SCC File No. 39360

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL OF ALBERTA)

B E T W E E N:

EUGENE NDHLOVU

Appellant

– and –

HER MAJESTY THE QUEEN

Respondent

– and –

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Interveners

FACTUM OF THE INTERVENER CANADIAN CIVIL LIBERTIES ASSOCIATION

(Pursuant to Rule 37 and 42 of the *Rules of the Supreme Court of Canada*)

November 23, 2021

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PART I – OVERVIEW

1. The ability to safeguard personal information and privacy is of "paramount importance in modern society" and "essential to the individual's personal growth and the flourishing of an open and democratic society".[1] The *Sexual Offender Information Registration Act* ("*SOIRA*") requires all individuals convicted of a designate offence to provide significant amounts of personal information to the state on an ongoing basis for the explicit purpose of state monitoring, purportedly in an effort to prevent and investigate crime. This is the case no matter how minor the circumstances of the offence, the circumstances of the individual, or whether the individual presents a risk of reoffending. Once convicted of a designate offence, sections 490.012 and 490.013 provide that sentencing judges must order the individual to be placed on the National Sexual Offender Registry (the "Registry") for a prescribed number of years, without exception. Some individuals are required to be placed on the Registry *for life*. For these individuals, ss. 490.012 and 490.013 impose state monitoring for the duration of their lifetime.

2. The CCLA submits that the mandatory and automatic inclusion of *all* individuals on the Registry, as well as the mandatory lifetime order for more than one offence, violate s. 7 of the *Canadian Charter of Rights and Freedoms*. The impugned provisions, as amended in 2011, significantly undermine informational privacy rights and engage liberty rights, as protected by s. 7 of the *Charter*. Security of the person is likewise engaged, as registration has distinct impacts on individuals separate from those that flow from conviction.

3. This Court should also find that sections 490.012 and 490.013 are overbroad, grossly disproportionate, and cannot be justified under s. 1. The benefit of statutory provisions cannot be based on unsubstantiated criminological assertions: when liberty is at stake, the Attorney General must adduce actual evidence demonstrating the benefit alleged. Most critically, uncertain risk and inability to assess risk cannot be used to justify mandatory or lengthy supervision for all.

PART II – POSITION ON QUESTIONS IN ISSUE

4. The CCLA submits that ss. 490.012 and 490.013 violate s. 7 of the *Charter* in a manner that cannot be demonstrably justified: the speculative benefit of the impugned provisions cannot outweigh the significant infringements on liberty, security of the person, and privacy rights.

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[1] *R. v. Jarvis*, 2019 SCC 10 at para. 66, citing *R. v. Dyment*, [1988] 2. S.C.R. 417 at p. 429; *R. v. Spencer*, 2014 SCC 43 at para. 48.

PART III – ARGUMENT

I. Sections 490.012 and 490.013 significantly intrude on s. 7 *Charter* rights

5. The sentencing judge relied on the significant volume of evidence adduced by the parties including expert evidence to hold that the impugned provisions involved "significant" interference with individual liberty, security, and privacy rights.[2] On the basis of this current evidentiary record, she found the reporting requirements to be "significant" and "quite onerous," and the impugned provisions to be overbroad and grossly disproportionate to the purpose of the legislation.[3]

6. By contrast, the majority of the Alberta Court of Appeal relied primarily on previous judicial determinations of the impact and constitutionality of these provisions, despite the wanting evidentiary records in those cases and the fact that the legislative scheme has since been significantly amended.[4] This Court must ground its determination in the evidence and legal framework that have evolved since prior judicial considerations of related issues.[5] It should also consider the full scope of intrusions including to informational privacy, largely neglected in the related jurisprudence to date.

a. The impact of the impugned provisions must be assessed in light of this Court's jurisprudence on informational privacy

7. The CCLA submits that the impact of the provisions cannot be fully assessed without considering their privacy implications. This Court has long recognized that the rights to individual liberty and security of the person as enshrined in s. 7 of the *Charter* also protect the fundamental right to privacy.[6] Informational privacy is vital to an individual's dignity, integrity, autonomy, and personal growth.[7] In addition to protecting individuals' general ability to choose when and with

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[2] See e.g. *R. v. Ndhlovu*, 2018 ABQB 277 ("*Ndhlovu* Section 1 Reasons") at paras. 100–2, 135; *R. v. Ndhlovu*, 2016 ABQB 595 ("*Ndhlovu* Constitutional Challenge") at para. 71–4.

