File Number: 39360

# IN THE SUPREME COURT OF CANADA

(ON APPEAL FROM THE COURT OF APPEAL OF ALBERTA)

BETWEEN:

**EUGENE NDHLOVU**

**APPLICANT**
(Respondent)

-and –

**HER MAJESTY THE QUEEN**

**RESPONDENT**
(Appellant)

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## APPLICATION FOR LEAVE TO APPEAL
**(Pursuant to s. 40 of the *Supreme Court Act*, R.S.C. 1985, c. S-26)**

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## PART 1 – STATEMENT OF FACTS AND OVERVIEW OF APPLICANT'S POSITION

### A. Overview

1. It is the Applicants position that the Court should grant leave to appeal to determine the constitutionality of s. 490.012 of the Criminal Code, RSC, 1985, C-46 ("*Criminal Code*") which requires mandatory registration under the Sex Offender Information Registration Act, SC 2004, c 10 ("*SOIRA*") and s. 490.013(2.1) of the Criminal Code which requires registration under *SOIRA* for the life of the offender. Previous to the Act's amendment in 2011, the *Criminal Code* made the application for a *SOIRA* order discretionary for a prosecutor and a judge was able to decline to grant a *SOIRA* order if they deemed the infringement of the offender's liberty to be "grossly disproportionate to the public interest".

2. The Ontario Court of Appeal in *G. v Ontario (Attorney General)*, 2019 ONCA 264[1] declared both Christopher's Law (Sex Offender Registry), 2000, S.O. 2000, c.1 ("*Christopher's Law*") and *SOIRA* are of no force or effect to the extent they impose mandatory registration and reporting requirements with no possible exemption on persons found not criminally responsible by reason of medical defect ("NCRMD") who had received an absolute discharge, suspending the declaration for 12 months. The Attorney General of Canada did not appeal the decision related to *SOIRA*, while the decision relating to *Christopher's Law* was appealed to the Supreme Court of Canada.

3. In *Ontario v G*, 2020 SCC 38, the Crowns appeal was dismissed[2] and *Christopher's Law* was declared to be of no force or effect as it applies to those found NCRMD who were granted an absolute discharge on the basis of G's s. 15(1) Charter claim, and that such breech was not justified under s. 1 of the *Charter*. The Court did not need to determine if there was a breach of s. 7 of the *Charter*, leaving it for another case to determine the registries effects on all registrants and whether the entire scheme complies with s.7 of the *Charter*.

4. As the Court has struck down the requirements for registration in *Christopher's Law* for a certain group of offender, and the Ontario Court of Appeal has struck down the requirements for registration in *SOIRA* for a certain group of people, it is respectfully submitted that it is of public importance to determine the constitutional validity of the

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[1] ***G v Ontario (Attorney General)***, 2019 ONCA 264, para 157
[2] ***Ontario v G***, 2020 SCC 38, para 184

*Criminal Code* sections requiring the mandatory registration in *SOIRA* of all people convicted of a sexual offence.

5. The premise on which previous cases have dismissed challenges to *SOIRA* (*Dyck, Long*) is that it does not infringe on the right to liberty under s. 7 of the *Charter*, resting its conclusion in those cases that the legislation's intrusion on liberty is "modest"[3]. This is a conclusion that has been rejected by Khullar J.A. in her dissent in the case at bar, finding that ss.490.012 and 490.013(2.1) impose significant burdens on the Applicants liberty and which burdens cannot be overcome by s. 1 of the *Charter*.

**B Statement of Facts**

6. The Applicant plead guilty on June 26, 2015 to two counts of sexual assault, contrary to s. 271 of the *Criminal Code*.

7. These offences occurred at a sexually themed "down to fuck" party held by one of the complainants who had invited him to attend and had driven him to the party. A stripper pole was to be available at the party. He was 19 years old at the time.

8. He was sentenced to 6 months of incarceration and 3 years' probation on one count, and 6 months' probation on the second count. He had no juvenile or adult criminal record.

9. The sentencing judge had found him to be at a very low risk to reoffend.[4]

10. A constitutional challenge was made regarding s. 490.012 of the *Criminal Code*[5] requiring an order under the Sex Offender Information Registration Act[6] (*SOIRA*) to issue for Mr. Ndhlovu to register under *SOIRA* and s. 490.013(2.1) requiring registration for life having been convicted of two sexual offences, under s. 7 and s. 12 of the *Charter*[7].

11. The sentencing judge heard arguments challenging ss. 490.012 and 490.013(2.1) and found that the reporting requirements associated with a *SOIRA* order constitute a deprivation of an offenders liberty. She continued on and found that the *SOIRA* orders for all sex offenders upon conviction of two or more offences is overbroad as well as grossly disproportionate. As the judge had found the two *Criminal Code* sections breached s. 7 of the *Charter*, it was not necessary to deal with the s. 12 *Charter* argument.

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[3] *Ibid*, p.78
[4] ***R v Ndhlovu***, 2016 ABQB 595, para 38
[5] *Criminal Code, RSC, 1985, c C-46*
[6] *Sex Offender Information Registration Act, SC 2004, c 10*
[7] *Canadian Charter of Rights and Freedoms*

12. Argument was then presented on s. 1 of the *Charter*, with extensive expert evidence called by both Mr. Ndhlovu and the Crown (Dr. Zgoba for Mr. Ndhlovu and Dr. Hanson for the Crown).

13. The sentencing judge found a pressing and substantial objective in the protection of society through the effective investigation of crimes of a sexual nature by providing police with rapid access to certain information on known sex offenders. She found that the Crown had not established on a balance of probabilities that there is a rational connection between the amended sections, and the Objective.

14. The judge found the removal of judicial discretion and the life registration on the SOIRA registry for a person convicted of more than one sexual offence was not minimally impairing of their rights, and declared ss. 490.012 and 490.013(2.1) were unconstitutional and struck each section down.

15. The Crown appealed this decision to the Court of Appeal of Alberta. A majority of the Court of Appeal found that ss. 490.012 and 490.013(2.1) are not overbroad as well as not being grossly disproportionate, and that no breech of s. 7 of the *Charter* had occurred. They allowed the appeal and the declarations by the Court of Queen's Bench that sections 490.012 and 490.013(2.1) are of no force and effect, are set aside.

16. In dissent, Khullar J.A. would have dismissed the appeal and upheld the sentencing judge's declaration that ss. 490.012 and 490.013(2.1) are unconstitutional and of no force or effect, offending s. 7 of the *Charter*, and neither provision being justified under s. 1 of the *Charter*.

## PART II – QUESTIONS IN ISSUE

17. This Application raises the following questions which are of national and public importance:

    i. Does ss 490.012 and 490.013(2.1) of the *Criminal Code* violate s. 7 of the *Charter*?

    ii. If ss 490.012 and 490.013(2.1) of the *Criminal Code* violate s. 7 of the *Charter*, are the violations saved under s. 1 of the *Charter*?

## PART III – STATEMENT OF ARGUMENT

### i. Ss 490.012 and 490.013(2.1) of the *Criminal Code* violate s. 7 of the *Charter*.

18. Prior to April 14, 2011, s 490.012(1),(2),(3) of the *Criminal Code* allowed the prosecutor discretion to make an application for an order under the *Sex Offender Information Registration Act* (*SOIRA*), and section 490.012(4) gave Courts the discretion to decline to impose *SOIRA* orders when the Court deemed the infringement on the offender's liberty to be "grossly disproportionate to the public interest."[8]

19. Parliament realized that a *SOIRA* order could infringe on an offenders liberty to an extent that would be grossly disproportionate to the public interest, leaving it to the courts discretion to not issue an order.

20. As of April 14, 2011, section 490.012(4) was replaced, and as such courts can no longer decline to impose *SOIRA* orders, even when an Order would be arbitrarily imposed, and grossly disproportionate.[9] The previous wording of the legislation acknowledged the order was firstly infringing upon the liberty of an offender it was imposed upon and it incorporated Charter protection language to guard against an infringement of that interest. The amendment explicitly removed any consideration of an order needing to be proportional to the impact on an offender's liberty interest and excised all discretion.

