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PEACE BONDS: PREVENTIVE JUSTICE?
OR PREVENTING JUSTICE?

PETER M. NEUMANN†

In this comment¹ I wish to examine some of the legal and practical problems with "peace bond" proceedings under s. 810 of the Criminal Code² for women who seek to protect themselves from their abusive partners. Recent research confirms that women are most likely to suffer violence at the hands of men they have known intimately and that they are especially vulnerable at the time of separation. A 1991 study funded by the Ontario Women's Directorate and the Ontario Ministry of Community and Social Services,³ for example, found that "intimate femicides"—or the killing of women by their intimate partners⁴—accounted for some 61 percent of all homicides of women where an offender was identified. In sharp contrast, only eight percent of all male victims were killed by their spouses.⁵ Women separating or recently estranged from their partners were at the greatest risk, homicide

† B. Appl. Sc. (Toronto), LL.B. anticipated 1994 (Dalhousie).

¹ I would like to thank Professor Rollie Thompson, Faculty of Law, Dalhousie University, for reviewing a draft of this paper and for providing me with many helpful comments.
⁴ An intimate partner was defined as a legal or common-law spouse, or a boyfriend, whether current or estranged. Ibid. at 27.
⁵ Note this figure refers to killings by legal or common-law spouses only, and not other intimate female partners. It is thus arguably a narrower definition than that of "intimate partner" used in the intimate femicide study. Nonetheless, a strict numerical comparison of spouse killings (in Ontario) reveals that, of the total 558 spouse killings between 1974 and 1990, women were victims in 75 percent of the cases. Ibid. at 34.
being significantly more likely to occur at this time than at other times during the relationship.\(^6\)

The results of the Ontario intimate femicide study are supported by a recent Statistics Canada survey on assault against women.\(^7\) Of 12,300 women interviewed, more than 50 percent revealed that they had been assaulted, physically or sexually, at least once in their lives.\(^8\) Again, this violence was found most likely to occur at the hands of an intimate partner: almost half (forty-five percent) of those interviewed said their assailters were dates, boyfriends, husbands, friends or family members.\(^9\)

The peace bond is one legal remedy that has been held out to battered women in the hope of providing them with some protection from their assailants.\(^10\) Found under s. 810 of the Criminal Code

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\(^6\) Ibid. at vii and at 166. See also L. MacLeod, *Battered But Not Beaten . . . Preventing Wife Battering in Canada* (Ottawa: Canadian Advisory Council on the Status of Women, 1987) at 44; J. Abell, "Women, Violence, and the Criminal Law: It's the Fundamentals of Being a Lawyer that are at Stake Here" (1992) 17 Queen's L.J. 147 note 35 at 161.


\(^8\) Ibid. Sexual and physical assault were defined consistent with the legal definitions of these offences, and included both threats and acts of violence ranging from pushing or shoving to the use of weapons to inflict harm.

\(^9\) Ibid. Despite this high incidence of violence, just 14 percent of all the incidents catalogued by the survey were reported to the police. Some 22 percent of those women assaulted said they had never even mentioned the assault to anyone else.

\(^10\) Other remedies include civil restraining orders, available under provincial law statutes such as Ontario's *Family Law Act* S.O. 1986, c. 4, s. 46 and British Columbia's *Family Relations Act* R.S.B.C. 1979, c. 121, s. 36.1 which permit provincial or superior court judges, on application, to make orders restraining persons (in Ontario, spouses) from "molesting, annoying or harassing [and, in B.C., also communicating with] the applicant" or the applicant's children; the court may also require the person named in the order to sign a recognizance, with or without sureties, with such conditions as the court considers appropriate. While Ontario's Act makes it an "offence" to contravene a restraining order, the penalty for which is a fine of up to $5,000 or imprisonment for three months (or both), and grants police officers the power to arrest without a warrant on "reasonable and probable grounds," the jurisdiction of the court only extends to married couples or couples who have cohabited "continuously for a period of not less than three years" [s. 29(a)] or in a "relationship of some permanence, if they are the natural or adoptive parents of a child" [s. 29(b)]. B.C.'s Act does not create an offence but has no marital or other relationship restrictions. See infra notes 39–46 and accompanying text.
under the heading "Sureties to Keep the Peace," this remedy has a simple three-part structure. Under s. 810(1):

Any person who fears that another person will cause personal injury to him or his spouse or child or will damage his property may lay an information before a justice.

Once such an information has been sworn, s. 810(2) stipulates:

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.

Section 810(3) then sets out the evidentiary requirements at this hearing and the remedial powers of a judge if these requirements are met:

The justice or the summary conviction court before which the parties appear may, if satisfied by the evidence adduced that the informant has reasonable grounds for his 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 conditions prescribed in the recognizance 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 fails or refuses to enter into the recognizance.

It should be noted that the vires of these sections, which grant provincial court judges jurisdiction (concurrently with superior court judges) to issue restraining orders, has never been challenged, either on the grounds that the sections unconstitutionally invade the exclusive jurisdiction of s. 96 courts, or because they are invalid as legislation falling within the federal criminal law power in s. 91(27) of the Constitution Act, 1867. On the other hand, provisions purporting to give provincial court judges jurisdiction in ordering exclusive occupancy of a residence or home have been challenged and held to be ultra vires on the grounds that they confer upon a provincial court a jurisdiction reserved to s. 96 courts alone. See Rudderham v. Rudderham (1988), 85 N.S.R. (2d) 267 (C.A.); Reference Re 5.6 of the Family Relations Act, 1978, [1982] 1 S.C.R. 62.
Although part of the Criminal Code, s. 810 nevertheless has several features which sets it apart from most other criminal proceedings. Unlike other informations, for example, a s. 810 information does not allege the commission of any offence.\textsuperscript{11} Moreover, unlike orders made under most penalty provisions of the Criminal Code, an order against a defendant under s. 810(3)(a) is not a conviction resulting in a sentence.\textsuperscript{12} Instead of punishing an offender for a past offence, s. 810 aims to prevent the defendant from breaching the peace in the future.\textsuperscript{13} It is this unique preventive function that has led some judges to refer to s. 810 as a codification of the ancient common law power of “preventive justice”\textsuperscript{14} which granted justices

\textsuperscript{11} Indeed, in Re Patricia E. Moses (1980), 5 W.C.B. 270 (Man. C.A.), the court noted that a s. 810 information must not allege that an offence has been committed or the information may be considered defective and quashed. Where an offence is alleged the proper procedure to follow is to lay an information in respect of that offence.

