are similar to the ones already provided in the provision.

There have been other important interpretations by courts as to the applicability of sections 810.1 and 810.2 recognizance orders. The following paragraphs will examine some of these decisions.

In *R. v. Obed*,³⁹⁰ the Nova Scotia Provincial Court heard an application for a recognizance order under section 810.2. In that case, the Crown sought a recognizance order that would have imposed restrictive conditions upon the defendant's release from prison. The court specified that the past conduct of the offender was relevant to determining if he or she should be subjected to restrictive conditions pursuant to a recognizance order, but that it was the present situation which was essential to the determination of dangerousness.³⁹¹ In the court's opinion, "[t]he past act can operate as the thermometer, so to speak, to gauge the present behaviour".³⁹²

³⁹⁰ *R. v. Obed*, 2000 CarswellNS 95, [2000] N.S.J. No. 18 [*Obed* cited to Carswell].

³⁹¹ *Ibid.* at para. 36. On that note, it is worth pointing out the reasoning of the Court in *Baker*, *supra* note 11 at para. 32, cited in *Obed*, *supra* note 390, at para. 51, with respect to the "present situation" of the potential offender: [i]f the Crown can point to a "contemporary act" of the defendant then this will undoubtedly bolster the Crown's case on reasonable grounds. However, this does not mean that an "act" of the defendant need be demonstrated before a recognizance can be issued".

³⁹² *Obed*, *ibid.* at para. 36.

Furthermore, in *Obed*, the court interpreted Parliament's objective in enacting section 810.2 and explained that it was "...to be used as a shield and not as a sword".³⁹³ The court explains as follows: "Parliament intended it, I think, to protect, in a positive passive manner, individual members of society who may be vulnerable to the offender, and not for it to be used as a negative pro-active tool to identify, vilify and subject otherwise innocent persons to legal process without just cause".³⁹⁴ Therefore, according to the court, the aim of section 810.2 is "...to protect the community from high risk offenders and low risk nonviolent offenders".³⁹⁵

The court also distinguishes the scheme under section 753 of the *Criminal Code* (dangerous offender designation) and section 810.2 and remarks that while the two sections are concerned with the "present behaviour of the defendant", they do so in a "different and distinct manner". The court considers section 810.2 as only applicable to persons who can be identified, and not to the community as a whole.³⁹⁶ It states the following:

Therefore, I think that the section must be confined to the protection of identifiable persons who can cause or suffer an injury. Here, the community per se, cannot suffer bodily harm, be sexually assaulted or ha[ve] its life endangered. In short, the community is not a living human being. In the end, having regard to the natural and ordinary meaning of the words used, the community per se, in my opinion, is not a person as envisaged by the section. Thus, the community per se, cannot avail itself to the section as it is presently worded.³⁹⁷

With respect to the constitutionality of section 810.2, the court explains that recognizance orders under this section are reasonable. In the court's opinion, individuals cannot have

³⁹³ *Ibid.* at para. 37.

³⁹⁴ *Ibid.*

³⁹⁵ *Ibid.* at para. 67.

³⁹⁶ *Ibid.* at para. 63.

³⁹⁷ *Ibid.* at para. 66.

restrictive conditions imposed upon them based only on the fact of what they represent, due to their past behaviour.³⁹⁸ The simple fact that a person has committed a crime in the past should not be sufficient to trigger a section 810.2 recognizance order.³⁹⁹ Therefore, the ambit of section 810.2 is not to address the concern of society towards a particular individual, but rather the imminent risk of dangerousness that he or she may present.

Before examining other decisions pertaining to the applicability of recognizance orders, it is worth pointing out that in *Obed*, the defendant was a member of a group of Inuit who had a history of difficulty of integration due to forced dislocation.⁴⁰⁰ This point is relevant because the court did mention the evidence given by a mental health expert who had "...comment[ed] on the culturally inherent biases" of some risk assessment tools. In fact, during the defendant's incarceration, various risk assessment tools, including the Hare PCL-R, were administered to evaluate his risk of dangerousness.⁴⁰¹ Once again, problems in the reliability of assessment tools, and more specifically when they are applied to some cultural minorities, are noted. It is argued that special consideration should also be given by judges when weighing the evidence emanating from risk assessment tools in cases involving minorities since the assessment tools may not have been validated. In this regard, some studies suggest that assessment tools may not perform as well with minorities.⁴⁰² This is a particularly relevant issue, when it is considered that minorities are often "...over-represented in the criminal justice system".⁴⁰³

³⁹⁸ *Obed*, *ibid.* at 78.

³⁹⁹ *Ibid.*

⁴⁰⁰ *Ibid.* at para. 3.

⁴⁰¹ *Ibid.* at para. 8.

⁴⁰² See for example Douglas L. Epperson *et al.*, "Minnesota Sex Offender Screening Tool-Revised (MnSOST-R) Technical Paper: Development, Validation, and Recommended Risk Level Cut Scores" (2003),

Several other decisions in Canadian criminal jurisprudence have examined the applicability of recognizance orders under sections 810.1 and 810.2. For example, in *R. v. Bateman*⁴⁰⁴, the Ontario Supreme Court of justice limited the applicability of recognizance orders to “..., persons who pose the greatest threat to all other members of society”.⁴⁰⁵

In the decision of *R. v. Falle*⁴⁰⁶, the Alberta Provincial Court explained that “...section 810.2 enacts concepts of preventive or restorative justice”.⁴⁰⁷ The court explains the following:

I find that this section of the Criminal Code is Parliament's attempt to move away from mere punishment to something approaching penitence by attempting to achieve character reform for those who have demonstrated habits and actions and lifestyles that are violent and dangerous to the peace of civil society.⁴⁰⁸

In the eyes of the court, a recognizance order under section 810.2 can be viewed as a tool utilized to achieve “post-release supervision” in order to protect vulnerable members of the society in cases where the offender was not reformed.⁴⁰⁹

Furthermore, in *R. v. George*, the Ontario Court of Justice commented on the sufficiency of the evidence needed to trigger the issuance of a recognizance order. The court stated

online: Minnesota Sex Offender Screening Tool – Revised

<<http://www.psychology.iastate.edu/~dle/TechUpdatePaper12-03.pdf>, at 22.

⁴⁰³ Joanne Fuller, “Assessing and Supervising Violent Offenders in the Community, A Report to the Multnomah County Board of County Commissioners And The Local Public Safety Coordinating Council” (14 July 2005), online: Department of Community Justice, Multnomah County Oregon <http://www.co.multnomah.or.us/dcj/violence_report05.pdf>, at 8.

⁴⁰⁴ *R. v. Bateman*, 2006 CarswellOnt 9391, O.J. No. 2219 (Ont. S.C.J.) [Bateman cited to Carswell].

⁴⁰⁵ *Ibid.* at para.7, also cited in *R. v. Helary*, 2006 CarswellNfld 323 [Helary], at para. 7.

⁴⁰⁶ *R. v. Falle*, 2001 CarswellAlta 185, 2001 ABPC 36, 285 A.R. 391 [Falle cited to Carswell].

⁴⁰⁷ *Ibid.* at para. 7.

⁴⁰⁸ *Ibid.*

⁴⁰⁹ *Ibid.* See also *George*, *supra* note 332 at para.3, where the Court states that section 810.2: “..., is aimed at creating a mechanism for some modest level of community supervision for individuals who are found by the Court to present a particular and demonstrable risk to others”.

that in general, “...past behaviour itself is the most reliable predictor of future conduct”.⁴¹⁰ According to the court, “[m]any s.810 applications require nothing more by way of evidentiary foundation than the criminal history of the defendant to secure an order”.⁴¹¹ Arguably, this view is diametrically opposed to the general approach taken by courts when weighing evidence in criminal law. More factors should be taken into account than the criminal history of the defendant, including the current situation of the offender.

In *George*, the court also pointed out that where there are no criminal records, expert assessment as to the risk of future dangerousness is desirable, if not required.⁴¹² The court also demonstrates a reluctance to accept the interpretation of risk assessments tools, such as the VRAG and HCR-20, from a lay person. In other words, the complexity of the results obtained with these tests can be better understood and explained by mental health professionals.⁴¹³ In other words, expert testimony on the risk of future behaviour will “carry more weight” than the one given by a lay person.⁴¹⁴ This view agrees with the reasoning of the judge in *Budreo* where he stated that risk factors “...need to be professionally evaluated to assess a person's risk of reoffending”.⁴¹⁵

Conversely, there is some case law supporting the idea that the use of expert opinions is not required in all cases.⁴¹⁶ In *Giroux c. Pelletier*, the Court of Quebec explained that in cases involving individuals with no prior criminal history, the required proof necessary to

⁴¹⁰ *George, ibid.* at para. 31.

⁴¹¹ *Ibid.*

⁴¹² *Ibid.* at para. 31.

⁴¹³ *Ibid.* at para. 31 and 32.

⁴¹⁴ *George, ibid.* at para. 31.

⁴¹⁵ *Budreo*, Gen. Crt., *supra* note 342 at para. 84. See also *Giroux c. Pelletier* 2009 CarswellQue 5560, 2009 QCCQ 4870, EYB 2009-159848 [*Giroux* cited to Carswell], at para. 19.

⁴¹⁶ *Giroux, ibid.* at para. 28.

obtain a recognizance order might be more difficult to present because of clarity issues as to his or her potential dangerousness.⁴¹⁷ In those cases, expert evidence would be needed. However, in cases involving multi-recidivists, the required proof may be easier to demonstrate, and the use of expert evidence may be less important.⁴¹⁸

ix) The Detrimental Consequences of a Determination of Dangerousness and the Imposition of a Recognizance Order upon a Potential Offender

The Court of Appeal in *Budreo* considered the restrictive conditions imposed on the defendant under section 810.1 as “...stop[ping] short of detention or imprisonment”.⁴¹⁹ However, on this point, the court made no mention of the consequences of imprisonment for a period of up to two years in case of a refusal to enter into a recognizance or a breach of the recognizance.⁴²⁰ This is an alarming situation, especially when we consider that risk assessment tests are not always reliable, and that judges rely on them, nevertheless, to determine the likelihood of the future dangerousness of an individual.⁴²¹ The imposition of restrictive conditions upon an individual on the basis that he might commit a crime is also at odds with the principle that in “...a democratic society under the rule of law and the Constitution..., there should be no coercive intervention by the state without a high measure of certainty that a crime has been, is being or will be committed”.⁴²² While

⁴¹⁷ *Ibid.*

⁴¹⁸ *Ibid.*

⁴¹⁹ *Budreo*, *supra* note 8 at para.39.

⁴²⁰ See generally *Criminal Code*, *supra* note 2 at ss. 810.01(4); 810.1(3.1); 810.2(4) and 811. It is worth pointing out that in the case of a refusal to enter into a recognizance under section 810.1 or 810.2 of the *Criminal Code*, the period of imprisonment cannot exceed twelve months [s.810.1(3.1) and s.810.2(4)].

⁴²¹ But see *Cohen*, *supra* note 14 at 425, where he notes that much deference is accorded to officials in making a determination of dangerousness since it is an “imprecise art”. In support of this contention, *Cohen*, *ibid.* at 425, also cites *Morales*, *supra* note 334 at 738: “[w]hile it is undoubtedly the case that it is impossible to make exact predictions about recidivism and future dangerousness, exact predictability of future dangerousness is not constitutionally mandated”.

⁴²² *Cohen*, *ibid.* at 412.

the conditions imposed under sections 810.1 or 810.2 might be viewed as reasonable and necessary to prevent the commission of an offense, some conditions can prove to be particularly detrimental to an offender's reintegration into society. For example, restrictive conditions can literally confine a potential offender to his or her place of residence.

In *Budreo*, the court even acknowledged that "...it [was] fair to conclude that detention or imprisonment under a provision that does not charge an offence would be an unacceptable restriction on a defendant's liberty and would be contrary to the principles of fundamental justice".⁴²³ Adding to this statement, the court also explained that the reasonableness of the conditions imposed upon the defendant enabled him "...to lead a reasonably normal life" but did not consider explicitly the real consequences upon the defendant's life.⁴²⁴

In the case of *R. v. George*, the court described the serious implications of a section 810 recognizance order in these terms:

The s.810 order may have a very significant impact on the liberty of the subject. These orders are registered in law enforcement databases, require regular reporting to the police, impose limits on freedom of mobility and association, and carry penal sanctions for failing to comply. Undoubtedly a significant stigma also attaches to such an order...⁴²⁵

Recognizance orders are powerful tools that can have serious implications on the life of potential offenders. In the next paragraphs, the potential detrimental effects of recognizance orders on the life of potential offenders will now be examined.

⁴²³ *Budreo*, *supra* note 8 at para. 39.

⁴²⁴ *Ibid.*

⁴²⁵ *George*, *supra* note 332 at para. 22.

x) Examples of Difficulties that can be Encountered by Potentially Dangerous Individuals when Trying to Abide by the Conditions of Recognizance Orders

In some cases, it might prove untenable for the offender to obey all the imposed conditions if he or she wants to live a normal life or to seek and find employment. The detrimental consequences of restrictive conditions under a recognizance order were examined by the John Howard Society. The John Howard Society described the restrictive nature of recognizance orders in the following terms:

On the surface, the high-risk peace bond measure appears reasonable, but when a number of conditions are imposed, particularly when they are not realistic, offenders may be unable to abide by them. Consequently, released offenders subject to a peace bond have an inordinately difficult time staying out of jail.⁴²⁶

It is argued that restrictive conditions pursuant to recognizance orders are not only supervisory measures, but also constitute a form of preventive detention in society. Despite the potential offender's best intentions when facing a recognizance order, he or she may very well breach the conditions of the order because of the virtual impossibility of abiding by them completely without remaining confined in their home. For example, an individual may have a hard time going to work without approaching areas where children are present. He or she may run afoul of conditions of his recognizance orders without even being aware of it. However, in this regard, there is some case law to the effect that a breach of recognizance order (at least under section 810(3)) requires a mental element, where "...guilt may not result from mere carelessness or negligence or forgetfulness".⁴²⁷ Moreover, "...a mental element is required for a breach under section

⁴²⁶ John Howard, *"Dangerous Offenders"*, *supra* note 51.

⁴²⁷ *R. v. Monroe* [1998] Q.J. No. 1415, 1998 CarswellQue 860, 19 C.R. (5th) 359 [*Monroe* cited to Carswell], at para. 17, cited in Solicitor General of Canada, *High-Risk Offenders: A Handbook for Criminal Justice Professionals*, online: National Institute of Corrections

810 such that there is "...the wilful action of an accused knowing that it is contrary to the terms of an existing recognizance".⁴²⁸

Nevertheless, restrictive conditions may, on some occasions, impose a heavy burden on an individual. This situation was once again highlighted by the John Howard Society that mentioned the case of a sex offender from Alberta who had been subjected to restrictive conditions under section 810.2. According to the John Howard Society, the conditions of the recognizance order included the following obligations:

...inform local police about a change in residence, providing at least 24 hours before the change; ..., report weekly to a specified detective in a city about 100 kilometers away, even though he does not have a vehicle;..., not come within 100 meters of a public area where children under the age of 14 might be present;..., [or] enter a residence within which live children under 14 years of age".⁴²⁹

Arguably, most of these restrictive conditions may appear reasonable at first glance since the Court was confronted with a convicted sex offender. However, by the John Howard Society's own description of the consequences on the life of the offender, it quickly becomes apparent that the restrictive conditions were hindering the possibility of the offender's reintegration.