21. Prior to the amendments in 2011, the Standing Committee on Public Safety and National Security that conducted a statutory review of *SOIRA* in 2010 was of the opinion that a judge should have the ability to depart from an automatic registration of offenders found guilty of a designated sexual offence or found not criminally responsible, in rare circumstances when he or she is convinced that the impact of inclusion in the registry on the offenders' privacy and liberty would be grossly disproportionate to the public interest. This was incorporated into Recommendation 2 of the Committee.[10]

22. In a Supplementary Opinion of the New Democratic Party to the Report of the Standing Committee on Public Safety and National Security, Don Favies, M.P., agreed that to the extent that the proposal preserves judicial discretion, they agree, and that the evidence was that the system was working well,[11] and that public safety requires giving judges discretion to keep people off the Registry who do not pose a risk to the public, with direct evidence. If

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[8] *Criminal Code of Canada* Ss 490.012(1),(2),(3) and 490.012(4)
[9] *Protecting Victims From Sex Offenders Act*, SC 2010 c. C 17
[10] *HC, Standing Committee on Public Safety and National Security, Statutory Review of the Sex Offender Information Registry Act, 2nd Session, 40th Parliament, December 2009* *p. 8-9*
[11] *Ibid.* at p. 36

the Registry is overpopulated by those who do not pose any real threat of reoffending, the Registry utility as a tool for police to rapidly investigate crimes is diminished.[12]

23. The reporting requirements under *SOIRA* are substantial. Offenders are required to report numerous information, including primary and secondary addresses, phone numbers, address of employment and where they volunteer, or if there is no address the location and the name of their employer or person who engages them in a volunteer basis and the type of work they do there, the address of every educational institution they are enrolled in, a telephone number they can be reached at at work, volunteer or school, their height and weight, the licence plate number,make, model, body type, year of manufucture and colour of the motor vehicles that are registered to them or they regulary use, drivers licience information, passport information, changes in employment or volunteer information, notification of departure and return dates whether in Canada or outside of Canada if away for more than 7 consecutive days, and expected addresses and locations.[13] Reporting is done once a year[14] and there can be random checks by the police. Failure to comply can result in a fine of not more than $10,000 and 2 years imprisionment if convicted by indictment, or a fine of not more than $10,000 and 6 months imprisonment by summary conviction.[15]

24. In *Blencoe v BC Human Rights Commission*[16], the Court established that an individual's section 7 right to life, liberty, and security of the person is engaged whenever:

> "(C)ompulsions or prohibitions affect important and fundamental life choices. This applies for example, where persons are compelled to appear at a particular time and place… to produce documents or testify… and not to loiter in particular areas… In our free and democratic society, individuals are entitled to make decisions of fundamental importance free from state interference." (para 49)

25. In the case at bar, it was undisputed that the mandatory registration and lifetime registration under ss 490.012 and 490.013(2.1) of the *Criminal Code* restricts Mr. Ndhlovu's liberty interest.[17]

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[12] *Ibid.* at p. 36
[13] *Sex Offender Information Registration Act, S.C. 2004 c. 10*, ss 5 and 6 [*SOIRA*]
[14] *Ibid.* s 4.1
[15] *Ibid.* s 490.031(1)
[16] ***Blencoe v BC Human Rights Commission*****,** [2000] 2 SCR 307**,** 2000 SCC 44, para 49
[17] ***R v Ndhlovu***, 2020 ABCA 307 (CanLII), para 46

26. Once it is determined that there is a violation of s. 7 of the Charter, it must be determined if the deprivation of liberty is contrary to the principles of fundamental justice.[18]

27. To make this determination, the court must determine if the mandatory *SOIRA* orders are arbitrary, overbroad and grossly disproportionate in relation to the government's objective in passing the legislation.

28. The objective is shown in s. 2(1) of *SOIRA*: "The purpose of this Act is to help police services prevent and investigate crimes of a sexual nature by requiring the registration of certain information relating to sex offenders."[19]

29. There must be a rational connection between providing police with current information on sex offenders and preventing and investigating sexual crimes, and requiring the mandatory registration of all sex offenders, many of them for life.

30. It is respectfully submitted that there is no rational connection between the effects of making *SOIRA* orders mandatory and the legislature's aim to prevent and investigate sex-related crimes. **T**he mandatory requirement creates grossly disproportionate effects and there is no clear indication that it assists in achieving *SOIRA's* purpose. In fact, courts have held that it may be diluting the registry[20] and making rehabilitation more difficult for offenders.[21] There is no public interest in a sex offender registry that is "so inclusive as to include so many low risk or no risk offenders as to dilute the resources and attention of the police from those that pose a genuine risk."[22]

31. In *Malmo-Levine*, LeBel J. held that fundamental liberty interests are infringed whenever a legislative response to social issues are, "disproportionate to the societal problems at issue and therefore arbitrary, in breach of s. 7 of the Charter."[23]

32. In *R v Have*, the Court concluded that;

> "The value of (SOIRA) registration in these circumstances is negligible. The impact of registration on the defendant is substantial. The balance is grossly disproportionate. Put another way, the present case is so far removed from the

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[18] ***Carter v Canada (Attorney General)***, 2015 SCC 5 para 55
[19] *SOIRA*, s 2(1)
[20] ***R v Have***, 2005 ONCJ 27 para 17 [*Have*]
[21] *Ibid.* at para 12
[22] *Ibid.* at para 17
[23] ***R v Malmo-Levine; R v Caine***, [2003] 3 SCR 571, 2003 SCC 74 para 280

> usual situations contemplated by the legislative scheme that subjecting the defendant to ten years of registration is not reasonably justified."[24]

33. As stated in *Bedford*[25] in paragraph 107, there is significant overlap between the three principles of arbitrariness, overbreadth, and gross disproportionality. In short, they will apply if a law is "inadequately connected to its objective or in some sense goes too far in seeking to attain it." (underlining added). In paragraph 111 of *Bedford*, the Supreme Court also defines arbitrariness as applying where there is not a "direct" or "rational" connection.

34. The question is not whether *SOIRA* is arbitrary, but that the legislature's decision to make *SOIRA* orders *mandatory* is arbitrary and thus has no rational connection to *SOIRA's* intended purpose.

35. The next question to be addressed is whether the mandatory *SOIRA* orders are overbroad, which is that there is no connection between the laws purpose and some, but not all of its impacts on life, liberty and security of the person.[26]

36. The laws purpose as previously mentioned, is to protect the public by allowing the police to have quick access to current information on sex offenders. This is so they are able to quickly investigate and arrest sexual offenders.

37. In *R v Heywood*, the majority of the Court found the law making it an offence for persons previously convicted of certain offences to loiter in certain areas such as public parks to be overbroad because in some circumstances restricted the liberty of offenders in a manner that did not further the objective of the legislation.[27] It was overbroad because it applied to all offenders even when they have ceased to be a danger to children, without the necessity of having to show that the offender will be a danger in the future.[28]

38. Difficulties in defining the scope of the law so that it would adequately serve the legislative purpose of the law are not relevant to whether the law is overbroad.[29]

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[24] ***Have*****,** para 27
[25] ***Canada (Attorney General v Bedford)*** 2013 SCC 72, [2013] 3 SCR 1101 para 107 [Bedford]
[26] *Ibid* para 111
[27] ***R v Heywood*** *[1994] 3 S.C.R. 761*
[28] *Ibid para 796*
[29] *R v* ***Safarzadeh-Markhali*** [2016] 1 S.C.R. 180, 2016 SCC 14 (CanLII) para 29 [Safarzadeh-Markhali]

39. This is similar to the case at bar, where the Applicant if he had never committed another offence, and is not considered a danger to society, at the age of 75 would still be required to report annually to the police, report any change in personal information, or travel plans. This would also apply to a person convicted of not disclosing his HIV status and being placed on the registry, even though he is not infectious and the sexual acts were consensual.

40. By having mandatory registration of everyone convicted of a sexual offence, regardless of the circumstances of the offence or of the offender, and having such registration last for the lifetime of some offenders, no matter what their circumstances, the legislation is overbroad in going too far in denying the liberty of the offender to accomplish the goal of protecting the public by having the police have quick access to information about sexual offenders.