On the other hand, some courts have held that s. 810 informations must comply to some extent with the requirements for informations under s. 581 of the Criminal Code, viz., an information must contain sufficient details of the circumstances to give the defendant reasonable information concerning the allegation. In Re William Boyko (1978), 2 W.C.B. 341 (Ont. Prov. Ct.) the court held that an information which merely alleges that the informant fears that the defendant will cause personal injury to him or her does not comply with s. 581 and is incapable of amendment and therefore must be quashed.

Similarly, in Regina v. Leslie Thoen (1984), 11 W.C.B. 468 (Sask. Un. Fam. Ct.) the court held that where the information fails to allege any particular instances to show the basis of the complainant’s fears, the information is a nullity in breaching s. 581(3) and cannot be cured by particulars.

The difficulty that might arise here is where the informant does not wish to charge the defendant with an offence—such as assault—but must rely on such an incident to support her information for a peace bond. Some justices of the peace automatically prefer to lay assault charges wherever the facts alleged by an informant could support such charges even where the informant is merely seeking a peace bond.


\textsuperscript{13} Defendants who do not, however, can be charged under s. 811 with “breach of recognizance,” an offence punishable on summary conviction.

\textsuperscript{14} See e.g. Stevenson v. Saskatchewan (Minister of Justice) (1987) 61 Sask. R. 91 (Q.B.) [hereinafter Stevenson]; R. v. Chester, [1991] B.C.J. No. 2881 (QL). In Stevenson, at 93 this prerogative power was described thus:

Common law preventive justice is an English concept so ancient that its origins are now obscure. It empowers justices to place a person under a bond where it appears the person may be a
the power to bind those persons over to the peace "whom there is a probable ground to suspect of future misbehaviour." 15

At first blush then, s. 810 would seem well-suited to the needs of women who wish to protect themselves from their batterers without taking the additional step and charging them formally with an offence. In a sense, s. 810 offers a middle-ground approach: the abusive partner is warned and given a second chance without being subjected to the full reprimand of the criminal law. By forming a part of the Criminal Code, however, the section retains the important symbolic function played by the criminal law in shaping society’s values and effecting social change. 16 This "softer" approach may be

threat to the peace, regardless of the fact the person has committed no offence.

The Supreme Court of Canada has recently indicated, however, that this sweeping power may not survive a Charter challenge. In R. v. Parks (1992), 75 C.C.C. (3d) 287 at 313–314, Sopinka, J. for the majority states:

[T]he extent and continued validity of this common law power has yet to be considered in light of the Canadian Charter of Rights and Freedoms. Restrictions on an individual’s liberty can only be effected in accordance with principles of fundamental justice or must be satisfied under s. 1. This applies to deprivations of liberty following a criminal conviction as well as those effected in other circumstances... 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.

It should be noted that the facts in R. v. Parks that gave rise to the discussion of common law powers to bind persons over to the peace were substantially different from those ordinarily arising in peace bond proceedings between spouses. In R. v. Parks, the defendant had been acquitted of murdering his mother-in-law through the defence of non-insane automatism caused by sleepwalking. Lamer, C.J.C. (Cory, J. concurring) argued (unsuccessfully) that the matter should be referred back to the trial judge who, through his or her common law power of preventive justice, could order appropriate conditions to be placed on the defendant’s release in order to prevent the recurrence of the tragic events in this case.


16 See L. MacLeod, supra note 6 at 78, who writes:
important to many women who, as studies show, are often reluctant to become involved in criminal proceedings and frequently choose not to report incidents of assault to the police.

In practice, however, the peace bond has proved to be neither as "preventive" nor as "just" as it has been held out to be. Studies

One of the most important roles the criminal justice system plays in our society is a symbolic one, through which it reflects, and may help promote, emerging values. It also symbolizes what we as a society will tolerate and what is beyond tolerance. It is this function, more than its correctional or punitive functions, which has given the criminal justice system such potential to be an important ally in promoting change in societal attitudes and responses to wife battering.

17 "50% of Women ... pervasive," supra note 7.
18 Ibid. As one American director of a project measuring the effectiveness of restraining orders notes, victims often are unwilling or unable to endure the strain of maintaining a firm position throughout a lengthy and often intimidating criminal process. See G. R. Brown, "Battered Women and the Temporary Restraining Order" (1988) 10 W.R.L.R. 261 at 264. MacLeod, in her study Battered But Not Beaten, supra note 6 at 85, observes that "women are most positive about criminal justice intervention when the criminal justice system is seen as a preventive and protective, rather than a punitive, system."
19 M. Crawford & R. Gartner, supra note 3 at 166. Just a few of the more recent examples of women murdered or seriously injured by men who were at the time subject to peace bonds or restraining orders are: Terri-Lyn Babb in Manitoba, killed by a man after she had rebuffed his offer of romance (Canadian Press, 23 January 1993); Daisy Jean Jefferson of Digby, Nova Scotia, strangled by her husband who later died himself in the blaze he set to cover up her death (Canadian Press, 30 July 1993); Tracy Evans, shot twice in the head by her husband, a prominent Calgary lawyer (Canadian Press, 29 January 1993); Marilyn Jensen, hacked to death in 1991 in Winnipeg by her former boyfriend (Ibid.); and Lorraine Mills of Nova Scotia, stabbed to death in April 1992 by her estranged husband (Canadian Press, 24 January 1993).