[3] *Ndhlovu* Constitutional Challenge, *supra*, at para. 52. These findings are entitled to deference absent palpable and overriding error: *Canada (Attorney General) v. Bedford*, 2013 SCC 72 at para. 56; *Carter v. Canada (Attorney General)*, 2015 SCC 5 at para. 109.

[4] Indeed, *R. v. Redhead*, 2006 ABCA 84; *R. v. Dyck*, 2008 ONCA 309; and *R. v. Long*, 2018 ONCA 282, either do not assist, or must be treated with caution.

[5] *Bedford*, *supra*, at para. 42; *Carter*, *supra*, at paras. 42–8.

[6] *R. v. O'Connor*, [1995] 4 S.C.R. 411 at paras. 113, 119; *M.(A.) v. Ryan*, [1997] 1 S.C.R. 157 at paras. 79–80. See also *R. v. Morgentaler*, [1988] 1 S.C.R. 30 at p. 166; *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44 at para. 50.

[7] *R. v. Jones*, 2017 SCC 60 at para. 38, *Dyment*, *supra*, at para. 22.

whom to share personal information, s. 7 *specifically* protects an individual's right to prevent certain personal information from falling into the hands of the state.[8]

8. Privacy includes the notion of "anonymity" which allows individuals to engage in public while preserving their freedom from identification and surveillance. In *Spencer*, Justice Cromwell explicitly endorsed Justice Doherty's comments in *Ward* that personal privacy "protects an individual's ability to function on a day-to-day basis within society while enjoying a degree of anonymity that is essential to the individual's personal growth and the flourishing of an open and democratic society".[9]

9. Under *SOIRA*, personal information is collected explicitly for the purpose of state monitoring. Given the nature of the information provided, placement on *SOIRA* eliminates any sense of anonymity the individual previously enjoyed vis-à-vis the state. Where individuals live, work, what they do in their spare time, whether they volunteer, where they travel, and how to quickly identify them and their whereabouts are all known by the state. Indeed, *the very purpose* of the scheme is to monitor and be able to quickly identify and locate individuals previously convicted of designated sex offences.[10]

10. When assessing the degree to which privacy is infringed, this Court in *Jarvis* held that a person's expectation of privacy regarding personal information will vary depending on the purpose for which the information is collected.[11] For example, collecting an address for the purpose of registering a vehicle is not the same as collecting it for the purpose of monitoring a person in the community and promptly identifying their whereabouts to investigate them or potentially apprehend them without delay. Under *SOIRA*, an individual does not simply need to report their primary residence to the state, but also the address of all secondary residences, of every place at which they are employed or retained, of every place at which they volunteer, of educational institutions at which they are enrolled, as well as every place where they stay inside and outside Canada if they leave their primary or secondary residence for more than 7 days, if they want to

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[8] *Carter*, *supra*, at para. 64; *Blencoe*, *supra*, at paras. 49, 54; *Jarvis*, *supra*, at para. 66; *R. v. Gomboc*, 2010 SCC 55 at para. 27; *Spencer*, *supra*, at paras. 40–2.

[9] *Spencer*, *supra*, at paras. 43, 48, citing *R. v. Ward*, 2012 ONCA 660 at para. 71.

[10] Canada, Parliament, Standing Committee on Public Safety and National Security, *Bill S-2: Protecting Victims from Sex Offenders Act*, 40th Parl., 3rd Sess., No. 40 (March 19, 2010), p. 2, online:https://lop.parl.ca/staticfiles/PublicWebsite/Home/ResearchPublications/LegislativeSummaries/PDF/40-3/40-3-s2-e.pdf.

