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Sex Offender Registries and Persons Found Not Criminally Responsible: Exit Ramps and Equality

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Case Commented On: *G. v. Ontario (Attorney General)*, 2019 ONCA 264 (CanLII); leave to appeal granted, 2019 CanLII 89651 (SCC)

On February 20, 2020, we had the opportunity to watch the Supreme Court of Canada hearing in *G. v. Ontario (Attorney General)* in Ottawa (webcast available here). The Supreme Court was closed to public hearings in mid-March as a result of COVID-19, and we feel very fortunate to have had the chance to attend this hearing in person.

The case concerns the issue of whether the provincial and federal sex offender registries created by *Christopher's Law (Sex Offender Registry), 2000*, SO 2000, c 1 and the *Sex Offender Information Registration Act*, SC 2004, c 10 (*SOIRA*) violate the *Charter* rights of persons found not criminally responsible on account of mental disorder (NCRMD). The *Charter* claimant, G, was found NCRMD on two counts of sexual assault, one count of unlawful confinement, and one count of harassment against his then-wife in June 2002. He received an absolute discharge from the Ontario Review Board (the body responsible for handling cases of persons found NCRMD) in August 2003. Despite this discharge, G was required to register with the Ontario and federal sex offender registries and was subject to their requirements for life. Persons who are found NCRMD have no ability to remove themselves from the Ontario registry at any point and can only apply for removal from the federal registry after 20 years. However, persons who are found guilty of sexual offences but receive a discharge at the time of sentencing are not required to register either provincially or federally, and persons who are convicted of sexual offences and later receive a pardon or record suspension may have their names deleted from the provincial registry. Neither option is available to persons found NCRMD.

G argued that the relevant provisions of *Christopher's Law* and *SOIRA* violate his rights under sections 7 and 15 of the *Charter* and could not be justified by the Ontario or federal governments under section 1 of the *Charter*. His challenge was unsuccessful at first instance, but the Ontario Court of Appeal accepted the argument that the registries legislation violates the *Charter*'s section 15 equality guarantee in the case of persons found NCRMD who receive absolute discharges. The Court of Appeal agreed with the application judge that the provisions do not offend the right to life, liberty or security of the person in a way that contravenes the principles of fundamental justice under section 7 of the *Charter*.

After describing the Court of Appeal decision in more detail, this post will set out our observations of the hearing at the Supreme Court, including our sense of what issues seemed to

be the most contentious for various justices of the Court and our predictions about the outcome of the case.

The Ontario Court of Appeal Decision

G argued that the sex offender registries legislation violates his section 7 rights to liberty and security of the person. The Court of Appeal accepted that the registries legislation violates the right to liberty (at para 87). The evidence showed that persons subject to the registry are required to personally register with the police, provide current photographs and other information (including home and work addresses and vehicle information) and report to the police annually or when leaving the country for more than seven days. Failure to do so is an offence that may be punished by imprisonment. These impositions were found to engage the right to liberty, though in a "modest" way (at para 99).

The Court of Appeal declined to decide whether the registries legislation also violates the right to security of the person. G argued that a violation of both liberty and security of the person has "cumulative effects" that matter to the analysis of the principles of fundamental justice, but the Court did not find this approach "readily apparent" (at paras 82-83). The Court also rejected G's argument (at paras 85-86) that an "entirely subjective approach" should be taken in determining whether his security of the person was engaged, in light of what it saw as an objective approach to this issue taken by the majority of the Supreme Court in *New Brunswick (Minister of Health and Community Services) v. G.(J.)*, 1999 CanLII 653 (SCC), [1999] 3 SCR 46.

