Straddling the Liminal Space Section 810.01(3) Recognizance: Preventative Justice or Preventing Justice

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Straddling the Liminal Space Section 810.01(3) Recognizance: Preventative Justice or Preventing Justice

Abstract
This paper inquires into the constitutionality of the section 810.01 "fear of terrorism" offence that was introduced into the Criminal Code under the Anti-Terrorism Act, 2015 amendments. Ordinarily, criminal justice and sentencing intersect at the punishment of offenders for crimes they have committed. However, post 9/11, in reaction to the fear of terrorism, the focus has shifted from punishing past crimes to crime prevention. That is, certain preventative measures may be imposed in the absence of a charge, trial or conviction. Arguably, the power to detain or control the movements of persons without charging them challenges the so-called sacrosanct nature of the rule of law. This paper will unfold in three parts. Part one outlines the legal framework related to preventative recognizances and the fear of terrorism offence in the Criminal Code. Part two surveys the case law and considers constitutional questions evoked by the Canadian Charter of Rights and Freedoms with particular attention paid to the tension between section 810.01(3) recognizances and the presumption of innocence, arbitrary detention and the right to remain silent, criminal procedure and the rule of law. Part three unpacks the preventative/punitive dichotomy which is the rationale upon which section 810.01(3) recognizances are justified, by arguing that rather than a preventative provision, they are punitive since, arguably, they criminalize behaviour that is otherwise legal. This is a departure from the position taken by the Supreme Court of Canada.

Disclaimer: The views expressed in this publication are the author’s own and do not represent the views of her current employer, the Department of Justice.

Keywords
criminal law, human rights, constitutional law, terrorism offences, preventative detention, Canadian Charter of Rights and Freedoms, Section 810, presumption of innocence
STRADDLING THE LIMINAL SPACE
SECTION 810.01(3) RECOGNIZANCE: PREVENTATIVE JUSTICE
OR PREVENTING JUSTICE

REBECCA LOUIS*

INTRODUCTION

Seyed Amir Hossein Raisolsadat, Aaron Driver, Kevin Omar Mohamed, Ismael Habib, Merouane Ghalmi, Daniel Minta Darko, Mohamed El-Shaer, Abdul Aldabous, Kadir Abdul, and Samuel Augustin Aviles are the Canadian citizens who have, to date, been held pursuant to section 810.01(3) recognizances.¹ Originally a provision aimed at criminal organizations, section 810.01 was expanded under Canada’s Anti-Terrorism Act² to include the “fear of terrorism offence” as grounds for seeking a peace bond.³ Section 810.01(3) now allows for a preventative recognizance to be imposed by a provincial court judge in the absence of a charge, trial, or conviction.⁴ This power to detain or control the movements of persons without charging them with a criminal offence challenges one of the foundational principles of criminal law—the presumption of innocence.

A concerning example is the case of Seyed Amir Hossein Raisolsadat. Raisolsadat was arrested in March of 2015 because the police “feared on reasonable grounds” that he would commit a terrorist offence. He was never charged with a criminal offence and the allegations against him were never tried in court. Still, the suspicions of law enforcement officials formed the provincial court judge’s basis for ordering Raisolsadat to enter into a section 810.01(3) recognizance.⁵ The provincial

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*Rebecca Louis is a third-year law student at McGill University’s Faculty of Law. This piece is dedicated to my loving father, Marcel Louis. My father has inspired my life through his unprecedented strength, enduring faith, and boundless love. I am forever grateful for everything he has done for me.

¹ Criminal Code, RSC 1985, c C-46, s 810.01(3) [Criminal Code].
² Anti-terrorism Act, SC 2001, c 41, s 22(1).
⁵ Notably, section 83.3 of the Criminal Code also contains a provision for imposing recognizances with conditions, particularly where a person is suspected of terrorism; however, since its introduction into the Criminal Code, in 2001, the most current information available demonstrates that it has never been used. See, generally, Public Safety Canada, “Annual Report of the Minister of Public Safety Concerning
court ultimately granted a peace bond—the documentary outcome of a preventative recognition—which required Raisolsadat to “keep the peace and be of good behaviour,” live at home, seek permission before he left the province, and check in weekly with the Royal Canadian Mounted Police. In their application for a peace bond, the police alleged that their suspicions stemmed from the seizure of castor beans from Raisolsadat’s home. Castor beans, the police alleged, were used to produce the deadly toxin, ricin. Notably, castor beans are neither a controlled nor prohibited product.6

This paper will consider whether recognizances arising in the context of section 810.01(3) are consistent with the current Canadian conceptual framework of criminal law, and whether they align with liberal democratic notions of criminal justice. It will argue that section 810.01(3) recognizances ought to be struck down as unconstitutional for three primary reasons. First, they compromise an individual’s rights to be presumed innocent until proven guilty, to remain silent, and to be free from arbitrary detention. Second, the standards of proof and the rules of evidence surrounding the imposition of the recognizances are opaque, and, thus, risk being used arbitrarily. Third, by prohibiting behaviour which is otherwise protected by the Canadian Charter of Rights and Freedoms,7 the recognizances are unconstitutionally overbroad.