This has led some groups, such as the Federal/Provincial/Territorial Working Group of Attorneys General Officials on Gender Equality in the Canadian Justice System, to consider overhauling the current peace bond process if not replacing it entirely with other more effective measures. As the authors note, "[i]t may be that the Criminal Code is not the appropriate vehicle for this application, or that legislative or policy changes are required to expedite the process." One reform that has been recommended by both the Uniform Law Conference of Canada and the Law Reform Commission of Canada is that police officers be given the power to release arrested persons on conditions. As noted by the authors, "this option provides more scope for the police to remove the offender from the home and reinforce protection for women and children by adding a no-contact condition." See Background Papers and the Proposals for
examining restraining type orders indicate an inverse relationship between preventive effectiveness and the severity or frequency of prior abuse: the greater the history of violence in the relationship, in other words, the less likely restraining orders will have any significant effect deterring subsequent violence.20 Equally, while restraining orders appear to have some effectiveness in curtailing verbal abuse, harassment and physical violence for women whose prior injuries were not severe, researchers have found that many women who begin the process of obtaining a restraining order give up before they actually get one.21

My own experience as a clinical law student22 representing a battered woman23 indicates that there are still many obstacles to obtaining a peace bond in Canada. Broadly speaking, informants face obstacles of both a procedural or substantive (interpretive) nature. Procedures safeguarding the rights of defendants in ordinary criminal proceedings often cause unjustifiable delays when imported wholesale into peace bond proceedings: while appropriate, perhaps, in the former context, complicated and lengthy procedures do not address the urgent situation faced by many battered women. This situation is exacerbated by the reluctance of many courts to consider any sort of interim protection for the informant where the defendant contests the information or is unrepresented and unprepared to defend himself. Furthermore, while Family Courts are generally preferable to Criminal Courts in peace bond proceedings, restrictive statutory requirements and court intake policies with respect to the relationship of the informant and defendant may prevent many women from applying for a peace bond.

Action by Attorneys General to Promote Gender Equality in the Canadian Justice System, prepared by this group in April 1992 and released July 5, 1993.


22 At Dalhousie Legal Aid Service, Dalhousie University, Halifax, Nova Scotia, September to December, 1993.

23 I will refer to this client and her experience obtaining a peace bond at other points throughout this comment.
in Family Court. Given the public, often intimidating environment of most Criminal Courts, women who might otherwise seek a peace bond in Family Court may choose not to do so in Criminal Court.

Similarly, obstacles to obtaining peace bonds may arise through overly restrictive interpretations of the substantive and evidentiary requirements of s. 810. Many courts, for example, place too high a burden of proof on the complainant to show her fears are reasonable; similarly, courts may define too narrowly the type of abusive or threatening conduct which will ground relief. Either way, the effect is to reduce access to peace bonds.

Of course, while procedural protections and presumptions in favour of accused persons are clearly important in criminal proceedings where the defendant faces conviction and/or incarceration, they must be re-examined in light of the unique preventive and non-punitive nature of s. 810 itself and the risk faced by informants—in particular, battered women—who are denied the protection of this remedy.

I. PROCEDURAL OBSTACLES

1. Forum: Family Court vs. Criminal Court

Most common-law provinces in Canada have established separate Family Courts with jurisdiction to hear family law matters including certain Criminal Code offences or informations between married or common-law spouses. In Nova Scotia, for example, women who wish to obtain a peace bond against a spouse can apply to the Family Court or the provincial court for a hearing. While, of course, both courts are dealing with the same provisions of the Criminal Code, in fact there may be significant advantages for battered women who can apply through the Family Court. Family Courts, which are generally closed to the public, for example, usually present a far less intimidating environment than that found in

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24 This jurisdiction may be held concurrently by other provincial courts.
25 Under s. 7(3) of the Nova Scotia Family Court Act, R.S.N.S. 1989, c. 159, for example, the Governor in Council has the power to confer on the Family Court jurisdiction over certain Criminal Code offences or matters, including under ss. (3)(e), "sections 810 and 811 where the parties are husband and wife or parent and child."
26 Subject to certain statutory definitional limitations and Family Court policies discussed infra at notes 39–48.
most Criminal Courts. Family court intake officers, moreover, are often more responsive to the needs of battered women than are criminal court justices of the peace and will take a greater pro-active role in assisting battered women throughout the peace bond process. Family Court officers are also generally more aware of the availability of auxiliary support services which will provide women in need with shelter, counselling and other urgent necessities.

Similarly, Family Court judges, who have more training and experience in dealing with criminal family law matters than criminal court judges, are generally more sensitive to the broader socio-logical and practical realities of spousal abuse and frequently adopt a more interventionist approach. One important manifest-

27 At Halifax Family Court, for example, the intake officer Sarah Osborne informs me that she will conduct a private interview with applicants and run through a "security check": this includes such things as ascertaining whether the applicant currently has shelter or whether her locks have been changed at her home. The intake officer will also assist the applicant in swearing an information for a peace bond if she so wishes. Telephone interview with Sarah Osborne (10 January 1994).

Criminal court justices of the peace, on the other hand, are often less likely to believe an informant and will set the test for swearing a peace bond information higher than is required in s. 810. See infra notes 50-51 and accompanying text.

28 While this is generally true, it is of course not necessarily true. A recent editorial, "Injudicious Remarks" The Globe and Mail (10 December 1993), reviewed several well-publicized examples of comments made by some of the more outspoken provincial court judges on our beaches in Canada:

In 1987, the Nova Scotia cabinet fired a provincial [Family Court] judge who commonly advised women to follow the Bible's teachings and be subservient to their husbands, even if their husbands abused them. In 1989, a Manitoba judge apologized after saying during a domestic assault case that, "Sometimes a slap in the face is all that she needs." In 1990, during an assault and weapons trial in a Montreal suburb, a senior judge said that rules are like women: they are meant to be violated.

This editorial was prompted by the Quebec judge who, in response to a wife's fears that her husband would kill her if released, replied: "If the gentleman assassinates the lady I won't lose any sleep over it and I won't die. Don't worry I won't suffer from depression either, because it is not my responsibility." See "Quebec judge's remarks keep courts in spotlight" The Globe and Mail (9 December 1993) A3.

29 See e.g. the decision of Niedermeyer, J.F.C. in D.L.K. v. J.J.B., (30 January 1991), Dartmouth DM91-0023 (N.S. Fam. Ct.) where a restraining type "protective order" was made against a violent husband pursuant to the Family
tation of this sensitivity is a greater likelihood on the part of Family Court judges, where peace bond hearings are contested, to apply the judicial interim release provisions of the Criminal Code at the first hearing of a s. 810 information, although broad authority for this procedure is still in its legal infancy. Rather than simply adjourning the matter for the subsequent hearing on the merits without considering the implications for the informant in the interim, the defendant is asked to agree to sign an undertaking pursuant to s. 515(2)(a) of the Criminal Code (Judicial Interim Release), usually to stay away from the complainant until the matter comes before the court again for adjudication. Where the defendant is unrepresented and unprepared to agree to this, some Family Court judges have adopted the practice of warning the defendant or demanding that the defendant give a verbal undertaking to stay away from the informant. In order to ensure that this verbal promise does not go unchecked, the intake officer of the court will see that a defendant who has breached his promise is brought before the same judge who issued the warning.

