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The Constitutional Limits of the Sex Offender Registry

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It has become conventional wisdom in public discourse that sex offenders are uniquely likely to repeat their crimes. This assumption, combined with the heinous nature of sex offences (particularly those involving child victims), has motivated law enforcement and legislators to adopt unique measures to solve and prevent sex offences. In the United States the FBI maintains a searchable sex offender database compiled from the data of the various state jurisdictions. A user may conduct a geographic search to quickly access the name, photograph, and rap sheet of any sex offender living in their neighborhood. (Eligibility for the database varies substantially by state, both in terms of seriousness of the triggering offence (in some states public urination qualifies), duration of time on the database (in many jurisdictions it is for life), and existence of judicial discretion to require registration (in most jurisdictions it is automatic upon conviction for a triggering offence)).

Canada's approach has been somewhat more moderate. Under the original incarnation of the *Sex Offender Information Registration Act*, SC 2004, c 10 (SOIRA), sex offenders subject to a judicial order were required to report within 15 days of the order and provide information for collection in a database, intended to "help police investigate crimes of a sexual nature." Unlike the publicly available FBI database, SOIRA only authorized specific law enforcement personnel to access this information for use in their investigations. In its original form, adopted in 2004, SOIRA allowed the Crown to make an application for such an order, which the sentencing judge had discretion to deny in cases where its effects on the offender's privacy or liberty interests would be grossly disproportionate to the public interest in protecting society. In 2011, amendments to the *Criminal Code* tightened up the application of SOIRA. (See *Protecting Victims from Sex Offenders Act*, SC 2010, c 17 (the Amending Act)).

In the first place, the Amending Act removed judicial discretion to refuse an order, rendering registration mandatory upon conviction. Second, it expanded the purposes for which authorized personnel could consult the database, from "investigating" to "preventing or investigating" sex crimes. Third, it imposed additional reporting requirements, including the requirement that offenders must report changes to contact information for their employer within 7 days, rather than the 15 days stipulated by the 2004 act. Finally, the Amending Act required offenders with more than one sexual offence to remain on the registry for their lifetimes (subject to an application process the offender may initiate at the 20 year mark). The forward-looking purpose to the Amending Act suggests that Parliament intended to move closer to the American approach to sex offender registration. Indeed, the U.S. Supreme Court has upheld the sex offender registry on the theory that it does not constitute punishment at all but, rather, serves an administrative public safety function, similar to involuntary commitment of the dangerously mentally ill. See, e.g., *Smith v Doe*, 538 U.S. 84 (2003).

The assumption that most sex offenders are recidivists, however, may be overly simplistic. In one meta-analysis conducted for Public Safety Canada, Andrew J.R. Harris and R. Karl Hanson found recidivism rates among sex offenders to be about 24% -rather less than the overall recidivism rate of 37.1%, calculated by Correctional Service Canada for all criminals. That said, Harris and Hanson report that their 24% figure contains alarming sub-categories of offenders. While rapists repeat offend at an average rate of 24%, child molesters with male victims repeat at a rate of 35%. Considering the seriousness of these sorts of offences, and the lessened relevance of obvious structural economic factors motivating the property and drug crimes included in the overall figure for crimes generally, these numbers are indeed disturbing. Harris and Hanson also observed that recidivism rates decreased as the age of the offender increased, and that prior offences were predictive of future recidivism.

These data show that, on the one hand, we should indeed be concerned about repeat sex offenders, particularly taking into account that empirical studies necessarily omit unreported and unsolved offences. Yet they also suggest that we risk being overly punitive in adopting a one-size-fits-all approach to sex offender databases. In *R v Ndhlovu*, the Alberta Court of Queen's Bench found that, for these reasons, the current incarnation of SOIRA runs afoul of the Charter.

Eugene Ndhlovu was a 19-year-old attending a *Jersey Shore*-themed party thrown by a friend. After drinking with the two victims and other party goers for many hours, Mr. Ndhlovu groped one of them on the thighs and rear end (at para 17). The other victim, RD, woke up in the middle of the night, to find Mr. Ndhlovu penetrating her with his fingers (at para 18). After she told him to stop he tried again, telling her it would "feel good." When she pushed him away the second time he left (at para 18).