This paper will unfold in three parts. Part one outlines the legal framework related to preventative recognizances and the fear of terrorism offence in the Criminal Code. Part two surveys jurisprudence and considers constitutional questions evoked by the Charter, with particular attention paid to the tensions between section 810.01(3) recognizances and the presumption of innocence, the right against arbitrary detention, the right to remain silent, and the rule of law. Part three unpacks the contradictory preventative–punitive dichotomy that is used to justify section 810.01(3) recognizances. Rather than preventative provisions, the recognizances are punitive because they criminalize behaviour that is otherwise legal. This is a departure from the position taken by the Court of Appeal for Ontario in R v Budreo8 that punitive orders parading as preventative ones violate section 7 of the Charter.


8 (2000), 46 OR (3d) 481 (CA), leave to appeal to Supreme Court of Canada refused [Budreo].
I. THE STATUTORY CONTEXT OF THE SECTION 810.01 OFFENCE

There is no universally agreed upon definition of preventative detention. Rather, the term has been employed to describe situations where a person is detained for political, public order, public safety, or national security reasons. Internationally, different phrases are employed to refer to preventative detention. These include “detention without charge or trial,” “administrative detention,” “administrative internment,” “retention administrative,” “ministerial detention,” and “a disposicion del poder ejecutivo nacional.” For the purposes of this paper, the term “preventative detention” is the imposition of restrictive conditions onto an individual who has not been charged with a criminal offence.

A provincial court’s ability to impose a preventative detention order is found in section 810.01 of the Criminal Code:

(1) A person who fears on reasonable grounds that another person may commit a terrorism offence may, with the Attorney General’s consent, lay an information before a provincial court judge.

(2) The provincial court judge who receives an information under subsection (1) may cause the parties to appear before a provincial court judge.

(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 a recognizance, with or without sureties, to keep the peace and be of good behaviour for a period of not more than 12 months.

(4) However, if the provincial court judge is also satisfied that the defendant was convicted previously of a terrorism offence, the judge may order that the defendant enter the recognizance for a period of not more than five years.

(5) The provincial court judge may commit the defendant to prison for a term of not more than 12 months if the defendant fails or refuses to enter the recognizance. …

The term “administrative detention” is preferred in civil law countries, while “preventative detention” is more common in common law jurisdictions. In the former

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10 Ibid at 102.
11 Criminal Code, Supra note 1.
12 S Elias, supra note 9 at 110.
instance, the idea is that detention is a tool of the bureaucracy, whereas in the latter, detention is necessary to prevent a potential threat from materializing.

I. TENSIONS BETWEEN SECTION 810.01 AND THE PRESUMPTION OF INNOCENCE, THE RIGHT AGAINST ARBITRARY DETENTION, THE RIGHT TO REMAIN SILENT, AND THE RULE OF LAW

Diluting the Presumption of Innocence

The presumption of innocence, which requires the Crown to prove the guilt of an accused person beyond a reasonable doubt, is a primary pillar of Canadian criminal law.\(^{13}\) In *R v Pearson*,\(^{14}\) the Supreme Court of Canada held that the presumption of innocence is not compromised simply because conditions are imposed on an individual prior to a finding of guilt, as in the case for bail. The Court stated that “the starting point for any proposed deprivation of…liberty…of the person or anyone charged with or suspected of an offence must be that the person is innocent.”\(^ {15}\) However, where the “process does not involve a determination of guilt,”\(^ {16}\) as in the case of section 810.01(3) recognizances, the presumption of innocence is not engaged. Further, the Crown is not bound by the *Charter* to prove guilt beyond a reasonable doubt, because no offence has been alleged. There are two main issues with this conceptualization of the presumption of innocence: it conflicts with jurisprudence concerning the broad scope of the presumption of innocence as a principle of fundamental justice under section 7 of the *Charter*,\(^ {17}\) and it disregards the detrimental impact that a section 810.01(3) recognizance may have on an individual’s right to a fair trial should they be subsequently charged with a terrorism offence.

It is unclear why the court has given such a narrow reading of the presumption of innocence in this context, despite the broad and purposive interpretation replete in *Charter* jurisprudence. Arguably, a more liberal interpretation of the presumption of innocence would neutralize the potential social dislocation and judgment of an individual where neither a charge nor a finding of guilt exists. The presumption of innocence is instrumental in reducing the antagonism between the state and the individual in this context.\(^ {18}\) “[T]he values entrenched in the *Charter* are those which characterize a free and democratic society,”\(^ {19}\) and, thus, courts should reflect on

\(^{13}\) *R v Dubois*, [1985] 2 SCR 350 at para 41.