A violation of section 7 requires a finding that the right to life, liberty or security of the person is breached in a way that contravenes the principles of fundamental justice. Here, the Court of Appeal did not accept G's argument that the registries legislation violated the principle that legislation cannot be overbroad in its application. Overbreadth refers to those situations where the law is broader than it needs to be in order to achieve its objectives. G's contention was that the purpose of the registries – protection of the public from sexual offences – is not furthered in the case of persons found NCRMD who receive an absolute discharge, because discharges only occur after an individualized assessment of risk (at para 88). However, the Court of Appeal noted that the registries are based on a "statistical connection between the commission of a designated offence and the heightened risk of committing another designated offence" (at para 99). On the expert evidence accepted by the application judge, this connection "exists for persons found NCRMD who have been absolutely discharged just as it exists for NCRMD persons who have not been discharged, and for persons convicted of designated offences" (at para 99). The legislation was therefore not overbroad in its application to persons found NCRMD, according to the Court of Appeal.

G's argument under section 15 of the *Charter* was that the registries legislation "has a harsher effect" on persons found NCRMD compared with persons who were found guilty of sexual offences (at para 104), amounting to discrimination based on mental disability. The Court of Appeal accepted this argument, noting that two "exit ramps" are available for the latter group but not the former. First, persons found guilty of sexual offences who receive a discharge at the time of sentencing are deemed not to be convicted and are thus not required to register (see s 730 of the *Criminal Code*, RSC 1985, c C-46). This exit ramp is not open to those found NCRMD,

"ironically" because they have not been found guilty of anything (at para 107). Second, persons who are convicted of most offences requiring registration can apply for a record suspension either five or ten years after completing their sentence and, if successful, will be automatically removed from the provincial registry and can apply for removal from the federal registry. Again, this exit ramp is closed to those found NCRMD because they have no criminal record to be suspended. The only option for persons like G who were found NCRMD in relation to two sexual offences is to apply for termination of a *SOIRA* order 20 years after the finding of NCRMD, with no possible exit from *Christopher's Law* (at para 114).

The Court of Appeal found that the comparative lack of exit ramps for people found NCRMD amounts to differential treatment on the basis of mental disability, satisfying the first step of the test under section 15 of the *Charter* (at paras 114-115). The second step of the test requires analysis of whether the differential treatment is discriminatory. The Court articulated "discriminatory differences" as "those which perpetuate *arbitrary disadvantage* by imposing burdens or disadvantages, or withholding benefits and advantages from individuals in the identified group based on their membership in that group" (at para 117, emphasis added). The respondent governments argued that the treatment of persons found NCRMD actually *promoted* equality by ensuring these persons were "not treated as criminals" – which is essentially an argument that the legislation is not arbitrary (at para 118). The Court noted that this argument did not explain the lack of comparable exit ramps for persons found NCRMD and did not account for their actual needs and circumstances (at paras 119-121). It also found that the lack of exit ramps reflects stereotypical assumptions that persons who commit criminal acts while NCRMD do not change and are "inherently and indefinitely dangerous" (at para 122).

The demands of substantive equality – which may require differential treatment in order to remedy historical disadvantage – were also referenced by the Court of Appeal. Substantive equality in this case dictated that persons found NCRMD who receive an absolute discharge should be given the opportunity for individualized assessment before being placed or maintained on a sex offender registry (at para 127). This approach was supported by the objectives of the *Criminal Code* for persons found NCRMD, which are to assess and treat mental illness as well as to protect the public (at para 130). The Court also noted that the registries may "erect new barriers to the NCRMD person's continued recovery and reintegration into society" in a way that "perpetuates rather than alleviates their systemic disadvantage" (at para 134). G was seen to be a case in point, with the registries having a negative impact on his mental health.

Turning to whether the section 15 violation could be justified under section 1 of the *Charter*, the parties agreed that the registries had a pressing and substantial objective – public safety – and that the legislation requiring registration by all persons convicted of or found NCRMD for sexual offences was rationally connected to this objective. However, the legislation did not pass the minimal impairment component of section 1 analysis. Although the Court of Appeal indicated that governments are owed some deference when responding to complex social problems, the sex offender registries were not seen to be sufficiently tailored to the circumstances of persons found NCRMD, especially because persons found guilty had exit ramps available to them (at paras 142-144). In the words of the Court, "[t]here is no evidence that, while the objective of the legislation is consistent with exceptions and exemptions for persons found guilty, it is somehow

undermined by comparable exceptions and exemptions for persons found NCRMD" (at para 145).