In the case described by the John Howard Society, the conditions imposed on the sex offender were breached by him on several occasions.⁴³⁰ The Society states that at one point, the offender changed residence and failed to notify the police. But in reality, he "...was evicted from a hotel in which he was living after his identity and sex offender

<http://ww2.pssp.gc.ca/publications/corrections/pdf/200105_handbook_e.pdf> [PSC, "High Risk Offenders"], at 124.

⁴²⁸ *Ibid.*

⁴²⁹ John Howard, "Dangerous Offenders", *supra* note 51.

⁴³⁰ *Ibid.*

status was publicized”.⁴³¹ According to the Society, the offender then tried to contact the police to notify them but to no avail. He decided to leave a message, but he breached his recognizance order because he had failed to notify the police 24 hours prior to a change of residence.⁴³² The offender then breached his recognizance order a second time “...when he moved in with his wife because she [was] liv[ing] across the street from a playground”.⁴³³

The sex offender stigma, coupled with the restrictive conditions attached to a recognizance order, also caused several problems to the offender, including difficulties in seeking employment or receiving welfare benefits.⁴³⁴ According to the John Howard Society, the restrictive conditions imposed on the offender had a punitive effect rather than a preventive one:

As it stands, he cannot walk down the street without potentially passing a young child. He risks returning to jail on a daily basis and is forced to stay in his hotel room twenty-four hours a day. In effect, the peace bond provision set out in section 810.2 of the Criminal Code, to which L. J. is subject, is operating as a punitive provision.⁴³⁵

Therefore, conditions under a section 810.2 recognizance order can have far reaching consequences on the liberty of an individual. They can not only restrict movement, but also the ability to function properly in society. In the end, it is the reintegration of the offender that suffers. Consequently, it is argued that a court should exercise great care in imposing restrictive conditions pursuant to a recognizance order. The importance of

⁴³¹ John Howard, “*Dangerous Offenders*”, *ibid.*

⁴³² *Ibid.*

⁴³³ *Ibid.*

⁴³⁴ *Ibid.*

⁴³⁵ *Ibid.*

rehabilitation and reintegration into society must also be weighed by the court before imposing a recognizance order.⁴³⁶

Furthermore, although the imposition of a recognizance order is not, “technically speaking”, the result of an offence as seen in *Budreo* and *Noble*, the effect of a breach of a restrictive condition under such an order does constitute an offence under section 811. In the Proceedings of the Special Senate Committee on Anti-terrorism Issue⁴³⁷ which looked at the consequences of the enactment of section 83.3 of the *Criminal Code*, Craig Forcese made the following observations with respect to the breach of conditions under a recognizance order: “[t]o set up a condition that is essentially a hair trigger, the effect is to convert a pre-emptive mechanism — a condition that avoids or mitigates the chances that an individual will be a threat — to an actual prosecution for an activity that, otherwise, is considered banal...”.⁴³⁸ It is argued that given the serious implications of a

⁴³⁶ The problem of proper reintegration into society posed by the implications of sections 810.1 and 810.2 recognizance orders on the life of potentially dangerous individuals is arguably not limited to the Canadian situation. For example, in Australia, the case of post-sentence restrictive conditions was examined recently in McSherry, Bernadette, *High Risk Offenders: Continued Detention and Supervision options*, Community Issues Papers (August 2006), online: Sentencing Advisory Council: <http://www.sentencingcouncil.vic.gov.au/wps/wcm/connect/Sentencing+Council/resources/file/eb20460d6d23bdf/High-Risk_Community_Issues_Paper.pdf> at 39: “[a]nother issue concerns the conditions that can be imposed in extended supervision orders. Orders can contain highly restrictive conditions which may severely limit offenders’ opportunities for normal day-to-day interaction. Offenders who have completed parole and are subsequently placed on an extended supervision order may find the conditions more onerous than their parole conditions. Although restrictive conditions may be considered necessary to protect the community, their effect may be to ‘punish’ offenders by restricting their liberty at the expense of aiding their rehabilitation and reintegration into the community. There was concern that the number and degree of conditions of an extended supervision order have the potential effectively to transform it into a form of continued detention”.

⁴³⁷ Parliament of Canada, *Proceedings of the Special Senate Committee on Anti-terrorism Issue-Evidence-Meeting*, Issue 2, January 28, 2008, Second Session, Thirty-ninth Parliament, 2007-2008, Chair: The Honourable David P. Smith, P.C., [Proceedings], online: <http://www.parl.gc.ca/39/2/parlbus/commbus/senate/Com-e/anti-e/02eve.htm?Language=E&Parl=39&Ses=2&comm_id=597>.

⁴³⁸ *Ibid.*

recognizance order and the risk of breaching a restrictive condition, these orders should only be imposed upon past convicted dangerous offenders.

xi) The Over-Prediction of Dangerousness by Members of the Judiciary

In Chapter V, we examined some of the problems associated with reliability in risk prediction tools used by mental health professionals. We also looked at how judges normally use these tools to assess the potential dangerousness of an individual in dangerous offender legislation and recognizance orders under sections 810.1 and 810.2.

However, as some of the findings of a new study reveal, there is evidence that members of the judiciary are over predicting the risk of future behaviour despite the use of risk prediction tools.⁴³⁹ In the study by Lussier *et al.*, the profiles of high-risk offenders under supervision (or bound by recognisance orders under section 810 of the *Criminal Code*) are examined. Of particular relevance to our analysis, Lussier *et al.* make the following observations: "...from those that have been identified by the courts as high-risk offenders to commit a sex crime while in the community, we found that about 50% did not meet the requirement of high risk when taking into account the two risk assessment tools [namely the Static-99 and the Stable]".⁴⁴⁰ In the words of the researchers, the Courts labelled a substantial proportion of individuals as dangerous and imposed community supervision under section 810, despite a low risk to re-offend.⁴⁴¹ Once again, the results of this research demonstrate that judges must be particularly vigilant in assessing the evidence in a section 810 hearing.

⁴³⁹ Patrick Lussier, Nadine Deslauriers-Varin & Tricia Râtel, "A Descriptive Profile of High-Risk Sex Offenders Under Intensive Supervision in the Province of British Columbia", Canada, *International Journal of Offender Therapy and Comparative Criminology*, (15 October 2008), online: Sage Journal Online <<http://ijo.sagepub.com/cgi/rapidpdf/0306624X08323236v1.pdf>>[Lussier], at 19.

⁴⁴⁰ Lussier, *ibid.*

⁴⁴¹ *Ibid.*

In the context of a statute which is primarily aimed at preventing crimes, by the imposition of restrictive conditions that undeniably affect fundamental principles of justice, it is a rather alarming situation. As explained earlier, not only are assessment tools plagued with reliability issues, but it appears that some members of the judiciary are over-predicting the results obtained by these tools. Perhaps, test results are prone to be misunderstood, partly because they can be difficult to interpret. However, arguably, the possibility of letting a potentially dangerous individual roam freely in the community, and later to commit a crime, may very well play a role in some judges' over-prediction. In other words, some members of the judiciary may be tempted to subjectively interpret test results in favour of a positive determination of dangerousness so as not to take any risk of enabling a potentially dangerous individual to commit a crime. In the eyes of the community, the negative consequences of a crime would be far more apparent than the ones attached to a false positive interpretation.

xii) The Severe Implications of a Refusal to Enter into a Recognizance Order, or a Breach of a Restrictive Condition

Earlier, it was explained that recognizance orders under sections 810.1 and 810.2 have been characterized as preventive measures rather than punitive ones, and that they do not constitute offenses.⁴⁴² While the imposition of a recognizance order is not technically the result of an offense, the failure or refusal to enter into one can constitute an offense for which punitive measures can be applied. Considering that most restrictive measures under a recognizance order will seek to limit otherwise banal activities (like taking a walk near a school), it is important to understand the consequences of a failure to abide by the

⁴⁴² See generally *Budreo*, *supra* note 8.

conditions.⁴⁴³ In fact, not only does the scheme under section 810.1 and 810.2 rely on an imprecise system of determination of dangerousness to impose recognizance orders, it also creates a new opportunity for the State to prosecute potentially dangerous individuals when they fail to abide by the conditions of the order.

In fact, failure or refusal to enter into a recognizance order can be severely punished by the court. For example, section 810.1(3.1) provides the following:

(3.1) The provincial court judge may commit the defendant to prison for a term not exceeding twelve months if the defendant fails or refuses to enter into the recognizance.⁴⁴⁴

Moreover, it is important to note that the breach of a recognizance order is considered an offense. The breach of a recognizance order can have serious repercussions on a potential offender. Section 811 provides:

811. A person bound by a recognizance under section 83.3, 810, 810.01, 810.1 or 810.2 who commits a breach of the recognizance is guilty of
(a) an indictable offence and liable to imprisonment for a term not exceeding two years; or
(b) an offence punishable on summary conviction.

As noted earlier, the detrimental effects of a breach of section 811 were recently examined in the Proceedings of the Special Senate Committee on Anti-terrorism Issue.⁴⁴⁵ Some members of the Committee criticised the “prosecution [of an] activity that, otherwise, is considered banal”.⁴⁴⁶ Viewed from this angle, it could be argued that the

⁴⁴³ This question was addressed by Craig Forcese in Proceedings, *supra* note 437.

⁴⁴⁴ *Criminal Code*, *supra* note 2 at s. 810.1(3.1). See also *ibid.* at s. 810.2(4).

⁴⁴⁵ Proceedings, *supra* note 437.

⁴⁴⁶ *Ibid.* Comments from Craig Forcese. While it could be argued that Mr. Forcese was making these observations in the context of section 83.3 of the *Criminal Code* which provide for recognizance orders in suspected terrorists cases, the same reasoning could arguably be applied to sections 810.1 and 810.2 of the *Criminal Code*. In fact, with the exception of the intended victims it seeks to protect, both sections 83.3, 810.1 and 810.2 are identical in nature.

scheme under sections 810.1 and 810.2 is not so concerned with the prevention of crimes, as with a new opportunity for the State to catch potentially dangerous individuals in conduct that would otherwise be considered legitimate.

The breach of recognizance orders was also analysed at length in the decision of *R. v. Helary*.⁴⁴⁷ In that case, the Newfoundland and Labrador Provincial Court underlined the seriousness of a breach of condition under a recognizance order which can amount to a lengthy period of incarceration.⁴⁴⁸ In the Court's opinion, when sentencing an individual for a breach of condition, the court should impose a sentence which takes into account the safety of the community.⁴⁴⁹ According to the Court, "[t]he community's safety can best be achieved by imposing sentences which ensure that those bound by a section 810.2 recognizance clearly understand that a breach of such an order will consistently result in considerable periods of imprisonment being imposed".⁴⁵⁰ Objectives of deterrence in the sentencing of the accused under section 811 are therefore inherent to the provision. Other sentencing principles under section 811 denoted by the Court in *Helary* include the following:

- the protection of the public is the Court's primary concern;
- particular emphasis must be placed upon both specific and general deterrence and the separation of the offender from society when necessary;
- rehabilitation will be of a much lesser concern than in sentencing for other offences;

⁴⁴⁷ *Helary*, *supra* note 405.

⁴⁴⁸ *Ibid.* at para. 10.

⁴⁴⁹ *Ibid.*

⁴⁵⁰ *Ibid.* See also *R. v. Spurr*, 2000 CarswellOnt 6527 (Ont. C.J.)(*Spurr*), cited in *Helary*, *supra* note 405 at para. 73-75. In *Spurr*, at para. 9, the Ontario Court of Justice states that in considering the relevant factors when sentencing, a court in order must "... impose a just sentence which has as its objective, an appropriate blend of the need to separate the accused from society to reflect the gravity of the offence before the Court, to deter others, to deter the accused and to consider the accused's rehabilitation."

- the proportionality principle must be applied, but the Court must also consider the nature of the order that was breached and the potential danger to the public that the offender poses;
- a breach of a section 810.2 recognizance is a signal or warning to the Court that the monitoring and controlling of the offender's behaviour and actions, so as to protect the public from him or her, cannot be achieved in the community; and
- the appropriate sentence will normally involve lengthy periods of imprisonment and probation.⁴⁵¹

The decision in *R. v. Spurr* also gives light to the principles of sentencing under section 811.⁴⁵² In that case, the court cautioned members of the judiciary that a reasonable and proportionate sentence should be ordered when a restrictive condition is breached:

The fact that a peace bond is a prophylactic tool designed to prevent wrong-doing before it occurs does not mean that a sentencing court can impose a sentence of a length that is completely disproportionate to the gravity of the conduct before the court as a pure exercise of preventative detention.⁴⁵³

Finally, in *R. v. Labbe*,⁴⁵⁴ the Court reiterated the importance of the societal concern of the protection of the public from potentially dangerous individuals when sentencing them for a breach of a condition imposed under section 810.2. In the Court's opinion, the non-respect of the conditions creates a situation where there is a real risk of dangerousness.⁴⁵⁵

The consequences of a breach of a condition or a refusal to enter into a recognizance order under section 810.2 (and 810.1) are serious and entail the possibility of a lengthy period of incarceration. Because the imposition of a recognizance order is normally applied to potentially dangerous individuals, the court will not view a breach of a restrictive condition under a favourable eye, out of concern for the protection of the public. In effect, what section 811 does is to create an offense for a breach of a

⁴⁵¹ *Helary*, *supra* note 405 at para. 92.

⁴⁵² *Spurr*, *supra* note 450.

⁴⁵³ *Spurr*, *ibid.* at para.10, cited in *Helary*, *supra* note 405 at para.75.

⁴⁵⁴ *R. v. Labbe*, [2006] O.J. No. 512 (Ont. C.J.), [2006] O.J. No. 512[*Labbe*], at para. 25, cited in *Helary*, *ibid.* at para. 84.

⁴⁵⁵ *Labbe*, *ibid.*

recognizance order under section 810.1 or 810.2. One must not forget that these recognizance orders are often applied based on a determination of dangerousness that is far from being completely accurate. As well, the restrictive conditions normally imposed under a recognizance order would not constitute an illegal activity in the case of an individual who poses no risk to society. By imposing restrictive conditions under which to perform otherwise regular and legitimate activities, the State effectively opens the door to monitoring and prosecution of potentially dangerous individuals, even after their mandatory prison sentence. In other words, section 811 acts like the sword of Damocles, dangling over the head of the suspected dangerous individual. If the individual is truly dangerous, this may very well be an acceptable position. However, one must never forget that a determination of dangerousness is prone to false positives.

xiii) Conclusions on the Applicability of Recognizance Orders under Sections 810.1 and 810.2 of the *Criminal Code*

From the above analysis, it is possible to underline the following tendencies. First, Canadian courts appear to accept the notion that dangerousness can be proven, although the required threshold is subject to interpretation. Secondly, in the cases that were examined, the informants who had a fear of imminent danger were generally members of the police or correctional services. As a matter of fact, “[o]rdinarily, police and/or provincial crown attorneys apply for sections 810.1 and 810.2 of the *Criminal Code*”.⁴⁵⁶ Moreover, courts rely on all relevant evidence to make a determination as to the “likelihood of future dangerousness”, which is the required threshold to issue a recognizance order. Courts adopted the “likelihood of future dangerousness” threshold

⁴⁵⁶ Public Safety, *supra* note 263.

from the approach taken in dangerous offender designations and bail hearings, but did not modify it. Consequently, it appears that the impossibility of predicting future dangerousness with accuracy is not an argument against the validity of the preventive scheme under sections 810.1 and 810.2. The case of *Lyons*, although concerned with a dangerous offender application, established the required threshold to determine dangerousness, namely a “likelihood of future conduct”.⁴⁵⁷ It confirmed that while psychiatric predictions of dangerousness may be unreliable, it is for the court to ultimately decide the weight to be given to the evidence.⁴⁵⁸ Of course, in *Lyons*, the Court was examining the dangerous offender scheme which deals entirely with the sentencing and labelling of convicted criminals who have demonstrated a pattern of violence.⁴⁵⁹ In a section 810.1 or 810.2 application, the court is not faced with a sentencing decision. Though in practice the court will have to determine the potential dangerousness of an individual who already has a criminal record, the legislation allows for the imposition of restrictive conditions upon an individual who has no criminal history. According to the decision on *Noble*, courts will impose a recognizance order under section 810.1 or 810.2, if it is satisfied on a balance of probabilities that the individual poses an imminent risk of dangerousness.⁴⁶⁰ In *Noble*, the court interpreted the threshold for proof of dangerousness under section 810.1 as being higher than a simple likelihood of dangerousness, because the legislation “...speaks of a reasonably grounded fear that the defendant “will” commit an offence”.⁴⁶¹

⁴⁵⁷ *Lyons*, *supra* note 149 at 364-365.