Mr. Ndhlovu, who has no other criminal history, plead guilty to one count of sexual assault against each victim, testified that he was so intoxicated he had no memory of the night's events, and expressed remorse during sentencing. He was sentenced to six months in jail, three years of probation and, according to SOIRA, ought to have automatically been placed on the sex offender registry (at para 20). Mr. Ndhlovu moved that SOIRA's application to his case violated his rights under sections 7 and 12 of the Charter.

In considering the accused's section 7 claim, the Court first determined that the reporting requirements of SOIRA do constitute a deprivation of liberty (at para 44). Given the amount of information required by the registry, the in-person reporting requirements, the requirement that the registrant report trips of seven days or more, and the fact that the registrant is subject to random follow-up visits from law enforcement, this conclusion is fairly unsurprising. In arriving at this conclusion the court also noted that the 2011 revisions had increased the registry's impact on an offender's liberty interest by expanding its potential access by law enforcement beyond the original sphere of cases where the state has "reasonable grounds to suspect that the crime being investigated is of a sexual nature" (at para 60).

One issue of significant debate between the parties on appeal was whether the registry itself affected his liberty interests in a psychological manner, by creating "a stigma in his own mind constantly reminding him of his status as a sex offender" (at para 73). The Crown's argument, which the Court rejected, was that any stigma in the accused's mind arises not from the registry but from the original conviction.

The more complicated question before the Court was the second part of the section 7 analysis, which was whether the deprivation of Mr. Ndhlovu's liberty interest was contrary to the

principles of fundamental justice. Based upon the language of SOIRA and its Amending Act and the associated Parliamentary debates, the Court defined the state's legislative objective as protecting "vulnerable people, including children, in society, by allowing police quick access to current information on convicted sex offenders" (at para 87). To determine whether the current incarnation of the Act violates section 7 the Court considered whether mandatory SOIRA orders are arbitrary, overbroad, or grossly disproportionate relative to that objective.

As to the question of arbitrariness the Court does not come to a clear conclusion. It notes that there is a connection between providing police with up-to-date information on prior offenders and the goal of investigating and preventing sex offences (at para 92). Without getting into the empirical data it also notes that "[t]here is, no doubt, a statistical probability that a sex offender will offend again" (at para 92). On this point it concludes that "statistical probabilities cannot protect individuals who will not probably find themselves on that statistical curve ever again," yet stops short of holding that SOIRA is constitutionally arbitrary.

As to the claims of overbreadth and gross disproportionality, however, the Court is very clear. As to overbreadth it cites the SCC in *Carter v Canada* for the proposition that "a law that is drawn broadly to target conduct that 'bears no relation to its purpose' in order to make enforcement more practical may therefore be overbroad" (at para 94, citing 2015 SCC 5 (CanLII) at para 85). The Crown attempted to argue that mandatory inclusion for all sex offenders was connected to SOIRA's purpose because "there is no way to reliably know in advance which offenders will reoffend and which ones will not" (at para 105). Relying on precedent, the Court held that such concerns about practical distinction are appropriate to a section 1 analysis of whether a section 7 violation is justifiable, but not relevant to the determination of whether the law is overbroad as a matter of fundamental justice. Therefore, it did not consider those arguments in concluding that the current SOIRA regime is overbroad insofar as it captures offenders (such as Mr. Ndhlovu) who are unlikely to reoffend in the first place.

In considering whether the SOIRA regime is grossly disproportionate, the Court cited the test announced by the SCC in *Bedford*, which balanced "the negative effect on the individual against the purpose of the law, not against societal benefit that might flow from the law" (at para 121, citing *Bedford v Canada (Attorney General)*, 2013 SCC 72 (CanLII) at para 121). The court notes the significant effect on a registrant of SOIRA's random compliance checks, including, in particular, the possibility that law enforcement could inadvertently disclose the registrant's status to unauthorized third parties during such checks (at para 124). (As an example, the Court cites Mr. Ndhlovu's ongoing concern that officers could come to perform such a check at his church (at para 122).)