Having found a violation of section 15 that could not be justified under section 1 of the *Charter*, the Court of Appeal declared that the impugned provisions of *Christopher's Law* and *SOIRA* "are of no force or effect to the extent that they impose mandatory registration and reporting requirements with no possibility of exemption on persons found NCRMD who have received an absolute discharge" (at para 157). The Court of Appeal also suspended the declaration for 12 months, reasoning that the federal and Ontario governments had several options available for fixing their legislation, which involved policy choices and the need to coordinate. In addition, immediate invalidity was said to "pose a potential danger to public safety" (at para 150). However, the suspension of invalidity did not apply to G, and the Court relieved him from future compliance with the sex offender registries and ordered the deletion of his information from them (at para 157).

Commentary on the ONCA Decision

Before describing our observations of the Supreme Court of Canada hearing, a few comments are in order. First, it is unusual in the criminal context for a court to find a violation of section 15 but not of section 7 of the *Charter*. Section 7 is in many ways the *Charter*'s superhero, and courts have often overlooked possible section 15 violations while relying on section 7 (see e.g. *Carter v Canada (Attorney General)*, 2015 SCC 5 (CanLII), dealing with assisted dying laws). It is interesting to see the Court of Appeal go in the opposite direction in this case. To ground its finding that the legislation was not overbroad, the Court of Appeal relied on the statistical connection between the commission of a designated offence and the heightened risk of committing another designated offence for both persons found NCRMD and for persons convicted of designated offences (at para 99). However, this begs the question of why, despite that risk existing for both groups, convicted persons have exit ramps that persons found NCRMD do not. This sounds like inequality and overbreadth for the latter group.

That leads to a second comment, which is that sections 7 and 15 can overlap to a large extent, particularly since the Supreme Court restated the scope of section 7's principles of fundamental justice in *Canada (Attorney General) v Bedford*, 2013 SCC 72 (CanLII). In *Bedford*, the Court reviewed and defined three key principles of fundamental justice – arbitrariness, overbreadth, and gross disproportionality – in ways that connect to norms of equality and non-discrimination. For example, gross disproportionality – the idea that the effects of a law cannot be grossly disproportionate to the state's objective – is very similar to section 15's protection against adverse effects discrimination where there are protected grounds at play. Both protections seek to ensure that individuals and groups are not subjected to disproportionate legal consequences. And, as seen in the Court of Appeal decision in this case, arbitrariness has crept in to section 15 analysis, whether through a general focus on "arbitrary disadvantage" or the continued consideration of the claimant's "actual needs and circumstances", a factor that is a holdover from *Law v. Canada (Minister of Employment and Immigration)*, 1999 CanLII 675 (SCC), [1999] 1 SCR 497.

However, the Supreme Court has more recently distanced itself from a formulation of the test for discrimination that relies on arbitrariness (see *Quebec (Attorney General) v. Alliance du personnel professionnel et technique de la santé et des services sociaux*, 2018 SCC 17 (CanLII); *Centrale des syndicats du Québec v. Quebec (Attorney General)*, 2018 SCC 18 (CanLII); and a comment on these pay equity-related cases here). This approach is the better one for section 15, because it does not include an internal limit like section 7 does. While "discrimination" is required to engage section 15, the analysis should focus on whether the differential treatment perpetuates a group's historical disadvantage rather than whether the treatment is arbitrary, which is a matter for section 1.

Third, there can also be overlap between section 7 and section 15 in cases involving a violation of security of the person and discrimination based on mental disability. The right to security of the person includes freedom from serious state-imposed psychological stress, which may converge with discrimination based on mental disability (and other grounds) in some cases.