41. The Court then needs to determine if the effects of mandatory *SOIRA* orders are grossly disproportionate in comparison to the law's objective, that is if the laws effects on life, liberty or security of the person are so grossly disproportionate to its purpose that they cannot rationally be supported.[30] It does not consider the beneficial effects of the law for society and balances the negative effect on the individual against the purpose of the law, not against the societal benefit that might flow from the law.[31]

42. Courts have largely recognized that those registered under *SOIRA* face serious legal obligations to report whenever they move, change employment, or go on vacation. In a free and democratic society, it is a serious infringement to be prevented from doing these things free from state intervention. In *R v Have* [32] the Ontario Court of Justice stated:

> "the impact of [a SOIRA] Order on any offender, including the defendant, is substantial. Subjecting the individual to an obligation for ten years enforceable by prosecution and imprisonment is, in itself, a significant infringement on liberty. The subject is required to provide information that he otherwise could keep private and to which the state would have no right of access. I agree with Hearn J in Dyck that there is substantial stigma attaching to an individual who is subject to registration, even if only in his mind. It may undermine treatment, rehabilitation and re-integration into the community. Finally, I would add that there may be a fine line between the legitimate police "tracking" of

[30] ***Bedford*** para 120
[31] *Ibid*, para 121
[32] ***Have*** para 12

> offenders and the harassing of them. There is no control against harassment except the judgment and restraint of the local police force.

43. Although there are many situations where a person's private information is disclosed, it is the person's choice whether to provide and disclose or not, in many of those situations. One can choose not to have a driver's licence, own a vehicle, apply for a passport, apply for a bank loan, or apply for a credit card. There is no governmental compulsion, under threat of fine or imprisonment, unlike a *SOIRA* order which will bring criminal consequences if there is non-compliance.

44. Previously, the government itself recognized that the inclusion of an offender in a *SOIRA* order could result in an impact on an individuals liberty that is grossly disproportionate to the public interest, and allowed courts the discretion in certain cases to exempt an offender from registering.[33]

45. By changing the law so that *SOIRA* orders are mandatory even when they are grossly disproportionate or overbroad it is a clear violation of section 7 of the *Charter*.

***ii.*** **Any violations of the *Charter* by ss 490.012 and 490.013(2.1) are not justified under s. 1 of the *Charter***

46. The Supreme Court of Canada in *R v Oakes*[34] held that a *Charter* infringing law will be saved by Section 1 only if all of the following can be established:

(1) There must be a pressing and substantial objective
(2) The means must be proportional to the effects
  (a) The means must be rationally connected to the objective
  (b) There must be minimal impairment of rights
  (c) The salutary effects outweigh its deleterious effects

47. Further, the onus is on the party seeking to come within the exception in s.1 to show that the law satisfies the *Oakes* test. In *R v Oakes*, "the burden of proof lies on the Crown when the Court considers section 1 of the Charter. Therefore, the Crown must present evidence to show that it has chosen "reasonable limits" in its legislative provisions." This

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[33] *Criminal Code of Canada*, s. 490.012 (4) repealed
[34] ***R v Oakes***, [1986] 1 SCR 103 para 66 - 68 [Oakes]

was defined at para 66 and 67 of *Oakes* as the standard of proof on a preponderance of probabilities. The majority in *Oakes* continued at para 67 and 68 that the standard of probability in a criminal *Charter* matter requires a high standard of probability, particularly where an individual's rights under the *Charter* are being infringed.[35]

48. The Applicant has conceded that there is a pressing and substantial objective in protecting society through having police forces have quick access to information on convicted sex offenders.

49. The issue is whether the government is able to justify including every person that might be found guilty of a sexual offence, in the *SOIRA* legislation by removing judicial discretion.

50. This issue, it is respectfully submitted, is to be resolved in light of the fact that the current legislation replaces earlier legislation which permitted the court to determine that certain offenders would not be appropriate to be included in the sex offender registry. The present legislation mirrors many other non-discretionary laws that have been found by the Courts to be unconstitutional, due to the legislation casting too wide a net.[36]

51. While a *SOIRA* order is not a "minimum sentence" it operates the same as a minimum sentence in that it removes a Court's discretion, discretion the Court had prior to the 2011 amendments.

52. In *R v Boudreault*, the Court held:

> "Indeed, it seems clear that the mandatory surcharge is not minimally impairing of the s.12 right because Parliament had open to it multiple valid alternatives to achieve its aims, most obviously by granting judges residual discretion to waive the surcharge in some cases. Consequently, the mandatory surcharge is not justified under s.1."[37]

53. Similarly, in *R v Lloyd*: "the wider the range of conduct and circumstances captured by the mandatory minimum, the more likely it is that the mandatory minimum will apply to offenders for whom the sentence would be grossly disproportionate."[38]

54. In *Lloyd*, McLachlin CJ, for the majority, stated:

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[35] *Ibid.* at para 66-68
[36] ***R v. Smith (Edward Dewey)*****,** [1987] 1 S.C.R. 1045, 1987 CanLII 64 (SCC), para 2 **,** ***R v Boudreault*****,** 2018 SCC 58, [2018] 3 SCR 599,para 94-97 [*Boudreault*]
[37] ***Boudreault***, para 97
[38] ***R v Lloyd***,[2016] 1 S.C.R. 130, 2016 SCC 13, para 24 [*Lloyd*]

> "…mandatory minimum sentences that, as here, apply to offences that can be committed in various ways, under a broad array of circumstances and by a wide range of people are vulnerable to constitutional challenge. This is because such laws will almost invariably include an acceptable reasonable hypothetical for which the minimum will be found unconstitutional. If Parliament hopes to sustain mandatory minimum penalties for offences that cast a wide net, it should consider narrowing their reach so that they only catch offenders that merit the mandatory minimum sentences.
> Another solution would be for Parliament to build a safety valve that would allow judges to exempt outliers for whom the mandatory minimum will constitute cruel and unusual punishment. Residual judicial discretion for exceptional cases is a technique widely used to avoid injustice and constitutional infirmity in other countries:… "[39]

55. In effect, the court in making this analysis is recognizing that not all offenders of a particular law can be fit within the same category. They are rejecting the notion of a one size fits all sentence, and in doing so are recognizing a subgroup of offenders that do not fit.

56. Thus the issue in the case at hand is not whether Parliament was right in setting up *SOIRA*, or whether the impugned provision violates the rights of all sexual offenders, but rather whether there is a subgroup of these offenders with no criminal history, who come from a stable environment, have good future prospects, have shown remorse and exhibited signs of change in their behaviour and habits, and have been ultimately deemed to be at a low risk to reoffend, and whether it is pressing and substantial to have these individuals subject to *SOIRA*. The interests of society must be balanced with the interests of this subgroup of low risk offenders.

57. These cases are informative to the present situation in that they all recognize that within each violation of the *Criminal Code*, there is a continuum of offenders with recognizable subgroups. These exist in the case at bar as well. Therefore what the Crown is to provide in this case is clear evidence that the person in the circumstances of Mr. Ndhlovu should be subject to the same requirements as some of Canada's worst sexual offenders such as child abductors, serial rapists, and repeat violent sex offenders. Evidence need not address these worst case scenarios with clear risk of recidivism but rather address the case of Mr. Ndhlovu, and such other individuals who would otherwise not be subject to a *SOIRA* order

[39] *Ibid.* at para 35, 36 and summary

in light of their low risk of reoffence and whose inclusion on the registry would be grossly disproportionate to the public interest in protecting society.

58. In *R v Oakes*, the court dictated the test must be applied rigorously, the evidence "should be cogent, and persuasive, and make clear to the court the consequences of imposing or not imposing a limit."[40] Respectfully, in this case the consequences of imposing or not imposing a limit have not been made clear.

59. It is for the Crown to show that each branch of the *Oakes* test has been met and therefore the legislation is a reasonable and demonstrably justified limit within a free and democratic society. In order to do this the Crown must demonstrate, with each part of the proportionality test, including offenders who would have been subject to an exclusion from a *SOIRA* order under the previous wording of the provision is justified and a reasonable limit. However, no evidence has been provided which establishes the consequences, if any, of not including all sex offenders in the registry.

**(1) Pressing and Substantial Objective**

60. The objective of section 490.012 (1) of the Criminal Code is both investigatory and preventative. Parliament has stated that *SOIRA's* purpose is the investigation and prevention of sex crimes. It is admitted that this objective is pressing and substantial and as such whether this law meets the first branch of the *Oakes* test is not being contested.

**(2) The means must be proportional to the effects**

**(a) Rational Connection to the Objective**

61. The second branch of the Oakes test dictates that the measures must not be arbitrary, unfair or based on irrational consensus but rather must be rationally connected to the objective.

