The Supreme Court Needs to Clean up the Sex Offender Registry

Before reading this blawg, please note that I completely understand that sex offences are incredibly serious and the harm they cause can completely ruin the lives of both the victim and their family and friends. These are very serious offences. In no way am I making light of that or trying to minimalize the moral culpability of the offenders or engage in an act of victim blaming. This blawg is intended on expose the legal and logical inconsistencies in support of the removal of judicial discretion for these offences. This paper is meant to highlight some of the very current developments in the legal system surrounding the Sex Offender Information Registration Act and, in particular, two Court of Appeal decisions that I find very interesting.

In 2018, the Alberta Court of Appeal upheld the decision made by Justice Moen in *R v Ndhlovu* at the Queen's Bench. This decision was that section 490.013(2.1) of the *Criminal Code* was unconstitutional for being overbroad and disproportionate to the offence committed.[1] This provision of the *Criminal Code* makes it mandatory that anyone convicted or found to be not criminally response of a sex offence is required to comply with the Sex Offender Information Registration Act (SOIRA). This mandatory requirement has been in place since 2011 when the Conservative government removed the possibility of a judge to be able to exempt sex offenders from registering if they were shown to not be a risk of reoffending, if the judge found that the SOIRA order was disproportionately harsh and would prevent proper rehabilitation; and if an overly inclusive registry wold hurt the intended purpose of SOIRA.[2]

SOIRA requires offenders to provide their name, gender, date of birth, height, weight, any distinguishing marks, any addresses and telephone numbers of all primary residence and any residence they frequently visit. All information relating the offence, or that can be related to the offence is allowed to be demanded by the registrar. The police are able to randomly check up on the offender at any time. They are required to report annually to the registrar office. They are required to report whenever they are changing any of the above information, are leaving the country.[3] This is only a short list of the requirements of SOIRA.

In *Ndhlovu*, the offender plead guilty to two counts of sexual assault for which he served 6 months in prison and was given 3 year's probation.[4] There were a long list of mitigating factors, the offences were on the lower end of moral culpability, the offender was very remorseful, and a presentence report concluded that Ndhlovu was no risk of reoffending. However, as he was being convicted of two sex offences, s. 490.013(2.1) required him to be

---

[1] *R v Ndhlovu*, QB's decision, at paras 116 to 118.
[2] Janine Benedet, "A Victim-Centred Evaluation of the Federal Sex Offender Registry", *Queen's Law Journal* 2012, 37 Queen's Law Journal pages 437 – 474 2012, at paras 29 and 30. .
[3] *Sex Offender Registration Act,* SC 2004, c. 10, (2004-04-01) [SOIRA].
[4] *R v Ndhlovu*, at para 1.

ordered to comply with SOIRA for the remainder of his life. He was 19. For these reasons the judge decided the lifetime registration was unconstitutional and found it of no force or effect.[5] A crucial part of the decision at the Court of Appeal, where the defence showed reliable evidence that recidivism rates for sex offenders were highest within 5 years of an offence, and steadily lowers for up to 10 years after the offence, at which point the risk of reoffending becomes very low.[6] In contrast to this, the Crown relied on logic accepted in a previous decision *R v Dyck*, which accepted the presumption that someone who commits a sexual offence is highly likely to commit another offence, and the best way to protect the public is to have a mandatory sex offender registry.[7] The Court of Appeal accepted the QB judge's ruling by accepting the evidence introduced over the Crown's presumption.

The decision in *Ndhlovu* lead to the same constitutional challenge in Ontario shortly after in the case of *R v Jones* (or *R v RL*). This case was arguing the same factors, but was decided differently in that the Ontario Court of Appeal did not find that s. 490.013(2.1) was unconstitutional. The circumstances in this case were very similar to *Ndlhovu*, although less mitigating. The offender had sexually assaulted his assistant in the work place three times within the same day, fondling her breast and kissing her neck.[8] He was ordered to comply with SOIRA for life. Although there were fewer mitigating factors in this circumstance, the judge did not decide that s. 490.013(2.1) was reasonable in his circumstance due to the nature of his offence, they instead reiterated their ruling in *Dyck* and rejected the decision made in *Ndhlovu.* The Ontario Court of Appeal found that the conditions of SOIRA were not so burdensome that they would impede with the offender's rehabilitation, nor that it was disproportionate to the offence committed.

Besides the two court of appeal decisions coming to the opposite conclusions regarding the constitutionality of this section of the *Criminal Code*, the way these decisions approach the topic of "internal stigma" is important. Internal stigma was used to describe the emotions experienced by the offender each time they are required to report annually or are randomly visited by the police will remind them, decades after their offence and their sentence have concluded, that they are a sex offender. In *Ndhlovu* Justice Moen concluded that this was a significant hinderance to the rehabilitation of the offender and that a life-time of this stigma was disproportionate for offences on the lower side of moral culpability and severity. By contrast, the Court of Appeal in *Jones* effectively dismissed this stigma by saying that the offender committed the crime, and SOIRA protects the public, so any stigma they feel is justified for the public good.[9]

Following this decision another case in Ontario challenged the SOIRA order: *G v Ontario*. In this case, the offender plead guilty to multiple sexual assaults on his wife over a period of time while he was suffering from acute bipolar affective disorder. The court found that "there is simply no evidence to find that the accused is a significant risk to the safety of the public"[10] He was required to register to SOIRA for life as he had committed more than one sex offence.