⁴⁵⁸ *Ibid.* at para. 98.

⁴⁵⁹ *Ibid.* at para. 71-74.

⁴⁶⁰ See generally *Noble*, *supra* note 9.

⁴⁶¹ *Ibid.* at para. 44.

While courts have examined the problem of inaccuracy in the context of dangerous offender legislation, they have remained silent on the issue with respect to recognizance orders under sections 810.1 and 810.2. In fact, the problem of the reliability of risk assessment tools and the possibility of false positive determinations, coupled with potential biases in psychological assessments due to the adversarial setting have not been addressed in the context of recognizance orders under sections 810.1 and 810.2. It has been established in *Lyons* that the required threshold to demonstrate dangerousness appears to be higher than a simple likelihood of dangerousness. However, the very process by which a risk of future dangerousness is determined and on which the court will weigh its decision can be inaccurate. Since the imposition of a recognizance order can have serious coercive effects on the liberties of an individual, it would have been appropriate to examine the process of the determination of dangerousness.

Multiple questions remain unanswered as to the real consequences of a recognizance order, especially when it is applied to an individual with no prior history of criminal activity. Recognizance orders have coercive aspects which can severely curtail the liberties of an individual. Recent research has demonstrated that restrictive conditions under a recognizance order can “...put further hurdles on the community reintegration” of potential offender.⁴⁶²

It is, therefore, worthwhile to examine the approach taken in other jurisdictions to compare their schemes of preventive measures applied to potentially dangerous individuals. In the next chapter, we will look at the French system of preventive measures

⁴⁶² Lussier, *supra* note 439 at 18.

which, in some aspects, resembles our system of recognizance orders. However, as we will demonstrate, the French legislator has decided not to apply preventive measures to individuals who have never committed a crime. In fact, the French scheme expressly limits the applicability of preventive measures to convicted offenders. While it is true that in practice, the applicability of the Canadian scheme is also limited to convicted offenders, sections 810.1 and 810.2, nonetheless, allow for the imposition of recognizance orders on individuals who have never committed a crime. Considering the fact that recognizance orders are imposed based on evidence demonstrating potential dangerousness, a process often plagued with problems of inaccuracy, the express limited applicability of the French scheme may very well be a reasonable compromise. Furthermore, as will be demonstrated in the next chapter, the particularities of the French investigatory system, which favours a concerted approach between experts in the determination of dangerousness and diminishes the risk of biases, also offers potential alternatives that are worth analysing.

CHAPTER VIII – PREVENTIVE MEASURES IN FRENCH CRIMINAL LAW

In countries where the rule of law is paramount to maintain peace and order, it could be argued that prophylactic measures such as peace bonds and recognizance orders are a natural extension of one of the objectives of criminal law, namely the prevention of crime. In France, like Canada, crime prevention is also one of the objectives of criminal law. Therefore, one could reasonably assume that the French legislators have enacted legislation similar to the Canadian approach to prevent crimes and control the dangerousness of particular violent individuals. While this affirmation is partly true, there are very important differences between the two systems.

It is true that both systems have laws dealing with potentially dangerous offenders. For example, one can immediately think of the dangerous offender and long term offender legislation in Canada⁴⁶³ and the *Loi sur la rétention de sûreté*⁴⁶⁴ in France. However, while the Canadian system explicitly allows the issuance of recognizance orders aimed at preventing potentially dangerous individuals from committing new crimes, the French system has no similar statutory provisions. This situation appears at odds with the fact that the concept of dangerousness or *dangerosité* (as it is known in France) and its control have been the primary focus of several new statutes enacted in recent years in France.⁴⁶⁵

The next section will examine the non-existence of peace bond provisions and recognizance orders in French criminal law. Attention will then be given to possible explanations which could shed light on the non-existence of these preventive measures in

⁴⁶³ *Criminal Code*, *supra* note 2 at Part XXIV.

⁴⁶⁴ *Loi sur la rétention de sûreté*, *supra* note 3.

⁴⁶⁵ Danet, *supra* note 42.

France. Several hypotheses are advanced. The discussion then concludes on preventive measures currently in force in French criminal law, including the *mesures de sûretés* and restrictive conditions under social-judicial probation. As we will see, these preventive measures on one level resemble Canadian recognizance orders in that they also impose conditions restricting the liberty of individuals. However, the key difference resides in their applicability. Generally, French preventive measures can only be imposed on convicted dangerous offenders, which is a clear departure from the possibility of imposing restrictive conditions on individuals with no criminal record in Canadian criminal law.

i) The absence of Peace Bonds and Recognizance Orders in French Criminal Law

A review of the *Code de Procédure pénal* and relevant French legislation reveals that there are currently no peace bonds or recognizance orders in French criminal law. Differences in the language used in describing these preventive measures could partly explain the situation. In France, preventive measures are known as *mesures de sûretés*.⁴⁶⁶ However, a review of these *mesures de sûreté* reveals that no restrictive conditions can be imposed in a form analogous to a Canadian peace bond or a recognizance order.⁴⁶⁷ On the other hand, some *mesures de sureté* provide for the imposition of restrictive conditions upon individuals who are considered as posing a risk of future dangerousness at the end of their mandatory prison terms. They differ mainly from peace bond provisions in that

⁴⁶⁶ See for example *Code de Procédure pénal*, at Article 706-135.

⁴⁶⁷ Bouquet, Alexandre, "Cautionnement pénal et politique criminelle : une relation à géométrie Variable"(2001) 23 Archives de politique criminelle 53, available online : <http://www.cairn.info/article.php?ID_REVUE=APC&ID_NUMPUBLIE=APC_023&ID_ARTICLE=APC_023_0053> [Bouquet].

regular citizens cannot ask the court to impose conditions on potentially dangerous individuals.

Moreover, restrictive conditions under the *mesures de sûretés* are only applicable to offenders who are both convicted dangerous multi-recidivists and/or mentally incapacitated individuals presenting a risk of dangerousness. In other words, the commission of a crime is normally a pre-requisite for the imposition of a *mesures de sûreté* in French criminal law. For example, a social-judicial probation (also known as *suivi médico-judiciaire*), probably the closest equivalent to restrictive conditions available under sections 810.1 and 810.2 of the *Criminal Code*, can only be imposed on a convicted offender, normally at the sentencing stage.⁴⁶⁸ One of the main goals of a *mesure de sûreté* such as social-judicial probation is to prevent recidivism. As for the equivalent of a “dangerous offender designation” in France, it can only be applicable to individuals who have been condemned for a period of incarceration that exceeds 15 years.⁴⁶⁹

ii) The *Asseurement* or the *Caution de Bonne Vie*: An Ancient French Preventive Measure Analogue to Canadian Peace Bond Provisions

At the outset, it should be pointed out that French Criminal law has not always been without some type of peace bond provisions. In the *ancien droit*, the *mesure de sûreté*, known as *asseurement* or *caution de bonne vie* (similar to common law peace bonds) was available to prevent and control dangerousness.⁴⁷⁰ The ultimate goal of the *asseurement*

⁴⁶⁸ See for example *Code pénal*, at Article 131-36-1.

⁴⁶⁹ See generally the *Loi sur la rétention de sûreté*, *supra* note 3.

⁴⁷⁰ Bonneville de Marsangy, Arnould, *De l'amélioration de la loi criminelle en vue d'une justice plus prompte, plus efficace, plus généreuse et plus moralisante* (Paris : Cosse et Marchal, 1864)[Bonneville], at 203. See also Ginoulhiac, Charles, *Cours élémentaire d'histoire générale du droit*

was to restore the peace between two diverging parties.⁴⁷¹ The *asseurement* was a legal instrument that "...flourished in the later Middle Ages".⁴⁷² According to Petkov, the *asseurement* was "[a] contract with a preventive character...[and] initially belonged to the domain of high justice but with time seeped down to bourgeois quarters".⁴⁷³ Bonneville de Marsangy remarks the following with respect to the applicability of the *asseurement*:

Dans nos anciens usages, l'asseurement était une simple mesure de sûreté, réclamée par tout citoyen qui redoutait une attaque ou un dommage. Celui à qui l'asseurement était demandé, était tenu de comparaître en justice, et il devait l'accorder en promettant qu'il ne ferait aucun mal à celui *qui avait doutance de lui*.⁴⁷⁴ [Footnotes omitted].

In other words, according to Bonneville de Marsangy, the *asseurement* was a simple preventive measure available to any citizen who feared an attack or harm.⁴⁷⁵ In that case, the presence of the individual facing an *asseurement* measure was required before the court. A promise not to commit any wrongs had then to be given to the court.⁴⁷⁶ Historically, failure to obey the terms of the *asseurement* resulted in the imposition of a fine and a period of banishment or reclusion (also known as *banissement*), or even punishment by hanging.⁴⁷⁷ Furthermore, as Bonneville remarks, the *asseurement* was only ordered by the judge in serious cases where the alleged threats were deemed to be sufficient.⁴⁷⁸

français public et privé depuis les premiers temps jusqu'à la publication du code civil (Paris : Arthur Rousseau, 1884), at 526-527.

⁴⁷¹ Bonneville, *ibid.* at 202.

⁴⁷² Petkov, Kiril, *The Kiss of Peace ritual, self, and society in the high and late medieval West*, Vol. 17 (Leiden, The Netherlands: Koninklijke Brill, 2003)[Petkov], at 91.

⁴⁷³ Petkov, *ibid.* at 91.

⁴⁷⁴ Bonneville, *supra* note 470 at 202.

⁴⁷⁵ *Ibid.*

⁴⁷⁶ *Ibid.*

⁴⁷⁷ *Ibid.* at 203.

⁴⁷⁸ *Ibid.*

A review of the literature did not shed light on the exact time when the *asseurement* was abandoned. However, in the late 19th century, Bonneville was already treating the *asseurement* as a relic from the past.⁴⁷⁹ In that case, presumably, the *asseurement* would have been abandoned at the time of the French Revolution. Bonneville also attributes the abolition of the *asseurement* to the creation of a public system of magistrates in charge of maintaining the peace and investigating and prosecuting offenders in the name of society.⁴⁸⁰ It was also thought that the power of accusation and prosecution belonged only to the State.⁴⁸¹ In other words, France abandoned the *asseurement*, a form of peace bond provision, partly because the State progressively assumed a greater role in preventing crime. The state also progressively took charge of all matters deemed to be criminal in nature.

iii) Another French Preventive Measure: the *Cautionnement Pénal*

Another form of preventive measure that relates to peace bond provisions in French criminal law is the *cautionnement pénal*. However, this form of preventive measure resembles most closely the Canadian scheme of bail or judicial interim release as it is known in the *Criminal Code*.

The *cautionnement pénal* in French criminal law has a restrictive applicability and is part of a series of judicial control measures contained in the *Code de procédure pénal*.⁴⁸² More precisely, it is governed by article 138 and 142 of the *Code de procédure pénal*.⁴⁸³ The *cautionnement pénal* can be defined as the payment of a sum of money to the court

⁴⁷⁹ *Ibid.*

⁴⁸⁰ *Ibid.*

⁴⁸¹ *Ibid.* at 204.

⁴⁸² Bouquet, *supra* note 467.

⁴⁸³ See *Code de Procédure Pénale*, at Article 1138 and 142. See also Bouquet, *ibid.*

in guarantee that the individual will act in a certain manner.⁴⁸⁴ Bouquet remarks that the *cautionnement pénal* has been part of the measures of *contrôle judiciaire* (judicial control) since 1970. As Larguier points out, the objectives of the measures under the *contrôle judiciaire* include an attempt to conciliate individual liberties with social protection.⁴⁸⁵ However, since a *cautionnement pénal* is considered a measure of *contrôle judiciaire*, its applicability is limited to the *instruction préparatoire* (preparatory stage in which the accused awaits trial).⁴⁸⁶ Consequently, as Bouquet notes, the *cautionnement pénal* cannot be used as an ante-delictum measure in French criminal law.⁴⁸⁷

iv) The *Mesures de Sûretés* : an Ante-Delictum Scheme

The social defense movement also had a substantial impact on the development of the *mesures de sûretés* applicable to dangerous individuals suffering from mental health conditions.⁴⁸⁸ The *mesures de sûretés* are not concerned with the fault of the individual and are normally imposed where a particular individual presents a risk of dangerousness.⁴⁸⁹ It is worth pointing out that the literature notes the absence of any clear definition of the concept of dangerousness in French legislative texts.⁴⁹⁰ Yet, numerous preventive laws are based upon the concept of dangerousness.

⁴⁸⁴ Bouquet, *ibid.*

⁴⁸⁵ Larguier, Jean, *Procédure pénale*, 17th ed. (Paris, Dalloz, 1999), at 128, cited in Bouquet, *ibid.*

⁴⁸⁶ Bouquet, *ibid.*

⁴⁸⁷ *Ibid.*

⁴⁸⁸ Rhenter, *supra* note 49. Rhenter, *ibid.*, points out that the social defense movement eventually led to the creation of prison-hospital to treat and control dangerous individuals suffering from mental health conditions.

⁴⁸⁹ Georges Levasseur. "Politique criminelle : peines ou mesures de sûreté ?", online : Jean-Paul Doucet, Le droit criminel

<http://ledroitcriminel.free.fr/la_sciences_criminelle/les_sciences_juridiques/la_loi_penale/sanction/levasseur_peines_ou_mesures_surete.htm>.

⁴⁹⁰ Damien Loup, "Note électronique - Droit à la sûreté ou efficacité répressive ?" Libertés et culture (13 January 2009), online: Laforge <http://74.125.95.132/search?q=cache:10b410CZ_fIJ:la-forge.info/2009/01/13/note-electronique-droit-a-la-surete-ou-efficacite-> [Loup].

In the 1950s, proponents of the social defense movement advanced the idea of detaining dangerous individuals while offering them medical treatment aimed at lowering their level of dangerousness.⁴⁹¹ The idea of creating a “hospital-prison” to punish and treat these potentially dangerous individuals also saw light during that time. Gradually, the treatments of criminals, coupled with new techniques in the detection of potential criminological factors, were to replace punishment.⁴⁹² As we will see later, the recent enactment of the *Loi sur la rétention de sûreté* puts emphasis on the development of these so called “hospital-prisons” to treat potentially dangerous individuals.

v) The Development of « Repressive Prevention » in French Criminal Law and its Influence on the Enactment of New Preventive Measures

In a country where much emphasis is placed on preventive justice, it is not surprising to note the importance of strategies of detection and neutralisation of potential criminological behaviour.⁴⁹³ In recent years, France has shifted towards a model of repressive prevention (*prévention répressive*) with the enactment of several new pieces of legislation that allow the identification, investigation and eventually the prosecution of potentially dangerous behaviour.⁴⁹⁴ These laws are primarily aimed at preventing delinquency, a form of dangerousness.⁴⁹⁵ According to Loup, the shift toward repressive prevention has enabled the State to regroup institutions dealing with at-risk populations (national education, public health, social services) under the authority of the Prefect and

⁴⁹¹ Rhenter, *supra* note 49.