[11] *Jarvis*, *supra*, at para. 31.

avoid criminal punishment. They must also promptly report any changes to those addresses. In short, the information is intended to – and does – disclose a person's whereabouts to the state. And the stated purpose of this disclosure is to facilitate investigative and preventative law enforcement.

11. Accordingly, in this case, the assertion that the intrusion is minimal because *SOIRA* does not "prohibit the [individuals] from going anywhere or doing anything" is flawed.[12] On this reasoning, forcing someone to wear an electronic monitoring bracelet or a tracking device on their vehicle would be a minimal intrusion because it wouldn't hamper the person's ability to go where they please or do what they wish to do. And yet there can be little doubt that gathering such information for the purpose of state monitoring would be an incredible intrusion on personal privacy. This is precisely why the informational privacy analysis is fundamental to the task at hand. From the perspective of informational privacy, and on the mere basis that the *SOIRA* scheme is intended as a form of state monitoring – for years if not for life – one would be hard-pressed to deny that it significantly intrudes on an individual's privacy rights.[13]

12. Moreover, the Court in *Gomboc* made clear that the analysis must focus on the totality of what the information is *capable* of disclosing, and not simply the nature of the information itself.[14] To state that what is at issue is merely information about an address, employer name and address, travel destination, and the like, does not do justice to what it is *capable* of disclosing – in particular when looking at the information as a whole. The information required is directed towards revealing whereabouts, but knowing where we live, work, learn, and play/travel reveals more than just where we may be: it is capable of revealing how we live our lives. Contrary to the Respondent's claim, the purpose and totality of information required to be disclosed is entirely dissimilar from other reporting obligations imposed on Canadian citizens.[15]

13. Moreover, consider how *SOIRA* imposes onerous and intrusive obligations any time registrants travel for seven consecutive days.[16] Before departure, they must notify the state about when they are departing, when they are returning to Canada, and every address or location where they expect to stay during that time. They must also notify the state of any change to the above

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[12] Respondent's Factum at paras. 137–9, citing *Long*, *supra*, at paras. 147–8; *R. v. T.A.S.*, 2018 SKQB 183; *R. v. Lafferty*, 2020 NWTSC 5; *R. v. Vitale*, 2021 NSSC 109; *R. v. Dyck*, *supra*.
[13] *SOIRA*, ss. 4–6; Appellant's Factum at para. 36.
[14] *Gomboc*, *supra*, at para. 39. See also *Spencer*, *supra*.
[15] Respondent's Factum at para. 124.
[16] *SOIRA*, s. 6.

noted information. These obligations should not be taken lightly. A person who remains on the Registry for 20 years and travels three times per year would be required to attend a registration center *at least* 60 times just for the purpose of notifying the government about their travel.

14. It is also not the case, as the Respondent asserts, that there is no ability for the public to access the information.[17] Section 16(2) of *SOIRA* enables researchers authorized under s. 13 who wish to access the data on the Registry "for research or statistical purposes" to consult the database and compare the information with other information.[18]

15. The CCLA submits that ss. 490.012 and 490.013 accordingly involve a significant impact on liberty and privacy rights. *All* individuals are entitled to reasonably shield personal information from the prying eyes of the state. A conviction for a sexual offence should not disentitle individuals to this fundamental right. Dangerous and long-term offenders are subject to ongoing monitoring only *because* they are a small group of highly dangerous offenders who pose an ongoing risk sufficient to justify the intrusion on individual liberty.[19] Others with prior convictions are monitored during their sentence, and are no longer under supervision once they have served their sentence and paid their debt to society. Any scheme that purported to make every person with a criminal record – regardless of risk – subject to ongoing monitoring merely because "we do not know who will reoffend"[20] would no doubt be vulnerable to challenge considering the significant s. 7 intrusion on liberty and privacy. Short of representing a verifiable and significant risk to society, individuals convicted of sex offences as a broad category should be treated no differently.

b. <u>The 2011 legislative amendments to the *Sex Offender Identification Registration Act* made the registry a more intrusive tool of state surveillance</u>

16. The intrusiveness of ss. 490.012 and 490.013 of the *Criminal Code* can only be assessed in concert with the 2011 amendments to *SOIRA*, which significantly expanded access to the registry and removed safeguards to ensure proper use of this information.