\(^{15}\) *Ibid* at para 33.

\(^{16}\) *Ibid* at para 37.

\(^{17}\) *R v Hall*, 2002 SCC 64 at paras 127–28 [*Hall*].


\(^{19}\) *R v Morgentaler*, [1988] 1 SCR 30 at para 310, Wilson J.
whether restricting individual liberty, in the absence of a charge or a trial, furthers such a vision of society.

Moreover, the legal principles that underlie the presumption of innocence extend beyond criminal law. It is a maxim that weighs against arbitrariness in decision making. The presumption is, therefore, best understood as an implication of a wider demand that the state treat individuals as both prospectively and retrospectively innocent unless it can marshal proof to the contrary. The Supreme Court of Canada affirmed this principle in *R v Oakes*,\(^{20}\) where it cited the values and principles of a free and democratic society as including respect for the inherent dignity of an individual and commitment to social justice and equality.\(^{21}\) It is fundamentally inconsistent to hold that the state requires proof *beyond a reasonable doubt* before punishing citizens for a past offence while also arguing that the state may legitimately subject citizens to pre-emptive restrictions of liberty based on *reasonable fear* that they will commit a future crime.

In addition, there is a real risk of generating uncritical public support for section 810.01(3) recognizance orders. Individuals under the recognizances are subject to conditions that may be only tenuously connected with terrorism. However, any violation of a condition added to the recognizance will amount to a criminal offence, thus providing grounds for an individual’s arrest. As a result, the public might erroneously assume that an individual who breaches a recognizance order—for instance by violating a curfew—is properly under state surveillance as an alleged terrorist.

Further, section 810.01(3) recognizances may “reduce” deterrence by increasing the circumstances under which individual liberty is pre-emptively restricted. This is because the individual has a greater risk of detection and punishment for any crime in comparison to any other non-law-abiding citizen. We ought not justify section 810.01(3) recognizances by presuming that the individual would likely, if left absolutely free, commit any offence. Rather, we must presume innocence since the reasonable fear of others creates no extra incentive to commit an offence but places a significant burden on the individual.

Further, section 810.01(3) recognizances risk diminishing the presumption of innocence for some groups disproportionately in comparison to others, especially where particular fears create the basis of the recognizance. The power to impose restrictions on individual liberty is premised on the assumption that the decision maker possesses the ability to reasonably predict an individual’s future dangerousness. Yet research suggests that it is highly unlikely for any such assessment to be made with any degree of


\(^{21}\) *Ibid* at para 67.
certainty.\textsuperscript{22} Moreover, the concept of dangerousness as it relates to national security threats is often an “emotive and politically charged” matter.\textsuperscript{23} An assessment of reasonable fear, and its proxy, “dangerousness,” is prone to error. Such predictions may be arbitrarily and unjustly directed at certain groups, such as ethnic minorities or the political opponents of a regime. Notably, seven of the ten Canadian citizens who have been the subject of section 810.01(3) recognizances in relation to the “fear of terrorism offence” are of Arab descent, the injustice of which can only be understood in the context of post–September 11, 2001 Islamophobia.

Take for example the case of Maher Arar, a suspected terrorist. Arar’s extradition to Syria from the United States illustrates how even “reasonable grounds to suspect” may yield draconian results. Arar is a Canadian citizen who was born in Syria. On his way home to Canada from Tunisia in September, 2002, he was stopped at John F. Kennedy Airport in New York.\textsuperscript{24} He was detained by American authorities based on information obtained from the Royal Canadian Mounted Police that suggested he had engaged with al-Qaeda operatives while abroad.\textsuperscript{25} Following a two-year investigation, the Canadian authorities’ suspicion turned out to be false: Arar had never been a member of al-Qaeda or any other terrorist group.\textsuperscript{26} The commission found that there was “categorically…no evidence to indicate that Mr. Arar ha[d] committed any offence or that his activities constitute[d] a threat to the security of Canada.”\textsuperscript{27} Nonetheless, the US Department of Justice had detained Arar for two weeks, interrogated him, and flown him to Jordan and then Syria.\textsuperscript{28} Syria released Arar a year later after concluding that he had no connection to terrorist activities.\textsuperscript{29} It is difficult to understand why a Canadian citizen was extradited to Syria, especially given the fact that the US State Department identifies Syria as a state sponsor of terrorism and accuses Syria of practicing torture. While section 810.01(3) recognizances are often championed as a necessary and effective tool to prevent terrorism, we must recognize that this “protection” will always come at a cost.

