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Challenging the Constitutionality and Applicability of the Sexual Offender Information Registry Act

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Cases Considered:

R. v. Warren, 2008 ABCA 436;
R. v. Schultz, 2008 ABQB 679;
R. v. Owusu, 2008 ABQB 715.

The *Sex Offender Information Registration Act*, S.C. 2004, c. 10 ("*SOIRA*") came into force on December 15, 2004. The *SOIRA* and related amendments to the *Criminal Code* (R.S.C. 1985, c. C-46) require courts, on application of a prosecutor, to make an order requiring a person convicted of a designated sexual offence to report to a registration centre within a certain period of time after conviction, and again after moving, to provide information including their address, place of work, and other personal information. *SOIRA* orders last for a certain length of time (up to life), and must be made unless the impact of the order on the sex offender, "including on their privacy or liberty, would be grossly disproportionate to the public interest in protecting society through the effective investigation of crimes of a sexual nature" (*Criminal Code*, s. 490.012(4)). Two recent Alberta cases have come to different conclusions on the application of the exemption to the circumstances of the offender, and in a third case, leave to appeal the constitutionality of the *SOIRA*'s retroactive application was granted.

In *R. v. Redhead*, 2006 ABCA 84, the Alberta Court of Appeal (per Justices Anne Russell, Ellen Picard and Peter Costigan) declined to consider the constitutionality of the SOIRA because notice of a constitutional challenge had not been provided to the Crown (see also *R. v. Aberdeen*, 2006 ABCA 164). The overall constitutionality of the *SOIRA* has not yet been ruled upon by the Supreme Court of Canada or any provincial appellate courts. However, in *R. v. Dyck*, 2008 ONCA 309, the Ontario Court of Appeal ruled that a similar provincial sex offender registry, implemented via *Christopher's Law (Sex Offender Registry)*, S.O. 2000, c.1, was constitutional.

R. v. Warren, 2008 ABCA 436 raises the more specific issue of whether the retroactive application of the *SOIRA* is constitutional. Section 490.02(1) of the *Criminal Code* provides that a sex offender may be subject to the *SOIRA* if "on the day on which the *Sex Offender Information Registration Act* comes into force, they are subject to a sentence for, or have not received an absolute discharge under Part XX.1 from, the offence; …"

Warren pled guilty to four counts of sexual assault under s. 271 of the *Criminal Code* and was sentenced to a 12 month conditional sentence order followed by 24 months of probation. His convictions were entered on January 5, 2004 and February 10, 2004. After the *SOIRA* came into force on December 15, 2004, Warren was served with a notice requiring him to comply with the *SOIRA* "for the balance of his life" (at para. 4). The *Criminal Code* provided authority for this notice given that Warren was still "subject to a sentence for" his offences as of December 15, 2004, as provided by s. 490.02(1). Warren argued that s. 490.02(1) of the *Criminal Code* violated his right to liberty under s.7 of the *Charter*.

On December 19, 2008 Justice Ronald Berger of the Alberta Court of Appeal granted Warren leave to appeal the trial judge's ruling that there had been no violation of s. 7 of the *Charter*. Justice Berger noted the Court of Appeal's earlier ruling in *Redhead* that *SOIRA* orders "infringe upon the privacy and liberty rights of the offender" (at para. 9, citing *Redhead* at para. 12). Further, he noted that a similar issue was raised in the case of *R. v. C.L.B.*, 2007 ABQB 521, in which leave to appeal was also being sought. The two cases will be heard together if leave is granted in *C.L.B.*

Although the decision is brief, one can get a flavour of the arguments the Crown is likely to make in defence of the *SOIRA* from its arguments on the leave application in *Warren*. First, the Crown submitted that the requirements of the *SOIRA* are "civil consequences" rather than punishment, and thus "do not engage s. 7 of the *Charter*" (at para. 8). The Crown also contended that the legislation permits sex offenders to seek early termination of *SOIRA* orders. Lastly, the Crown argued that "the informational and reporting requirements of the *SOIRA* are not unlike those that most citizens must comply with to operate a motor vehicle or receive tax forms" (at para. 8). Overall, the Crown's arguments suggest that it will take the position on appeal that any violation of liberty interests imposed by the *SOIRA* and related *Criminal Code* provisions are insignificant and do not amount to a violation of s.7 of the *Charter*. None of these arguments speak directly to the retroactive application of the legislation, which will likely be an issue going to whether any violation of liberty is in accordance with the principles of fundamental justice.