17. First, prior to 2011, the purpose of *SOIRA* was to assist police in investigating crime. In 2011, the purpose broadened to include investigating *and preventing* sexual offences. This has the

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[17] Respondent's Factum at para. 43.

[18] Or "by electronic means, combine the information with, or link it to, any other information contained in a computer system within the meaning of subsection 342.1(2) of the *Criminal Code*": *SOIRA*, ss. 13, 16(2).

[19] *R. v. Lyons*, [1987] 2 S.C.R. 309 at paras. 16, 62, 91–2.

[20] *R. v. Ndhlovu*, 2020 ABCA 307 ("*Ndhlovu* ABCA") at paras. 90, 93; Respondent's Factum at paras. 57, 98, 111, 164.

necessary effect of significantly expanding access to the registry, ostensibly allowing police to access the information to *prevent* a broad range of offences that might occur at some point in time in the future based on an unsubstantiated hunch.

18. Second, prior to 2011, police needed "reasonable grounds to suspect [that the specific crime being investigated] is of a sexual nature"[21] to access information in the registry. Contrary to the Respondent's assertion, the 2011 legislative amendments removed this threshold, again broadening police access to individuals' private information. Now, nothing prevents the police from accessing the data where they have a mere suspicion, hunch, or gut feeling. Likewise, police are not restricted in accessing the data where there is a specific crime being investigated; they are now authorized to access the Registry indiscriminately to "prevent" sexual offences.

19. Largely unaddressed by the Court of Appeal, these amendments are troubling from a civil liberties perspective, and particularly so, given their interaction. While the Respondent makes a bare assertion, citing no evidence,[22] that access to the registry is tightly controlled, the legislative scheme provides no such assurance.

c. The impugned provisions engage security of the person

20. The CCLA further submits that both the external and internal stigma – as well as the anxiety – created by registration engage the rights to liberty and security of the person. This stigma goes above and beyond the one associated with the conviction. The "sex offender registry" signals to individuals that they are not merely a person who has committed a sexual offence: they are predators who pose a continuous (and often permanent) risk to public safety and who must be surveilled. They require continued state supervision to ensure they do not offend in the future. They are, and will always be, dangerous "sexual offenders".

21. Legislators' comments only serve to reinforce this idea with those subject to the regime and with the public at large:

> **Hon. Bob Runciman**: It will help to keep our **children** safe from sexual predators. It will ensure that people who commit such acts are dealt with appropriately… […]
>
> Honourable senators, with passage of this legislation, we can all send a strong message that there is zero tolerance in Canada for sexual predators...all too often, we hear tragic stories on the news of **children** being victimized by sex offenders. Compounding the nightmare

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[21] *Protecting Victims From Sexual Offenders Act*, S.C. 2010, c. C 17, s. 44.
[22] See Respondent's Factum at paras. 40–8.

> is that offenders often move into new cities and neighbourhoods and repeat these crimes because the police and communities are unaware of their presence…[23]
>
> **Mr. Brent Rathgeber**: It is a bill that deserves our utmost attention, as it deals with ensuring the safety of our **children and other vulnerable Canadians** from sexual predators.
>
> Protection from sexual predators is the raison d'être of this legislation.[24]

Naturally, then, that is *precisely* what both accused persons and the public think of when they think of the sex offender registry. Legislator and public commentary should inform the stigma analysis.

22. Of course, this message of continued risk – to children no less – is inconsistent with most registered individuals' understandings of their own risk, with professional psychologists' assessments of their risk, and with the often-significant efforts they have undertaken to rehabilitate themselves. Yet that is the stigma attached to *SOIRA*: one is no longer a person once convicted of a sexual offence (the circumstances of which may greatly vary), one is now perceived to be "a sexual predator" who must be closely monitored and surveilled, given the universal risk posed.