Fourth, the Court of Appeal's suspension of the declaration of invalidity is difficult to understand, especially if one returns to the nature of the violation the Court found. Why does immediate invalidity pose a problematic danger to public safety when persons who are found guilty or convicted of designated offences are already permitted to exit the registry in some circumstances? The public danger rationale does not appear very strong in this light. As for the "give the governments time" rationale, that alone should not justify a suspended declaration of invalidity (see e.g. *Schachter v. Canada*, 1992 CanLII 74 (SCC), [1992] 2 SCR 679) – although the need for consultations between governments might (see e.g. *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, 1999 CanLII 687 (SCC), [1999] 2 SCR 203).

Supreme Court of Canada Hearing

Section 15 / Section 1

The Attorney General of Ontario (AGO) commenced oral arguments with a discussion about the risk posed by persons found NCRMD. This quickly led to questions from the bench (by Justices Michael Moldaver, Sheilah Martin, and Nicholas Kasirer) about how that risk differs from that posed by persons convicted or discharged of designated offences, and why the latter group is able to rely on exit ramps that the former group is not. In response, the AGO maintained that there is no "arbitrary disadvantage" against persons found NCRMD, nor are they subject to stereotyping in the current scheme. While the Court did not question this formulation of the test for discrimination, they did not appear persuaded by the AGO's argument that the distinction between these groups of offenders is evidence-based. Justice Rosalie Abella also raised concerns about the need for individual assessments for persons found NCRMD. Much of the discussion blended justification and accommodation arguments with the question of whether the legislation is discriminatory, but hopefully that signalled the Court's inclination to find a section 15 violation that requires justification, and not the importation of section 1 considerations into the section 15 analysis.

The AGO's section 1 arguments focused on minimal impairment as the so-called "crunch question" and relied on the need for a categorical approach to persons found NCRMD given their

risk of reoffending and the "fallibility" of individualized testing. The Attorney General of Canada (AGC) took no position on section 15 and focused on similar arguments under section 1 for justifying the federal registry. Again, the Court did not appear to find the risk-focused nature of these arguments persuasive given the exit ramps available for other sex offenders, with Justice Moldaver particularly vocal on this point.

The respondent made a strong argument for upholding the finding that the sex offender registry legislation violates section 15. Relying on the historical disadvantage of and stereotyping against the mentally ill, as well as the lack of evidence that they pose a heightened risk of reoffending as compared to persons who are found guilty of sexual offences, G's counsel argued that the treatment of persons found NCRMD is based on a discriminatory assumption that they cannot be rehabilitated. Interestingly, the Empowerment Council – an intervener representing the interests of persons with disabilities – argued that the main problem was that the governments had not considered the impact of the sex offender registries on persons found NCRMD. This argument speaks to the possibility that the governments failed to see the problematic impact of the scheme rather than having engaged in stereotyping, though the legislation would perpetuate historical disadvantage either way.

In response to questions from Justices Andromache Karakatsanis, Abella, and Moldaver about individualized assessments, the respondent clarified that their position was primarily based on the unavailability of exit ramps after initial placement on the registry. However, they also argued that it would be open to the legislature to decide not to mandate registration at all for persons found NCRMD and given absolute discharges after assessment by the Review Board.

There was also a federalism angle to the section 15 arguments, with the AGO arguing that the federal government was responsible for the lack of exit ramps attached to pardons for persons found NCRMD. Justice Russell Brown questioned this stance, noting that the AGO had itself tied *Christopher's Law* to the *Criminal Code*. This was also the focus of the oral arguments of the Criminal Lawyers' Association of Ontario (CLAO), adding that the Ontario government had made its own legislative choices about who should stay on or be removed from the provincial registry.

Section 7

The AGO only touched on section 7 briefly in oral submissions, choosing to focus mainly on section 15 in the interests of time. When Justice Karakatsanis asked why this was not an appropriate case to consider section 7, the AGO replied that *Christopher's Law* is not overbroad or arbitrary in its application to persons found NCRMD, and that the necessary connection exists between the law's purpose and effect.