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\textsuperscript{28} R Leung, \textit{supra} note 24.
\textsuperscript{29} \textit{Ibid}.
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The case of Arar exemplifies the way in which race and ethnic origin are often implicated in section 810.01(3) recognizances for fear of terrorism offences. Following the September 11, 2001, terrorist attacks, more than one thousand Muslim immigrants were detained based on mere suspicions of terrorism in the absence of objective evidence—they were sometimes held for months before being released or deported for immigration violations.\(^{30}\) This underscores the fact that race and ethnic origin may serve as proxies for risk, where the premium placed on the presumption of innocence fluctuates as a function of race and ethnic origin. In his dissenting opinion in \(R v\ Hall,^{31}\) Justice Iacobucci stated:

The mere fact that Parliament has responded to a constitutional decision of the Supreme Court is no reason to defer to that response where it does not demonstrate a proper recognition of the constitutional requirements imposed by that decision.

[The] role of the Supreme Court, and indeed of every court in our country, to staunchly uphold constitutional standards is of particular importance when the public mood is one which encourages increased punishment of those accused of criminal acts and where mounting pressure is placed on the liberty interest of these individuals. Courts must be bulwarks against the tides of public opinion that threaten to invade these cherished values. Although this may well cost courts popularity in some quarters, that can hardly justify a failure to uphold fundamental freedoms and liberty.\(^{32}\)

Justice Iacobucci’s comments serve as a reminder that one of the aims of the \textit{Charte}r is to protect minorities and vulnerable groups in society. If this aspiration is to be realized, the \textit{Charte}r must be invoked to protect the rights of accused persons and those deprived of liberty by the state. However, even if the judiciary were to find that section 810.011 infringed sections 7 or 11(d) of the \textit{Charte}r, it is possible that the law would be upheld under section 1, by relying on public safety or national security considerations. Furthermore, sections 9 and 11(c) of the \textit{Charte}r are equally vulnerable to potential infringements under the imposition of section 810.01(3) recognizances. Whether these contraventions would be saved under section 1 of the \textit{Charte}r is considered below.

\textbf{ Arbitrary Detention and the Right to Remain Silent}

Section 9 of the \textit{Charte}r, which provides that individuals have the right to be free from arbitrary detention, may be violated by section 810.01(3) recognizances based on the standard of proof required to impose the recognizances. The standard for non-


\(^{31}\) \textit{Hall}, \textit{Supra} note 17.

\(^{32}\) \textit{Ibid} at paras 127–28.
arbitrary detention demands only that individuals detained for investigative purposes are advised, in clear and simple language, of the reasons for their detention. This is the standard usually involved in non-intrusive or short-term detention. Examples of non-intrusive detentions include stops related to the enforcement of highway traffic regulations, airport customs, and detentions of allegedly suspicious persons for investigation. Much of the jurisprudence concerning section 810 recognizances suggest that non-intrusive detentions do not include imposing conditions on an individual that may last as long as twelve months, and which are insulated from review.

Additionally, “reasonable grounds to believe” that an individual will engage in a terrorist offence may be easily muddled with “reasonable grounds to suspect,” where evidence is not tested in court or subject to cross-examination. Further, once an information is laid, a warrant may be issued for the individual which may result in their detention and arrest, pending a recognizance order by a provincial court judge. At this point, no crime has occurred. Rather, judges determine ex post facto whether there is enough evidence to sustain the recognizance.

Moreover, the Anti-Terrorism Act includes no provision indicating whether investigative questioning will occur in open court. Though the common law presumption is that court proceedings are open, it is difficult to predict how a court would respond to an application to exclude the public where national security is at issue. In *Travers v Canada (Chief of Defence Staff)*, the Court held, with respect to a statutory board of inquiry, that the proceedings need not be open because the Board had no decision-making role. The Court held that “[b]efore any “right” of access…can be asserted it is necessary to ask what it is to which access is sought. Where…access is sought to an inquiry or investigation it is proper to look to its function and purpose.” The paradox is that although section 810.01(3) recognizances stem from neither charges nor findings of guilt, the Charter rights of the accused are not triggered, yet the individual subject to the recognizance order is exposed to the full force of criminal law. The recognizance is a spectre, existing both inside and outside of the criminal law, straddling the liminal space between legal and extra-legal. It tests the limits of the coercive force of criminal law—the indisputable sovereign power over bare life.