The Court therefore concluded that "the law as it stands will now place Mr. Ndhlovu on police radar for the rest of his life anytime a sexual offence is committed by a black man of average height in his neighborhood" (at para 132). It relied on its own factual findings at sentencing that Mr. Ndhlovu was a low-risk offender due to his lack of criminal history, his remorse, and his testimony that he no longer drank alcohol after the incident in question. Therefore, it concluded that the mandatory reporting regime currently prescribed by Section 490.012 of the *Criminal Code* unjustifiably infringes section 7 of the *Charter*, allowing the Crown to proceed with a section 1 hearing to determine whether the infringement can be justified and the provisions saved. (Having resolved the appeal under section 7, the Court did not address Mr. Ndholovu's section 12 argument (at para 131)).

This holding is consistent with the SCC's approach in other areas of criminal procedure, which have shown that section 7 issues of overbreadth can be resolved where the trial court has discretion to determine on a case-by-case basis whether a procedural requirement violates a specific defendant's *Charter* rights. For example, in *R v Corbett*, [1988] 1 SCR 670 (CanLII) the SCC read trial court discretion into section 12 of the Canada Evidence Act, which allows the Crown to introduce an accused's prior criminal history as impeachment evidence where the accused takes the stand. While the Court does not cite the empirical literature on recidivism, its holding implicitly acknowledges the reality that not all sex offenders fit the repeat offender model. While its reasons make it seem unlikely that the Court will find that SOIRA is saved by section 1, the hearing will present an important opportunity for the parties to make submissions that will educate courts and Parliament about what we actually know about sexual offender recidivism. To the extent that SOIRA should be amended to reintroduce discretion, trial courts will benefit from information about how best to wield it in a way that balances victim protection against the liberty of the accused.

It is worth noting, however, that despite the constitutional—and practical—benefits to the ABQB's approach in *Ndhlovu*, its reasons for judgment raise some concerns about the fact-finding at trial. First off, in its statement of facts the Court notes that the victim "personally insisted on Mr. Ndholovu's attendance at her party" which was "'advertised' on [her] Facebook page as a highly sexualized Jersey Shore DTF (down to fuck) party and was to have a stripper pole available" (at paras 14-15). While these observations hardly rise to the level of Justice Camp's now-famous commentary, their seeming irrelevance to the accused's undisputed conduct in manually raping the hostess calls into question the court's conclusion that Mr. Ndhlovu is an unlikely repeat offender. (One would assume that a party-goer should be on notice that an invitation to a Jersey Shore party does not constitute consent by the hostess to every party-goer who stumbles upon her while asleep). Indeed, Mr. Ndhlovu's conduct—manual penetration of an unconscious woman after both had been drinking together at a party—is identical to that of Brock Turner's, whose light sentence by a California court has become emblematic of inappropriate use of sentencing discretion by trial courts in sexual assault cases.

Second, the Court seems to place a fair amount of emphasis on the fact that Mr. Ndhlovu's "offences related to alcohol consumption and he testified that he had since stopped drinking" (at para 133). While it is certainly relevant to the risk of re-offence that an accused who offends while drinking has stopped drinking, it does not sound as though the Court conducted any fact-finding on that question. In the absence of such fact-finding, the trivializing of sexual offences committed while drunk undermines the policy of section 273.2 of the *Criminal Code*, which prevents an accused from arguing mistaken belief in consent where it arose from self-induced intoxication. In amending the law in this manner Parliament sought to protect victims from the moral hazard of sexual assailants being able to rely on exactly the circumstances in which sexual assaults are most likely to occur. In minimizing the role of alcohol in this case for SOIRA, the ABQB seems to be making a bit of an end-run around this policy.

In other words, appropriate constitutional scrutiny of sex offender databases is a double-edged sword. In the United States, the legal fiction that such databases do not constitute "punishment" has shielded them from scrutiny under the Eighth Amendment prohibition on cruel and unusual punishment, and eased their defence under the Due Process clauses. If Canadian courts are, as they should, going to require a more nuanced analysis on a case-by-case basis, that analysis should not run afoul of existing principles in the substantive law of sexual assault. Judicial discretion is only constitutionally valuable if it is wielded appropriately.

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