

Appellant Factum

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COURT OF APPEAL of Wilfrid Laurier University FILE NO. CA39360

His Majesty The King vs. Eugene Ndhlovu

Appellant's Factum

COURT OF APPEAL

ON APPEAL FROM the order of Justices Andromache Karakatsanis and Sheilah L. Martin of the Supreme Court of Canada pronounced on the 28th of October 2022.

BETWEEN:

His Majesty The King

APPELLANT

AND:

Eugene Ndhlovu

RESPONDENT

Attorney General of Canada, Attorney General of Ontario, Attorney General of Quebec, Attorney General of Nova Scotia, Attorney General of British Columbia, Criminal Lawyers' Association (Ontario), Canadian Civil Liberties Association, HIV & AIDS Legal Clinic Ontario, HIV Legal Network, Mobile Legal Clinic and Association québécoise des avocats et avocates de la défense

Intervenors

APPELLANT'S FACTUM

His Majesty The King

His Majesty The King

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CHRONOLOGY

Date	Event	Reference
April 1, 2004	The <i>Sex Offender Information Registration Act (SOIRA)</i> was assented to, making amendments to the <i>Criminal Code</i> and other Acts.	History of legislative regime at para. 22 of <i>R v. Ndhlovu (2016)</i> .
March 12, 2011 (evening)	At a party hosted by Ms. RD at her residence, Eugene Ndhlovu sexually touched both Ms. RD and Ms. CB on multiple occasions without their consent.	Factual background at para. 17 of <i>R v. Ndhlovu (2016)</i> .
March 13, 2011 (morning)	Ms. RD awoke to Mr. Ndhlovu digitally penetrating her. Mr. Ndhlovu stopped and left the residence after Ms. RD pushed him away.	Factual background at para. 18 of <i>R v. Ndhlovu (2016)</i> .
April 15, 2011	<i>SOIRA</i> and the <i>Criminal Code</i> were amended, making <i>SOIRA</i> orders mandatory for designated offences without room for judicial discretion.	Discussion at para. 7 of <i>R v. Ndhlovu (2016)</i> .
June 26, 2015	Eugene Ndhlovu plead guilty to two counts of sexual assault. He was sentenced to 6 months of imprisonment followed by 3 years of probation.	Introduction at para. 1 of <i>R v. Ndhlovu (2016)</i> .

February 26, 2016	Mr. Ndhlovu was subject to lifetime registration in the Sex Offender Registry in accordance with Section 490.012 and Section 490.013(2.1) of the <i>Criminal Code</i> . Mr. Ndhlovu challenged the constitutionality of this provision.	Introduction at para. 3 of <i>R v. Ndhlovu (2016)</i> .
October 24, 2016	The Court of Queen's Bench of Alberta ruled that Section 490.012 of the <i>Criminal Code</i> unjustifiably infringed Section 7 of the <i>Canadian Charter of Rights and Freedoms</i> . The provisions were declared to be of no force or effect, and there was no <i>SOIRA</i> order made with respect to Mr. Ndhlovu.	Conclusion at para. 134 of <i>R v. Ndhlovu (2016)</i> .
April 9, 2018	The Court of Queen's Bench of Alberta ruled that the infringements on Mr. Ndhlovu's Section 7 rights could not be saved by Section 1 of the <i>Charter</i> .	Conclusion at para. 145 of <i>R v. Ndhlovu (2018)</i> .
September 3, 2020	The Court of Appeal of Alberta ruled that Sections 490.012 and 490.013(2.1) of the <i>Criminal Code</i> were constitutionally valid.	Conclusion at para. 146 of <i>R v. Ndhlovu (2020)</i> .
October 28, 2022	The Supreme Court of Canada (SCC) ruled that Sections 490.012 and 490.013(2.1) of the <i>Criminal Code</i> infringed on section 7 of the	Overview at para. 10 of <i>R v. Ndhlovu (2022)</i> .

	<p><i>Charter</i> and could not be saved by Section 1.</p> <p>The provisions were declared to be of no force or effect.</p>	
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OPENING STATEMENT

This appeal arises from the Supreme Court of Canada's decision holding that Section 490.012 and Section 490.013(2.1) of the *Criminal Code* unjustifiably violate Section 7 of the *Canadian Charter of Rights and Freedoms* and declaring the provisions to be of no force or effect under Section 52(1) of the *Constitution Act*.