This sort of interim protective relief is crucial for many battered women who may be in the first stages of separating from their partners and who may thus doubly invite retaliation, once for

*Maintenance Act* although the Act provided for no such power expressly; rather, the court found jurisdiction through a *parens patriae* jurisdiction derived in turn from s. 18(5) of the Act which states that, in any proceeding concerning care and custody or access in respect to a child, “the welfare of the child is the paramount consideration.” The judge then stated:

> Regrettably, too often we hear in the general public and media horrendous tales of separated couples whereby one of the parties becomes so irrational that they violently strike back at the other partner, even to the point of taking that person’s life.

Some feminist critics would take issue with the notion that males are simply “irrational” when battering their intimate partners. See M. Crawford & R. Gartner, *supra* note 3 at 28.

30 See *infra* notes 66–70 and accompanying text.

31 As described by the intake officer at Halifax Family Court. See Interview with S. Osborne, *supra* note 27.

32 *Ibid.* It is unclear what recourse a judge has at this point. Presumably, the breach of such a verbal undertaking will weigh against the defendant in the subsequent hearing on the merits.

33 See *e.g.* R. v. Collin, (1986) 4 Q.A.C. 215, where the defendant stabbed and killed his mistress and her five-year old son five days after she separated from him and laid a peace bond information against him; similarly, in April of 1992,
trying to separate, and again for bringing their partners to court. Bringing an application for a peace bond may in these circumstances thus ironically provoke further violence. It would seem ludicrous if the courts were to deny women interim protection given this reality. Some judges nevertheless seem unperturbed by this irony and refuse to consider any evidence or argument in support of conditional release at a first hearing of a peace bond.34

Other advantages to Family Court proceedings noted by proponents of this route for domestic-related criminal matters include: the desirability of keeping all civil and criminal proceedings relating to the same family in one court; and the importance of recognizing the uniqueness of the victim–offender relationship in order to single out domestic violence for the special attention it merits.35

On the other hand, as a Standing Committee on wife battering reported in 1982:

[T]he prosecution of domestic violence cases in the Family Court does have certain inherent disadvantages. The mere assignment of these crimes to a non-criminal court suggests that wife assault is not a criminal offence.36

While the Committee left this issue open for further study, more recent research would seem to indicate that the Family Court is still the best forum for hearing domestic criminal matters. Linda MacLeod’s 1987 study, Battered But Not Beaten,37 for example, found that

Paul Joseph Halnuck of New Waterford, Nova Scotia stabbed his estranged wife Lorraine Mills to death hours after she had applied for a peace bond (Canadian Press, 5 November 1993).

34 In response to my request for an undertaking on behalf of my client in Halifax Provincial Court, Judge Hughes Randall summarily replied, “I don’t do that in my court.” An argument that the Saskatchewan Court of Appeal, in R. v. Wakelin (1992), 71 C.C.C. (3d) 115, had done so was equally unpersuasive. As a result, my client, whose time at a crisis shelter was about to expire, was left without any preventive protections before her hearing on the merits, which was set some four months later.


36 Ibid.

37 Supra note 6.
women are most positive about criminal justice intervention when the criminal justice system is seen as preventive and protective, rather than punitive.\textsuperscript{38}

Moreover, MacLeod's study observed that, for most battered women, the notion of preventive intervention is a broad one, often extending beyond traditional legal remedies and notions of justice to include a component of counselling for the batterer. Family Courts are generally better prepared to adopt this sort of pro-active role than are the criminal courts.

2. Restrictive Statutory Definitions and Intake Policies

One barrier to proceeding with a peace bond in Family Court or to obtaining relief under restraining order provisions found in some provincial family law statutes may arise through restrictive definitions of the terms “spouse” or “husband” or “wife” employed in provincial Family Law legislation. In Ontario's \textit{Family Law Act},\textsuperscript{39} for example, the definition of a spouse includes only married couples or common-law couples who have cohabited “continuously for a period of not less than three years”\textsuperscript{40} or “in a relationship of some permanence if they are the natural or adoptive parents of a child”;\textsuperscript{41} women who do not meet these criteria are denied relief against their partners under the Act's restraining order provisions.\textsuperscript{42} In Nova Scotia, sections 7(2) and 7(3) of the \textit{Family Court Act}\textsuperscript{43} allow for

\textsuperscript{38} \textit{Ibid.} at 85.
\textsuperscript{39} S.O. 1986, c. 4.
\textsuperscript{40} \textit{Ibid.}, s. 29(a).
\textsuperscript{41} \textit{Ibid.}, s. 29(b).
\textsuperscript{42} Section 46(1) reads:

> On application, a court may make an interim or final order restraining the applicant's \textit{spouse} from molesting, annoying, or harassing the applicant or children in the applicant's lawful custody, or from communicating with the applicant or children, except as the order provides, and may require the applicant's spouse or former spouse to enter into the recognizance that the court considers appropriate [emphasis added].

In contrast, British Columbia's \textit{Family Relations Act}, R.S.B.C. 1979, c. 121, permits a order to be made against “\textit{any} person” [emphasis added] :restraining them from “molesting, annoying, harassing or communicating” or attempting to do the same with an applicant.

\textsuperscript{43} R.S.N.S. 1989, c. 159.
Family Court jurisdiction in peace bond proceedings where the parties are a “husband or wife,” including a man and woman who, although not married to each other, have lived together as husband and wife for a period of not less than one year. 44

Excluded from this definition then—and thus also from initiating peace bond proceedings in Family Court—are any women whose relationships for one reason or another do not qualify as “husband or wife,” or women who have not yet lived together with their partners for one year.