Section 810.01(3) recognizances do not take place in the context of a trial, and, therefore, the accused does not benefit from the right to remain silent per se. The corollary of the presumption of innocence is that an accused has the right to remain

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33 See *R v Mann*, 2004 SCC 52 at paras 20–21.
36 *Ibid* at para 3.
silent before and during the trial. While it is true that an accused is not compelled to testify in section 810.01(3) proceedings, it is unclear how maintaining silence will affect the imposition of a recognizance, especially where the fear is that the individual will engage in terrorism. The right to silence is rooted in two common law concepts: first, the confession rule, which renders a confession improperly obtained inadmissible in evidence, and second, the privilege against self-incrimination, which precludes accused persons from being required to testify against themselves at trial. The underlying concern is the repute and integrity of the justice system. We limit the coercive power of the state in order to ensure that an accused has a fair trial, thereby allaying concerns that the individual has been induced into giving a false confession. The repute and integrity of the system depends upon the fact that the power imbalance between an accused and the state is not exploited.

Although an individual is detained under the power of the state, theoretically he or she has the right to choose whether to answer questions. It is true that the state is not entitled to use its power to deny an individual this right. However, when the authorities intercept a suspect, their initial conversations, which may or may not be coerced, may be presented before a judge as part of the state’s case for an application to impose a section 810.01(3) order.

While individuals are not legally required to testify against themselves, they may nonetheless feel compelled. Whether the rules of evidence apply at section 810.01(3) proceedings is unclear, and, therefore, whether the court is required to observe the evidentiary principles consistent with criminal law is ambiguous. In *R v Chambers*, the Supreme Court of Canada held that it would be “snare and delusion” to offer a suspect the right to silence during an investigation but turn his silence against him at trial. By virtue of the state’s power and the potentially coercive nature of conditions added to a recognizance, an individual may feel inclined to offer an explanation in an attempt to inspire the judge to impose less stringent conditions. This is especially true in this context, where non-compliance may result in incarceration.

In *R v P(MB)*, the Supreme Court of Canada also held that the accused must answer the case against him or her when it is clear that there is a case to be met. Chief Justice Lamer, as he then was, stated that once a *prima facie* case has been presented that would not attract a verdict of acquittal, “the accused can no longer remain a passive participant in the prosecutorial process and becomes—in a broad sense—compellable.

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38 See *Charter*, supra note 7 (section 7 of the *Charter* provides that everyone has the right to life, liberty and the security of the person, and the right not to be deprived thereof except in accordance with the principles of fundamental justice); *R v Hebert*, [1990] 2 SCR 151 at para 150 [Hebert].
40 *Ibid* at para 60.
That is, the accused must answer the case against him or her, or face the possibility of conviction.”42 This decision was eventually overturned in *R v Noble*,43 where the majority of the Supreme Court of Canada—in a five to four decision—held that any use of the accused’s silence in order to establish guilt beyond a reasonable doubt is impermissible, even in the case of overwhelming evidence.44 While seemingly triumphant for the rights of the accused, the decision’s close 5–4 split suggests that the extent to which the accused’s silence is truly insulated from scrutiny may depend on the proclivities of the particular judge—and perhaps the nature of the offence. Writing for the dissent in *Noble*, Chief Justice Lamer, as he then was, maintained that the right to silence extends only so far, and seemed to question the sacrosanctity of the accused’s right to silence: “Why…has this Court commented so frequently on the effect of the accused’s silence? Why has it arisen so often as an issue before this court? The reason is simple: silence can be very probative….Under the right circumstances…silence can be probative and form the basis for natural, reasonable, and fair inferences.”45 Although, the right to silence is reflected in principles of fundamental justice,46 there is a diversity of judicial opinion on the extent to which adverse inferences may be drawn from the silence of an accused. Finally, the overbreadth and arbitrary use of section 810.01(3) recognizances suggest that the fear of terrorism offence and section 810.01(3) recognizances erode the rule of law.

**Rule of Law: Overbreadth and Arbitrary Enforcement**

That otherwise mundane conduct may amount to a criminal offence in the context of section 810.01(3) recognizances runs several risks. It may compromise the individual’s routine activities or political dissent, which are not in themselves criminal. In addition, there is a risk of error in enforcement, which may have a “chilling effect,” such that law-abiding citizens become anxious about their encounters with law enforcement. As a result, those subject to 810.01(3) orders may avoid socially beneficial activities for fear of being accused of breaching their peace bond.47 There is a risk of arbitrariness in that “if no objectively verifiable statutory conduct requirements are available to keep officers in check, individuals may be harassed because of characteristics such as ethnic or racial origin, religion, socio-economic background, criminal past, psycho-medical condition, or political affiliation.”48 One way to curtail

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42 *Ibid* at para 41.
43 [1997] 1 SCR 874 [*Noble*].
45 *Ibid* at para 15.
46 See, generally, *Hebert, supra* note 38.
arbitrariness would be to define what constitutes “suspicious” conduct when statutorily delineating the prerequisites for imposing section 810.01(3) recognizances.49 The prerequisites should be based on patterns of conduct that evince a criminal intent or, at the very least, reasonably ground a suspicion of criminal intent. This may be a way of diminishing the risk of abuse and the “chilling effect.” Critics may argue that this would hamper the flexibility of section 810.01(3) recognizances. However, it is more likely that transparency regarding the basis of the legitimate fear would bolster and legitimize recognizances related to fear of terrorism.