These provisions mandate *Sex Offender Information Registration Act (SOIRA)* orders for designated offences, including sexual assault, and require lifetime registration for individuals convicted of more than one designated offence. Section 490.012 and Section 490.013(2.1) were enacted as part of the 2011 amendments to the *Criminal Code* and *SOIRA* under the *Protecting Victims from Sex Offenders Act*. The Supreme Court failed to acknowledge that these amendments reflect Parliament's deliberate decision to uphold *SOIRA*'s purpose of preventing and investigating sexual crimes. This legislation is designed to ensure uniform application of *SOIRA* and mitigate the significant risk of harm posed by sexual offenders.

The Supreme Court has erred in its determination that Section 490.012 and Section 490.013(2.1) of the *Criminal Code* are inconsistent with the principles of fundamental justice. These provisions are not arbitrary, grossly disproportionate, nor overbroad. The Supreme Court's decision fails to properly apply established precedents, including *R v. Redhead*, *R v. Long*, and *R v. Dyck*. These cases affirm that the burdens imposed on offenders by mandatory *SOIRA* orders are in line with the legislation's pressing purpose to address the heightened risk of recidivism among all convicted sex offenders.

Your Honours, we respectfully submit that the provisions outlined in Section 490.012 and Section 490.013(2.1) do not infringe Section 7 of the *Charter*. Accordingly, it is not necessary to

undertake a Section 1 *Charter* analysis. Consequently, the constitutionality of these laws must be upheld and Mr. Ndhlovu must be subject to lifetime registration on the National Registry.

Thank you.

PART 1 - STATEMENT OF FACTS

1. On March 12, 2011, Eugene Ndhlovu attended a party hosted by Ms. RD at her residence. Over the course of the evening, Mr. Ndhlovu consumed alcohol with Ms. RD and their mutual friend, Ms. CB. As the night progressed, both Ms. RD and Ms. CB reported multiple incidents of non-consensual sexual touching by Mr. Ndhlovu.

Reference: R v Ndhlovu, 2016 ABQB 595 (CanLII), <<https://canlii.ca/t/gv923>> at paragraphs 14-17.

2. The morning after the party, Ms. RD awoke to Mr. Ndhlovu digitally penetrating her. Mr. Ndhlovu stopped and left the residence after Ms. RD protested several times and pushed him away.

Reference: R v Ndhlovu, 2016 ABQB 595 (CanLII), <<https://canlii.ca/t/gv923>> at paragraph 18.

3. On June 26, 2015, Mr. Ndhlovu pled guilty to one charge of sexual assault against Ms. RD and one charge of sexual assault against Ms. CB.

Reference: R v Ndhlovu, 2016 ABQB 595 (CanLII), <<https://canlii.ca/t/gv923>> at paragraph 1.

4. Based on the circumstances of the offence, his lack of criminal history, and his apparent remorse, the trial judge concluded Mr. Ndhlovu was unlikely to reoffend and sentenced him to six months of imprisonment followed by three years of probation.

Reference: R v Ndhlovu, 2016 ABQB 595 (CanLII), <<https://canlii.ca/t/gv923>> at paragraph 20.

5. Section 490.012 of the *Criminal Code* stated that *SOIRA* orders were mandatory for offenders convicted of designated offences including sexual assault, while Section 490.013(2.1) mandated lifetime registration for individuals convicted of more than one designated offence. Mr. Ndhlovu was subject to mandatory lifetime registration in the Sex Offender Registry in accordance with these provisions.

Reference: R. v. Ndhlovu, 2022 SCC 38 (CanLII), <<https://canlii.ca/t/jsnhh>> at paragraph 3.

6. On April 15, 2011, *SOIRA* and the *Criminal Code* were amended under the *Protecting Victims from Sex Offenders Act*. These amendments brought about significant changes: *SOIRA* orders became mandatory for designated offences, judicial discretion not to impose *SOIRA* orders was removed, additional reporting requirements were imposed on offenders, and the purpose of the registry was expanded to include crime prevention in addition to investigation.

Reference: R v Ndhlovu, 2016 ABQB 595 (CanLII), <<https://canlii.ca/t/gv923>> at paragraphs 26-32.