⁴⁹² Bertrand, *supra* note 87.

⁴⁹³ Loup, *supra* note 490.

⁴⁹⁴ *Ibid.*

⁴⁹⁵ Danet, *supra* note 42.

Prosecutor, while facilitating the collection of valuable information on the behaviour of potentially dangerous individuals.⁴⁹⁶

In terms of concrete measures of repressive prevention, Loup identifies the *Loi du 5 mars 2007 relative à la prévention de la délinquance*⁴⁹⁷ as a good example. The *Loi relative à la prévention de la délinquance* places the mayor at the center of the application of a policy that aims to prevent repression of delinquency.⁴⁹⁸ This new piece of legislation enables the mayor to gather valuable information, including normally confidential information with respect to at-risk populations under his or her authority. For example, the mayor can have access to the confidential reports of social workers and to performance records of school children.⁴⁹⁹ With the help of a team of professionals, the mayor is able to identify potential criminological tendencies, such as a lack of assiduousness in class. In other words, the mayor becomes the main actor in identifying potentially dangerous behaviour at the root, as he or she receives information about the social and educational difficulties encountered by citizens under his authority and coordinates an action plan aimed at eradicating the potential criminal behaviour.

The *Loi sur la prévention de la delinquance* has been vividly criticised for two main reasons: it can transform the mayor into a sort of “sheriff”, and it allows the exchange of confidential information normally retained by social workers.⁵⁰⁰ However, the real

⁴⁹⁶ Loup, *supra* note 490.

⁴⁹⁷ *Loi sur la prévention de la délinquance*, *supra* note 89.

⁴⁹⁸ Loup, *supra* note 490. See also “La loi sur la prévention de la délinquance”, *Liberation.fr* (16 January 2007), online :

Liberation.fr <<http://www.liberation.fr/marbre/010118234-la-loi-sur-la-prevention-de-la-delinquance>>.

⁴⁹⁹ See *Loi sur la prévention de la délinquance*, *supra* note 89, at Article 8 and 12.

⁵⁰⁰ Récit, “Prévention de la délinquance, un projet de loi dangereux et en trompe-l’œil” Communiqué de presse DEI France (Droit des Enfants International) (July 2006), online: Récit <<http://recit.net/spip.php?article769>>.

effects of this new legislation on the prevention of delinquency (which concerns for the most part minors) and the exchange of confidential information have still to be assessed due to its recent enactment in 2007. To this date, it would appear that the implementation of this preventive legislation has encountered numerous difficulties, and various provisions have yet to be concretely followed by mayors.⁵⁰¹

Under the repressive prevention model, Loup also notes the creation and multiplication of various records of individuals who have been convicted or suspected of acts of delinquency.⁵⁰² Loup remarks that these records essentially fulfill two objectives: they place potential delinquents under surveillance and facilitate future repressive action by the State through collecting personal information.⁵⁰³ The main problem with these records, according to Loup, is that several thousand individuals are identified as potential criminals, without consideration as to the determination of guilt or innocence by a court.⁵⁰⁴ In effect, this type of legislation tries to identify potentially dangerous individuals even before they manifest their risk of future behaviour. Evidently, this approach inevitably raises questions on potential infringements of fundamental principles of justice, and may not prove to be the ideal solution in controlling dangerousness because of its serious “Orwellian” implications.⁵⁰⁵

⁵⁰¹ Michel Tendil, “Prévention de la délinquance : une loi pour rien ?” Localtis.info (14 avril 2009), online : Localtis.info
<<http://www.localtis.info/servlet/ContentServer?c=artJour&cid=1239698725800&pagename=Localtis/artJour/artJour>>.

⁵⁰² Loup, *supra* note 490.

⁵⁰³ *Ibid.* Loup gives the example of two information records : « *Service de traitement informatisé des infractions constatées de la police nationale* » and the « JUDEX ».

⁵⁰⁴ *Ibid.*

⁵⁰⁵ Orwellian refers to the “Big Brother concept” explained by Orwell, George, 1984 (New York: Signet Classic, 1981).

Loup also identifies elements of repressive prevention in the development of various preventive measures targeting convicted criminals who have completed their sentences of incarceration.⁵⁰⁶ These measures include the creation of a national record of sexual offenders, or FJAIS (*Fichier Judiciaire National Automatisé des Auteurs d'Infractions Sexuelles*), and the mandatory treatment of potentially dangerous offenders or *injonction de soin*.⁵⁰⁷ According to Loup, individuals placed on the FJAIS can be required to inform authorities of their change of address and to report regularly to the police.⁵⁰⁸ Repressive prevention under this form targets potentially dangerous individuals by monitoring and treating their dangerousness.

vi) The *Suivi Médico-Judiciaire* : An Ante-Delictum Measure Influenced by Repressive Prevention

Loup also identified other measures of “repressive prevention” that have an impact on how dangerousness is treated in France, including the creation of a mandatory social-judicial probation called *suivi médico-judiciaire*.⁵⁰⁹ These forms of probations are applicable to certain types of convicted criminals (including paedophiles and potentially dangerous offenders).⁵¹⁰ In French criminal law, the social-judicial probation is

⁵⁰⁶ Loup, *supra* note 490.

⁵⁰⁷ *Ibid.* Loup explains that the FJAIS was created by the *Loi n°2004-204 du 9 mars 2004 portant adaptation de la justice aux évolutions de la criminalité*, J.O., 10 March 2004, 4567, also known as “*Loi Perben II*”.

⁵⁰⁸ *Ibid.* See *Code de Procédure pénale*, at Article 706-53-5. The obligation to report to police and to notify the authorities of a change of address is similar to some of the restrictive conditions that can be imposed under a recognizance order under section 810.1 and 810.2 of the *Criminal Code*. However, once again, there is an important distinction between the two schemes because a recognizance order can be applied to an individual who has never committed a crime, base solely upon his dangerousness.

⁵⁰⁹ See generally *Loi n° 98-468 du 17 juin 1998 relative à la prévention et à la répression des infractions sexuelles et à la protection des mineurs*, J.O., 18 June 1998, 9255.

⁵¹⁰ Loup, *supra* note 490. See also France, Ministère de la justice et des libertés, *Les condamnations à une mesure de suivi socio-Judiciaire* (9 March 2007) online : Ministère de la justice et des libertés <<http://www.justice.gouv.fr/index.php?rubrique=10054&ssrubrique=10058&article=12571>>, where the *Ministère de la justice et des libertés* notes that in 2005, more than a thousand social-judicial probation have been ordered.

considered a *mesure de sûreté*. It is important to note that the restrictive conditions which can be attached to a social-judicial probation order resemble the conditions that can be imposed under a section 810 recognizance order. For the purpose of our comparative analysis, social-judicial probation orders are virtually identical to the Canadian scheme, with the exception that they are limited to convicted offenders.

In fact, Article 131-36-2 specifies that an individual under a social-judicial order may be subjected to the following restrictive obligations:

- 1° not to be present in such places or such category of places as specifically designated, in particular where minors are to be found;
- 2° not to visit or to have contact with certain persons or certain categories of persons, and particularly minors, except, where relevant, those specified by the court;
- 3° not to carry out any professional or voluntary activity involving regular contact with minors.⁵¹¹

As for Article 131-36-9, it gives the court the power to impose electronic monitoring on an offender who is subjected to a social-judicial prevention.⁵¹²

Article 132-44 of the *Code pénal* establishes the list of supervisory measures that can be imposed on an individual. They include follow-up visits with social workers; notification of any change in employment or residence; and required authorisation prior to traveling.⁵¹³

As for Article 132-45, it allows the judge to impose the following obligations upon a convicted offender:

⁵¹¹ *Code Pénal*, at Article 131-36-2.

⁵¹² *Ibid.* at Article 131-36-9.

⁵¹³ *Ibid.* at Article 132-44.

A trial court or a penalties enforcement judge may specially impose on the convicted person a duty to observe one or more of the following obligations:

- 1° to exercise a professional activity or to follow a course of education or professional training;
- 2° to establish his residence in a determined place;
- 3° to undergo medical examination, treatment or medical care, and where necessary hospitalisation;
- 4° to demonstrate that he is contributing to family expenses or is regularly paying any alimony that he may owe;
- 5° to make good, in all or part, according to his ability to pay, the damage caused by the offence, even in the absence of a court decision on civil liability;
- 6° to demonstrate that he is paying according to his ability to pay the amounts due to the public Treasury in consequence of the sentence;
- 7° to abstain from driving certain vehicles determined by the category of driving licences provided for under the Traffic Code;
- 8° not to engage in professional activity in the exercise of which or on the occasion of which the offence was committed;
- 9° to abstain from appearing in any place as specifically identified;
- 10° not to engage in betting, especially in betting shops;
- 11° not to frequent public houses;
- 12° not to keep company with certain convicted persons, especially other offenders or accomplices to the offence;
- 13° to abstain from contacting certain persons, especially with the victim of the offence;
- 14° not to hold or carry any weapon.⁵¹⁴

Conditions 9 and 14 are similar to restrictive conditions imposed under sections 810.1 and 810.2 of the *Criminal Code*. However, some of the conditions available under 132-5 go further, such as condition 3, which obligate the offender “...to undergo medical examination, treatment or medical care, and where necessary hospitalisation”.⁵¹⁵

The measures under a social-judicial probation are aimed at facilitating the person’s social rehabilitation.⁵¹⁶ In other words, unlike recognizance orders, they are only available to supervise potential recidivists. Social-judicial probation measures cannot be

⁵¹⁴ *Ibid.* at Article 132-45.

⁵¹⁵ *Ibid.* at Article 132-45, Condition 3.

⁵¹⁶ *Ibid.* at Article 131-36-3.

imposed prior to conviction. Arguably however, they resemble sections 810.1 and 810.2 recognizance orders as they consist in a form of supervision of potentially dangerous individuals in society, upon their release from prison. Dangerousness is, therefore, controlled and monitored, but restrictive conditions are only applicable to convicted offenders who have committed a crime. This approach is more conservative than the Canadian scheme, because the risk of false positives and the problems of inaccuracy in determining dangerousness are limited to individuals who have committed a crime.

In the end, the French “repressive prevention” measures all have the same objective: “...to detect, to monitor and to neutralise potentially dangerous individuals”.⁵¹⁷ As Loup remarks, all these preventive measures are based on a notion of dangerousness for which boundaries have never really been legally defined. The enactment of the *Loi sur la rétention de sûreté* in February 2008, which aims at identifying, preventing and controlling the risk of future dangerousness of certain individuals, is the latest chapter in the development of the repressive prevention shift observed by Loup. It offers a novel approach in determining and controlling dangerousness. The next section will analyse some of the characteristics of the *Loi sur la rétention de sûreté*, with an emphasis on the process of determining dangerousness.

vii) The *Loi sur la Rétention de Sûreté*, a Novel Approach in Determining and Controlling Dangerousness

A comparative analysis of the French preventive measures and the determination of dangerousness would not be complete without a look at the newly enacted *Loi sur la rétention de sûreté* (*Loi relative à la rétention de sûreté et à la déclaration*

⁵¹⁷ Loup, *supra* note 490.

d'irresponsabilité pénale pour cause de trouble mental). The *Loi sur la rétention de sûreté* is the latest attempt in a series of new legislation pertaining to the control of dangerousness. It is largely based on a 2006 report from the *Commission des Lois*, a French committee comprised of several members of the Senate, which had made various recommendations on the determination and treatment of dangerousness.⁵¹⁸ One of the key recommendations made by the Commission was the development of “hospital-prisons” where the potential dangerousness of offenders could be identified and treated, controlled by a multidisciplinary team of experts.⁵¹⁹

At the outset, it should be pointed out that the *Loi sur la rétention de sûreté* once again deals with the concept of dangerousness as it applies to convicted dangerous offenders. Moreover, a *rétention de sûreté* equals preventive detention to control, and eventually lower the risk of future dangerousness of an offender. In a sense, it is probably more closely related to the Canadian dangerous offender scheme, than to sections 810.1 and 810.2 recognizance orders. A *rétention de sûreté* (or preventive detention) also falls under the category of the *mesure de sûreté*, and is only applicable at the end of the mandatory prison sentence, and for various rehabilitation measures.⁵²⁰ Therefore, a *rétention de sûreté* cannot be imposed where no crime has been committed.

⁵¹⁸ France, Sénat, Commission des lois et de la mission d'information de la commission des lois, “Rapport d'information n° 420 (2005-2006) de MM. Philippe GOUJON et Charles GAUTIER”, No. 420 (22 June 2006) (President : Jean-Jacques Hyst), online : Bienvenue au Sénat <<http://www.senat.fr/rap/r05-420/r05-4201.pdf>> [Sénat], at 18. See also Sébastien Martineau, (Directed Research Paper, Dalhousie University, 2008)[unpublished][Martineau, Directed Research Paper] .

⁵¹⁹ See “Rachida Dati lance son plan contre les criminels dangereux”, Le Figaro (27 September 2008), online : Le Figaro <http://www.lefigaro.fr/actualite-france/2008/09/27/01016_20080927ARTFIG00202-rachida-dati-lance-son-plan-contre-les-criminels-dangereux-.php>, where it is noted that the Centre socio-médico-judiciaire of Fresnes (the first French “prison-hospital”) has recently opened its door to treat the potential dangerousness of individuals subjected to a “*rétention de sûreté*”.

⁵²⁰ See Martineau, Directed Research Paper, *supra* note 518.

The *Loi sur la rétention de sûreté* is a relevant to our comparative analysis because of the novel approach taken by the French legislature to treat and control dangerousness. For example, under the French scheme, a potentially dangerous individual is not simply sent back into prison at the end of his or her mandatory sentence. He or she is to be treated in a specially created facility that proposes a social-judicial approach. This particularity is just one of many others that are part of the newly enacted *Loi sur la rétention de sûreté*. The following paragraphs will examine the controversial legislation in more detail, in an attempt to extract the relevant sections dealing with the concept of dangerousness.

Following the recommendations of the *Commission des Lois*, the French Parliament amended the *Code de procédure pénale* (CPP) to include several new provisions pertaining on the treatment of dangerousness. For example, Article 706-53-13 of the CPP confirms the exceptionality of the *rétention de sûreté* and defines it as the placement of a dangerous individual in a specially created centre (*Centre socio-médico-judiciaire*) where a social, medical and judicial approach is offered.⁵²¹ Only individuals convicted for a minimum of 15 years of incarceration and considered as presenting a risk of dangerousness (defined in Article 706-53-13 of the CPP “...as a high probability of recidivism combined with a serious personality disorder”) can be subjected to a *rétention de sûreté*.⁵²² In essence, the approach taken by the French legislator in limiting the applicability of the *rétention de sûreté*, shows that it is not ready to generalise preventive measures that restrict the liberties of individuals who have not committed a crime. While the French scheme recognizes the concept of dangerousness and the importance of

⁵²¹ *Code de procédure pénale*, at Article 706-53-13.

⁵²² *Ibid.* See also Cons. constitutionnel, 21 February 2008, Commentaires aux cahiers, *LOI n° 2008-174 du 25 février 2008 relative à la rétention de sûreté et à la déclaration d'irresponsabilité pénale pour cause de trouble mental*, J.O. 2008. 3272, 08-562 DC [Cons. Constitutionnel], at para. 2 and 18.

preventing it, it also limits its control to very serious cases. Perhaps this is an implicit admission by the French legislator that the system of determination of dangerousness is imperfect and ought to be reserved only to the most extreme cases.