Moreover, section 810.01(3) orders extend the reach of criminal law by criminalizing conduct that is associated—even if tenuously—with actual acts of terrorism. For instance, the definition of “terrorist activity” in the Criminal Code includes inchoate offences—such as conspiracies, attempts, threats, accessory, or counselling—tied to the underlying acts of violence constituting the terrorist activity.50 When considered in parallel with the new offences created by the Anti-terrorism Act—many of which are inchoate offences—the actus reus is so nebulous that Kent Roach refers to it as the “piling of inchoate liability on top of inchoate crimes.”51 Typically, it is unusual in Canadian criminal law to criminalize acts that constitute mere preparation. This is because pre-emptively criminalizing an individual is a severe price to pay when restrictions on liberty are concerned. Ostensibly, section 810.01(3) recognizances for fear of terrorism offences appear to be sentences or punishments in the absence of a criminal trial.

**Rules of Evidence and the Standard of Proof**

Procedural fairness and due process central tenets of criminal justice in Canada. We recognize that procedural justice is vital, yet section 810.01(3) orders require the state to satisfy less burdensome procedural and evidentiary burdens than those required in regular criminal trials. Like the United Kingdom’s Anti-Social Behaviour Orders,52 Canada's peace bond regime reduces the criminal burden of “beyond a reasonable doubt” to the civil burden of a “balance of probabilities.”53 Less onerous evidentiary burdens where liberty is at stake run contrary to traditional distinctions between criminal and civil law, in the name of enabling the state to act against risk and uncertainty. Arguments supporting a lower burden often suggest that the purpose,

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50 *Criminal Code, Supra*, note 1 at s 83.01(1).
53 *Miller v Miller* (1990), 87 Nfld & PEIR 250 at para 23 [*Miller*].
language, and effect of section 810 differ significantly, in their preventative aims, from other Criminal Code provisions. However, one must weigh the risk of future harm with the risk of unjustly placing restrictions on individual liberty. In Miller v Miller,\textsuperscript{54} the court offers several rationales, three of which are reproduced below, for why the standard of proof is 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 follows 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 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 risk 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.\textsuperscript{55}

The first reason is premised on the assumption that proceedings under section 810.01 are “at best quasi-criminal in nature.”\textsuperscript{56} If section 810.01 proceedings were intended to be quasi-criminal, then these recognizances would presumably be codified under a provincial regulation. Also, the meaning of quasi-criminal is unclear, especially where deprivation of liberty is at stake. There is little grey area on the continuum between innocence and guilt, particularly where restrictions on liberty are concerned.

\textsuperscript{54} Ibid.
\textsuperscript{55} Ibid.
\textsuperscript{56} Brandon Chase, “Where Injury or Damage is Feared: Peace Bonds as Counter-Law?” (2014) 63 Studies in Law, Politics and Society 1 at 19.
The second reason is premised on the assumption that the words “fears,” “satisfied,” and “reasonable grounds” do not suggest the same severity as bona fide criminal proceedings. This assumption is compounded by the fact that the grounds for a section 810.01(3) recognizance equate to grounds for a criminal complaint. This is erroneous because, in many cases, “reasonable grounds” for “fear” in a peace bond application may not be as severe as a bona fide criminal proceeding. This is reflected in the lower burden of proof that is needed to accommodate fear and the fact that the evidence might not have surpassed the criminal threshold of proof beyond a reasonable doubt.

The third reason assumes that section 810.01(3) orders are not burdensome on individuals. However, the conditions that can be imposed under section 810.01(3) are various. The scope of an 810.01(3) recognizance can be gleaned from the conditions placed on release pending the outcome of immigration security-certificate adjudications, as they are often lauded as necessary for the government to hobble terrorist activities. The conditions imposed on Mohammed Harkat, for example, were five pages long.57

Moreover, these informal “trials” permit a greater use of hearsay evidence.58 The Court in Budreo suggested that the traditional exclusionary rule of hearsay evidence does not necessarily apply at peace bond hearings.59 Hearsay evidence has been traditionally excluded due to its lack of reliability.60 This unreliability is vested in “...a recognition of the difficulty for a trier of fact to assess what weight, if any, is to be given to a statement made by a person who has not been seen or heard, and who has not been subject to the test of cross-examination.”61 As such, fairness may be hindered by relying on traditionally unreliable evidence to justify a liberty restriction under a section 810.01(3) order. This ultimately erodes the reliability of evidence and ignores the principled approach to hearsay evidence, which requires the court to ensure that the probative value outweighs the prejudicial effects in admitting the evidence. Furthermore, questions may arise with regard to what sort of conduct triggers section 810.011 proceedings for fear of terrorism offences. It is not clear whether this fear is assessed on an objective basis or on a more subjective one.