Court intake policies may further restrict access to peace bond hearings in some Family Courts. Halifax Family Court, for example, will only accept those applicants who have lived in a relationship as “husband and wife” for one year and have not been separated from their common-law spouses for more than one year immediately preceding the laying of a s. 810 information. 45 This second requirement, it should be noted, has no statutory basis 46 and is thus really an arbitrary policy decision on the part of the court to set intake limits.

Unfortunately, such policies can have absurd results. Thus my client, for example, was refused permission to apply in Family Court for a peace bond against her former common-law spouse—even though she had at one time lived with him for over fifteen years and had had three children with him—merely because the two had been separated for over one year at the time of application. As a result, she was forced to go to provincial criminal court, where her hearing on the merits was set some four months from the date she first applied and no interim protection was granted. 47 Her application for custody, on the other hand, was permitted to proceed in Family court.

44 Ibid., s. 7(2).
45 Note also that intake officers and justices of the peace will not accept informations in relation to threats or incidents of violence if these have not occurred within the six month limitation for summary conviction offences [s. 786(2) of the Criminal Code] immediately prior to the laying of the information.
46 S. 7(2) places no qualification on common-law spouses other than they have to have lived together as husband and wife for one year.
47 See supra note 34 and accompanying text.
This sort of fragmentation of proceedings is clearly one additional barrier that battered women do not need placed in their way. The question one might ask is why any woman, who has at any point in her life been in an intimate relationship with a violent man, should not be allowed to apply for protective relief in Family Court where, on balance, such issues are more efficiently and carefully addressed. This is especially true when the relationship has produced children and the parties are held together by some sort of access arrangement. Court intake policies and the various legislative definitions of a spouse and/or husband and wife need to be rethought to ensure that all battered women have access to peace bonds and/or restraining orders in Family Court if they so desire.

3. Procedural Delays and the Inconsistent Availability of Interim Protective Relief

There is perhaps no single matter of greater concern to battered women who decide to seek protection from their assailants than that they receive it without delay. As one author notes:

The timing of orders is critical. Studies of wife beating hypothesize a "cycle of violence." In order to prevent further beatings which are part of the cycle, immediate help may be necessary.48

Although crisis shelters across the country are providing one essential component of this protection, women seeking the additional preventive protection of a peace bond are often met with a variety of procedural delays.

These delays can be both systemic and discretionary in nature. Systemic delays, due to high court case loads, are perhaps to some degree unavoidable in busy jurisdictions. Nonetheless, court intake officers or justices of the peace have significant discretionary power in deciding how soon a peace bond application will first be heard.49

This decision may depend on a number of factors, including the degree of urgency accorded the situation by the individual doing

48 Grau, supra note 20 at 728.
49 At Halifax Family Court, the intake officer informs me that she will normally schedule a first hearing for a peace bond within seven to ten days from the date the information is laid, depending on where the defendant lives. At provincial court, on the other hand, my client was initially offered a first hearing several weeks after swearing her information and it was only after I insisted that this would not do that we were given an earlier date.
the intake and his or her perception generally of the importance of peace bonds. In the busier criminal courts, there is a tendency to ratchet up the relatively low threshold test for the swearing of a s. 810 information (that is, "any person who fears that another person will cause personal injury to him [sic]"), most likely in order to reduce case load. Thus my client, for example, in trying to lay her information was asked rather skeptically by the justice of the peace whether she "was afraid for her life." Besides being plainly wrong, this sort of question trivializes the experience of many women who have been the victims of spousal violence and may result in turning-away many legitimate peace bond applicants.

Those applicants who do succeed in laying a s. 810 information are faced with another problem. Where a defendant in a s. 810 proceeding arrives at the first hearing without counsel and/or contests the information, the procedure ordinarily followed by the courts is to adjourn the proceedings to a future date for the hearing on the merits. This procedure, which is simply that routinely followed for summary conviction proceedings, raises several issues. One must question, first, both the appropriateness and necessity of a two-stage approach in view of the delay this causes. Given the significantly disproportionate interests potentially at stake—namely, the interest of an informant to have immediate protection from harassment, assault and even death, versus the interest of a defendant not to be unfairly restricted in his liberty to communicate with or contact the informant—one might argue that the ordinarily rigorous procedural and constitutional safeguards in place for "accuseds" in other Criminal Code proceedings should be relaxed in favour of a more expedited peace bond process.

This argument is supported by the language of s. 810 and the unique nature of peace bond proceedings: unlike other provisions of the Criminal Code, s. 810 does not create an "offence" in respect to which an "accused" can be "charged," "convicted," or "sentenced";
s. 810 proceedings, moreover, are arguably not like other criminal code prosecutions—the better judicial interpretation is that they are "hearings" and not "trials";\(^{53}\) the burden of proof is that on a balance of probabilities and not beyond a reasonable doubt;\(^{54}\) and, the ordinarily strict rules of evidence do not apply.\(^{55}\) Although under s. 810(3) a justice can commit a defendant to prison for up to twelve months if he fails or refuses to enter into the recognizance, this power must be viewed in light of the potential gravity of the threats or fears warranting an order for a peace bond in the first place.

These unique features imply a different, perhaps more flexible, approach to be followed in peace bond proceedings than that followed otherwise under the \textit{Criminal Code};\(^{56}\) when viewed alongside the purpose of the section—that being, to prevent the commission of a future harm—that approach should be one of proceeding without delay. This might mean, for example, that, where both parties are present at the first hearing, a court should make every effort to proceed with the merits of the information without adjourning unless there are some compelling reasons for so doing. One notes in this regard that under s. 803(1) adjournments in summary conviction proceedings are \textit{discretionary} and are not to exceed "eight clear days unless both parties or their counsel or agents consent to the proposed adjournment." This section suggests that adjournments are not to be granted as a matter of course. In order to ensure that the parties are prepared to proceed as quickly and fairly as possible, however, advance notice could be given, perhaps at the time the information is laid or when the summons is served, regarding the nature of the proceeding and the need to be prepared to present evidence when first appearing in court.

\(^{53}\) See \textit{R. v. Manette}, \textit{supra} note 12, per Cacchione, Co. Ct. J.


\(^{55}\) \textit{Patrick}, \textit{supra} note 12. In \textit{Patrick}, Ryan, Co. Ct. J. argued that evidence of disposition or propensity of an accused, not normally admissible in criminal trials, \textit{was} admissible in a s. 810 hearing because the rationale for excluding such evidence—undermining the presumption of innocence—had less significance in peace bond proceedings which by their nature sought to predict and prevent the commission of crime.