Furthermore, the inclusion of Article 706-53-14 of the CPP probably represents the most drastic measure in terms of determination of dangerousness. It is argued that if some aspect of the measure were to be implemented in the context of Canadian recognizance orders, it would add additional safeguards in the determination of dangerousness of potential offenders. Article 706-53-14 provides that the risk of future dangerousness of an individual subjected to a *rétenion de sûreté* is assessed by a multidisciplinary panel of experts over a minimum period of 6 weeks.⁵²³ The determination of dangerousness, is therefore, not necessarily dependent on contradictory evidence, which is the hallmark of adversarial courts.⁵²⁴ Rather, it puts emphasis on a team approach, given the imprecise nature of a determination of dangerousness. Several experts work together to determine the potential dangerousness of a particular offender. Arguably, this conciliatory approach reduces the risk of bias in the determination of dangerousness, since both parties are at the same table, including the experts who can focus solely on the particularities of the case. In an adversarial setting, as explained earlier, mental health professionals may succumb to external pressures, including the consequences of a false-negative, or the influence of the lawyers of both parties.

Under Article 706-53-14 of the CPP, the multidisciplinary panel of experts include the president of the *Chambre de la Cour d'appel*, the region prefect, the director of the

⁵²³ *Code de procédure pénale*, at Article 706-53-14.

regional penitentiary services, an expert psychiatrist, an expert psychologist, a representative from a victim association, and a lawyer.⁵²⁵ It is worth pointing out the presence of a representative from a victim association in the process demonstrates the legislator's willingness to hear "both sides of the story" in a conciliatory approach.

In assessing the potential dangerousness of an offender, the panel can recommend a *rétenction de sûreté* to a regional authority comprised of three magistrates, if there is a high risk of recidivism, and if it is the only available method to control the individual's dangerousness.⁵²⁶ The ultimate decision to impose a *rétenction de sûreté* is taken by the regional authority under Article 706-53-15 of the CPP, after careful analysis of the evidence emanating from the multidisciplinary panel and the offender's counter-expertise. In effect, this constitutes an adversarial procedure. However, the French system provides for the participation of the offender and independent mental health experts when the determination of dangerousness is made by the committee. Furthermore, the system prescribes that three magistrates must hear the evidence and decide on the reasonableness of the panel's recommendation. In Canada, a determination of dangerousness is ultimately done by a single judge. Arguably, it would appear that the use of three magistrates to decide whether or not an individual should be considered potentially dangerous increases the chances that the decision is objective and sound. This is

⁵²⁵ *Code de procédure pénale*, at Article R61-8. It should be noted that the multidisciplinary panel was created prior to the enactment of the *Loi sur la rétenction de sûreté*, *supra* note 3, by the *Loi sur le traitement de la récidive*, *supra* note 13. See also France, Ministère de la justice, Les commissions pluridisciplinaires des mesures de sûreté (6 November 2008) online : Ministère de la Justice <<http://www.justice.gouv.fr/index.php?rubrique=10017&ssrubrique=10024&article=16212>> and Martineau, Methodological Prospectus, *supra* note 21 at 8.

⁵²⁶ *Code de procédure pénale*, at Article 706-53-14.

especially important in the context of controversial evidence based on an imprecise science.

Finally, pursuant to Article 706-53-16 of the CPP, a *rétenion de sûreté* can be imposed for a period of one year, and be renewed indefinitely every year, provided that the offender still presents a risk of future dangerousness.⁵²⁷ This allows for the court to re-evaluate the dangerousness of the offender on a regular basis and to modify the conditions of the *rétenion de sûreté*. It also gives a chance to the offender to demonstrate that his level of dangerousness has decreased to an acceptable level.

The *Loi sur la rétenion de sûreté* was recently examined by the *Conseil Constitutionnel*.⁵²⁸ With the exception of a clause of retroactivity which would have made the *rétenion de sûreté* applicable to cases decided before the enactment of the statute, the Conseil declared the *rétenion de sûreté* constitutional.⁵²⁹ In its decision, the *Conseil Constitutionnel* concluded that the *rétenion de sûreté* was an adequate, necessary and proportional measure to the objective sought by the legislature, namely the prevention of crime and the control of dangerousness.⁵³⁰ The exceptionality of the measure (only applicable to convicted dangerous offenders sentenced for a period of incarceration of 15 years or more) and the rehabilitative function of the measure (through a socio-judicial approach in a specially created hospital-prison and aimed at lowering the risk of recidivism), were two important factors in the *Conseil Constitutionnel* decision.

⁵²⁷ *Code de procédure pénale*, at Article 706-53-16.

⁵²⁸ Cons. constitutionnel, *supra* note 522. See also generally Martineau, Directed Research Paper, *supra* note 518.

⁵²⁹ *Ibid.*

⁵³⁰ Cons. Constitutionnel, *ibid.* at para. 13.

Another important point is that the *Conseil* considers the *rétenction de sûreté*, not as punishment following the commission of an offense, but rather as a preventive measure. This view is similar to Canadian court's general opinion that recognizance orders are preventive and restrictive measures that are imposed when there is a high risk of future dangerousness. The imposition of restrictive conditions under Canadian recognizance orders is not the result of the commission of offenses. They are preventive in nature.⁵³¹ As discussed earlier, the "preventive nature" of the scheme allows courts to circumvent the normally required burden of proof in criminal law, namely, proof beyond a reasonable doubt, and saves them from having to assure satisfaction of constitutional requirements. In other words, on a simple balance of probability, the court can impose restrictive conditions on an individual despite the fact that it is only suspected that he or she might commit a crime in the future. Arguably, the same situation currently prevails in France, where the *rétenction de sûreté* is considered a *mesure de sûreté* (or preventive measure). This also allows the court to impose restrictive conditions on an individual on a much lower burden of proof than the normally required *intime conviction*.⁵³²

The *rétenction de sûreté* has been extensively criticised in France because it inevitably infringes fundamental principles of rights, such as the right to liberty, and the right not to be punished where no crime has been committed.⁵³³ According to some magistrates, the *rétenction de sûreté* equates to a punitive measure because it enables preventive detention

⁵³¹ See *Budreo*, *supra* note 8 at para. 25.

⁵³² On the question of the normally required burden of proof in French criminal Court (*intime conviction*), see Guinchard, *supra* note 214 at 303. See also McKillop, *supra* note 242 at 92.

⁵³³ Cosse, Emmanuelle, "Rétenction de sûreté, Entretien avec Dominique Rousseau" (2008) 49 *Regard*, online: <<http://www.regards.fr/article/print/?id=3576>>[Cosse].

of potentially dangerous individuals for an indeterminate period of time in a closed environment.⁵³⁴

While it is true that a *rétenction de sûreté* equates to the Canadian concept of preventive detention of a potentially dangerous individual (for example, under the dangerous offender legislation), it does provide for a more limited application. The *rétenction de sûreté*, as well as social-judicial probations are only applicable to multi-recidivists or high-risk dangerous offenders. This exceptional and limited applicability feature is the main distinction between the two preventive measures schemes. In the development of a judicial risk assessment method involving a co-ordinated approach from a team of experts, the French legislation provides for an alternative to a prickly problem: namely, the accuracy and sufficiency of procedural safeguards in the determination of dangerousness and the imposition of restrictive conditions. While French psychologists do not necessarily benefit from better risk assessment tools, they can now assess the dangerousness of a potential offender in an unbiased setting, far from the inherent pressures of an adversarial system based on a win or lose approach. In this regard, it is worth noting that the literature has identified benefits to a consensus approach in determining dangerousness. Campbell's remarks on this particular issue are quite compelling:

...when clinicians consult with each other (e.g., multidisciplinary review boards) and with victims of violence, they are able to pool their diverse knowledge and expertise in reaching a consensus. The social worker, psychologist, advanced nurse clinician, psychiatrist, counsellor, parole officer, and victim have very different perspectives; together they form a more complete assessment of risk for future violence.⁵³⁵

⁵³⁴ Cosse, *ibid.*

⁵³⁵ Campbell, *supra* note 176 at 10.

While some preventive measures, such as a social-judicial probation order, enable French courts to impose restrictive conditions on a multi-recidivist, there are currently no provisions enabling the issuance of pre-conviction recognizance orders in French criminal law. The following paragraphs will offer some hypotheses on absence of peace bond or recognizance order provisions in France.

CHAPTER IX –THE ABSENCE OF RECOGNIZANCE ORDERS IN FRENCH CRIMINAL LAW

i) Possible Hypothesis Explaining the Absence of Peace Bonds and Recognizance Order Provisions in French Criminal Law

Because France is a member of the European Union and a signatory of the *European Charter of Human Rights*,⁵³⁶ it is possible that “supranational” restrictions may prevent the enactment of peace bond provisions. However, at the outset, it appears that section 5(1) of the European Charter of Human Rights enables the enactment of restrictive measures:

Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

...

b. the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;

c. the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence **or when it is reasonably considered necessary to prevent his committing an offence** or fleeing after having done so; [Emphasis added].

It is argued that the French Parliament can comfortably rely on section 5(1) to enact preventive measures to curtail the freedom of an individual when it is “necessary” to do so to protect society. But preventive measures such as peace bonds are nonexistent in French criminal law.

⁵³⁶ *Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocol No. 11 with Protocol Nos. 1, 4, 6, 7, 12 and 13*, 4 November 1950, 213 U.N.T.S. 221 [*European Charter of Human Rights*].

One hypothesis retained in the literature appears to be the progressive abandonment of peace bonds provisions known as *asseurement* due to the legislature's belief that these forms of preventive measures were a matter of private law.⁵³⁷ As we explained earlier, peace bond provisions and recognizance orders can be imposed on an individual when an informant (and not necessarily the State) demonstrates a reasonable fear that the individual will commit an offence. Generally, in Canadian criminal law, the Crown is the sole party who has the power to prosecute in criminal proceedings. However, peace bond provisions and recognizance orders are exceptions to this rule because an informant, the putative victim, can lay information before the court and request the imposition of restrictive conditions on a potentially dangerous individual. The Canadian Parliament did keep a public aspect to the peace bonds and recognizance orders scheme by requiring the consent of the Attorney General to proceed under a section 810.2 application.⁵³⁸ Furthermore, while it is true that in theory peace bond provisions and recognizance orders can be triggered by the application of a party other than the Crown, in reality, these preventive orders are normally sought by members of the police or correctional facilities employees.⁵³⁹

Another hypothesis is the influence of the civil law tradition on the development of French criminal law. As we have explained earlier, peace bonds owe their origin to the development of the common law, a system foreign to French criminal law. There was no common law tradition on which the legislator could rely to attempt the codification of peace bond provisions in the *Code de procédure de pénal*.

⁵³⁷ Bonneville, *supra* note 470 at 204.

⁵³⁸ See *Criminal Code*, *supra* note 2 at s. 810.2(1).

⁵³⁹ Public Safety, *supra* note 263.

There are, however, at least two counter-arguments to this position. The first is the existence of the *asseurement* in the *ancien droit*.⁵⁴⁰ Earlier, we explained that the *asseurement* was a practice used in old French criminal law to obtain a so-called surety to keep the peace from an individual who presented a danger.⁵⁴¹ This measure was similar to the common law power of courts to impose peace bonds. Therefore, in reality, there is a history of peace bond provisions in French criminal law, though they were abandoned progressively, mostly due to the pre-eminence of the State's action in all matters considered public.

The second argument is that some civil law tradition countries have codified peace bond type provisions. This is the case of Switzerland that codified the *cautionnement préventif*.⁵⁴² Essentially, article 66 of the *Code pénal Suisse* provides that if a person fears that a particular individual will commit a crime, a judge can request a recognizance order against the individual and require him or her to give sufficient sureties.⁵⁴³ Detention can be imposed on the individual in question if he or she refuses to follow the recognizance order.⁵⁴⁴

⁵⁴⁰ Bonneville, *supra* note 470 at 203.

⁵⁴¹ *Ibid.* at 202.

⁵⁴² The French text of article 66.1 of the *Code pénal Suisse* provides the following:

"1. Cautionnement préventif

1 S'il y a lieu de craindre que celui qui a menacé de commettre un crime ou un délit ne le commette effectivement ou si un condamné pour crime ou délit manifeste l'intention formelle de réitérer son acte, le juge peut, à la requête de la personne menacée, exiger de lui l'engagement de ne pas commettre l'infraction et l'astreindre à fournir des sûretés suffisantes.

2 S'il refuse de s'engager ou si, par mauvaise volonté, il ne fournit pas les sûretés dans le délai fixé, le juge peut l'y astreindre en ordonnant sa détention. Cette détention ne peut excéder deux mois. Elle est exécutée comme une courte peine privative de liberté (art. 79).

3 S'il commet l'infraction dans les deux ans à partir du jour où il a fourni les sûretés, celles-ci sont acquises à l'Etat. En cas contraire, elles sont rendues à l'ayant droit".

⁵⁴³ *Code pénal Suisse, ibid.* at art. 66.1.

⁵⁴⁴ *Ibid.* at art. 66.2.

Procedural differences in the determination of dangerousness may also be part of the answer. In the French scheme of determining dangerousness, it is argued that collegiality amongst mental experts and the desire to reach consensus in search of the truth due to non-adversarial influences, do not favour the development of preventive measures such as recognizance orders. Moreover, peace bonds, being a creation of the common law, thrive in an adversarial setting because citizens are encouraged to take action in a judicial arena against potential offenders in the name of protecting the public. As explained earlier, though it is true that in Canadian criminal law, informants may only initiate a peace bond or recognizance order proceeding with the consent of the Attorney General, these provisions give informants a means to participate in the criminal procedure. In French law, only the Public Prosecutor is entitled to bring an action where public order is jeopardised: "... [w]here a crime causes no harm to an individual, but simply endangers public order, such as possession of a drug or a forbidden weapon, only a Public Prosecutor will be able to initiate the prosecution..."⁵⁴⁵

Another potential explanation resides in the fact that dangerousness as a concept is not viewed or controlled in the same manner by the French legislator. The *Defense sociale* has had influences on the development of preventive measures targeting potentially dangerous individuals to the same extent that the community protection model described by Petrunik influenced the development of dangerous offender legislation in Canada.⁵⁴⁶ The *Defense sociale* favoured the development of *mesures de sûretés*, and eventually the newly enacted *Loi sur la retention de sûreté*, but limited its application to convicted

⁵⁴⁵ Elliot, *supra* note 218 at 33.

⁵⁴⁶ See generally Petrunik, "Models of dangerousness", *supra* note 4 and Ancel, *supra* note 38.

dangerous offenders.⁵⁴⁷ It is as if the State alone is able to identify potentially dangerous actors and to neutralise them. Perhaps part of the answer to this affirmation lies in the important role played by the French State in all aspects of its citizen's life; a sort of socialistic influence that prevents everyday citizens from initiating criminal proceedings in cases where they fear the actions of a potentially dangerous individual. In the French context, crime prevention appears to be oriented around State enacted measures, whereby the State is responsible for preventing, identifying threats, investigating and prosecuting crimes.

⁵⁴⁷ Danet, *supra* note 42.

CHAPTER X – CONCLUSION

This thesis explored the concept of dangerousness in Canada and in France as it applies to controversial preventive measures such as high risk judicial restraint orders under sections 810.1 and 810.2 of the *Criminal Code*, and their French equivalent. It was thought that a comparative analysis of the French scheme of preventive measures could only benefit our system of recognizance orders by identifying new alternatives in controlling dangerousness.