57 The release order is reproduced in Harkat v Canada (Minister of Immigration and Citizenship), 2006 FCA 215 [Harkat].
59 Supra note 8 at para 60.
61 Khelawon, supra note 60 at para 35.
I. CONTRADICTIONS IN THE PREVENTATIVE-PUNITIVE DISTINCTION

The traditional view of section 810 recognizances is that they are not punitive because they do not create offences that result in a conviction or a sentence. They are designed to prevent crime rather than punish. Moreover, a person bound by a section 810 recognizance can deny having ever been charged with, or convicted of, an offence because a peace bond is not a conviction. According to section 731 of the Criminal Code, probation orders are only made when courts enter convictions or discharges, and section 810 orders do not amount to probation. In Budreo, the Court suggested that where the reason for restraint is preventative rather than punitive, the recognizance is an acceptable restraint on liberty as a basis for diminishing Charter protection. The issue remains, however, whether section 810.01(3) recognizances are more appropriately characterized as preventative or punitive in nature.

The apparent distinction between “preventative” and “punitive” is not watertight. First, pre-charge or pre-conviction deprivations of liberty can be as intrusive as post-conviction deprivations of liberty. Additionally, to reify a distinction between “preventative” and “punitive” in this context suggests greater constitutional protection for those who have been found guilty of an offence, by providing that a punitive order is unconstitutional. As a matter of intuition, it is unsettling and incoherent to suggest that a punitive order is then justifiable under section 810.01(3) where no finding of guilt has been made. Finally, the apparent distinction can be manipulated and employed instrumentally, which dispels support for any argument concerning a principled distinction between the two rationales. For instance, in R v Lyons, the long-term detention imposed under the dangerous offender provisions was challenged as contrary to section 7 of the Charter on the basis that the detention was preventative and not punitive. The detention effectively enabled accused persons to be detained because of fears or suspicions related to criminal proclivities. Contrary to the Court’s holding in Budreo, the Court in Lyons suggested that if the order was preventative rather than punitive, this would have constituted a violation of section 7. In Lyons, the Court upheld the dangerous offender provisions of the Criminal Code in part because they were punitive and not preventative. This suggests that the preventative versus punitive distinction is contingent on context and the presumed implications of a finding in either direction and that Charter considerations may be less pertinent where the government acts before an offence occurs.

Furthermore, there are other considerations which are seemingly inconsistent with the theory that section 810.01(3) orders are not punitive. If there is little connection

62 R v Schaffner, 2002 BCPC 397 at para 1; Harkat, supra note 57 at para 10.
63 Budreo, supra note 8 at para 25.
between the conditions imposed and the alleged offence, the conditions themselves may be punitive. The difficulty here, is that the alleged offence is not sufficiently outlined such that any inference may be drawn and used to assess the punitive nature of the conditions. Regardless of the judicial assertion about the preventative nature of these orders, the analysis of whether the conditions are preventative or punitive ought to begin from the perspective of the impugned person and the concomitant effects of the conditions on their liberty.

Assuming that these 810.01(3) orders are a function of the logic of precaution is risky since these “decisions are not made in a context of certainty, nor even of available knowledge, rather, they are premised on doubt, premonition, foreboding, mistrust, fear and anxiety.”65 Effectively, section 810.01 proceedings are an expansion of the state’s capacity to criminalize risky populations where nothing otherwise inherently criminal has occurred. This is compounded by the assumption that maintaining jurisdiction over an individual under section 810.01(3) will enhance the safety of the public. However, breaches resulting from 810.01(3) orders may not be tied to terrorism per se; therefore, their preventative force as related to terrorism, specifically, may be overstated. A section 810.01(3) recognizance does not amount to a conviction, but it seems curious that a court order which does not stem from a criminal conviction could have similar, if not more onerous, implications than that of a conviction. Notably, a failure to enter the peace bond voluntarily is an offence and can result in incarceration for up to twelve months.66

Furthermore, the way in which certain behaviour is understood by the courts can invite the imposition of section 810.01(3) recognizances. In speaking about the bail provisions of the Criminal Code in Pearson, the Supreme Court of Canada held that bail permits the imposition of recognizance conditions, and that these powers do not violate the presumption of innocence. The Court reasoned that, while the presumption of innocence supports the principle under section 7, “the starting point for any proposed deprivation of… liberty… of the person of anyone charged with or suspected of an offence must be that the person is innocent,” and this principle has a different, less intense meaning where the “process does not involve a determination of guilt.”67 As such, the presumption of innocence is not offended by pre-conviction restrictions of liberty, nor is the Crown required by the Charter to prove an offence beyond a reasonable doubt to obtain pretrial restrictions on liberty.