7. On February 26, 2016, Mr. Ndhlovu challenged sections 490.012 and 490.013(2.1) of the *Criminal Code* on constitutional grounds. He argued that the absence of judicial discretion to impose *SOIRA* orders for sexual offenders violated Section 7 of the *Charter*, which outlines the right to life, liberty, and security of the person. Mr. Ndhlovu also contended that the provisions infringed upon Section 12 of the *Charter*, which protects the right not to be subjected to any cruel and unusual treatment or punishment.

Reference: R v Ndhlovu, 2016 ABQB 595 (CanLII), <<https://canlii.ca/t/gv923>> at paragraphs 3-5.

8. On April 9, 2018, the Court of Queen's Bench of Alberta ruled that Section 490.012 of the *Criminal Code* unjustifiably infringed Section 7 of the *Charter*. This was based on the determination that mandatory *SOIRA* orders deprive offenders of their life, liberty, or security of the person, and that the deprivation of liberty is contrary to the principles of fundamental justice. Once this Section 7 breach was identified, it was unnecessary for the Court of Queen's Bench of Alberta to consider Mr. Ndhlovu's argument that his Section 12 *Charter* rights had been infringed. Section 490.012 of the *Criminal Code* was declared to be of no force or effect, and there was no *SOIRA* order made with respect to Mr. Ndhlovu.

Reference: R v Ndhlovu, 2016 ABQB 595 (CanLII), <<https://canlii.ca/t/gv923>> at paragraphs 132-137.

9. On April 9, 2018, the Court of Queen's Bench of Alberta ruled that the infringements on Mr. Ndhlovu's Section 7 rights could not be saved by Section 1 of the *Charter*. Section 1 of the *Charter* guarantees that *Charter* rights and freedoms are subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Reference: R v Ndhlovu, 2018 ABQB 277 (CanLII), <<https://canlii.ca/t/hrcz9>> at paragraph 11.

10. On September 3, 2020, the Court of Appeal of Alberta found that the Court of Queen's Bench of Alberta had erred in its ruling. The Court of Appeal determined that the deprivation of Mr. Ndhlovu's Section 7 *Charter* rights was in accordance with the principles of fundamental justice and upheld the purpose of *SOIRA*. Based on the lack of a Section 7 breach, the Court of Appeal declined conducting a Section 1 analysis. The Court of Appeal ruled that sections 490.012 and 490.013(2.1) of the *Criminal Code* were constitutionally valid, setting aside the decision of the Court of Queen's Bench of Alberta. Mr. Ndhlovu was subject to a lifetime *SOIRA* order in accordance with the law.

Reference: R v Ndhlovu, 2020 ABCA 307 (CanLII), <<https://canlii.ca/t/j9hc6>> at paragraphs 145-148.

11. On October 28, 2022, the Supreme Court of Canada found that Sections 490.012 and 490.013(2.1) of the *Criminal Code* infringed upon Section 7 of the *Charter* and could not be saved by Section 1 of the *Charter*. Thus, the Supreme Court declared the provisions to be of no force or effect under Section 52(1) of the *Constitution Act*. Mr. Ndhlovu was exempt from lifetime registration under *SOIRA*.

Reference: R. v. Ndhlovu, 2022 SCC 38 (CanLII), <<https://canlii.ca/t/jsnhh>> at paragraph 143.

PART 2 - ERRORS IN JUDGEMENT

12. The Supreme Court of Canada erred in its determination that Section 490.012 and Section 490.013(2.1) of the *Criminal Code* are unconstitutional. Specifically:
 - a. While mandatory *SOIRA* orders engage Section 7 of the *Charter* by interfering with an offender's liberty, this deprivation of Section 7 rights is consistent with the principles of fundamental justice. The provisions set out in Sections 490.012 and 490.013(2.1) are neither arbitrary, grossly disproportionate, nor overbroad.
 - b. It is not necessary to undertake a Section 1 *Charter* analysis based on the fact that Section 7 rights have not been breached.
13. These errors resulted in a ruling that was fundamentally incorrect. The Supreme Court of Canada's decision rests on a flawed interpretation of *SOIRA*'s purpose and the principles of fundamental justice. The appellant submits that the majority erred in the application of law in ruling that Section 490.012 and Section 490.013(2.1) of the *Criminal Code* are unconstitutional.