The French scheme was deemed a good measure of comparison because its criminal law system is influenced by similar factors. In fact, similarities between the philosophies of the Canadian and French criminal legal systems facilitated our comparative analysis on how dangerousness is determined and controlled. Both systems are concerned with the prevention of crime, and both countries are obsessed with the security and protection of the community. In Canada, emergence of the community protection model identified by Petrunik has certainly pushed law-makers into enacting restrictive measures such as recognizance orders. In France, the protection of the community is also an important concern, but the identification of potential criminological factors and the rehabilitation of offenders are equally important.

The obsession with security has resulted in the proliferation of new policies and preventive legislation concerning dangerousness in the last few decades. Surprisingly, these new preventive measures have been implemented in both countries despite a

decrease in the general crime rate in recent years.⁵⁴⁸ Inevitably, the following questions come to mind: has our world become more dangerous, or is the proliferation of preventive measures the result of unwarranted fear based on sensationalistic media coverage? One could argue that the dissemination of information is certainly a factor that could help explain why states are concerned, more than ever before, with the concept of dangerousness. Perhaps the answer also lies in societies' generalised fear of dangerous individuals who may commit random criminal acts. And perhaps, new preventive measures are actually efficient in decreasing the crime rate. In the end, the enactment of preventive measures appears to be popular with the electorate who feels that the State is actually taking action, but at what cost?

Early on, it was determined that recognizance orders had been deemed constitutional by lower courts in Canada. The analysis could have stopped there. However, as Zweigert and Kötz explained in citing *Rudolph v. Jhering*: “[n]o one bothers to fetch a thing from afar when he has one as good or better at home, but only a fool would refuse quinine just because it didn’t grow in his back garden (Geist des römischen Rechts, Part 1 (9th edn., 1955)8f.)”.⁵⁴⁹ Consequently, it was determined that a comparative analysis with a foreign system may yield valuable alternatives.

It was first determined that the process by which dangerousness is usually assessed has received virtually no attention from the courts in the context of recognizance orders,

⁵⁴⁸ See for example Statistics Canada, “Crime Statistics”(17 July 2007), online: Statistics Canada <<http://www.statcan.gc.ca/daily-quotidien/080717/dq080717b-eng.htm>>”, where it is stated: “Canada's national crime rate, based on data reported by police, declined for the third consecutive year in 2007, continuing the downward trend in police-reported crime since the rate peaked in 1991”.

⁵⁴⁹ Zweigert, Konrad & Hein Kötz, *Introduction to comparative law*, 3rd ed. (Oxford: Oxford University Press, 1998) [Zweigert & Kötz], at 16. See also Martineau, *Methodological Prospectus*, *supra* note 21 at 14.

despite its fundamental importance in the imposition of restrictive conditions. The thesis also established that recognizance orders under sections 810.1 and 810.2 can be applied to any potentially dangerous individuals. A recognizance order is not intended to punish a crime that was committed.⁵⁵⁰ Rather, it is concerned with the risk of future dangerousness of a particular individual. However, a review of the literature has revealed that some risk assessment tools used in the prediction of dangerousness are plagued with inaccuracy and reliability issues.⁵⁵¹ A determination of dangerousness is not an easy task because it involves the consideration of highly technical data, based on a science that is still in its early stages. Over the last decades, mental health professionals have developed tests to predict the future risk of dangerousness of a particular individual. These include clinical judgment, actuarial assessments and structured clinical judgment.⁵⁵² However, even if the reliability of these tests has increased over the years, the fact remains that there is, and will always be, a margin of error. No test will ever be perfect in the prediction of future criminal acts because that would equate to predicting the future. Do inaccuracy issues in determining dangerousness justify the abolition of all preventive measures that are based on an assessment of the risk of future behaviour? Given the fact that the protection of the community from a potentially dangerous individual is important in a society like ours, the answer to this question lies in how much a society is ready to endure constitutional infringements upon fundamental principles of justice in the name of security and the control of potentially dangerous individuals. Inaccuracy issues should not prevent the enactment of preventive measures based on determination of dangerousness, but numerous procedural safeguards must exist to reach a balance.

⁵⁵⁰ *Budreo, supra* note 8 at para. 25.

⁵⁵¹ See for example Menzies, *supra* note 111. See also MacAlister, *supra* note 37 at 27.

⁵⁵² MacAlister, *ibid.*

The challenges faced by mental health experts and members of the judiciary in determining dangerousness with accuracy are encountered in other sciences. Although not dealing with the concept of dangerousness per se, meteorologists, for instance, are constantly faced with the problem of inaccuracies in their predictions, but they always talk in terms of probabilities of precipitations, and so on. In fact, despite considerable improvements in technology, weather is still difficult to predict with accuracy, just as it is the case in determining dangerousness.⁵⁵³ Moreover, meteorologists know that weather involves complex variables that need to be taken into account. For example, it is not sufficient to rely on the temperature of a given day to predict with any exactitude future temperatures. Patterns of weather may prove to be helpful, but have to be considered as simple probabilistic indicators. However, the possibility of inaccuracy does not prevent many industries that rely on meteorology, such as the aviation sector, to use probabilities rather than certainties on an everyday basis.

The same can be said of predictions of dangerousness. An individual's criminal history may offer valuable information as to his or her propensity to commit a crime, but experts will generally qualify the risk in terms of probabilities because there is no way of knowing if a crime will actually be committed in the future.⁵⁵⁴ Therefore, predictions of future events are possible, but they are based on "probabiliti[es]" rather than

⁵⁵³ See Monahan, John, "Violence Risk Assessment: Scientific Validity and Evidentiary Admissibility Symposium: The Law's Scientific Revolution" (2000) 57 Wash. & Lee L. Rev. 901, at 914, where he states: "[n]o one questions that the state of the science is such that the prediction of violence, like the prediction of the weather, is subject to a considerable margin of error." See also Monahan, John & Henry J. Steadman, "Violent Storms and Violent People: How Meteorology Can Inform Risk Communication in Mental health Law" (1996) 51 Am. Psychologist 931.

⁵⁵⁴ See Campbell, *supra* note 176 at 10 where she explains the importance of taking into account the history of violence in predicting dangerousness: "[r]easearch into the prediction of interpersonal violence consistently shows that a history of violence is one of the best predictors of future violence...".

certain[ies]”.⁵⁵⁵ Given the possibility of error in prediction, the underlying concern with determination of dangerousness should always be the effect and consequences of a positive determination. The measure of redress should be reasonable and proportional while minimally impacting fundamental principles of justice.

Furthermore, as discussed in the thesis, clinicians’ predictions of dangerousness are also influenced by internal and external factors. Internal factors, such as the risks of personal biases, subjectivity, the complexity of understanding and interpreting risk factors included in risk assessments tools, as well as the risk of false positives can all affect the reliability of risk assessments tools. External factors, such as the political agenda of a legislator, the pressures of the population to protect it from potentially dangerous individuals, statutory provisions defining what constitutes dangerousness and what threshold must be attained to prove it, as well as the procedural system in place (adversarial or investigatory), can all arguably affect the accuracy of a prediction of dangerousness.

Despite these difficulties in accurately determining dangerousness, recognizance orders under sections 810.1 and 810.2 have been deemed constitutional by lower courts across Canada. For example, in the case of *Budreo*, the court concludes that recognizance orders under section 810.1 are not overbroad or unconstitutional, even if they can be applied to individuals who have never committed a crime.⁵⁵⁶ However, as noted earlier, this reasoning does not take into account the fact that a determination of dangerousness is subjected to a risk of false positives. Furthermore, the fact that the accuracy and

⁵⁵⁵ See Menzies, *supra* note 111 at 67.

⁵⁵⁶ *Budreo*, *supra* note 8 at 42.

reliability of predictions of dangerousness depends on the type of risk assessment tool used by mental health experts is also not explored by the Court of Appeal in *Budreo*. In other words, arguably, the court's reasoning is based on the assumption that a determination of dangerousness is possible and sufficient to justify the imposition of restrictive conditions.

In this regard, in *Budreo*, the court followed the Supreme Court of Canada reasoning in *Lyons* which dealt with the problem of inaccuracy in the determination of dangerousness and the constitutionality of the dangerous offender scheme. In *Lyons*, the Supreme Court of Canada stated that a finding of potential dangerousness could be made where the Court was satisfied that there was "a likelihood of future conduct".⁵⁵⁷ But again, this determination was made in the context of the dangerous offender scheme. The dangerous offender scheme deals with convicted criminals at the sentencing stage. It is a designation imposed on a particularly dangerous offender. In those cases, several experts' reports and assessments will generally be needed to designate an offender as dangerous. Even if, as the literature demonstrates, expert evidence with respect to dangerousness presents problems of inaccuracy, it can constitute a good indicator. Moreover, an individual subjected to a dangerous offender designation has presumably a long and/or extreme criminological history on which the judge can formulate an opinion as to his or her potential dangerousness.

Arguably, in the context of sections 810.1 and 810.2 of the *Criminal Code*, the court could make a finding of dangerousness without any expert reports and impose severe restrictive conditions upon any individual. The only condition is that it must be satisfied

⁵⁵⁷ *Lyons*, *supra* note 149 at 364-365.

that the informant's fear is reasonable with respect to the potential dangerousness of the offender. Dangerousness already presents numerous challenges in its assessment and prediction even with the help of expert reports. Consequently, questions remain as to how it could be demonstrated without any expertise. With the current wording of section 810.1 and 810.2, a court could impose a recognizance order on an individual who has no criminal history without the benefit of an expert's report. When one considers the fact that the possibility of over-predicting dangerousness is real, even in cases involving convicted dangerous offenders, there are causes to be concerned with a scheme that allows the imposition of recognizance orders on individuals who have no criminal history. The imposition of recognizance orders upon an individual who has never committed a crime and who would be erroneously labelled as potentially dangerous could have serious detrimental consequences on his or her enjoyment of life because of the stigma attached to such a designation. It is unclear how false positives would impact the assessment of dangerousness in those cases, but the possibility of over-prediction is real and the consequences of an erroneous determination are undeniably devastating. Thus, while the current wording of sections 810.1 and 810.2 may answer society's need to rely on a quick method to control imminent danger, it does so at the expense of fundamental principles of justice.

In response, one might argue, based on the decision in *Noble*, that the required threshold to impose a recognizance order has been interpreted as being higher than a simple demonstration of a likelihood of dangerousness. In a sense, that would prevent serious infringements on fundamental principles of justice. However, the fact remains that the threshold is lower than proof beyond a reasonable doubt and that severe restrictive

conditions can be imposed on an individual on a simple balance of probabilities. Arguably, whenever coercive measures can be applied in cases where the standard of proof is lowered, it opens the door to abuse of powers.

It is, therefore, important to look at the least invasive compromise in terms of protecting society from potentially dangerous individuals while preserving fundamental principles of justice. As noted earlier, the possibility of imposing serious restrictive conditions upon individuals who have yet to commit a crime inevitably raises questions as to potential infringements of fundamental principles of justice. Generally, Canadian courts have declared that procedural safeguards, such as a right to appeal the decision, are sufficient in the context of recognizance orders under sections 810.1 and 810.2 of the *Criminal Code*. However, one cannot consider Canadian recognizance orders as a perfect system of preventing and controlling dangerousness. In many respects, the Canadian scheme could actually learn from the French perspective on dangerousness.

For one, with the exception of the newly enacted *Loi sur la prévention de la délinquance*, the French scheme is more respectful of fundamental principles of justice because it limits expressly the applicability of restrictive measures to convicted criminals, multi-recidivists and individuals who are mentally ill and considered dangerous. Restrictive conditions under a social-judicial probation or a *rétenion de sûreté* cannot be imposed upon an individual who has no criminal record. While in practice recognizance orders in the Canadian context are not usually imposed upon individuals who have no criminal records, the legislation does not expressly limit its applicability, as is the case in France. Furthermore, peace bond and recognizance order provisions with their citizen initiated aspect are also absent from French criminal law. Therefore, the State is solely in charge

of identifying and controlling potentially dangerous individuals. In a sense, this further limits the use of restrictive conditions, since a citizen cannot apply for a recognizance order, as is the case in Canada. The French legislature has crafted the preventive measures scheme around the notions of exceptionality and limited applicability. On the other hand, arguably, the Canadian scheme of recognizance orders under sections 810.1 and 810.2 of the *Criminal Code* could be considered as a “disguised” state power over its citizen, closer in essence to post-detention provisions such as the dangerous offender scheme, than to peace bonds. As noted earlier, recognizance orders under sections 810.1 and 810.2 are usually sought by the Crown, upon the release from prison of an offender, despite the fact that these measures are available for anyone who has a fear that an individual will commit a crime. The wording used in sections 810.1 and 810.2 may very well hide Parliament’s true intentions. Instead of being a simple variant of peace bonds, recognizance orders create a new tool to restrict the liberties of individuals after they have served their mandatory incarceration sentence. It also creates new means to control and monitor the whereabouts of these individuals. In this context, the sentence is no longer definite, but continues insidiously, although in a different manner, after the mandatory period of incarceration has been served.

The French scheme of restrictive measures also benefits from the influences of the judge-centered investigatory system. As demonstrated earlier, an investigatory system appears to favour an unbiased determination of dangerousness by mental health experts. The French scheme also favours a concerted approach between various mental health experts when determining and assessing dangerousness. On the downside, the literature demonstrates that French mental health experts are still relying on psychoanalysis in

predicting a risk of future behaviour, a method that has been criticised for its unreliability and inaccuracy.⁵⁵⁸ In this regard, the actuarial methods and structured clinical judgment method widely used by Canadian clinicians have proved to be more reliable.⁵⁵⁹

Perhaps one of the most notable features of the French scheme of preventive measures geared toward the effective control of dangerousness is that it recognizes the importance of rehabilitation and treatment of dangerousness in a specially created environment, namely hospital-prisons. This forms a comprehensive system that focuses on the identification of criminological factors, the control of multi-recidivists and the treatment of these individuals considered as potentially dangerous individuals. Of course, the identification of potential dangerous individuals as permitted by the newly enacted *Loi sur la prevention de la délinquance* may infringe upon fundamental principles of justice. However, when one look at the French scheme of determination of dangerousness, coupled with the fact that French law-makers are not only concerned with controlling dangerousness, but also with treating and eradicating it, it can be argued that the French scheme offers potential reasonable alternatives in the application of recognizance orders.

Thus, given the problems in terms of reliability of predictions of dangerousness, it is suggested that the Canadian scheme be modified to include some of the French features. In particular, Canadian recognizance orders should be expressly limited to convicted criminals and multi-recidivists. In practice, this is already the case, but the legislation should be modified to reflect the reality. While not settling the issue of inaccuracies in the prediction of dangerousness and the effect of fundamental principles of justice, it would

⁵⁵⁸ Bébin, *supra* note 141, at 2.

⁵⁵⁹ See generally MacAlister, *supra* note 37.

at least expressly limit the applicability of the measure to individuals who have a criminal history. Arguably, this would help respect fundamental principles of justice even more.

Moreover, since the courts base their decisions on the reasonableness of the informant's fear that an individual will commit an offence, it is suggested that assessment of dangerousness should be the product of a concerted approach by a multidisciplinary team of experts. Cooperation between clinicians, instead of competition, could potentially decrease the risk of biased opinion, while offering the judge a clearer picture from which to form his or her opinion. A mandatory team of experts, similar to the multidisciplinary panel of experts in existence in France, and comprised of mental health experts, prison officials, and lawyers, could also be involved in assessing the dangerousness of a particular individual. The panel could then formulate recommendations to the court that would make the ultimate decision.