62. Like the impugned provision in *R v Safarzadeh-Markhali*, the mandatory requirements under s. 490.012 of the Criminal Code are not rationally connected to its purported purpose of *SOIRA*, "because it draws distinctions between offenders... on arbitrary grounds." [41]

63. Meeting the objectives of prevention and investigation of sex crimes through the use of a sex offender registry are necessarily contingent upon the registrants' likelihood of reoffending. Having access to an offender's current whereabouts and personal information

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[40] ***Oakes***, para. 68
[41] ***Safarzadeh-Markhali***, para 17

when they are unlikely to ever reoffend is of no use when trying to solve a subsequent crime, or prevent a future crime.

64. Sex offenders, like any other offenders, do not all fit into one category in terms of likelihood to recidivate.[42] In terms of statistics, significant testimony was given on this topic. An increase in cummulative recidivism rates occur because if an offender recidivates at the 5 year mark he is still counted at the 10, 15 and 20 year mark, but the largest rate of recidivism takes place right outside of either being released or back to the community and decreases thereafter, and that after the 15,20 year mark they have the same risk level as the general population to commit a sexual offence[43]

65. The risk of recidivisim is roughly cut in half for every 5 years the individual is offence free in the community.[44] Thus a person with a risk level of moderate at 7 percent would decrease to 3 to 3.5 percent after 5 years.[45]

66. Not all individuals who are convicted of a sex offence are equally at risk, some will be higher and some will be lower and that risk decreases over time, so that after 5, 10 and 20 years their risk will be substantially lower.[46] The longer people refrain from reoffending, the less likely they are to reoffend in the future.[47]

67. Once convicted, most sexual offenders are never reconvicted of another sexual offence[48] and first time sexual offenders are significantly less likely to sexually reoffend.[49] The longer the offender remains risk free in the community the less likely they are to re-offend sexually, and eventually are less likely to re-offend than a non-sexual offender is to commit an "out of the blue" sexual offence.[50]

68. Recidivism rates are not uniform across all sex offenders and risk of reoffending varies based on well-known factors and can be reliably predicted by widely used risk assessment

[42] Transcript of Dr. Hanson at p. 226/21-25
[43] Transcript of Dr. Zgoba at p. 430/37-41, p. 431/1-32
[44] Transcript of Dr. Hanson at p. 224/24-27
[45] *Ibid.* at p. 225/4-7
[46] *Ibid.* at p. 226/21-25
[47] *Ibid.* at p. 230/17-18
[48] *Ibid.* at p. 240/12-24
[49] *Ibid.* at p. 240/29-35
[50] *Ibid.* at p. 240/37-41, p. 241/1-8

tools such as the static-99 or static-99R which are used to classify offenders into various risk levels.[51]

69. Total recidivisim rates for offenders in general are substantially higher than the rate of sex crimes specifically among sexual offenders.[52]

70. Because offenders have different risks of recidivism, it is of no benefit to include those who have next to no risk of reoffending on the registry, and does not assist in either objective of the sex offender registry.

71. Where an offender exists on this continuum of risk is affected by a multitude of factors, only one of which is whether they have previously been convicted of a sex crime. In addition, both Dr. Hanson and Dr. Zgoba agreed that looking at one single factor to attempt to determine the likelihood of an individual reoffending is of little to no use.[53] It is only when we look at all of the relevant factors together that the odds of reoffending can be predicted. However, the law as it stands only permits for one factor to be considered, previous convictions.

72. The irrationality is further exhibited when looking at low risk sexual offenders to non-sex offenders. The Crown has argued that all sex offenders have a risk of reoffending and therefore it is reasonable that they all be subject to *SOIRA* orders. However, the Crown's own expert, Dr. Hanson indicated that over a 15 year period, low risk sex-offenders "look as risky for sex offence as… the population of, you know, people with a criminal conviction in general … there's no perceptible difference between them."[54] Therefore it might as well be that all offenders be subject to *SOIRA* orders if there is no perceptible difference between their rates of reoffending and the individuals who are now included under the new legislation that were previously excluded - the lowest risk offenders.

73. Dr. Hanson also provided information to the court that "the risk is different and the risk [of re-offending] changes over time and [we need to] set our policies accordingly".[55], and not have blanket policies treating everyone the same.[56] For instance, a medium risk

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[51] *Ibid.* at p. 239/39-41, p. 240/1-10
[52] Transcript of Dr. Zgoba at p. 439/21-37
[53] Transcript of Dr. Hanson p. 171/6-19
[54] Transcript of Dr. Hanson p. 210/5-19.
[55] *Ibid.* at p. 227/2
[56] *Ibid.* at page 231/5-16

offender who has spent 10 years in the community without re-offending has the equivalent risk of an ordinary individual.[57] Ultimately risk of re-offending varies greatly between individual offenders and it also varies over time, in that it goes down significantly as time passes without another offence.

74. Furthermore, no evidence has been adduced that shows the new regime is better able to reach the objectives. No evidence or data has shown more crimes have been solved as a result of the increased scope of the registry, one is simply asked to speculate that by including more offenders on the registry, regardless of their likelihood to reoffend, this somehow makes it more effective at investigating and solving crimes. Dr. Hanson in fact indicated in his testimony there is no evidence that those individuals who were excluded from *SOIRA* or the Ontario registry went on to recidivate.[58]

75. The registry only really provides the ability to locate an offender. Using Mr. Ndhlovu as an example, a situation where there was no abduction or disguise, Mr. Ndhlovu's DNA is on file, as is his photograph, and his address can be easily accessed by the police. The police also have access to any vehicles registered in his name without the use of the *SOIRA*. Mr. Ndhlovu has significant ties to the community, and is stable, so the likelihood of him absconding is minimal and he could easily be located in the future. It is unlikely as a low risk offender, that the police would ever need to locate him, and further if they did, other measures which are less intrusive to the offender are readily available to do so. Therefore, including people like Mr. Ndhlovu in the registry, bears no rational connection to any objective of the registry. It should however be emphasized that the issue is not Mr. Ndhlovu. The issue is whether the government is able to provide any evidence on why or whether those people, whose risk of recidivism are very low and similar to the risk posed by the general population, should be included in *SOIRA*.

**(b) Minimal Impairment of Rights**

[57] I*bid.* at p. 228/17-34
[58] *Ibid.* at p. 259 line 14-30

76. As described by the court in *Oakes* "… the means, even if rationally connected to the objective in this first sense, should impair "as little as possible" the right or freedom in question…"[59]

77. In order to justify mandatory *SOIRA* Orders, "the Crown must show the absence of less drastic means of achieving the objective in a 'real and substantive manner.'"[60]

78. The Crown has previously argued that the law minimally impairs the right because there is no other means by which to achieve a registry with all sex offenders who could possibly re-offend. However, respectfully this is an oversimplification of Parliament's intentions. The new legislation has the effect of including all sex offenders who could possibly re-offend, but to characterize the objective of the law in this manner is under-inclusive and self-serving. It is like saying parliament's goal in legislating a mandatory minimum sentence was not "…denunciation, deterrence, and retribution" but rather to establish a sentence that would capture all who are convicted of a particular offence and therefore there is no other means to reach this goal but through a mandatory minimum. Characterizing Parliament's intent this way makes every law impervious to this branch of the test.

79. The stated objectives of the legislation are to prevent further sexual offences and to assist in the investigation of sex crimes that have already occurred.