PART 3 - ARGUMENT

14. In order for the Crown to prove that Section 490.012 and Section 490.013(2.1) of the *Criminal Code* do not infringe on Section 7 of the *Charter*, it must show that mandatory *SOIRA* orders deprive offenders of their rights to life, liberty, and security of the person in a way that is consistent with the principles of fundamental justice. The principles of fundamental justice are that a law must not be arbitrary, grossly disproportionate, or overbroad.

Reference: R. v. Ndhlovu, 2022 SCC 38 (CanLII), <<https://canlii.ca/t/jsnhh>> at paragraph 49.

a. Arbitrariness

15. Mandatory *SOIRA* orders are not arbitrary. Arbitrariness describes the absence of a rational connection between a law's purpose and its impugned effect on the individual. There is a clear rational connection between being convicted of a designated sexual offence and being included on the National Registry for sex offenders. The original sentencing judge, judge at the Court of Appeal, and the Supreme Court of Canada concluded that Sections 490.012 and 490.013(2.1) of the *Criminal Code* were not arbitrary.

Reference: R v Ndhlovu, 2020 ABCA 307 (CanLII), <<https://canlii.ca/t/j9hc6>> at paragraph 42.

16. Having accurate and up-to-date information about persons more likely to commit sexual offences is directly connected to *SOIRA*'s purpose of investigating and preventing sexual crimes.

Reference: R. v. Ndhlovu, 2022 SCC 38 (CanLII), <<https://canlii.ca/t/jsnhh>> at paragraphs 163.

17. As outlined in *R v. Redhead*, the legislative purpose of *SOIRA* extends beyond specific categories of sexual offences, such as predatory offences involving children. The Court ruled that the legislation's purpose is to protect society as a whole, not just a particular sub-category of society. The Court rejected the argument that an offender's lack of criminal history or low risk of reoffending excluded them from *SOIRA*'s scope, and found that Parliament has established a

public interest in including all persons who commit designated sexual offences on the National Registry.

Reference: R. v. Redhead, 2006 ABCA 84 (CanLII), <<https://canlii.ca/t/1ms3i>> at paragraphs 36-42.

18. The wording of Sections 490.012 and 490.013(2.1) after the 2011 amendments to *SOIRA* and the *Criminal Code* continues to reflect Parliament's recognition of predictable repetitive behaviour of sexual offenders. To exclude Mr. Ndhlovu from the registry simply due to the influence of alcohol, his lack of a criminal record, and his low risk of reoffending would be directly contrary to both the clear wording of *SOIRA*'s legislative purpose and the findings made in *R v. Redhead*.

Reference: R v Ndhlovu, 2020 ABCA 307 (CanLII), <<https://canlii.ca/t/j9hc6>> at paragraphs 63-64.

19. The findings in *R v. Redhead* support the fact that mandatory *SOIRA* orders for all sexual offenders are not arbitrary. There is a clear rational connection between the purpose of Sections 490.012 and 490.013(2.1) and their impugned effect on the individual.

Reference: R. v. Ndhlovu, 2022 SCC 38 (CanLII), <<https://canlii.ca/t/jsnhh>> at paragraph 20.

b. Gross disproportionality

20. Mandatory *SOIRA* orders are not grossly disproportionate. Gross proportionality is found where a law's effects on life, liberty, or security of the person are so grossly disproportionate to its purposes that they cannot rationally be supported. While the registration and reporting requirements under *SOIRA* impose a burden on offenders, these requirements are not so burdensome that they can be disconnected from the legislation's purpose.

Reference: R. v. Ndhlovu, 2022 SCC 38 (CanLII), <<https://canlii.ca/t/jsnhh>> at paragraph 151.

21. As outlined in *R v. Long*, the purpose of *SOIRA* and the sex offender information provisions of the *Criminal Code* (Sections 490.011 to 490.032) is to ensure that the information on the National Registry is complete, current, and accurate, so that police are able to identify and locate a convicted sex offender when seeking to prevent or investigate a sex crime.

Reference: R v Ndhlovu, 2020 ABCA 307 (CanLII), <<https://canlii.ca/t/j9hc6>> at paragraph 60.

22. The burdens imposed by *SOIRA* are minimal and reasonable compared to the significant objective of protecting society from recidivist sexual offenders. *R v. Dyck* outlines that neither the informational nor physical duties imposed by *Christopher's Law* can be fairly described as so onerous as to be grossly incompatible with the protection of society from recidivist sexual offenders. *Christopher's Law* established the National Registry for sex offenders, and its provisions mirror several features of *SOIRA*'s National Registry.