23. The stigma associated with registration can also have impacts beyond psychological wellbeing. State policies such as *SOIRA* registration create structural and social barriers to pro-social community involvement and rehabilitative efforts *in addition to* the impacts of conviction.[25] Stigma-inducing state policies impact individuals' long-term criminal and non-criminal outcomes. Such policies limit positive community opportunities as individuals are rejected and therefore isolated from the broader community, while also communicating to them that they *should* remain excluded and outside of regular society because of the kind of person they are.[26]

d. Following this Court's reasoning in *Heywood*, the impugned provisions are overbroad

24. The Court's decision in *R. v. Heywood* is directly applicable to the provisions at issue here and the same result should follow. In *Heywood,* this Court concluded that vagrancy laws, which

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[23] Canada, Parliament, *Senate Debates*, 40th Parl., 3rd Sess., Vol. 147, No. 9 (March 23, 2010), pp. 147–8, online: https://sencanada.ca/en/content/sen/chamber/403/debates/009db_2010-03-23-e?language=e.

[24] Canada, Parliament, *House of Commons Debates*, 40th Parl., 3rd Sess., Vol. 145, No. 62 (June 14, 2010) at pp. 3796, 3797, online: www.ourcommons.ca/DocumentViewer/en/40-3/house/sitting-62/hansard [emphasis added].

[25] K.E. Moore, J.B. Stuewig & J.P. Tangey, "The Effect of Stigma on Criminal Offenders' Functioning: A Longitudinal Mediational Model" (2016) 37:2 Deviant Behav. 196 at pp. 19–20, online: https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4788463/pdf/nihms665217.pdf.

[26] *Ibid*.

precluded individuals with certain criminal records from attending all public parks whether or not children were likely to be present, violated s. 7 of the *Charter* on the basis of overbreadth.[27] Given the legislation's purpose (to protect children from becoming victims of sexual offences), it was overbroad on the basis that it applied to persons convicted of the predicate sexual assault offence even where they no longer posed a danger to children, as well as in cases where the offence was not against a child.[28]

25. Based on *Heywood* and the Court's more recent jurisprudence on overbreadth, the impugned provisions present a clear and straight-forward case of legislative overbreadth. To the extent that courts have found that these and similar provisions are not overbroad, the CCLA submits that the analyses have been influenced by common societal stereotypes that are applied to all individuals labelled as "sexual offenders". This Court ought not double down on this stigma by endorsing the false premise that persons convicted of sexual offences – and indeed, of more than one sexual offence – are necessarily at higher risk of re-offending. The Court's analysis must be driven by the evidence on *actual risk* and recidivism.

26. The judicial system must carefully guard against reliance on stereotypes: individuals subject to *SOIRA* must receive the same constitutional protections afforded to other Canadians. Fundamental principles of justice so demand. The protections afforded under s. 7 should not be weakened because of the identity or acts of those claiming constitutional protection. To do so would signal an erosion of this protection. To the extent there are legitimate societal interests that may justify infringements of s. 7 rights, those are properly considered under s. 1.

I. The seriousness of the infringement is not proportionate to the benefit derived from the legislation

a. The benefit of the impugned provisions cannot be based on unsubstantiated criminological theories and assertions

27. The majority of the Alberta Court of Appeal based its analysis on unsubstantiated theories and previous judicial determinations about sexual offenders' recidivism rates rather than the expert evidence in fact adduced at the sentencing hearing, and accepted by the sentencing judge. As this Court has held, where scientific or social science evidence is available, it will be required to justify

[27] *R. v. Heywood*, [1994] 3 S.C.R. 761.
[28] *Ibid* at pp. 794–800.

an infringement on *Charter* rights.[29] Criminological theories that are unsupported by evidence cannot "demonstrably justify" an infringement of s. 7.[30] Further, the majority erroneously preferred previous judicial findings in *Redhead* and *Long* (neither of which involved expert evidence) regarding recidivism rates over the evidentiary findings made in this case on the basis of Crown and defence experts who were largely in agreement on the central issues at stake.