80. In *R v Safarzadeh-Markhali,* for example, the Court is tasked with determining whether *s.* 719(3.1) of the *Criminal Code* violated s. 7 of the *Charter*, and whether it was saved under s. 1. Similarly to the case at hand, in *Safarzadeh-Markhali* the Court was concerned with a provision which parliament had amended that effectively took away judicial discretion in sentencing. The particular change to the *Criminal Code* "removed a sentencing court's discretion to give any enhanced credit to offenders for pre-sentence custody, if they were denied bail primarily on the basis of their criminal record."[61]

81. In determining whether the Crown had shown that there was an absence of less drastic means to achieve the objective, McLachlin C.J. writing for the majority, stated:

> "The Crown has not discharged [their] burden. Alternative and more reasonable means of achieving its purposes were open to Parliament. Strathy J.A. provided one example — a law requiring the sentencing judge to consider whether to grant enhanced credit for pre-sentence

[59] ***Oakes***, para 70
[60] ***Safarzadeh-Markhali*****,** para 63
[61] ***Ibid.*** para 2

> custody based on (i) the offender's criminal record, (ii) the availability of rehabilitative programs and the desirability of giving the offender access to those programs, and (iii) whether the offender was responsible for prolonging his or her time in pre-sentence custody. Such a regime would achieve the goal of promoting public safety and security through rehabilitation, without catching chronic or other offenders who pose no risk to public safety." [Emphasis added][62]

82. Mandatory *SOIRA* Orders do not minimally impair offenders' rights. This case is one of the few in which we have the benefit of hindsight. Under the previous law, courts were able to distinguish between various sex offenders with respect to whether it was appropriate for them to be included in the registry or not by considering the interests of society against the interests of the offender. It was a high bar that offenders had to pass to be excluded but we know in many instances the effect on the accused of being included in the registry was in fact found to be grossly disproportionate to the interests of society. In *R v Putrus*, for example, the Alberta Court of Queen's Bench stated at paragraph 24:

> "Because this is an offence of only a single incident lasting less than a minute, the onerous effect of being registered on a sex offender registry and the requirements of reporting and the limitations on privacy and liberty is grossly disproportionate to the public interest in protecting society through the effective investigation of crimes of a sexual nature. It is highly probable that Putrus will never re-offend and the conditions for treatment that may be prescribed by the Conditional Sentence Supervisor should assist in dealing with that risk. Having reached the conclusion that the offender falls within the section 490.012(4) exception..."[63]

83. Judicial discretion would allow courts to minimally impair offenders' rights on a case-by-case basis. Parliament could also narrow the group of offenders who are subject to mandatory *SOIRA* Orders so that it applies only to, for example, offenders with at least one *previous* sex-related conviction, those who have used physical force to overpower, or those in a position of trust convicted of sexually assaulting a minor. These limits would reduce the number of cases in which a grossly disproportionate order could result.

84. Further, the law as it stands subjects the offender to a mandatory life-time registration requirement. We have the evidence of Dr. Hanson that the dissidence threshold (the point where people with a history of sexual crime are no longer at significant or meaningful risk

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[62] ***Ibid.*** para 63
[63] ***R v Putrus*** 2006 ABQB 313, para 24

than others, and there is no public policy benefit to treat them as an offender) varies from at time of release to 20 years later when almost all offenders would be, regardless of initial risk level.[64] Also, having two convictions on the same date as part of a spree is unrelated to recidivism[65] Therefore to achieve the objective less impairing measures could be brought by Parliament, including limiting the time of the order for those convicted of more than one sexual offence.

85. In *Safarzadeh-Markhali* the Court ultimately found the law did not minimally impair the right to liberty. In finding so they stated:

> "The Crown argues that the provision is reasonably tailored to its objective because it "applies to a relatively narrow class of offenders, focusing on the most serious recidivists": A.F., at para. 62. But the law plainly does the opposite: it makes any person with a criminal record, even for missed court dates, a potential target for restriction of enhanced credit. In my view, the challenged provision is not minimally impairing of the right to liberty."[66]

86. Here the law cannot even be said to apply to a relatively narrow class of offenders, nor does it focus on the most serious recidivists, therefore it should be even clearer that the provision in question is not minimally impairing.

87. Similarly in *R v Lloyd,* the Court was looking at the constitutionality of Parliament's imposition of a 1 year mandatory minimum sentence for a trafficking offence. In determining whether the law minimally impaired the s.12 right of the *Charter* they indicated:

> "Parliament's objective — to combat the distribution of illicit drugs — is unquestionably an important objective: *R. v. Oakes*, [1986] 1 S.C.R. 103 (S.C.C.), at p. 141. This objective is rationally connected to the imposition of a one-year mandatory minimum sentence for the offence of possession for the purpose of trafficking of Schedule I drugs. However, the law does not minimally impair the s. 12 right. As discussed above, the law covers a wide array of situations of varying moral blameworthiness, without differentiation or exemption, save for the single exception in s. 10(5) of the *CDSA*. The Crown has not established that less harmful means to achieve Parliament's objective of combatting the distribution of illicit drugs, whether by narrowing the reach of the law or by providing for judicial discretion in exceptional cases, were not available.[67]

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[64] Transcript of Dr. Hanson p. 229/6-23, p. 230/15-32
[65] *Ibid.* p.191/16-24
[66] ***Safarzadeh-Markhali,*** para 64
[67] ***Lloyd,*** para 49

88. Here as well, the Crown has not established there are not less harmful means to achieve Parliament's objectives of preventing future sex crimes and assisting in the investigation of sex crimes that have occurred, even though providing judicial discretion in exceptional cases is and was in fact available. It has not been established that the use of judicial discretion where the effects of a *SOIRA* order were grossly disproportionate to the interests of society derailed the objectives of parliament as it has not been established that any offenders who were exempted in fact went on to re-offend.

**(c) The salutary effects outweigh its deleterious effects**

89. The third branch of the test requires that "a proportionality between the *effects* of the measures which are responsible for limiting the Charter right or freedom and the objective which has been identified as of "sufficient importance"'.[68]

90. How can it be said that positives outweigh the negatives when we have been given no evidence of such? Absolutely no evidence has been adduced to show that the small subgroup of offenders whom were previously exempted from a *SOIRA* order have re-offended such that it is beneficial to include all sex offenders on the registry, some for the remainder of their lives. It has not even been shown that the registry has solved any crimes whatsoever, the Crown has rather asked that it be assumed the registry is meeting its objectives such that the violation of individual's rights is warranted. Rather, the National Sex Offender Registry up until 2009 could not be attributed to have solved a single crime in the country where the offender was unknown.[69] Since that time (2009) the National Sex Offender Registry has not solved any crimes.[70]

91. Any benefit of mandatory *SOIRA* Orders, though arguably none has been shown, is "outweighed by the detriment flowing from an artificial distinction that undermines public confidence in the justice system."[71]

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[68] ***Oakes***, para. 70

[69] Pierre Nezan officer in charge National Sex Offender Registry before Standing Committee on Public Safety and National Security April 21, 2009

[70] Transcript of Brennan Nelson, National Sex Offender Registry Database Manager p. 352/23-33

[71] ***Safarzadeh-Markhali***, para 17

92. Therefore minimal protection of the public is achieved by including low risk offenders on the registry, who have committed the types of sexual offences similar to Mr. Ndhlovu.

93. On the other hand, the registry has significant negative impact, as was stated in *R v Have*[72], and previously noted at paragraph 42.

94. Ultimately where a law has been found to be overbroad and grossly disproportionate, by definition it cannot be proportional. In *R v Nur* for example, after finding the law in question violated s.12 of the Charter in that it was grossly disproportionate, this dictated their finding under the third branch of the Oakes test:

> "This stage of the analysis weighs the impact of the law on protected rights against the beneficial effect of the law in terms of the greater public good. In light of the conclusion that the mandatory minimum terms of imprisonment in s. 95 when the Crown proceeds by indictment are grossly disproportionate, I do not find that the limits are a proportionate justification under s. 1."[73]

95. There is substantial impact of a *SOIRA* order on an offender and his liberty, and there has not been evidence presented that including all sex offenders, many of them for life, on the *SOIRA* registry has resulted in the better achievement of the Objective.

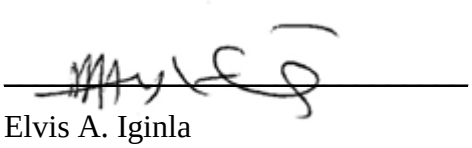
## PART IV – SUBMISSIONS AS TO COSTS

96. The Applicant makes no submissions on costs.

## PART V – ORDER SOUGHT

97. It is respectfully submitted that the Court make an order granting leave to appeal the judgment of the Court of Appeal of Alberta.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 8th day of January, 2021.