R. v. Dyck, 2008 ONCA 309 (CanLII), <<https://canlii.ca/t/1wpdg>> at paragraphs 86-93.

23. In *R v. Dyck*, the court emphasized that the reporting requirements under *Christopher's Law* are limited in their informational scope, do not significantly limit lawful activities or dictate where offenders can go or whom they can associate with, and are no more intrusive than other state-imposed registration requirements such as renewing a driver's license or filing income taxes.

R. v. Dyck, 2008 ONCA 309 (CanLII), <<https://canlii.ca/t/1wpdg>> at paragraphs 111-112.

24. In regards specifically to Sections 490.012 and 490.013(2.1) of the *Criminal Code*, mandatory *SOIRA* orders impose minimal stigma on the offender and are not publicly known. Access to the Registry is controlled and confidential, with information being strictly limited to police use for the prevention and investigation of sexual offences. The dissenting judges on the Supreme Court conclude that any stigma experienced by an offender from being labelled a sex offender stems from the convictions themselves, not registration.

Reference: R. v. Ndhlovu, 2022 SCC 38 (CanLII), <<https://canlii.ca/t/jsnhh>> at paragraph 166.

25. Furthermore, the duration of a *SOIRA* order is directly linked to the maximum term of imprisonment for that sexual offence, displaying that Parliament embedded proportionality into

the legislation. Termination orders are available for offenders who can meet the high standard of demonstrating that there has been a truly disproportionate impact on their privacy or liberty.

Reference: R. v. Ndhlovu, 2022 SCC 38 (CanLII), <<https://canlii.ca/t/jsnhh>> at paragraphs 169-170.

26. The exclusion of any particular sex offender from the National Registry, whether or not they may be considered low risk, undermines the purpose of the legislation and the National Registry itself.

Reference: R v Ndhlovu, 2020 ABCA 307 (CanLII), <<https://canlii.ca/t/j9hc6>> at paragraph 99.

c. Overbreadth

27. Mandatory *SOIRA* orders are not overbroad. The first step in an overbreadth analysis is to determine the purpose of the challenged provisions. Once the purpose of the measures has been identified, the next step is to determine whether they are overbroad. A law is overbroad when it is so broad in scope that it includes some conduct that bears no rational connection to its purpose, making it arbitrary in part. The Supreme Court of Canada erred in its finding that the burdens imposed by Sections 490.012 and 490.013(2.1) were overbroad. The Supreme Court failed to consider the full scope of *SOIRA*'s purpose and failed to correctly apply relevant precedents.

Reference: R. v. Ndhlovu, 2022 SCC 38 (CanLII), <<https://canlii.ca/t/jsnhh>> at paragraphs 59-77.

28. To determine an impugned law's purpose, courts may consider the statements of purpose in the legislation, the text, context, and scheme of the legislation, and extrinsic evidence such as legislative history and evolution.

Reference: R. v. Ndhlovu, 2022 SCC 38 (CanLII), <<https://canlii.ca/t/jsnhh>> at paragraph 64.

29. *SOIRA*'s explicitly stated purpose is to aid police services in investigating and preventing sexual crimes. In addition, extrinsic evidence indicates that Parliament amended *SOIRA* in 2011 to provide for automatic registration of sex offenders in response to concerns that National

Registry's effectiveness was compromised due to the exercise of judicial discretion to exempt nearly half of all convicted sex offenders from registration. Thus, Sections 490.012 and 490.013(2.1) are essential components to *SOIRA*'s statutory purpose of aiding police services in investigating and preventing sexual crimes.

Reference: R. v. Ndhlovu, 2022 SCC 38 (CanLII), <<https://canlii.ca/t/jsnhh>> at paragraph 154.

30. Longstanding Supreme Court jurisprudence endorses the rationality of Parliament's view that the consequences of all crimes of a sexual nature are inherently serious, regardless of the particulars of each circumstance. As noted in *R v. Seaboyer; R v. Gayme*, sexual crimes against women and children are for the most part unreported, unlike other crimes of a violent nature. Conservative estimates indicate that at least one in five women in Canada will be sexually assaulted during her lifetime. Additionally, one in two females will be the victim of unwanted sexual acts according to the Report of the Committee on Sexual Offences Against Children and Youth. By all accounts, women are victimized at an alarming rate, with evidence suggesting that sexual assault rates are increasing. Perhaps more than any other crime, the fear and ongoing reality of sexual assault affects how women navigate their lives and how they define their relationship with society as a whole. This further emphasizes the pressing importance of *SOIRA*'s overall objective of investigating and preventing sexual crimes.