The AGC conceded that the respective registration requirements engaged G's liberty interest. However, they argued that the restrictions on G's liberty were "modest" in comparison to the restrictions on liberty imposed on persons still under supervision of the Review Board.

The respondent argued that in determining whether, and to what extent, the registration and reporting requirements infringed G's security of the person interest, the Court should consider

the specific effects that these requirements have on persons found NCRMD. According to this view, it is necessary to recognize that specific groups are more susceptible to particular harms when determining whether a claimant's security of the person has been engaged.

According to the respondent, this security of the person analysis would still be an objective test, albeit a modified objective test informed by section 15 equality rights. The respondent noted that the Supreme Court considers section 15 as a "preeminent" *Charter* right that informs all other rights, based on *Andrews v. Law Society (British Columbia)*, 1989 CanLII 2, [1989] 1 SCR 143. In essence, the Court should consider whether a person of reasonable sensibilities *in similar circumstances to the claimant* would feel that their security of the person was infringed. Formulating a test that only speaks to one, generalized person of reasonable sensibilities would, in the respondent's view, risk discounting the reasonable sensibilities of persons with mental disorders by failing to take their particular circumstances and vulnerabilities into account.

Justice Malcolm Rowe pushed back against the respondent's position that the section 7 analysis should be "infused" by section 15, suggesting that the respondent drop the letters 'i' and 'n' and simply ask the Court to 'fuse' section 7 and 15 and recognize a hybrid right beyond the scope of what the *Charter* contemplates.

Several of the Justices pointed out that if the respondent is successful on section 15, it is not necessary for the Court to consider section 7. Justice Rowe posited that the respondent's real goal here was to attack section 7 doctrine, using this case as a vehicle to implement a new, modified objective test that could be helpful for future claimants from disadvantaged groups. Justice Brown pointed out that most respondents, being successful at the level of court below, avoid raising issues that are not necessary to their client's success on appeal. Referencing *Star Wars*, Justice Brown quipped that most respondents simply wave a hand and say "Nothing to see here, these aren't the droids you're looking for," hoping that the appellate court will not disturb the lower court's findings.

The Canadian Civil Liberties Association (CCLA) also made submissions on section 7, arguing that the registration requirements are onerous and "meaningfully intrude" on G's liberty interest. They disputed the Court of Appeal's finding that the liberty intrusions were modest or minimal, especially considering the cumulative effects of the various reporting requirements and significant consequence of breaching them. The CCLA only touched briefly on security of the person, pointing out that the 'modified objective' test suggested by the respondent is similar to modified objective tests used frequently in criminal law.

The CCLA finished by arguing that the deprivation of G's liberty is not in accordance with the principles of fundamental justice, as imposing restrictions such as these on a person who poses only a statistical risk, as opposed to an actual one, is overbroad.

Remedy

There was a lively discussion of remedy at the Supreme Court hearing. The AGO argued that if the Court were to find a *Charter* violation, it should uphold the suspended declaration of invalidity granted by the Ontario Court of Appeal based on a public safety rationale. It also noted

that the government might decide to eliminate exit ramps for persons found guilty of designated offences, an apparent argument against a remedy of reading in similar exit ramps for persons found NCRMD (which was emphasized by Justice Karakatsanis in one of her questions). In response to a question from Justice Brown, the respondent clarified that persons found NCRMD were not just being denied the benefit of an exit ramp, but were also experiencing the burden of being kept on the registry. The CLAO also made this point, arguing that it would be contrary to substantive equality for a government to respond to the *Charter* violations by removing all exit ramps for all sex offenders.