Elvis A. Iginla
Counsel for the Applicant

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[72] ***Have***, para 12-13
[73] ***R v Nur***, [2015] 1 S.C.R. 773, 2015 S.C.C. 15 para 118

## PART VI - TABLE OF AUTHORITIES



## HANSARD

| | |
|---|---|
| HC, Standing Committee on Public Safety and National Security, *Statutory Review of the Sex Offender Information Registry Act*, 2nd Session, 40th Parliament, December 2009 | 21, 22 |

## STATUTORY PROVISIONS

| ***The Constitution Act, 1982*, Schedule B to the *Canada Act 1982* (UK), 1982, c. 11** | ***Loi constitutionnelle de 1982*, Annexe B de la *Loi de 1982 sur le Canada* (R-U), 1982, c.11** |
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| **1.** The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society | **1.** La *Charte canadienne des droits et libertés* garantit les droits et libertés qui y sont énoncés.<br>Ils ne peuvent être restreints que par une règle de droit, dans des limites qui soient raisonnables<br>et dont la justification puisse se démontrer dans le cadre d'une société libre et démocratique. |
| **7.** Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice. | **7.** Chacun a droit à la vie, à la liberté et à la sécurité de sa personne; il ne peut être porté atteinte à ce droit qu'en conformité avec les principes de justice fondamentale. |
| **52.**(1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect. | **52.**(1) La Constitution du Canada est la loi suprême du Canada; elle rend inopérantes les dispositions incompatibles de toute autre règle de droit. |
| ***Criminal Code*, R.S.C. 1985, c. C-46** | ***Code criminel*, L.R.C. 1985, c. C-46** |
| **490.012** (1) As soon as possible after a court imposes a sentence on a person for an offence referred to in paragraph (*a*), (*c*), (*c.1*), (*d*) or (*e*) of the definition *"designated offence"* in subsection 490.011(1) or renders a verdict of not criminally responsible on account of mental disorder for such an offence, it shall, on application of the prosecutor, make an order in Form 52 requiring the person to comply with the *Sex Offender Information* | **490.012** (1) Le tribunal doit, sur demande du poursuivant, dès que possible après le prononcé de la peine ou du verdict de non-responsabilité, enjoindre à la personne visée par celui-ci ou déclarée coupable, à l'égard d'une infraction visée aux alinéas *a*), *c*), *c.1*), *d*) ou *e*) de la définition de *« infraction désignée »* au paragraphe 490.011(1), par ordonnance rédigée selon la formule 52, de se conformer à la *Loi sur l'enregistrement de renseignements sur les délinquants sexuels* |

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| *Registration Act* for the applicable period specified in section 490.013.<br><br>Order<br><br>(2) As soon as possible after a court imposes a sentence on a person for an offence referred to in paragraph (*b*) or (*f*) of the definition *"designated offence"* in subsection 490.011(1), it shall, on application of the prosecutor, make an order in Form 52 requiring the person to comply with the *Sex Offender Information Registration Act* for the applicable period specified in section 490.013, if the prosecutor establishes beyond a reasonable doubt that the person committed the offence with the intent to commit an offence referred to in paragraph (*a*), (*c*), (*c.1*), (*d*) or (*e*) of that definition.<br><br>Order<br><br>(3) As soon as possible after a court imposes a sentence on a person for a designated offence in connection with which an order may be made under subsection (1) or (2) or renders a verdict of not criminally responsible on account of mental disorder for such an offence, it shall, on application of the prosecutor, make an order in Form 52 requiring the person to comply with the *Sex Offender Information Registration Act* for the applicable period specified in section 490.013, if the prosecutor establishes that<br><br>(*a*) the person was, before or after the coming into force of that Act, previously convicted of, or found not criminally responsible on account of mental disorder for, an offence referred to in paragraph (*a*), (*c*), (*c.1*), (*d*) or (*e*) of the definition *"designated offence"* in subsection 490.011(1) of this Act or in paragraph (*a*) or (*c*) of the definition *"designated offence"* in section 227 of the *National Defence Act*; | pendant la période applicable selon l'article 490.013.<br><br>Ordonnance<br><br>(2) Le tribunal doit, sur demande du poursuivant, dès que possible après le prononcé de la peine, enjoindre à la personne déclarée coupable, à l'égard d'une infraction visée aux alinéas *b*) ou *f*) de la définition de « *infraction désignée* » au paragraphe 490.011(1), par ordonnance rédigée selon la formule 52, de se conformer à la *Loi sur l'enregistrement de renseignements sur les délinquants sexuels* pendant la période applicable selon l'article 490.013, dès lors que le poursuivant établit hors de tout doute raisonnable que celle-ci a commis l'infraction avec l'intention de commettre une infraction visée aux alinéas *a*), *c*), *c.1*), *d*) ou *e*) de cette définition.<br><br>Ordonnance<br><br>(3) Le tribunal doit, sur demande du poursuivant, dès que possible après le prononcé de la peine ou du verdict de non-responsabilité, enjoindre à la personne visée par celui-ci ou déclarée coupable, à l'égard d'une infraction désignée, si celle-ci peut faire l'objet d'une ordonnance au titre des paragraphes (1) ou (2), par ordonnance rédigée selon la formule 52, de se conformer à la *Loi sur l'enregistrement de renseignements sur les délinquants sexuels* pendant la période applicable selon l'article 490.013, dès lors que le poursuivant établit :<br><br>*a*) que la personne a déjà, avant ou après l'entrée en vigueur de cette loi, fait l'objet d'une déclaration de culpabilité ou d'un verdict de non-responsabilité à l'égard d'une infraction visée aux alinéas *a*), *c*), *c.1), d*) ou *e*) de la définition de *« infraction désignée »* au paragraphe 490.011(1) de la présente loi ou aux alinéas *a*) ou *c)* de la définition de « |

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| (*b*) the person has not been served with a notice under section 490.021 of this Act or section 227.08 of the *National Defence Act* in connection with the previous offence; and<br><br>(*c*) no order was made under subsection (1) or under subsection 227.01(1) of the *National Defence Act* in connection with the previous offence.<br><br>Exception<br><br>(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*. | *infraction désignée* » à l'article 227 de la *Loi sur la défense nationale*;<br><br>*b*) qu'aucun avis ne lui a été signifié en application de l'article 490.021 de la présente loi ou de l'article 227.08 de la *Loi sur la défense nationale* à l'égard de cette infraction;<br><br>*c*) qu'aucune ordonnance n'a été rendue à l'égard de cette infraction en application du paragraphe (1) ou du paragraphe 227.01(1) de la *Loi sur la défense nationale*.<br><br>Exception<br><br>(4) Le tribunal n'est toutefois pas tenu de rendre l'ordonnance s'il est convaincu que l'intéressé a établi que celle-ci aurait à son égard, notamment sur sa vie privée ou sa liberté, un effet nettement démesuré par rapport à l'intérêt que présente, pour la protection de la société au moyen d'enquêtes efficaces sur les crimes de nature sexuelle, l'enregistrement de renseignements sur les délinquants sexuels prévu par la *Loi sur l'enregistrement de renseignements sur les délinquants sexuels*.<br><br>Motifs<br><br>(5) La décision doit être motivée.<br><br>• 2004, ch. 10, art. 20;<br>• 2007, ch. 5, art. 13. |
| **490.013** (1) An order made under section 490.012 begins on the day on which it is made.<br><br>Duration of order<br><br>(2) An order made under subsection 490.012(1) or (2) | **490.013** (1) L'ordonnance prend effet à la date de son prononcé.<br><br>Durée de l'ordonnance<br><br>(2) L'ordonnance visée aux paragraphes 490.012(1) ou (2) :<br><br>*a*) prend fin dix ans après son prononcé si l'infraction en cause est poursuivie selon la |

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| (*a*) ends 10 years after it was made if the offence in connection with which it was made was prosecuted summarily or if the maximum term of imprisonment for the offence is two or five years;<br><br>(*b*) ends 20 years after it was made if the maximum term of imprisonment for the offence is 10 or 14 years; and<br><br>(*c*) applies for life if the maximum term of imprisonment for the offence is life.<br><br>Duration of order<br><br>(3) An order made under subsection 490.012(1) or (2) applies for life if the person is, or was at any time, subject to an obligation under section 490.019 of this Act or section 227.06 of the *National Defence Act*.<br><br>Duration of order<br><br>(4) An order made under subsection 490.012(1) or (2) applies for life if the person is, or was at any time, subject to an order made previously under section 490.012 of this Act or section 227.01 of the *National Defence Act*.<br><br>Duration of order<br><br>(5) An order made under subsection 490.012(3) applies for life.<br><br>• 2004, c. 10, s. 20;<br>• 2007, c. 5, s. 14. | procédure sommaire ou est passible d'une peine maximale d'emprisonnement de deux ou cinq ans;<br><br>*b*) prend fin vingt ans après son prononcé si l'infraction en cause est passible d'une peine maximale d'emprisonnement de dix ou quatorze ans;<br><br>*c*) s'applique à perpétuité si l'infraction en cause est passible d'une peine maximale d'emprisonnement à perpétuité.<br><br>Durée de l'ordonnance<br><br>(3) Elle s'applique à perpétuité si l'intéressé est ou a été assujetti à l'obligation prévue à l'article 490.019 de la présente loi ou à l'article 227.06 de la *Loi sur la défense nationale*.<br><br>Durée de l'ordonnance<br><br>(4) Elle s'applique à perpétuité si l'intéressé fait ou a fait l'objet d'une ordonnance rendue antérieurement en application de l'article 490.012 de la présente loi ou de l'article 227.01 de la *Loi sur la défense nationale*.<br><br>Durée de l'ordonnance<br><br>(5) L'ordonnance visée au paragraphe 490.012(3) s'applique à perpétuité.<br><br>• 2004, ch. 10, art. 20;<br>• 2007, ch. 5, art. 14. |
| Offence<br><br>**490.031** (1) Every person who, without reasonable excuse, fails to comply with an order made under section 490.012 of this Act or section 227.01 of the *National Defence Act*, or with an obligation under section 490.019 of | Infractions<br><br>**490.031** (1) Quiconque, sans excuse raisonnable, omet de se conformer à l'ordonnance rendue en application de l'article 490.012 de la présente loi ou de l'article 227.01 de la *Loi sur la défense* |