When Warren is heard, the Alberta Court of Appeal will no doubt consider the implications of *R. v. Cross*, 2006 NSCA 30 (CanLII), leave to appeal denied 2006 CanLII 29077 (S.C.C.), where the *SOIRA* order in question was found to be in compliance with s.11(i) of the *Charter*. Section 11(i) provides that any person who is charged with an offence has the right "if found guilty of the offence and if the punishment for the offence has been varied between the time of commission and the time of sentencing, to the benefit of the lesser punishment." In *Cross*, the Nova Scotia Court of Appeal held that a *SOIRA* order does not amount to "punishment", so its retroactive application does not engage s. 11(i). Following *Cross*, and even more on point for *Warren*, the B.C. Court of Appeal found that the retroactive application of the *SOIRA* does not violate s. 7 of the *Charter* in *R. v. S.S.C.*, 2008 BCCA 262. Further, a 4:3 majority of the Supreme Court of Canada ruled in *R. v. Rodgers*, 2006 SCC 15, that similar retroactive provisions relating to the mandatory provision of DNA samples post conviction do not violate the *Charter*. It will be interesting to see how these rulings influence the Court of Appeal's judgment in *Warren*, and ABlawg will report on the appeal decision when it is released.

The other two recent decisions concerning the *SOIRA* draw on a different aspect of the *Redhead* case. While the constitutional challenge in *Redhead* did not go anywhere, the Court of Appeal established guidelines for the application of the exemption from the *SOIRA* in s. 490.012(4) of the *Criminal Code*. In full, that section provides as follows:

> (4) The court is not required to make an order under this section if it is satisfied that the person has established that, if the order were made, the impact on them, including on their privacy or liberty, would be grossly disproportionate to the public interest in protecting society through the effective investigation of crimes of a sexual nature, to be achieved by the registration of information relating to sex offenders under the *Sex Offender Information Registration Act*.

In *Redhead*, the Court of Appeal first noted that *SOIRA* orders are not part of a convicted person's sentence, so they should not be subject to the same deferential standard of review as sentencing decisions. The Court likened *SOIRA* orders to orders requiring convicted persons to provide a sample of their DNA, and held that a similar standard of review should apply: an appellate court "can alter a [*SOIRA*] order decision only where there is an error of principle, failure to consider a relevant factor, an over emphasis of appropriate factors, or a clearly unreasonable decision" (at para. 13).

Second, the Court considered what evidence the sex offender must put forward in order to make out their entitlement to an exemption. The Court found that while the evidentiary burden was on the offender he need not adduce evidence during the *SOIRA* application, and that evidence from the trial and pre-sentence report could be considered, or a court could take judicial notice of relevant evidence (at para. 25).

Third, the Court found that the exclusion of certain criteria from the *SOIRA* that were present in the provisions concerning DNA orders - including the offender's criminal record and the circumstances of the offence - meant that these criteria were not intended to be included as relevant to whether a *SOIRA* order should be made. Rather, "[t]he focus … must be on the offender's present and possible future circumstances, and not on the offence itself" (at para. 28). Factors that might be relevant here were said to include "unique individual circumstances such as a personal handicap, whereby the offender requires assistance to report…; the intangible effects of the legislation, including stigma, even if only in the offender's mind; the undermining of rehabilitation and reintegration in the community; and whether such an order might result in police harassment as opposed to police tracking" (at para. 31). In a subsequent case, *R. v. G.E.W.*, 2006 ABQB 317, economic impact on the offender was also found to be a relevant factor (as cited in *R. v. Owusu*, 2008 ABQB 715 at para. 5).

Overall, the impact on the offender must be "grossly disproportionate to the public interest in protecting society through the effective investigation of crimes of a sexual nature" (s. 490.012(4) of the *Criminal Code*). In terms of the public interest, s. 2 of the *SOIRA* sets out its purpose: "to help police services investigate crimes of a sexual nature", requiring "rapid access to certain information relating to sex offenders." The Court in *Redhead* noted that "[t]he underlying

assumption is that a sex offender will re-offend" (at para. 36, citing *R. v. Have*, 2005 ONCJ 27 at para. 16). Accordingly, "the focus of the inquiry is not on whether there is a public interest in having the offender registered, but rather on whether the impact on the offender would be grossly disproportionate to the public interest" (at para. 42). "Grossly disproportionate" was said to be a high threshold requiring proof of a "marked and serious imbalance" between the interests of the offender and the public interest (at para. 43, citing *R. v. J.D.M.*, 2005 ABPC 264 at para. 53). At the same time, the exemption should not be interpreted "so narrow[ly] that the *SOIRA* order is effectively mandatory," or it will be rendered "meaningless" (at para. 44).