The Asper Centre for Constitutional Rights focused its intervener submissions on remedy, arguing that a suspension of a declaration of invalidity is an extraordinary remedy that is to be used sparingly, so as to avoid an ongoing and unjustifiable violation of *Charter* rights. Justice Brown raised the point that legislatures could rely on section 33 of the *Charter* – the notwithstanding clause – to buy themselves more time in the face of immediate declarations of invalidity, instead of relying on courts to suspend those declarations. To this, counsel for the Asper Centre responded that suspended remedies are appropriate if they are necessary and based on legitimate reasons, such as those enumerated in *Schachter*. In the AGO's reply arguments on remedy, Justice Brown went further on section 33, suggesting that the Constitution did not give the Court the power to suspend declarations of invalidity.

On the issue of whether G should have been exempted from the suspended remedy, the AGO spoke against this aspect of the Court of Appeal decision, arguing that unlike the *Carter* case, G had no need for an immediate remedy (see *Carter v. Canada (Attorney General)*, 2016 SCC 4 (CanLII)). Justice Moldaver responded by indicating that G appeared to be an ideal candidate for exiting the sex offender registries as he has had a clear record for 17 years, and the respondent emphasized this point in their argument. Justice Rowe remarked that this personal remedy for G was akin to a "clean tag" in baseball, as G would almost certainly qualify for any exit ramp that the legislature made available to persons found NCRMD in order to bring the registry laws into constitutional compliance. For those not familiar with baseball, a clean tag occurs when a fielder clearly tags a runner out on the base path and the result is not up for debate. We appreciated the sports reference from the Court, and would also have accepted 'slam dunk.' The Asper Centre supported the Court of Appeal's exemption of G from the suspension as well, arguing that this was a remedy available under section 24 of the *Charter* and that section 24 and 52 remedies can work together in appropriate cases.

Commentary and Predictions

We predict that the Supreme Court will focus on section 15 in its reasons for decision in this case. Hopefully, the Court will not perpetuate the language of "arbitrary disadvantage" used by the Ontario Court of Appeal and the AGO at the oral hearing, and will instead find a violation of section 15 using the more modern test for discrimination articulated in the 2018 Quebec pay equity cases mentioned above. The comparable lack of exit ramps for persons found NCRMD was a common refrain at the Supreme Court hearing, and this – combined with the clear presence of an enumerated ground – provides a clear case in which to find a violation of equality rights.

It would also be worthwhile for the Court to weigh in on the equality-infused approach to section 7 put forward by the respondent. This approach was taken by concurring Justices Claire L'Heureux-Dubé, Charles Gonthier and Beverley McLachlin in *New Brunswick v. G.(J.)* when they recognized that the security of the person interests engaged by child protection proceedings are gendered, engaging equality rights under sections 15 and 28 of the *Charter* (at paras 112-113). The concurring Justices also acknowledged that child protection proceedings and related security of the person interests have "particular importance for the interests of women and men who are members of other disadvantaged and vulnerable groups, particularly visible minorities, Aboriginal people, and the disabled" (at para 114). This equality-infused approach to section 7 has broader applicability to the impact of criminal consequences on racialized and Indigenous persons, a systemic chronic issue in our legal system that the Court has recognized previously And that remains chronic (see e.g. *R. v. Gladue*, 1999 CanLII 679 (SCC), [1999] 1 SCR 688; *R. v. Williams*, 1998 CanLII 782 (SCC), [1998] 1 SCR 1128).

If the sex offender registries legislation is found to be discriminatory, it is difficult to see how it is not also an overbroad violation of security of the person when applied to persons found NCRMD who receive absolute discharges. That overbreadth would also be fatal to the governments' section 1 arguments, and we predict the Supreme Court will find no reasonable justification in this case.

The Court may split on remedy, however. The other members of the Court did not pick up on Justice Brown's line of questioning about section 33 of the *Charter*, which is a rather controversial approach in light of governments' historical reluctance to rely on that section. It would be useful if the Court takes this opportunity to clarify the circumstances in which suspended declarations of invalidity, and exemptions from those suspensions for individual claimants, should be granted.

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