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| this Act or section 227.06 of the *National Defence Act*, is guilty of an offence and liable<br><br>(*a*) in the case of a first offence, on summary conviction, to a fine of not more than $10,000 or to imprisonment for a term of not more than six months, or to both; and<br><br>(*b*) in the case of a second or subsequent offence,<br><br>(i) on conviction on indictment, to a fine of not more than $10,000 or to imprisonment for a term of not more than two years, or to both, or<br><br>(ii) on summary conviction, to a fine of not more than $10,000 or to imprisonment for a term of not more than six months, or to both. | *nationale* ou à l'obligation prévue à l'article 490.019 de la présente loi ou à l'article 227.06 de la *Loi sur la défense nationale* commet une infraction et encourt :<br><br>*a*) la première fois, sur déclaration de culpabilité par procédure sommaire, un emprisonnement maximal de six mois et une amende maximale de 10 000 $, ou l'une de ces peines;<br><br>*b*) pour toute récidive :<br><br>(i) sur déclaration de culpabilité par mise en accusation, un emprisonnement maximal de deux ans et une amende maximale de 10 000 $, ou l'une de ces peines,<br><br>(ii) sur déclaration de culpabilité par procédure sommaire, un emprisonnement maximal de six mois et une amende maximale de 10 000 $, ou l'une de ces peines. |
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| *Protecting Victims From Sex Offenders Act*, SC 2010, c *17* | *Loi protégeant les victimes des délinquants sexuels, LC 2010, c 17* |
| **5.** Section 490.012 of the Act is replaced by the following:<br><br>**Order**<br><br>• **490.012** (1) When a court imposes a sentence on a person for an offence referred to in paragraph (*a*), (*c*), (*c.1*), (*d*) or (*e*) of the definition *"designated offence"* in subsection 490.011(1) or renders a verdict of not criminally responsible on account of mental disorder for such an offence, it shall make an order in Form 52 requiring the person to comply with the *Sex Offender Information Registration Act* | **5.** L'article 490.012 de la même loi est remplacé par ce qui suit :<br><br>Ordonnance<br><br>• **490.012** (1) Le tribunal doit, lors du prononcé de la peine ou du verdict de non-responsabilité à l'égard d'une infraction visée aux alinéas *a*), *c*), *c.1*), *d*) ou *e*) de la définition de *« infraction désignée »* au paragraphe 490.011(1), enjoindre à la personne en cause, par ordonnance rédigée selon la formule 52, de se conformer à la *Loi sur l'enregistrement de renseignements sur les délinquants sexuels* pendant la |

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| for the applicable period specified in section 490.013.<br>• **Order — if intent established**<br><br>(2) When a court imposes a sentence on a person for an offence referred to in paragraph (*b*) or (*f*) of the definition *"designated offence"* in subsection 490.011(1), it shall, on application of the prosecutor, make an order in Form 52 requiring the person to comply with the *Sex Offender Information Registration Act* for the applicable period specified in section 490.013 if the prosecutor establishes beyond a reasonable doubt that the person committed the offence with the intent to commit an offence referred to in paragraph (*a*), (*c*), (*c.1*), (*d*) or (*e*) of that definition.<br><br>• **Order — if previous offence established**<br><br>(3) When a court imposes a sentence on a person for a designated offence in connection with which an order may be made under subsection (1) or (2) or renders a verdict of not criminally responsible on account of mental disorder for such an offence, it shall, on application of the prosecutor, make an order in Form 52 requiring the person to comply with the *Sex Offender Information Registration Act* for the applicable period specified in section 490.013 if the prosecutor establishes that<br><br>o (*a*) the person was, before or after the coming into force of this paragraph, previously convicted of, or found not criminally responsible on account of mental disorder for, an offence referred to in | période applicable selon l'article 490.013.<br>• Ordonnance<br><br>(2) Le tribunal doit, sur demande du poursuivant, lors du prononcé de la peine, enjoindre à la personne déclarée coupable à l'égard d'une infraction visée aux alinéas *b*) ou *f*) de la définition de *« infraction désignée »* au paragraphe 490.011(1), par ordonnance rédigée selon la formule 52, de se conformer à la *Loi sur l'enregistrement de renseignements sur les délinquants sexuels* pendant la période applicable selon l'article 490.013, dès lors que le poursuivant établit hors de tout doute raisonnable que la personne a commis l'infraction avec l'intention de commettre une infraction visée aux alinéas *a*), *c*), *c.1*), *d*) ou *e*) de cette définition.<br><br>• Ordonnance<br><br>(3) Le tribunal doit, sur demande du poursuivant, lors du prononcé de la peine ou du verdict de non-responsabilité à l'égard d'une infraction désignée, si celle-ci peut faire l'objet d'une ordonnance au titre des paragraphes (1) ou (2), enjoindre à la personne en cause, par ordonnance rédigée selon la formule 52, de se conformer à la *Loi sur l'enregistrement de renseignements sur les délinquants sexuels* pendant la période applicable selon l'article 490.013, dès lors que le poursuivant établit :<br><br>o *a*) que la personne a déjà, avant ou après l'entrée en vigueur du présent alinéa, fait l'objet d'une déclaration de culpabilité ou d'un verdict de |

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| paragraph (*a*), (*c*), (*c.1*), (*d*) or (*e*) of the definition *"designated offence"* in subsection 490.011(1) or in paragraph (*a*) or (*c*) of the definition *"designated offence"* in section 227 of the *National Defence Act*;<br>o (*b*) the person was not served with a notice under section 490.021 or 490.02903 or under section 227.08 of the *National Defence Act* in connection with that offence; and<br>o (*c*) no order was made under subsection (1) or under subsection 227.01(1) of the *National Defence Act* in connection with that offence.<br>• **Failure to make order**<br><br>(4) If the court does not consider the matter under subsection (1) or (3) at that time, the court<br><br>o (*a*) shall, within 90 days after the day on which it imposes the sentence or renders the verdict, set a date for a hearing to do so;<br>o (*b*) retains jurisdiction over the matter; and<br>o (*c*) may require the person to appear by closed-circuit television or any other means that allows the court and the person to engage in simultaneous visual and oral communication, as long as the person is given the opportunity to communicate privately with counsel if they are represented by counsel. | non-responsabilité à l'égard d'une infraction visée aux alinéas *a*), *c*), *c.1*), *d*) ou *e*) de la définition de « *infraction désignée* » au paragraphe 490.011(1) ou aux alinéas *a*) ou *c*) de la définition de « *infraction désignée* » à l'article 227 de la *Loi sur la défense nationale*;<br>o *b*) qu'aucun avis ne lui a été signifié en application des articles 490.021 ou 490.02903 ou de l'article 227.08 de la *Loi sur la défense nationale* à l'égard de cette infraction;<br>o *c*) qu'aucune ordonnance n'a été rendue à l'égard de cette infraction en application du paragraphe (1) ou du paragraphe 227.01(1) de la *Loi sur la défense nationale*.<br>• Défaut de rendre l'ordonnance<br><br>(4) Si le tribunal ne décide pas de la question visée aux paragraphes (1) ou (3) au moment prévu :<br><br>o *a*) il fixe la date de l'audience pour ce faire dans les quatre-vingt-dix jours suivant le prononcé de la peine ou du verdict;<br>o *b*) il reste saisi de l'affaire;<br>o *c*) il peut ordonner à l'intéressé de comparaître à l'audience par un système de télévision en circuit fermé ou tout autre moyen leur permettant de se voir et de communiquer simultanément, pourvu que l'intéressé ait la possibilité, s'il est représenté par un avocat, de communiquer en privé avec lui. |