---

[5] *R v Ndhlovu*, 2016 ABQB 595, at paras 116 – 118.
[6] *R. v. Ndhlovu*, 2018 ABCA 260, at para 52.
[7] *Ibid,* at 52.
[8] *R v RL* 2018 ONCA 282, 146 WCB (2d) 541 (*RL).*
[9] *Ibid, at para 147.*
[10] *G v Ontario (Attorney General)*, 2017 ONSC 6, at para 17.

However, as recognized by the court that gave the order a finding of NCR "means there is no finding of guilty…[t]here was no crime."[11] Therefore, when the defence challenged the order due to the internal stigma suffered by the offender, the court couldn't follow their same logic from *Jones* in which they dismissed the stigma as being a result of committing the crime. Rather, they claimed the stigma flows from the potential embarrassment of being discovered as a sex offender, not personal guilt of being an offender.[12] The court upheld the SOIRA order against *G* and he is required to be on SOIRA for life.

SOIRA itself is an act that allows the police to quickly investigate the whereabouts of offenders in the event of a sex offence taking place. "the purpose of SOIRA is to further public safety by enabling police to keep track of sex offenders who, by virtue of their past convictions, could be suspects in future crimes."[13] This is obviously a very valuable tool for police investigation. Sexual offences and sexual violence can have deep and devastating impacts on the victims and those around those victims. The pain caused can spread across generations and throughout communities. To protect the people from these offences, having a list of dangerous or potentially dangerous offenders is a very legitimate reason to risk an internal stigma to those on this list.

However, a mandatory court ordered registration actually is harmful to both those who are required to register on it *and to the purpose of the register itself.* Evidence has shown that over-inclusion on lists decreases its value when investigating sex offences. If the police are busy looking for the Ndhlovu's and G's, there is less time to be investigating the actual sex predators. Legal scholars have argued that the narrowing of the registries to those who are actually considered risks of reoffending would increase both their practicality and their constitutionality. In addition, most sex offences happen between people known to the victim. None of the cases examined earlier, *Ndhlovu, Jones,* or *G* would have required a sex offender registry to report the person who assaulted them, they all knew them well. The police wouldn't have needed a registry to investigate those crimes.

Mandatory sex offender registration is "mixed at best."[14] The evidence shows that there is a general deterrence effect in areas that implement sex offender registries. However, that evidence is not clear that it deterred future offenders, that it has been an effective tool to aid police, and rather that it has been a hinderance to the police in the past.[15]

To correct the problems going forward with SOIRA and the current *Criminal Code* provisions, I proscribe two things: that SOIRA be incorporated into the general sentencing provisions for sex offenders, and that the Supreme Court of Canada make a final decision on the mandatory registration requirement of s. 490(013).01.

SOIRA is not considered an official factor when handing down a criminal sentence, it is considered an ancillary order with "civil consequences".[16] This exclusion from sentencing

---

[11] *Ibid*.
[12] *Ibid*, at paras 73 and 78.
[13] *Supra* at note 3, s. 2.
[14] Dennis Magee, "After 20 years, sex offender registry's success is mixed", *Des Moines Register*, September 20th, 2015, Accessed April 1st 2019, < https://www.desmoinesregister.com/story/news/crime-and-courts/2015/09/20/sex-offender-registry-twenty-years/72485326/>.
[15] *Ibid*.
[16] *R v Warren,* 2008 ABCA 436, at para 8.

principles means that all normal factors a judge balances, using their discretion, ignore the SOIRA conditions attached to the decision. A judge is not allowed to consider the lifetime requirements to SOIRA when determining what a fair sentence is. It is easier for a Court of Appeal judge to dismiss the notion that a mandatory SOIRA order is disproportionate to a criminal sentence by stating that it is not a criminal sentence, merely a tool for the public good and proportionality isn't a mandatory consideration when considering a non-criminal sentence directed to the public good.

Ndhlovu was appealed to the Supreme Court of Canada, and they agreed to review the case, but unfortunately, that application was withdrawn 6 weeks later.[17] This indicates that the Supreme Court would like to hear this case and make a national decision for themselves. This is essential when considering the current state of the law. As it stands, the Ontario courts are forced to make arguments around stigma work, albeit logically inconsistently. The Supreme Court of Canada should make this decision and end the debate and confusion conclusively.

Marni Soupcoff argues that "with so little proof of the actual protective power of sex-offender registries, and so much proof of the registries' power to ruin the lives of non-violent perpetrators who are unlikely to reoffend, it's hard to see how much longer they will be considered actable – at least without some considerable refinement."[18] It is time for Canada to revisit these laws and come up with a decision, not based in political motivation or fearful presumptions, but based on evidence and sound reasoning.

[17] *R v Ndholovu,* [2018] CSCR no. 220, [2018] SCCA No. 220.

[18] Marni Soupcoff, "Sex Offender Registries may be doing more harm than good," *The National Post*, June 11 2018, Accessed April 1, 2019, < https://nationalpost.com/opinion/marni-soupcoff-sex-offender-registries-may-be-doing-more-harm-than-good>.