\(^{56}\) In \textit{Miller}, \textit{supra} note 54, for example, Handrigan, P.C.J. took note of what he called the "quasi-criminal" character of s. 810 to argue that the degree of proof in a section 810 hearing was not beyond a reasonable doubt as in true criminal proceedings, but rather on a balance of probabilities.
Interestingly, there would seem to be no such notice requirement at common law when binding an individual over to the peace. In *R. v. Woking*, the English Court of Appeal held that a defendant, who is before a judge on a charge and is acquitted of that charge, can be bound over to keep the peace without being given notice of the judge’s intention to do so. The court distinguished the situation of the defendant from a witness, observing:

> By contrast, the defendant comes before the court knowing that allegations are to be made against him, knowing that he can be represented if appropriate, and knowing that he can call evidence if he wishes. It seems to me that a rule which requires a witness to be warned of the possibility of a binding-over should not necessarily apply to a defendant in that different position.

Canadian courts have divided over *Woking* and whether the absence of notice and the opportunity to make submissions where a judge imposes a common law peace bond amounts to a denial of natural justice. In *R. v. White, Ex Parte Chohan*, *Re Regina and Shaber* and *Re Compton and the Queen*, the courts found that it did. More recent cases, including a 1984 decision from the Ontario High Court of Justice, *Re Broomes*, have held the opposite. Moreover, *Broomes* and *Woking* were cited with approval by Lamer, C.J.C (dissenting, on other grounds) in the recent Supreme Court of Canada decision *R. v. Parks*.

Where an adjournment is granted, the question which arises is, can a court order some form of interim protection for the informant? This issue came squarely before the Saskatchewan Court of Appeal in the recent case *R. v. Wakelin*. In *Wakelin*, the defendant had been named in a s. 810 peace bond information after threatening to kill the informant. At his first appearance before a justice of the peace he was released after executing an undertaking not to

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57 (1973) 2 All E.R. 621 (C.A.) [hereinafter *Woking*].
58 Ibid. at 623.
60 (1972), 8 C.C.C. (2d) 422 (Ont. H.C.J.).
62 (1984), 12 C.C.C. (3d) 220 (Ont. H.C.J.) [hereinafter *Broomes*].
63 See Stevenson, supra note 14.
64 (1992), 75 C.C.C. (3d) 287 (S.C.C.).
65 (1992), 71 C.C.C. (3d) 115 (Sask. C.A.) [hereinafter *Wakelin*].
communicate with the informant pursuant to the judicial interim release provisions in s. 515. Before the peace bond hearing was held, Wakelin breached this undertaking and was charged under s. 145(3) with failure to comply with a condition in an undertaking. At trial, he was acquitted on the grounds that the judicial interim release provisions could not be applied to a person who is the subject of a peace bond proceeding.

On appeal, however, this decision was overturned: Jackson, J.A. held that a judge could order the release of a person named in a s. 810 information on an undertaking pursuant to s. 515. In arriving at this conclusion, the court observed:

Section 810(5) incorporates by reference all of the provisions relating to summary conviction offences generally. Section 795 makes the provisions of Part XVI [which includes judicial interim release] apply to summary conviction offences "with such modifications as the circumstances require." Part XVI refers throughout to an "accused." It is reasonable to conclude that a required modification to make section 515 applicable to section 810 is to read "accused" in section 515 as including a person against whom an information has been laid under section 810.66

Jackson, J.A. considered but refused to follow the reasoning of the British Columbia Supreme Court in R. v. Forrest67 where it was held that a defendant in a s. 810 proceeding is not an "accused charged with an offence" as referred to in s. 515(1) and thus cannot be released under this section. Instead, she relied on the decision R. v. Allen,68 where the Ontario Court of Appeal used an argument similar to her own to find that a warrant for arrest under Part XVI could be issued under s. 810, even though this section does not create an offence. On the strength of Allen, the British Columbia Supreme Court has itself since declined to follow Forrest in the case R. v. Chester.69

Wakelin, Allen, and Chester provide solid legal authority for arguing that the judicial interim release provisions apply to the release of defendants in a s. 810 proceeding. Such defendants in

66 Ibid. at 121.
68 (1985), 18 C.C.C. (3d) 155 (Ont. C.A.) [hereinafter Allen].
69 Supra note 14.
other words can be made to sign undertakings not to communicate or have any contact with their victims. Judges thus do have the power to provide interim protective relief for women while they await the peace bond hearing itself. The sense of relief and empowerment this provides battered women cannot be underestimated. Lawyers representing battered women in peace bond proceedings should therefore be prepared to "show cause" when first appearing on a s. 810 information as in any other bail hearing; by the same token judges should be prepared to hear the evidence so presented and place defendants under appropriate undertakings if cause is shown.

II. SUBSTANTIVE AND EVIDENTIARY OBSTACLES

At a hearing of a s. 810(1) information, two important requirements must be met before a peace bond will be ordered: an informant must adduce sufficient evidence to satisfy the court that she has reasonable grounds to fear the other person will cause personal injury to her (or her child). Judicial interpretation of s. 810 has not produced any clear or consistent understanding of how these two requirements are to be met. In particular, two key issues remain unresolved:

1. What is the standard of proof in a peace bond proceeding?
2. What sort of conduct qualifies to trigger the requirement in s. 810(1) that an informant fear that someone will cause her "personal injury"? Is this fear assessed solely on an objective basis, or on a more subjective one?