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| **6.** Subsection 490.013(3) of the Act is replaced by the following:<br><br>Duration of order<br><br>(2.1) An order made under subsection 490.012(1) applies for life if the person is convicted of, or found not criminally responsible on account of mental disorder for, more than one offence referred to in paragraph (*a*), (*c*), (*c.1*), (*d*) or (*e*) of the definition *"designated offence"* in subsection 490.011(1). | **6.** Le paragraphe 490.013(3) de la même loi est remplacé par ce qui suit :<br><br>Durée de l'ordonnance<br><br>(2.1) L'ordonnance visée au paragraphe 490.012(1) s'applique à perpétuité si l'intéressé fait l'objet d'une déclaration de culpabilité ou d'un verdict de non-responsabilité à l'égard de plus d'une infraction visée aux alinéas *a*), *c*), *c.1*), *d*) ou *e*) de la définition de *« infraction désignée »* au paragraphe 490.011(1). |
| **21.** (1) Subsection 490.031(1) of the Act is replaced by the following:<br><br>Offence<br><br>• **490.031** (1) Every person who, without reasonable excuse, fails to comply with an order made under section 490.012 or under section 227.01 of the *National Defence Act* or with an obligation under section 490.019 or 490.02901, under section 227.06 of the *National Defence Act* or under section 36.1 of the *International Transfer of Offenders Act* is guilty of an offence and liable<br>o (*a*) on conviction on indictment, to a fine of not more than $10,000 or to imprisonment for a term of not more than two years, or to both; or<br>o (*b*) on summary conviction, to a fine of not more than $10,000 or to imprisonment for a term of not more than six months, or to both. | **21.** (1) Le paragraphe 490.031(1) de la même loi est remplacé par ce qui suit :<br><br>Infractions<br><br>• **490.031** (1) Quiconque, sans excuse raisonnable, omet de se conformer à l'ordonnance rendue en application de l'article 490.012 ou de l'article 227.01 de la *Loi sur la défense nationale* ou à l'obligation prévue aux articles 490.019 ou 490.02901, à l'article 227.06 de la *Loi sur la défense nationale* ou à l'article 36.1 de la *Loi sur le transfèrement international des délinquants* commet une infraction et encourt :<br>o *a*) sur déclaration de culpabilité par mise en accusation, un emprisonnement maximal de deux ans et une amende maximale de 10 000 $, ou l'une de ces peines;<br>o *b*) sur déclaration de culpabilité par procédure sommaire, un emprisonnement maximal de six mois et une |

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| | amende maximale de 10 000 $, ou l'une de ces peines. |
| **28.** (1) Subsection 2(1) of the *Sex Offender Information Registration Act* is replaced by the following:<br><br>Purpose<br><br>**2.** (1) The purpose of this Act is to help police services prevent and investigate crimes of a sexual nature by requiring the registration of certain information relating to sex offenders. | **28.** (1) Le paragraphe 2(1) de la *Loi sur l'enregistrement de renseignements sur les délinquants sexuels* est remplacé par ce qui suit :<br><br>Objet<br><br>**2.** (1) La présente loi a pour objet, en exigeant l'enregistrement de certains renseignements sur les délinquants sexuels, d'aider les services de police à prévenir les crimes de nature sexuelle et à enquêter sur ceux-ci. |
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| *Sex Offender Information Registration Act*, S.C. 2004 c. 10 | *Loi sur l'enregistrement de renseignements sur les délinquants sexuels*, *LC 2004, c 10* |
| Purpose<br><br>**2.** (1) The purpose of this Act is to help police services investigate crimes of a sexual nature by requiring the registration of certain information relating to sex offenders. | Objet<br><br>**2.** (1) La présente loi a pour objet, en exigeant l'enregistrement de certains renseignements sur les délinquants sexuels, d'aider les services de police à enquêter sur les crimes de nature sexuelle. |
| Subsequent obligation to report<br><br>**4.1** A sex offender shall subsequently report to the registration centre that serves the area in which their main residence is located in person or in accordance with regulations made under paragraph 18(1)(*a*) or subsection 19(1),<br><br>(*a*) within 15 days after they change their main residence or any secondary residence;<br><br>(*b*) within 15 days after they change their given name or surname; and | Comparution subséquente<br><br>**4.1** Le délinquant sexuel comparaît par la suite au bureau d'inscription du secteur où se trouve sa résidence principale en personne ou conformément au règlement pris en vertu de l'alinéa 18(1)*a*) ou du paragraphe 19(1) :<br><br>*a*) au plus tard quinze jours après avoir changé de résidence principale ou secondaire;<br><br>*b*) au plus tard quinze jours après avoir changé de nom ou de prénom; |

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| (*c*) at any time between 11 months and one year after they last reported to a registration centre under this Act. | *c*) au plus tôt onze mois mais au plus tard un an après la dernière fois qu'il s'y est présenté sous le régime de la présente loi. |
| Obligation to provide information<br><br>**5.** (1) When a sex offender reports to a registration centre, they shall provide the following information to a person who collects information at the registration centre:<br><br>(*a*) their given name and surname, and every alias that they use;<br><br>(*b*) their date of birth and gender;<br><br>(*c*) the address of their main residence and every secondary residence or, if there is no such address, the location of that place;<br><br>(*d*) the address of every place at which they are employed or retained, or are engaged on a volunteer basis or, if there is no such address, the location of that place;<br><br>(*e*) the address of every educational institution at which they are enrolled or, if there is no such address, the location of that place;<br><br>(*f*) a telephone number at which they may be reached, if any, for every place referred to in paragraphs (*c*) and (*d*), and the number of every mobile telephone or pager in their possession; and<br><br>(*g*) their height and weight and a description of every physical distinguishing mark that they have.<br><br>Additional information<br><br>(2) When a sex offender provides the information referred to in subsection (1), the person who collects the information may ask them when and where they were convicted of, | **5.** (1) Lorsqu'il se présente au bureau d'inscription, le délinquant sexuel fournit les renseignements suivants au préposé à la collecte des renseignements :<br><br>*a*) ses nom et prénom et tout nom d'emprunt qu'il utilise;<br><br>*b*) sa date de naissance et son sexe;<br><br>*c*) l'adresse de sa résidence principale et de toute résidence secondaire ou, à défaut d'une telle adresse, l'emplacement de l'une et l'autre;<br><br>*d*) l'adresse de tout lieu où ses services ont été retenus à titre de salarié, d'agent contractuel ou de bénévole ou, s'il n'y a pas d'adresse, l'emplacement de ce lieu;<br><br>*e*) l'adresse de tout établissement d'enseignement où il est inscrit ou, s'il n'y a pas d'adresse, l'emplacement de cet établissement;<br><br>*f*) le numéro de téléphone permettant de le joindre dans les lieux visés aux alinéas *c*) et *d*) et celui de tous ses téléphones mobiles ou téléavertisseurs;<br><br>*g*) sa taille, son poids et la description de ses marques physiques distinctives.<br><br>Renseignements additionnels<br><br>(2) Le préposé peut alors lui demander d'indiquer quand et où il a été déclaré coupable ou non responsable criminellement, pour cause de troubles mentaux, à l'égard de l'infraction à l'origine de toute ordonnance ou de l'infraction désignée, au sens du |

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| or found not criminally responsible on account of mental disorder for, an offence in connection with which an order was made or, if they are subject to an obligation under section 490.019 of the *Criminal Code*, a designated offence within the meaning of subsection 490.011(1) of that Act.<br><br>Additional information<br><br>(3) When a sex offender reports to a registration centre in person, the person who collects the information referred to in subsection (1) may record any observable characteristic that may assist in identification of the sex offender, including their eye colour and hair colour, and may require that their photograph be taken. | paragraphe 490.011(1) du *Code criminel*, s'agissant de l'obligation prévue à l'article 490.019 de cette loi.<br><br>Autres renseignements<br><br>(3) Le préposé peut en outre consigner toute caractéristique apparente permettant de l'identifier, dont la couleur de ses yeux et des cheveux, et lui demander de se soumettre à une séance de photographie. |