Reference: R v Ndhlovu, 2020 ABCA 307 (CanLII), <<https://canlii.ca/t/j9hc6>> at paragraph 81.

31. The use of judicial discretion to determine whether a sexual offender should be registered on the National Registry undermines the purpose of *SOIRA*. Experts agree that recidivism risk cannot be determined with certainty at sentencing, and observed recidivism rates often underestimate true reoffending rates. Given that a risk assessment cannot guarantee whether any individual will reoffend, it is dangerous to use a risk-based assessment to determine which offenders should be registered; any exclusion of convicted sex offenders necessarily results in

police not having information on some offenders who do, in fact, reoffend. The mandatory inclusion of all sex offenders on the National Registry is justified due to this uncertainty in predicting which offenders will reoffend. Parliament's approach in amending *SO/RA* to include all convicted sex offenders in the National Registry ensures the law is appropriately tailored to its purpose, prioritizing public safety and addressing the inherent uncertainty for prosecutors and judges in predicting individual recidivism.

Reference: *R. v. Ndhlovu*, 2022 SCC 38 (CanLII), <<https://canlii.ca/t/jsnhh>> at paragraphs 175-181.

32. All sexual offenders exhibit a heightened risk of committing a future sexual offence. Expert evidence suggests that persons convicted of a sexual offence are five to eight times more likely to reoffend than those convicted of a non-sexual offence, and even sexual offenders who are considered low risk pose a heightened risk to commit another sexual offence relative to the general criminal population.

Reference: *R. v. Ndhlovu*, 2022 SCC 38 (CanLII), <<https://canlii.ca/t/jsnhh>> at paragraph 174.

33. Accordingly, Parliament is entitled to cast a wide net in requiring registration for all sex offenders under Sections 490.012 and 490.013(2.1) of the *Criminal Code*, relying on this shared characteristic to fulfill *SO/RA*'s legislative objective of protecting public safety. This was clearly outlined in *R v. Long*, a case that closely parallels the facts in *R v. Ndhlovu*. In *R v. Long*, the respondent, Mr. Long, was convicted of three counts of sexual assault. Pursuant to Section 490.013(2.1) of the *Criminal Code*, Mr. Long was subject to lifetime registration in the National Registry. In response, Mr. Long brought a constitutional challenge under Section 7 of the *Charter* arguing that Section 490.013(2.1) was arbitrary, overbroad, and grossly disproportionate. Upon conducting its analysis, the Ontario Superior Court ruled that there had been no breach of Section 7 of the *Charter*, and the appellant's appeal was therefore dismissed. *R v. Long* was

decided in 2015, meaning its analysis took into account the 2011 amendments to *SOIRA* and the *Criminal Code*.

Reference: R. v Long, 2015 ONSC 4509 (CanLII), <<https://canlii.ca/t/gk1p7>> at paragraphs 17-20.

34. In *R v. Long*, the court rejected the argument that an individual assessment of each offender's potential risk is required for sex offender registries to operate within the principles of fundamental justice. *R v. Long* asserts that a prior conviction of a sexual offence is a reasonable proxy for a risk of re-offending. Thus, even if an offender is said to be of low risk to reoffend, this does not mean this risk is absent altogether. The premise underlying the National Registry is that all sex offenders present a greater risk of committing a future sexual offence compared to the rest of the population. Parliament deliberately chose not to distinguish between more serious and less serious sexual offences or higher risk and lower risk offenders when enacting sections 490.012 and 490.013(2.1). Thus, mandatory *SOIRA* orders are not overbroad just because they encompass "low-risk" offenders, countering the main argument of the Supreme Court in its ruling in *R v. Ndhlovu*.

Reference: R. v. Ndhlovu, 2022 SCC 38 (CanLII), <<https://canlii.ca/t/jsnhh>> at paragraph 24.