I. The Standard of Proof

Section 810(3) provides that a justice may order a defendant to enter into a recognizance to keep the peace with or without conditions "if satisfied by the evidence adduced that the informant has reasonable grounds for [her] fears" [emphasis added]. While there appears to be no disagreement that the informant bears the burden of proof in a s. 810(3) hearing, it is less certain on what standard this burden is to be met. Some courts have held that s. 810 hearings are no different from other criminal proceedings and that standard of proof

70 I base this statement on observing the response of my client when she was denied this procedure.
\footnote{72 See Miller, supra note 54. \textit{Stevenson}, supra note 14, while not deciding one way or the other, leans in favour of a burden less onerous than beyond a reasonable doubt. See infra notes 74–75 and accompanying text.}

By contrast, other courts have argued that the standard of proof is that on a balance of probabilities, or, in any event, less than that for “true” criminal proceedings.\footnote{73 \textit{Supra} note 14.}

The uncertainty over this issue and some of the underlying competing arguments are best illustrated in the judgement of Halvorson, J. in \textit{Stevenson v. Saskatchewan (Minister of Justice)}:\footnote{74 \textit{Ibid.} at 94.}

\textit{It was not argued before me, and I need not decide the nature of the standard of proof contemplated under section 745 [now s. 810]. The section specifies that the judge must be satisfied that the complainant had reasonable grounds for fear. The trial judge construed that onus to be beyond a reasonable doubt. If he was correct then the burden of proof under [s. 810] would be more onerous than under the common law preventive justice jurisdiction. As this proceeding was commenced by information under the summary conviction part of the \textit{Criminal Code}, it is arguable that proof of allegation must be beyond a reasonable doubt. However, if it is so that a conviction does not result when an accused is bonded under [s. 810], then it could be contended the burden of proof is less than beyond a reasonable doubt. Support for this latter position may be found in the fact that [s. 810] is at least a partial codification of the common law preventive justice principle which did not require proof beyond a reasonable doubt.}

\textit{As Halvorson, J. points out, the argument that s. 810 hearings must be held to the ordinary “criminal” standard of proof rests primarily on the notion that s. 810 proceedings are no different from any other proceedings under the \textit{Criminal Code}. Defendants in peace bond proceedings must thus be accorded all the rights of an...
accused in an ordinary trial. In *R. v. Kirkham*, for example, Salhany, J. argues:

> It is necessary to repeat that it is been long settled that the onus in all criminal cases, even one involving a proceeding under section 810 of the *Criminal Code*, is that there must always be proof beyond a reasonable doubt.

A similar explanation was given by Caney, Prov. Ct. J. in *Charles English* where the matter is one of criminal law, the onus is upon the Crown to establish beyond a reasonable doubt the allegation contained in the information.

Clearly, however, as discussed earlier a strong argument could be put that hearings under s. 810 are substantially different from other proceedings under the *Criminal Code* and the standard of proof must thus also be different. As Halvorson, J. in *Stevenson* suggests, s. 810's non-punitive nature and link with the common-law power of "preventive justice" militate against the application of the normal criminal standard in peace bond proceedings. Perhaps even more persuasive, however, are the reasons provided by Handrigan, Prov. Ct. J. in *Miller* in holding that the standard of proof under s. 810 was on a balance of probabilities:

1. Proceedings under section 810 are at best quasi-criminal in nature and even where there is a finding that the accused is required to enter into a recognizance this is not a conviction and no penalty flows directly there from.

2. The wording of section 810 of the Criminal Code is to the effect that an application can be taken out by any person "who fears," and that the court must be satisfied on the evidence adduced that the applicant has "reasonable grounds for his fears." The use of the words "fears," "satisfied," and "reasonable grounds" do not suggest the same severity or significant degree of proof attendant upon the prosecution in bona fide criminal proceedings.

3. While it may be argued that a respondent entering into a recognizance has his liberty restricted, or that a very

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75 [1993] O.J. No. 1618 (QL) [hereinafter *Kirkham*].
76 *Ibid.* at para. 3.
77 *Supra* note 71.
real consequence will result to those directed to but who refuse to enter into a recognizance, essentially the existence of a recognizance is no penalty or burden for a respondent to bear, simply because he is only binding himself to do what all law-abiding citizens are required to do. It is true that he attracts the risks of further penalty for breaching the peace or failing to be of good behaviour but this is not such an unreasonable burden or expectation for him, such that his exposure to it should be supportable only by proof beyond a reasonable doubt.

4. The recognizance contemplated by section 810 of the Criminal Code may be in form 32 of the Criminal Code and this is the type of form suggested as being the form of a recognizance to be entered into by a person released by the court under the judicial interim release provisions of the Criminal Code. It is a well established fact that the burden on the applicant under the judicial interim release provisions is not beyond a reasonable doubt but on a balance of probabilities. Hence, it would follow a fortiori that the burden contemplated by section 810 of the Criminal Code is on the same standard, proof on a balance of probabilities. 79

The purpose, language and effect of s. 810, as Handrigan notes, differ markedly from most other Criminal Code proceedings. All three point to a lower standard of proof to be applied in the adjudication of peace bond informations. While it is true that the liberty of the defendant is affected by a s. 810 order, this effect is in most circumstances a peripheral one and should not be viewed in the abstract. One must weigh, in other words, the interests of an informant to be free from the threat of personal injury with those of a defendant to be free from any restrictions on his liberty, however insignificant. Stated another way, one must compare the risk of future harm faced by an informant with the risk of unjustly placing restrictions on a defendant's freedom of movement or communication. Such an awareness of the interests at stake is even more cru-

79 Miller, supra note 54 at 255. Note also, that one court has previously held that the standard of proof under s. 98(6) of the Criminal Code, which permits the court to make an order prohibiting the possession of firearms if "satisfied that there are reasonable grounds to believe that it is not desirable in the interests of safety" [emphasis added], was less than that for ordinary criminal proceedings. See R. v. Anderson (1981), 59 C.C.C. (2d) 439 (Ont. Co. Ct.) at 449 [hereinafter Anderson].
cial in the context of violence against women—the context applicable to most peace bond proceedings today⁸⁰—where there is a proven threat of future violence.⁸¹ Lowering the standard of proof in peace bond proceedings is merely recognizing that the traditional imbalance of risk in a criminal trial is not at play in a s. 810 hearing.

Cases like Kirkham and Charles English, however, indicate that for many judges the standard of proof in a peace bond proceeding is unequivocally beyond a reasonable doubt. On the other hand, Stevenson, Miller, and perhaps to a lesser extent Anderson,⁸² provide counsel with some authority to argue that the ordinary criminal standard of proof should not be applied in a s. 810 hearing.