Additionally, it is suggested that a panel of judges should ultimately decide on the dangerousness of an individual, instead of leaving the entire task on the shoulders of a single provincial court judge. Arguably, this would also decrease the risk of error in the determination of dangerousness, because more than one individual would be involved in the determination process. While lower courts in Canada have already declared the scheme under sections 810.1 and 810.2 constitutional, the impact on fundamental principles of justice would be reduced even more by integrating some of the above-noted aspects of the French scheme.

The comparative analysis also underlines several potential problems with the accuracy and reliability of determination of dangerousness. Several factors can have an influence

on the accuracy of determination of risks of future behaviour. In fact, not only is dangerousness a concept difficult to define, it is even more difficult to determine it. The task is not impossible, however. Some risk assessment tools, such as actuarial assessment, have promising results.⁵⁶⁰ But the risks of false positives, over-prediction and misinterpretation remain. It is, therefore, important to seek a reasonable compromise between the need of society to protect itself from potentially dangerous individuals, and respecting fundamental principles of justice. Accordingly, based on the above findings of the comparative analysis, the following amendments are proposed to the recognizance scheme under sections 810.1 and 810.2 of the *Criminal Code*.

First, the wording in sections 810.1 and 810.2 should be modified to limit the persons to whom restrictive conditions may apply. The scheme should be reserved for convicted offenders and multi-recidivists who present a high risk of future dangerousness. As noted earlier, the problems of reliability in determining dangerousness, coupled with the risk of false positives militates in favour of a restrictive approach in the imposition of recognizance orders.

Second, to respect fundamental principles of justice, it is argued that restrictive conditions under recognizance orders should be clearly delineated in the legislation. In other words, judges' discretion should be limited. In effect, this would decrease the risk of imposing unreasonable conditions on an individual. While this may certainly add rigidity to the system, one should never forget that the individual subjected to a recognizance order has not yet committed a crime. In this regard, the comments of Mr. Forcese in the Proceedings of the Special Senate Committee on Anti-terrorism, with

⁵⁶⁰ See generally MacAlister, *supra* note 37.

respect to the wide discretion of judges in imposing restrictive conditions under sections 83.3 and 810.01 of the *Criminal Code* (two similar provisions to sections 810.1 and 810.2) are quite relevant: “[i]n our system, it is an open invitation for a judge to impose conditions, the outer limit of which have not been tested in our courts, subject to being persuaded to do so by the Crown”.⁵⁶¹ Even more shocking is the fact that there is currently no way of tracking which conditions are imposed on potentially dangerous individuals. Again, in this regard, Mr. Forcese raises the following concerns:

Yes, in large measure that is right. I am also motivated by the current problem of tracking this use. It is not always easy to determine what conditions are imposed as part of a peace bond. For example, it is only if there is a constitutional challenge to the peace bond provision writ large that there is some resolution on what those peace bonds include. **Absent greater disclosure of what these conditions are, the existing open invitation in the Criminal Code in terms of the imposition of conditions is unmanageable. There is no check and balance so it is difficult to monitor exactly what is happening. It remains in the hands of individual judges across the country to develop measures that seem reasonable in the circumstances.** Given the extraordinary nature of these provisions, I want to see more guaranteed continuity.⁵⁶² [Emphasis added].

In a scheme that relies heavily on an inaccurate science to determine dangerousness and impose restrictive conditions, fundamental rights of justice ought to be given a high importance. Accordingly, given the negative impact and stigma attached to a recognizance order, restrictive conditions should be clearly set out in the legislation, as it is the case in France.⁵⁶³ This would give more clarity to the system and prevent the imposition of unreasonable conditions. While it is true that an individual can exercise his

⁵⁶¹ Proceedings, *supra* note 418.

⁵⁶² Proceedings, *ibid.*

⁵⁶³ For example, conditions are clearly defined under social-judicial probations orders. See *Code penal*, at Article 131-36-2.

right to appeal under a recognizance order application, this, technically, constitutes another procedural burden for an often under-resourced party.

Furthermore, the legislative scheme under sections 810.1 and 810.2 of the *Criminal Code* should be modified to reflect the fact that restrictive conditions can have potentially detrimental effect on the lives of individuals subjected to them. In fact, there are questions as to the effectiveness of restrictive conditions in lowering the risk of dangerousness of an individual. It was argued that in some cases, an offender's ability to reintegrate into society properly can be hampered by over-restrictive conditions.⁵⁶⁴ Consequently, the scheme should have a very restrictive applicability. In this regard, the court's interpretation in *Noble* of a higher threshold than a simple demonstration of a likelihood of dangerousness is a step in the right direction.

In addition, the legislation should provide for a rehabilitative component as part of the conditions that can be imposed on an individual. It is argued that society in general would benefit from a rehabilitative approach that not only aims at controlling dangerousness but also at reducing it with concrete measures. Building on the French experience in this field, it would be worth examining the feasibility of creating "hospital-prisons" where potentially dangerous individuals would be assessed and treated as needed.

Finally, another point worth considering in amending the legislation is that failure to abide by the conditions of a recognizance order constitutes a punishable offense under section 811 of the *Criminal Code*. In the context of sections 810.1 and 810.2 of the *Criminal Code*, conditions can be imposed upon an individual based on a simple

⁵⁶⁴ See John Howard, "Dangerous Offenders", *supra* note 51.

determination of dangerousness. This enables the state to monitor and restrict the liberties of an individual, while creating new opportunities to arrest him or her for non-compliance. In cases of non-compliance, an individual faces the possibility of having a criminal record and being incarcerated. However, as noted earlier, restrictive conditions can, sometimes, have the effect of imprisoning an individual inside their house, thereby seriously restricting their mobility and hampering any chance of reintegrating into society.⁵⁶⁵ When individuals fail to abide by the conditions imposed under a recognizance order, whether by their own misfortune or by reasons out of their control, a sentence of imprisonment may not constitute the most reasonable measure.

In this regard, in the debates before the Standing Committee on Justice and Legal Affairs which examined Bill C-55, one of the members of the Committee raised the issue and offered a potential solution:

Even on that assumption, I see a problem with clause 810.2, and that's the fourth point which states that the judge may commit the defendant to prison for a term not exceeding 12 months if the defendant fails or refuses to enter into the recognizance. You know very well that if a person is found guilty under clause 810.2, sub-clause 4), the person will have a criminal record pursuant to the Criminal Records Act.

Therefore, by administering a rule based on the preponderance of evidence, we start from point A to arrive to point B, and the person who refuses will then have a criminal record. I therefore feel it would be wiser to consider the person as having been in contempt of court, as is the case, if memory serves me, when a warrant is issued. [Emphasis added].⁵⁶⁶

When we factor in unreliability in the determination of dangerousness and the numerous imperfections of the scheme, it would seem reasonable to place an individual who fails to

⁵⁶⁵ John Howard, *"Dangerous Offenders"*, *ibid.*

⁵⁶⁶ Standing Committee, Allan Rock, *supra* note 278, at 1215 [Comments from Mr. Langlois (Bellechasse)].

enter into a recognizance order in contempt of court, rather than impose a prison sentence on him or her; at the very least, the option should exist. Another alternative to imprisonment would be to allow a judge to review the conditions imposed in a recognizance order in a “breach of conditions hearing”. This would enable a judge to re-evaluate the relevance of the conditions and monitor their impact on the life of the potential offender.

Evidently, there is no guarantee that the above-noted recommendations which were influenced by the French scheme are necessarily applicable to the Canadian context. In this regard, Zweigert and Kötz offer a warning:

[w]henver it is proposed to adopt a foreign solution which is said to be superior, two questions must be asked: first, whether it has proved satisfactory in its country of origin, and secondly, whether it will work in the country where it is proposed to adopt it. It may well prove to be impossible to adopt, at any rate without modification, a solution tried and tested abroad because of differences in court procedures, the powers of the various authorities, the working of the economy, or the general social context into which it would have to benefit.⁵⁶⁷

Once again, it is argued that some aspect of the French approach in determining dangerousness (i.e. assessment by multidisciplinary panel of experts, creation of prison-hospital, etc.), are worth exploring in the hopes of implementing or modifying preventive measures and rendering more respectful of fundamental principles of justice. Of course, before implementing any recommendations based on the French scheme, it would be necessary to explore in more detail the French approach to determine if it has proven to be satisfactory. One should remember, however, that some French preventive measures, such as the *rétenion de sûreté*, have only been enacted recently.

⁵⁶⁷ Zeigert & Kötz, *supra* note 549 at 16.

In implementing some of the above recommendations, there is, of course a downside from the State's perspective: fewer people would be subjected to the legislation. On the other hand, it would better preserve the balance between the right of society to be protected from potentially dangerous individuals, and the importance of protecting fundamental principles of justice.

In conclusion, there are several key differences between the two systems with respect to the determination of dangerousness. Perhaps the most notable distinction between the two systems is the applicability of restrictive conditions. As noted earlier, the French scheme limits the applicability of restrictive conditions to convicted offenders and multi-recidivists, while the Canadian scheme also encompasses individuals who have no criminal history.

In this context, with the exception of the newly enacted *Loi sur la prévention de la délinquance* which raised concerns, the French system appears more advantageous in terms of respect of fundamental principles of justice. In addition, the French investigatory system appears to provide for numerous procedural safeguards in the imposition of restrictive conditions similar to recognizance orders under the Canadian scheme. The investigatory system, at least with respect to the *mesure de sûreté* such as the *rétenion de sûreté*, favours objective opinion from mental health experts by relegating the difficult tasks of determining dangerousness to a multidisciplinary panel of experts who do not work for one party or the other.

In the end, however, whether dangerousness is assessed by two mental health experts who provide conflicting evidence in an adversarial setting, or by a multidisciplinary team

in an investigatory setting, similar difficulties will be encountered in determining the risk of dangerousness. Problems such as the inaccuracy and unreliability of certain risk assessment tools, difficulties in the interpretation of results, as well as the risks of false positives, will continue to present challenges for both criminal law systems. Arguably, despite these challenges, preventive measures will also continue to be developed to control dangerousness. Hopefully, lawmakers will be concerned with the protection of fundamental principles of justice when enacting preventive measures. In the end, perhaps a move toward a new and better system that integrates the best characteristics of the French investigatory system, such as the assessment of dangerousness by a multidisciplinary team of experts, coupled with the Canadian approach of using improved risk assessment tools, such as the structured clinical judgment in determining dangerousness, would be more respectful of fundamental principles of justice.

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APPENDIX A – CRIMINAL CODE OF CANADA – SECTION 810

Source: Department of Justice Canada, online:

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SURETIES TO KEEP THE PEACE

Where injury or damage feared

810. (1) An information may be laid before a justice by or on behalf of any person who fears on reasonable grounds that another person will cause personal injury to him or her or to his or her spouse or common-law partner or child or will damage his or her property.

Duty of justice

(2) A justice who receives an information under subsection (1) shall cause the parties to appear before him or before a summary conviction court having jurisdiction in the same territorial division.

Adjudication

(3) The justice or the summary conviction court before which the parties appear may, if satisfied by the evidence adduced that the person on whose behalf the information was laid has reasonable grounds for his or her fears,

(a) order that the defendant enter into a recognizance, with or without sureties, to keep the peace and be of good behaviour for any period that does not exceed twelve months, and comply with such other reasonable conditions prescribed in the recognizance, including the conditions set out in subsections (3.1) and (3.2), as the court considers desirable for securing the good conduct of the defendant; or

(b) commit the defendant to prison for a term not exceeding twelve months if he or she fails or refuses to enter into the recognizance.

Conditions

(3.1) Before making an order under subsection (3), the justice or the summary conviction court shall consider whether it is desirable, in the interests of the safety of the defendant or of any other person, to include as a condition of the recognizance that the defendant be prohibited from possessing any firearm, cross-bow, prohibited weapon, restricted weapon, prohibited device, ammunition, prohibited ammunition or explosive substance, or all such things, for any period specified in the recognizance and, where the justice or summary conviction court decides that it is so desirable, the justice or summary conviction court shall add such a condition to the recognizance.

Surrender, etc.

(3.11) Where the justice or summary conviction court adds a condition described in subsection (3.1) to a recognizance order, the justice or summary conviction court shall specify in the order the manner and method by which

(a) the things referred to in that subsection that are in the possession of the accused shall be surrendered, disposed of, detained, stored or dealt with; and

(b) the authorizations, licences and registration certificates held by the person shall be surrendered.

Reasons

(3.12) Where the justice or summary conviction court does not add a condition described in subsection (3.1) to a recognizance order, the justice or summary conviction court shall include in the record a statement of the reasons for not adding the condition.

Idem

(3.2) Before making an order under subsection (3), the justice or the summary conviction court shall consider whether it is desirable, in the interests of the safety of the informant, of the person on whose behalf the information was laid or of that person's spouse or common-law partner or child, as the case may be, to add either or both of the following conditions to the recognizance, namely, a condition

(a) prohibiting the defendant from being at, or within a distance specified in the recognizance from, a place specified in the recognizance where the person on whose behalf the information was laid or that person's spouse or common-law partner or child, as the case may be, is regularly found; and

(b) prohibiting the defendant from communicating, in whole or in part, directly or indirectly, with the person on whose behalf the information was laid or that person's spouse or common-law partner or child, as the case may be.

Forms

(4) A recognizance and committal to prison in default of recognizance under subsection (3) may be in Forms 32 and 23, respectively.

Modification of recognizance

(4.1) The justice or the summary conviction court may, on application of the informant or the defendant, vary the conditions fixed in the recognizance.

Procedure

(5) The provisions of this Part apply, with such modifications as the circumstances require, to proceedings under this section.

R.S., 1985, c. C-46, s. 810; 1991, c. 40, s. 33; 1994, c. 44, s. 81; 1995, c. 22, s. 8, c. 39, s. 157; 2000, c. 12, s. 95.

Fear of certain offences

810.01 (1) A person who fears on reasonable grounds that another person will commit an offence under section 423.1, a criminal organization offence or a terrorism offence may, with the consent of the Attorney General, lay an information before a provincial court judge.

Appearances

(2) A provincial court judge who receives an information under subsection (1) may cause the parties to appear before a provincial court judge.

Adjudication

(3) The provincial court judge before whom the parties appear may, if satisfied by the evidence adduced that the informant has reasonable grounds for the fear, order that the defendant enter into a recognizance to keep the peace and be of good behaviour for any period that does not exceed twelve months and to comply with any other reasonable conditions prescribed in the recognizance, including the conditions set out in subsection (5), that the provincial court judge considers desirable for preventing the commission of an offence referred to in subsection (1).

Refusal to enter into recognizance

(4) The provincial court judge may commit the defendant to prison for a term not exceeding twelve months if the defendant fails or refuses to enter into the recognizance.

Conditions — firearms

(5) Before making an order under subsection (3), the provincial court judge shall consider whether it is desirable, in the interests of the safety of the defendant or of any other person, to include as a condition of the recognizance that the defendant be prohibited from possessing any firearm, cross-bow, prohibited weapon, restricted weapon, prohibited device, ammunition, prohibited ammunition or explosive substance, or all of those things, for any period specified in the recognizance, and where the provincial court judge decides that it is so desirable, the provincial court judge shall add such a condition to the recognizance.

Surrender, etc.

(5.1) Where the provincial court judge adds a condition described in subsection (5) to a recognizance, the provincial court judge shall specify in the recognizance the manner and method by which

(a) the things referred to in that subsection that are in the possession of the defendant shall be surrendered, disposed of, detained, stored or dealt with; and

(b) the authorizations, licences and registration certificates held by the defendant shall be surrendered.