28. The sentencing judge made the following findings of fact: (1) overall recidivism rates are low for individuals found guilty of a sexual offence; (2) within this group there is very significant variation in individuals' risk to reoffend; (3) this group's recidivism rates decrease by 50% every five years an individual is in the community offence-free, and the re-offence risk drops off to background levels 15 to 20 years after release; (4) individuals who have committed a sexual offence "age out" of re-offending; and (5) there is a difference between recidivism rates between a person who committed two sexual offences as part of the same series of events, and those who offended again following a conviction.[31]

29. This Court should endorse the well-grounded finding of the sentencing judge that individuals found guilty of a sexual offence present neither a universally high nor perpetual risk of reoffending over time. This finding is supported by empirical evidence that shows individuals convicted of sexual offences have some of the lowest rates of reoffending.[32]

b. Uncertain risk cannot justify mandatory and permanent registration for all individuals

30. Relying on uncertain and speculative risk to justify mandatory registration of all individuals, as the majority of the Court of Appeal did in this case,[33] is inconsistent with the principles of fundamental justice and would effectively gut the s. 1 analysis. Consistent with *G.*, this Court should reject the notion that because risk assessments can never be certain, the purpose of legislative provisions can only be achieved by a mandatory and permanent register.[34]

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[29] *Ibid*. See also *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 2 S.C.R. 199 at para. 105; *R. v. Sharpe*, [2001] 1 S.C.R. 45.
[30] *R. v. Oakes*, [1986] 1 S.C.R. 103 at 137
[31] *Ndhlovu* Section 1 Reasons, *supra*, at paras. 53, 90, 123.
[32] L. Stewart et al., *Correctional Service Canada Research Report: A Comprehensive Study of Recidivism Rates among Canadian Federal Offenders* (August 2019), p. 54, online: www.csc-scc.gc.ca/005/008/092/005008-r426-en.pdf.
[33] *Ndhlovu* ABCA, *supra*, at paras. 89–90, 93.
[34] See *Attorney General (Ontario) v. G.*, 2020 SCC 38 at para. 75.

31. In this case, the judge's findings with respect to ability to determine the actual risk that an individual will reoffend are unchallenged. She concluded that: (1) recidivism rates are low for persons convicted of a sexual offence; (2) very few such offenders are ever convicted a second time; (3) it is impossible to determine with any certainty whether a particular sexual offender will reoffend; (4) it is impossible to determine whether any person in the general offender population will offend; (5) after 5 years, the same proportion of the general offender population is convicted of a sexual offence as those previously convicted of a sexual offence; and (6) there was no evidence that being convicted of two designated offences makes an individual more likely to reoffend.[35]

32. Allowing the government to justify the broad restrictions of rights on the inability to predict risk and the unreliability of prediction would deprive the s. 1 analysis of any true meaning. This gap should undermine, not support, the government's argument that the rights infringement is justified. If the state cannot demonstrably justify that the infringement is confined to what is reasonably necessary to achieve its purpose, the legislation should not stand.[36] In *Carter*, this Court rejected Canada's argument that a blanket prohibition should be upheld unless those challenging it can demonstrate that an alternative approach eliminates all risk. It held that a "theoretical or speculative fear cannot justify an absolute prohibition… Justification under s. 1 is a process of demonstration, not intuition or automatic deference to the government's assertion of risk."[37]

PART IV – SUBMISSIONS ON COSTS

33. The CCLA does not seek costs and asks that no costs be awarded against it.

PART V – ORDER SOUGHT

34. Sections 490.012 and 490.013 unjustifiably infringe s. 7 of the *Charter*.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 23rd day of November, 2021

Christine Mainville
Carly Peddle

Counsel for the Intervener,
Canadian Civil Liberties Association

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[35] *Ndhlovu* Section 1 Reasons *supra*, at paras. 35, 61, 76–7, 88, 90, 105.
[36] *Carter*, *supra*, at para. 102.
[37] *Ibid* at paras. 118–9.

PART VI – TABLE OF AUTHORITIES

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