2. The Meaning “Personal Injury” and “Reasonable Grounds”

Before a judge will order a defendant to enter into a peace bond under s. 810(3), she or he must be satisfied that the informant has “reasonable grounds” to fear that the defendant will cause her (or her children) “personal injury.”⁸³ While the law is clear that the meaning of “personal injury” extends to any reasonable apprehension of physical harm,⁸⁴ it is less certain whether psychological harm or other forms of harassment⁸⁵ will also qualify as personal injury.

Equally ambiguous under s. 810(3) is whether the fear of “personal injury” an informant must demonstrate is to be assessed on a purely objective basis or according to some

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⁸⁰ Of the 37 peace bond judgements I read where I could clearly identify the gender of the parties and the nature of the conflict, thirty (81%) of them involved a woman seeking protection against a man, usually a spouse; four (11%) involved a man seeking a bond against another male; and one (2.7%) involved a man seeking protection from a woman—of the other two, one was sought against a company and the other by a family against a son.

⁸¹ See supra note 6 and accompanying text, with respect to the increased risk of harm for battered women who separate from and begin legal action against their spouses.

⁸² Supra note 79.

⁸³ Note, however, that some justices of the peace will sometimes unjustifiably take on this role to a certain degree themselves. See supra note 50 and accompanying text.


⁸⁵ Note that Parliament has recently passed amendments to the Criminal Code with respect to "stalkers" or persons who repeatedly harass others: Bill C-126, adding s. 264 to the Criminal Code.
subjective/objective mix. Must the judge alone believe there are reasonable grounds for the informant’s fears, or is it sufficient that the informant herself has reasonable grounds for her fears? The distinction is important as what a judge believes is reasonable may not seem reasonable to the informant. In fact, as some of the more notorious examples of judicial bias and sexism emphasize, what a judge believes may be patently unreasonable. 86

In Regina v. Francis Balfour, 87 a B.C. provincial court judge examined both the issue of personal injury and on what basis such injuries would be assessed. In Balfour the defendant had verbally abused his estranged wife but had never used physical violence against her. In rejecting the informant’s request for a peace bond, Collings, Prov. Ct. J. held that only the reasonable apprehension of physical violence could be the subject of a s. 810 order. Collings, Prov. Ct. J. further argued that, as s. 810(3) imposed an objective standard, whether or not the informant herself was scared was not the focus of inquiry; rather the question was whether a “reasonable impartial bystander” would fear physical harm.

Balfour’s harshly objective “reasonable impartial bystander” test may have been softened somewhat, however, in two recent cases, also out of British Columbia. In Patrick, 88 the County Court held, inter alia, that the examination of what constitutes “reasonable grounds” for fear includes an inquiry into the informant’s belief as to the accused’s propensity for causing injury. Similarly, in R. v. Nelitz, 89 the test articulated by Smith, Prov. Ct. J. was thus:

A reasonable person placed in the position of [the informant] must be able to conclude there were reasonable ground for her fears [emphasis added].

In Nelitz, the informant had been followed around and pestered by the defendant, a stranger, but he had never threatened or physically harmed her. Smith, Prov. Ct. J. refused to decide whether the meaning of personal injury included the type of psychological injury being inflicted here on the informant; instead, the judge referred to Parliament’s new anti-stalking legislation and concluded

86 See supra note 28.
87 Supra note 84.
88 Supra note 12.
that a reasonable person in the informant’s situation would fear personal injury.

Neither Nelitz nor Patrick follows a strict interpretation of Balfour where the test for personal injury was based solely on threats of physical harm as assessed from the perspective of a purely objective bystander. Instead these cases have allowed a measure of subjectivity to ground a legitimate claim under s. 810. This approach, it should be noted, is in tune with the Supreme Court of Canada’s decision in Lavallee v. R.90 wherein Wilson, J. stated (with respect to battered women and self-defence):

The issue is not ... what an outsider would have reasonably perceived but what the accused [here, the battered woman] reasonably perceived, given her situation and her experience.91

Nelitz, furthermore, may have impliedly extended the meaning of “personal injury” to include some degree of harassment or psychological injury. This is a welcome shift for battered women, who often have difficulty speaking about or remembering with any detail the physical harm they have endured.92

Nevertheless, Balfour indicates that many judges will still require a reasonable apprehension of physical violence assessed on a purely objective basis in order to grant relief under s. 810. Nelitz and Patrick are two cases that counsel can employ to counter this restrictive approach.

III. CONCLUSIONS

In this comment I have attempted to expose some of the problems faced by battered women who attempt to secure a peace bond under s. 810 of the Criminal Code. While it is impossible to put an exact figure to the problem, studies indicate that the number of women denied access to, or who are put off obtaining, a peace bond may be substantial.93 This comment has pointed to some of the procedural

91 Ibid. at 883.
92 My client, for example, had a great deal of difficulty speaking about the physical abuse she had suffered and often would forget specific incidents of physical violence in the past. See also MacLeod, supra note 6 at 11–18.
93 See Grau, supra note 20.
and substantive obstacles that may unfairly stand in the way of an informant who seeks the protection of s. 810. In particular, I have noted the problems caused by procedural delays and the inconsistent application of interim protection via the judicial interim release provisions of the Criminal Code. I have furthermore argued that, as a s. 810 hearing is significantly different in purpose and nature than other “true” criminal proceedings, the courts should not apply the normal standard of proof. Finally, the courts should similarly avoid an overly restrictive and objective assessment of what constitutes a reasonable fear of “personal injury.”

While there are, of course, many broader sociological reasons why women may be put off initiating peace bond proceedings,94 as one researcher rightly observes:

To assist victims of abuse who have traditionally been deterred from pursuing legal recourse because of the intimidating and cumbersome nature of the criminal process, restraining orders should be readily available and easy to obtain. Ready access to restraining orders reassures victims who may be wary of pursuing legal action.95

Providing ready access to peace bonds will ensure that this remedy stays true to its function of “preventive justice” and will not itself be “preventing justice.”

94 There may be a variety of reasons why women decide not to pursue or give up pursuing restraining type orders, including the cost of legal fees where aid is unavailable; a lack of information or education with respect to court and peace bond proceedings; the fear that violence will increase if peace bond proceedings are commenced; or a tendency on the part of the women victims to assume some blame or responsibility for the violence perpetrated against them by their spouses or partners. See Brown, supra note 18 at 262–63.
95 Ibid. at 263.