Reasons

(5.2) Where the provincial court judge does not add a condition described in subsection (5) to a recognizance, the provincial court judge shall include in the record a statement of the reasons for not adding the condition.

Variance of conditions

(6) A provincial court judge may, on application of the informant, the Attorney General or the defendant, vary the conditions fixed in the recognizance.

Other provisions to apply

(7) Subsections 810(4) and (5) apply, with any modifications that the circumstances require, to recognizances made under this section.

1997, c. 23, ss. 19, 26; 2001, c. 32, s. 46, c. 41, ss. 22, 133; 2002, c. 13, s. 80.

Where fear of sexual offence

810.1 (1) Any person who fears on reasonable grounds that another person will commit an offence under section 151, 152, 155 or 159, subsection 160(2) or (3), section 163.1, 170, 171 or 172.1, subsection 173(2) or section 271, 272 or 273, in respect of one or more persons who are under the age of 16 years, may lay an information before a provincial court judge, whether or not the person or persons in respect of whom it is feared that the offence will be committed are named.

Appearances

(2) A provincial court judge who receives an information under subsection (1) may cause the parties to appear before a provincial court judge.

Adjudication

(3) If the provincial court judge before whom the parties appear is satisfied by the evidence adduced that the informant has reasonable grounds for the fear, the judge may order that the defendant enter into a recognizance to keep the peace and be of good behaviour for a period that does not exceed 12 months.

Duration extended

(3.01) However, if the provincial court judge is also satisfied that the defendant was convicted previously of a sexual offence in respect of a person who is under the age of 16 years, the judge may order that the defendant enter into the recognizance for a period that does not exceed two years.

Conditions in recognizance

(3.02) The provincial court judge may add any reasonable conditions to the recognizance that the judge considers desirable to secure the good conduct of the defendant, including conditions that

- (a) prohibit the defendant from engaging in any activity that involves contact with persons under the age of 16 years, including using a computer system within the meaning of subsection 342.1(2) for the purpose of communicating with a person under that age;
- (b) prohibit the defendant from attending a public park or public swimming area where persons under the age of 16 years are present or can reasonably be expected to be present, or a daycare centre, schoolground or playground;
- (c) require the defendant to participate in a treatment program;
- (d) require the defendant to wear an electronic monitoring device, if the Attorney General makes the request;
- (e) require the defendant to remain within a specified geographic area unless written permission to leave that area is obtained from the provincial court judge;
- (f) require the defendant to return to and remain at his or her place of residence at specified times; or
- (g) require the defendant to abstain from the consumption of drugs except in accordance with a medical prescription, of alcohol or of any other intoxicating substance.

Conditions — firearms

(3.03) The provincial court judge shall consider whether it is desirable, in the interests of the defendant's safety or that of any other person, to prohibit the defendant from possessing any firearm, cross-bow, prohibited weapon, restricted weapon, prohibited device, ammunition, prohibited ammunition or explosive substance, or all of those things. If the judge decides that it is desirable to do so, the judge shall add that condition to the recognizance and specify the period during which the condition applies.

Surrender, etc.

(3.04) If the provincial court judge adds a condition described in subsection (3.03) to a recognizance, the judge shall specify in the recognizance how the things referred to in that subsection that are in the defendant's possession should be surrendered, disposed of, detained, stored or dealt with and how the authorizations, licences and registration certificates that are held by the defendant should be surrendered.

Condition — reporting

(3.05) The provincial court judge shall consider whether it is desirable to require the defendant to report to the correctional authority of a province or to an appropriate police authority. If the judge decides that it is desirable to do so, the judge shall add that condition to the recognizance.

Refusal to enter into recognizance

(3.1) The provincial court judge may commit the defendant to prison for a term not exceeding twelve months if the defendant fails or refuses to enter into the recognizance.

Judge may vary recognizance

(4) A provincial court judge may, on application of the informant or the defendant, vary the conditions fixed in the recognizance.

Other provisions to apply

(5) Subsections 810(4) and (5) apply, with such modifications as the circumstances require, to recognizances made under this section.

1993, c. 45, s. 11; 1997, c. 18, s. 113; 2002, c. 13, s. 81; 2008, c. 6, ss. 52, 54, 62.

Where fear of serious personal injury offence

810.2 (1) Any person who fears on reasonable grounds that another person will commit a serious personal injury offence, as that expression is defined in section 752, may, with the consent of the Attorney General, lay an information before a provincial court judge, whether or not the person or persons in respect of whom it is feared that the offence will be committed are named.

Appearances

(2) A provincial court judge who receives an information under subsection (1) may cause the parties to appear before a provincial court judge.

Adjudication

(3) If the provincial court judge before whom the parties appear is satisfied by the evidence adduced that the informant has reasonable grounds for the fear, the judge may

order that the defendant enter into a recognizance to keep the peace and be of good behaviour for a period that does not exceed 12 months.

Duration extended

(3.1) However, if the provincial court judge is also satisfied that the defendant was convicted previously of an offence referred to in subsection (1), the judge may order that the defendant enter into the recognizance for a period that does not exceed two years.

Refusal to enter into recognizance

(4) The provincial court judge may commit the defendant to prison for a term not exceeding twelve months if the defendant fails or refuses to enter into the recognizance.

Conditions in recognizance

(4.1) The provincial court judge may add any reasonable conditions to the recognizance that the judge considers desirable to secure the good conduct of the defendant, including conditions that require the defendant

- (a) to participate in a treatment program;
- (b) to wear an electronic monitoring device, if the Attorney General makes the request;
- (c) to remain within a specified geographic area unless written permission to leave that area is obtained from the provincial court judge;
- (d) to return to and remain at his or her place of residence at specified times; or
- (e) to abstain from the consumption of drugs except in accordance with a medical prescription, of alcohol or of any other intoxicating substance.

Conditions — firearms

(5) The provincial court judge shall consider whether it is desirable, in the interests of the defendant's safety or that of any other person, to prohibit the defendant from possessing any firearm, cross-bow, prohibited weapon, restricted weapon, prohibited device, ammunition, prohibited ammunition or explosive substance, or all of those things. If the judge decides that it is desirable to do so, the judge shall add that condition to the recognizance and specify the period during which the condition applies.

Surrender, etc.

(5.1) If the provincial court judge adds a condition described in subsection (5) to a recognizance, the judge shall specify in the recognizance how the things referred to in that subsection that are in the defendant's possession should be surrendered, disposed of, detained, stored or dealt with and how the authorizations, licences and registration certificates that are held by the defendant should be surrendered.

Reasons

(5.2) If the provincial court judge does not add a condition described in subsection (5) to a recognizance, the judge shall include in the record a statement of the reasons for not adding the condition.

Condition — reporting

(6) The provincial court judge shall consider whether it is desirable to require the defendant to report to the correctional authority of a province or to an appropriate police authority. If the judge decides that it is desirable to do so, the judge shall add that condition to the recognizance.

Variance of conditions

(7) A provincial court judge may, on application of the informant, of the Attorney General or of the defendant, vary the conditions fixed in the recognizance.

Other provisions to apply

(8) Subsections 810(4) and (5) apply, with such modifications as the circumstances require, to recognizances made under this section.

1997, c. 17, s. 9; 2002, c. 13, s. 82; 2008, c. 6, s. 53.

Breach of recognizance

811. A person bound by a recognizance under section 83.3, 810, 810.01, 810.1 or 810.2 who commits a breach of the recognizance is guilty of

(a) an indictable offence and liable to imprisonment for a term not exceeding two years; or

(b) an offence punishable on summary conviction.

R.S., 1985, c. C-46, s. 811; 1993, c. 45, s. 11; 1994, c. 44, s. 82; 1997, c. 17, s. 10, c. 23, ss. 20, 27; 2001, c. 41, s. 23.

APPENDIX B – CODE DE PROCÉDURE PÉNALE

Code de Procédure Pénale : Article 131-36-1 to 131-36-8; Article 132-44 to 132-46.

Source : "LEGIFRANCE - With the participation of John Rason SPENCER, Professor at the University of Cambridge (Selwyn College)", available online: LegiFrance
<http://www.legifrance.gouv.fr/html/codes_traduits/code_penal_textA.htm#Sub-section%206%20Of%20socio-judicial%20probation>.

ARTICLE 131-36-1

Inserted by Act no. 1998-468 of 17 June 1998 Article 1 Official Journal of 18 June 1998

Where the law so provides, the trial court may order socio-judicial probation.

Socio-judicial probation entails, for the convicted person, the duty to submit, under the supervision of the penalties enforcement judge for the period determined by the trial court, to measures of supervision and assistance designed to prevent recidivism. The period of socio-judicial probation may not exceed ten years in the case of conviction for a misdemeanour or twenty years in the case of conviction for a felony.

The trial court also fixes the maximum term of imprisonment to be served by the convicted person where he fails to observe the obligations imposed upon him. This imprisonment may not exceed two years in the case of a conviction for a misdemeanour or five years in the case of a conviction for a felony. The manner in which the penalties enforcement judge may order the imprisonment to be wholly or partly executed is determined by the Code of Criminal Procedure.

The president of the court, after giving judgment, warns the convicted person of the obligations arising from it and of the consequences if they are not fulfilled.

ARTICLE 131-36-2

Inserted by Act no. 1998-468 of 17 June 1998 Article 1 Official Journal of 18 June 1998

The measures of supervision applicable to the person sentenced to socio-judicial probation are those laid down by article 132-44.

The convicted person may also be subjected by the trial court or by the penalties enforcement judge to the obligation specified by article 132-45. He may also be subjected to one or more of the following obligations:

1° not to be present in such places or such category of places as specifically designated, in particular where minors are to be found;

2° not to visit or to have contact with certain persons or certain categories of persons, and particularly minors, except, where relevant, those specified by the court;

3° not to carry out any professional or voluntary activity involving regular contact with minors.

ARTICLE 131-36-3

Inserted by Act no. 1998-468 of 17 June 1998 Article 1 Official Journal of 18 June 1998

The object of assistance measures to which a convicted person is subjected is to support his efforts towards rehabilitation.

ARTICLE 131-36-4

Inserted by Act no. 1998-468 of 17 June 1998 Article 1 Official Journal of 18 June 1998

Socio-judicial probation may include a requirement of treatment.

This requirement may be ordered by the trial court if it is established after a report by a medical expert, obtained in the conditions laid down by the Code of Criminal Procedure, that the person prosecuted is a suitable case for such treatment. This examination is carried out by two experts in the case of a prosecution for the murder of a minor preceded or accompanied by rape, torture or acts of barbarity. The president warns the convicted person that no treatment may be undertaken without his consent, but that if he refuses the treatment offered to him, imprisonment imposed under the third paragraph of article 131-36-1 may be enforced.

Where the trial court orders treatment and a non-suspended custodial sentence has also been imposed on the relevant person, the presiding judge informs the convicted person that he has the option of starting treatment whilst serving the sentence.

ARTICLE 131-36-5

Inserted by Act no. 1998-468 of 17 June 1998 Article 1 Official Journal of 18 June 1998

Where the socio-judicial probation order is imposed with an immediate custodial sentence, the probation order is enforced, for the period fixed in the sentence, to run from the day when the custodial sentence comes to an end.

The socio-judicial probation order is suspended by any detention that intervenes while it is running.

Imprisonment ordered on account of failure to observe the obligations contained in the socio-judicial probation order is consecutive to any immediate custodial sentence imposed for offences committed during the currency of the order, and may not be concurrent with them.

ARTICLE 131-36-6

Inserted by Act no. 1998-468 of 17 June 1998 Article 1 Official Journal of 18 June 1998

A socio-judicial probation may not be ordered together with a custodial sentence which is suspended, in whole or in part, on condition of good behaviour.

ARTICLE 131-36-7

Inserted by Act no. 1998-468 of 17 June 1998 Article 1 Official Journal of 18 June 1998

In proceedings for misdemeanours, socio-judicial probation may be imposed as the main sentence.

ARTICLE 131-36-8

Inserted by Act no. 1998-468 of 17 June 1998 Article 1 Official Journal of 18 June 1998

The manner of enforcement of a socio-judicial probation is determined by Title VII bis of Book V of the Code of Criminal Procedure.

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ARTICLE 132-44

Act no. 2000-516 of 15 June 2000 Article 124 Official Journal of 16 June 2000

The supervision measures the convicted person must undergo are the following:

1° to attend when required to do so by the penalties enforcement judge or the designated social worker;

2° to receive the visits of the social worker and to provide him with such information or documents as are necessary to verify his means of existence and the execution of his obligations;

3° to inform the social worker of any change of employment;

4° to inform the social worker of any changes of residence or of any journey in excess of fifteen days and to explain how he will return;

5° to obtain the prior authorisation from the penalties enforcement judge for any journey abroad and, where it is liable to obstruct the execution of his obligations, for any change of employment or residence.

ARTICLE 132-45

A trial court or a penalties enforcement judge may specially impose on the convicted person a duty to observe one or more of the following obligations:

1° to exercise a professional activity or to follow a course of education or professional training;

2° to establish his residence in a determined place;

3° to undergo medical examination, treatment or medical care, and where necessary hospitalisation;

4° to demonstrate that he is contributing to family expenses or is regularly paying any alimony that he may owe;

5° to make good, in all or part, according to his ability to pay, the damage caused by the offence, even in the absence of a court decision on civil liability;

6° to demonstrate that he is paying according to his ability to pay the amounts due to the public Treasury in consequence of the sentence;

7° to abstain from driving certain vehicles determined by the category of driving licences provided for under the Traffic Code;

8° not to engage in professional activity in the exercise of which or on the occasion of which the offence was committed;

9° to abstain from appearing in any place as specifically identified;

10° not to engage in betting, especially in betting shops;

11° not to frequent public houses;

12° not to keep company with certain convicted persons, especially other offenders or accomplices to the offence;

13° to abstain from contacting certain persons, especially with the victim of the offence;

14° not to hold or carry any weapon.

ARTICLE 132-46

The objective of an assistance measure is to support the convicted person's efforts towards social reintegration.

These measures take the form of social, and if need be, financial assistance, and are implemented by the probation service with the participation, where appropriate, of any private or public institution.

APPENDIX C – EXAMPLE OF THE RAPID ASSESSMENT FOR SEXUAL OFFENSE RECIDIVISM (RRASOR)

Excerpt from:

Hanson, R. Karl, *The Development of a Brief Actuarial Risk Scale for Sexual Offense Recidivism*, 1997-04, online: Department of the Solicitor General of Canada <http://ww2.pssp.gc.ca/publications/corrections/199704_e.pdf>, at 14:

Table 4

The Rapid Risk Assessment for Sexual Offense Recidivism (RRASOR).

Prior sex offenses (not including index offenses)	
None	0
1 conviction; 1-2 charges	1
2-3 convictions; 3-5 charges	2
4 or more convictions; 6 or more charges	3
Age at release (current age)	
more than 25	0
less than 25	1
Victim gender	
only females	0
any males	1
Relationship to victim	
only related	0
any non-related	1

To standardize the rates across studies, certain assumptions concerning the recidivism rates were required. Based on previous long-term follow-up studies (e.g., Hanson et al., 1993; Rice & Harris, 1997), it was assumed that the recidivism rate was quickest during the first five years and then continued at a lower rate (approximately half) for up to 15 years post release. The amount of recidivism following 15 years post release was considered to be negligible. It was also assumed that the ratio of the recidivism rates for the different risk levels would be approximately constant across time (i.e., the “proportional hazard” assumption). Consequently, the adjustment was based on the following simple formula:

Total recidivism rate =
 $\text{YRR} \times \text{years}(\text{for years } 1 - 5) + (\frac{1}{2})\text{YRR} \times \text{years}(\text{for years } 6 - 15),$