Redhead continues to be seen as the leading case in the application of the exemption under s.490.012(4) of the *Criminal Code* in Alberta and across Canada. Its guidelines were applied in both *R. v. Owusu* and *R. v. Schultz*, 2008 ABQB 679, although the judge in each case came to a different conclusion on the availability of the exemption in the circumstances.

In *R. v. Owusu*, Justice Barbara Romaine of the Alberta Court of Queen's Bench held that the exemption should apply. Owusu was convicted of sexual assault and originally given a conditional sentence of 2 years, but after a Crown appeal this was increased to 3 years imprisonment on the basis of the starting point sentence for major sexual assaults in *R. v. Sandercock* (1985), 62 A.R. 382; 1985 CanLII 104 (see my earlier post Sentencing in Sexual Assault Cases - Whither Appellate Guidance?). The Crown sought a *SOIRA* order that would require the offender to report to the nearest registration centre annually for 20 years. The evidence established that Owusu was training to be a chemical engineer and planned to work in the oilfield, a plan that necessitated travel away from the urban centres where he could fulfill the reporting requirements of a *SOIRA* order. Further, it was said that there would be stigma attached to the order, but details of that argument particular to the offender's situation are not provided. Justice Romaine also considered that Owusu was young, he had an "impressive" background (at para. 10), he was seen as a role model with high potential, and he had taken advantage of several programs while incarcerated.

It is questionable whether these latter considerations are relevant, as they speak to the offender's past circumstances and his likelihood of reoffending. On the basis of this evidence, Justice Romaine found that "the impact of an exemption order on the public interest would be relatively slight" (at para. 16), which runs counter to the Court of Appeal's ruling in *Redhead* that the focus should not be on the public interest in considering an exemption. The impact on Owusu's future employability was a relevant consideration, however, and seems to be the main reason for Justice Romaine's conclusion that "a *SOIRA* order would undermine the important sentencing purposes of rehabilitation and re-integration into society" (at para. 16).

In *R. v. Schultz*, Madam Justice J.E. Topolniski considered a very different set of circumstances in relation to an exemption from the *SOIRA*. Schultz was convicted of transmitting child pornography after he posted nude photographs of his ex-girlfriend, who was 16 years old at the time, on his Nexopia profile page. Schultz challenged the mandatory minimum sentence of 1 year imprisonment under s. 163.1(3)(a) of the *Criminal Code* as cruel and unusual punishment contrary to s.12 of the *Charter*, as well as the *SOIRA* order that was mandated upon his

conviction for a designated offence (distributing child pornography). Interestingly, the same test - that of gross disproportionality - applies with respect to both inquiries.

Justice Topolniski rejected Schultz's arguments that the minimum sentence and the *SOIRA* order had a grossly disproportionate impact upon him. Focussing on the *SOIRA* order, Justice Topolniski noted that the evidentiary burden was on the offender, and held that he had "not raised any circumstances which would establish that his registration would be grossly disproportionate to the public interest" (at para. 158). Unlike Owusu, for example, Schultz did not have educational or career goals that would be impacted by a *SOIRA* order, as he was unemployed at the time of sentencing and had no concrete future plans. Justice Topolniski also seemed unpersuaded by Schultz's arguments regarding the stigma of being labelled as a sex offender at the young age of 22 years old. Lastly, she rejected the argument that the crime was not one of a "sexual nature" and that the public had no interest in registering Schultz as a sex offender. Citing cases from other jurisdictions (see for example *R. v. Ayoob* (2005), 68 W.C.B. (2d) 426 (Ont. S.C.J.; *R. v. Aylesworth*, 2008 ONCJ 68), Justice Topolniski found that distribution of child pornography is a crime of a sexual nature, and in any event, noted that it was a designated offence under the *SOIRA*. Accordingly, she concluded that "Parliament is of the view that registration of certain information relating to an individual who has committed any of the offences under s. 163.1, no matter what the circumstances of the offence, can achieve the public interest of protecting society through the effective investigation of crimes of a sexual nature" (at para. 155). In the end, Schultz was sentenced to 1 year imprisonment followed by 2 years of probation, and was ordered to comply with the *SOIRA*.