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66 Budreo, supra note 8 at para 5.
67 Pearson, supra note 14 at paras 31, 35.
The distinction between *Pearson* and section 810.01(3) recognizances that stem from the fear of terrorism offence under section 810.01 is that, in cases such as *Pearson*, the detainee has been charged and is awaiting trial—the restrictions on liberty precede an adjudication of guilt to follow. Conversely, recognizances stemming from the fear of terrorism offence are rarely followed by adjudications of guilt. Where adjudications of guilt do arise, they generally stem from a breach of conditions or offences unrelated to terrorism, which are often the result of the greater scrutiny placed upon those subjected to section 810.01(3) orders.

The preventative versus punitive distinction is an attempt to justify that, where the state acts before an offence occurs, *Charter* considerations are less of an issue. The question remains, however, whether section 810.01(3) recognizances are worth the restrictive implications on individual liberty, especially since *Charter* protections are not triggered as a check on the state’s decision to impose them. This is especially troubling since the decreased *Charter* protections afforded to the individual in question provides the state a license to restrict liberty in the absence of a charge or conviction. Notably, five of the eight men subject to section 810.01(3) recognizances have not, to date, been charged or found guilty of terrorism-related offences. Merouane Ghalmi was charged for breaching his recognizance, but that charge was dropped in a Quebec provincial court. Thus, only two of the eight men—Kevin Omar Mohammed and Ismael Habib—were subsequently convicted of terrorism-related offences. In this sense, section 810.01(3) recognizances have, to date, been a justifiable compromise to individual liberty in twenty-five per cent of cases. Although section 810.01(3) recognizances are imposed in only a small number of circumstances, they are nonetheless problematic, since pre-emptive restrictions on liberty might be further compounded by increased instances of arbitrary detention or unreasonable searches or seizures for the individual. Though pre-emptive restrictions on liberty may face some pragmatic resistance, the fact remains that there has been an increased use of preventative detention by way of section 810.01(3) recognizances since 2015.68

Finally, a section 810 recognizance will appear in a criminal record check while it is still in effect but should no longer be visible after it expires. However, certain criminal record searches, such as “vulnerable person checks,” will reveal a peace bond even after its expiration.69 This may be punitive insofar as the impugned individual is

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categorically excluded from, for instance, employment opportunities or civic engagement as a result of these searches.

CONCLUSION

A section 810.01(3) recognizance that is characteristically used to deal with fear of terrorism offences is fundamentally unjust since it trammels core principles of Canadian criminal law and constitutional protections. After surveying the jurisprudence, legal framework, criminal procedure, and judicial rationales for section 810.01(3) recognizances, it is clear that these recognizances may undermine the presumption of innocence, the right against arbitrary detention, the right to remain silent, and the rule of law. Further, the preventative–punitive dichotomy that justifies its use is far from a watertight distinction. Accordingly, the law under section 810.01(3) of the Criminal Code, by virtue of the pre-emptive measures imposed under it in the context of fear of terrorism offences, ought to be struck down as unconstitutional.

If section 810.01, and the recognizances that stem from it, are unconstitutional, then these recognizance orders effectively constitute punishment without any preceding crime. Notably, Bill C-59, An Act respecting national security matters,70 if adopted, would do away with “investigative hearings” and make it slightly more difficult for law enforcement to seek section 810.01(3) orders and detain individuals without criminal charges. Moreover, if passed, Bill C-59 would require annual reports setting out the number of recognizances entered into under section 810.011 in the previous year. Future research in this field should concern itself with potential alternatives to suspicion of terrorism. One option may be to create an administrative or preventative detention regime to deal with restrictions on liberty and interrogations of those suspected of engaging in future terrorism that is consistent with criminal due process standards. Alternatively, in the context of section 810.01 offences, a caveat could be applied to section 810.01(3) recognizances in order to reflect a more balanced approach between liberty restrictions and individual freedom: (a) they ought only be granted in situations where there is evidence of imminent threat of an attack; (b) they ought to expire after sixty days, rather than the usual twelve months; and (c) where renewal is sought, new evidence ought to be presented, and the impugned person ought to be afforded a trial where the regular rules of criminal procedure apply. The fear of terrorism in today’s world is undeniable. However, fears and suspicions alone should not provide a basis for incursive deprivations of liberty pursuant to section 810.01 of the Criminal Code.

70 Bill C-50, An Act respecting national security matters, 1st Sess, 42nd Parl, 2015, cl 153 (as passed by the House of Commons 19 June 2018).