35. The provisions outlined in Sections 490.012 and 490.013(2.1) are not overbroad and do not deprive an offender's Section 7 rights in a manner that bears no connection to its objective. There is a rational connection between mandatory registration on the basis of a sex conviction and *SOIRA*'s purpose of protecting society from the harm posed by recidivist offenders.

Reference: R. v. Ndhlovu, 2022 SCC 38 (CanLII), <<https://canlii.ca/t/jsnhh>> at paragraph 174.

36. Mandatory *SOIRA* orders do not deprive offenders of their Section 7 Charter rights in way that is inconsistent with the principles of fundamental justice. Accordingly, the appellant submits that Section 490.012 and Section 490.013(2.1) of the *Criminal Code* do not infringe on Section 7 of the *Charter*.

PART 4: NATURE OF ORDER SOUGHT

37. The appellant seeks an Order:

- a. Allowing the appeal and reversing the Supreme Court of Canada's decision declaring that Sections 490.012 and 490.013(2.1) of the Criminal Code unjustifiably infringe Section 7 of the *Charter*.
- b. Reinstating the mandatory *SOIRA* order for the respondent, Eugene Ndhlovu, including lifetime registration on the National Sex Offender Registry pursuant to Section 490.013(2.1).

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 18th day of December, 2024.

Melisa Onder

His Majesty The King

APPENDICES: LIST OF AUTHORITIES

Authorities	Page # in factum	Para # in factum
<i>R. v. Dyck, 2005 CanLII 47771 (ON SC).</i>	8-16	22, 23
<i>R. v Long, 2015 ONSC 4509 (CanLII).</i>	8-20	21, 33, 34
<i>R. v. Ndhlovu, 2022 SCC 38 (CanLII).</i>	5-20	5, 11, 14, 16, 19, 20, 24, 25, 27, 28, 29, 31, 32, 34, 35
<i>R v Ndhlovu, 2020 ABCA 307 (CanLII).</i>	6-18	10, 15, 18, 21, 26, 30
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<i>R v Ndhlovu, 2016 ABQB 595 (CanLII).</i>	5-11	1, 2, 3, 4, 6, 7, 8
<i>R. v. Redhead, 2006 ABCA 84 (CanLII).</i>	8-14	17, 18, 19
<i>R. v. Seaboyer; R. v. Gayme, 1991 CanLII 76 (SCC), [1991] 2 SCR 577</i>	18	30

APPENDICES: ENACTMENTS

Christopher's Law (Sex Offender Registry), 2000, SO 2000, c 1

Sex offender registry

2 The ministry shall establish and maintain a registry containing the names, dates of birth and addresses of offenders, the sex offences for which, on or after the day section 3 comes into force, they are serving or have served a sentence or of which they have been convicted or found not criminally responsible on account of mental disorder and such additional information as may be prescribed.

2000, c. 1, s. 2.

Sex Offender Information Registration Act, SC 2004, c 10

Purpose and principles

Purpose

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.

Principles

(2) This Act shall be carried out in recognition of, and in accordance with, the following principles:

(a) in the interest of protecting society through the effective prevention and investigation of crimes of a sexual nature, police services must have rapid access to certain information relating to sex offenders;

(b) the collection and registration of accurate information on an ongoing basis is the most effective way of ensuring that such information is current and reliable; and

(c) the privacy interests of sex offenders and the public interest in their rehabilitation and reintegration into the community as law-abiding citizens require that

(i) the information be collected only to enable police services to prevent or investigate crimes of a sexual nature, and

(ii) access to the information, and use and disclosure of it, be restricted.

The Constitution Act, 1982, Schedule B to the Canada Act 1982 (UK), 1982, c 11

Rights and freedoms in Canada

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.

Life, liberty and security of person

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.

Criminal Code, RSC 1985, c C-46

Order to Comply with the Sex Offender Information Registration Act

Order

490.012 (1) Subject to subsection (5), when a court imposes a sentence on a person for a designated offence, it shall make an order in Form 52 requiring the person to comply with the Sex Offender Information Registration Act if

(a) the designated offence was prosecuted by indictment;

- (b) the sentence for the designated offence is a term of imprisonment of two years or more; and
- (c) the victim of the designated offence is under the age of 18 years.

Application for variation order

490.05 (1) A person may apply to a court for an order to vary the duration of

- (a)** an order made under section 490.012, if the order applies for life under subsection 490.013(2.1), as it read from time to time before the day on which this paragraph comes into force