Court of Queen's Bench of Alberta

Citation: R v Ndhlovu, 2018 ABQB 277

Date: 20180409
Docket: 110548831Q1
Registry: Edmonton

Between:

Her Majesty the Queen

Respondent

- and -

Eugen Ndhlovu

Accused/Applicant

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Reasons for Judgment
Re: Constitutionality of SOIRA, Section 1 Analysis
of the
Honourable Madam Justice A.B. Moen

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I Introduction

[1] Eugen Nhlovu has challenged the constitutional validity of the 2011 amendments to the *Sex Offender Information Registry Act (SOIRA).*

[2] In ***R v Ndhlovu***, 2016 ABQB 595 (*Ndhlovu* 2016) I found that the amended provisions of *SOIRA* and the *Criminal Code of Canada* violated section 7 of the *Charter* because they are overbroad and grossly disproportionate. The Crown now seeks to prove that those provisions in *SOIRA* can be saved under section 1 of the *Charter*. To this end we had a hearing with several witnesses. Therefore, I must now consider whether the infringement of the *Charter* is justifiable under section 1 of the *Charter*.

[3] For the factual background to this decision, I refer to *Ndhlovu*, 2016. I will refer in this decision to the expert evidence called in the section 1 hearing, both by the Crown and by the Defence. Both of those experts addressed the issue of recidivism relating to sex offenders.

II. Discussion

[4] *SOIRA* came into force in 2004 establishing a sex offender registry. It also set out the procedure for registration and outlined reporting requirements. Mr. Ndhlovu does not take issue on a *Charter* basis with *SOIRA* as it was enacted in 2004 (*SOIRA* 2004).

[5] In 2011, Parliament amended *SOIRA* and the *Criminal Code* when it enacted the *Protecting Victims from Sex Offenders Act*, SC 2010, c 17 [the Amending Act], which amendments I shall refer to as (*SOIRA* 2011). That amendment took away all discretion of the prosecutor and of the sentencing judge and provided mandatory registration for life of a person convicted of two sex offenses.[1] Prior to that amendment, sentencing judges, on giving reasons, had discretion to refuse a *SOIRA* order if the effects of the order on the offender's privacy or liberty interests were grossly disproportionate to the public interest in protecting society. I note here, that in my discussion to follow, I will refer to the amendments to both *SOIRA* and the *Criminal Code* in 2011 as amendments to *SOIRA* 2011. My intention is to include both those statutes in my general discussion.

[6] To be clear, there were many changes made to *SOIRA* in 2011 which are not subject to a review here.

[7] Legislation that violates the *Charter* may be justifiable under section 1 of the *Charter*. In some cases, Parliament, for practical reasons, may be able to meet an important objective only by means of a law that has some fundamental flaw, such as being overbroad: ***Carter v. Canada (Attorney General)***, 2015 SCC 5.

[8] The Crown argues that *SOIRA* is such a case. They argue that the ultimate aim of the *SOIRA* registry is to ensure that police have ready access to reliable information on every sex offender. They say that, because it is not possible to determine which offenders will reoffend, the exclusion of any offenders will inevitably result in the registry not having information on some sexual offenders that reoffend. The Crown says that the removal of judicial discretion to exempt offenders at the time of sentencing has a pressing and substantial objective sufficient to justify an infringement of individual *Charter* rights. It says that Parliament's legislative response of removing prosecutorial and court discretion is rationally connected to Parliament's objective and is proportionate. In particular, the Crown says that there are no less intrusive means reasonably available to Parliament to meet its objective, and the impact on offenders' section 7 rights is not so severe that it outweighs the benefit of having a national sex offender registry that contains information on **all** sexual offenders who will reoffend.

[9] Mr. Ndhlovu argues that the SOIRA registry impinges on his liberty rights and the government cannot justify including in the *SOIRA* registry **every** person that is found guilty of a sexual offence. Further, Mr. Ndhlovu says that a lifetime registry for two offenses is similarly not justified. Mr. Ndhlovu also argues that given the variability of circumstances of offenses and of offenders, judicial discretion must be permitted.

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[1] To be clear, the case before me was about one indictment with two sexual offenses, both on the same day at the same party. Therefore, when speaking of prior offences, we cannot be referring to that here. This is not a case of someone who has been convicted of a sexual offense and then commits another sexual offense. In that case, we could speak of a prior conviction. Here there was no prior conviction, but the language of the amendment to the *Criminal Code* requiring a life registration included such a case as the one before me.

[10] Both parties called expert evidence on recidivism. I note that the public interest in protecting society is dealt with through the recidivism evidence. The higher the recidivism, the more likely it is that putting an offender on the registry will ensure that the police will benefit by being able to find prior offenders on that registry when they have a sexual offence by a stranger to solve.

[11] I find that breach of the *Charter* in this case is not saved by section 1 of the *Charter*.

III. Analysis

[12] Section 1 of the *Charter* provides:

> 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.

[13] The ***Oakes*** test applies with respect to our analysis of section 1: ***R v Oakes***, [1986] 1 SCR 103.

[14] The burden of proof lies on the Crown when the Court considers section 1 of the *Charter*. Therefore, the Crown must present evidence (demonstrably justify) to show that it has chosen "reasonable limits" in its legislative provisions. The standard of proof is on a preponderance of probabilities: ***Oakes*** at para 66 and 67. 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 violated: ***Oakes*** at para 67 and 68.

[15] In this analysis, the court must be guided: "by the values and principles essential to a free and democratic society which … embody … commitment to social justice and equality …" The ultimate standard against which the rights and freedoms guaranteed by the *Charter* is whether the law in question is reasonable and demonstrably justified: ***Oakes*** at para 64. I must, therefore, measure the limitations on the freedom of Mr. Ndhlovu against what is "reasonable" and "demonstrably justified in a free and democratic society": ***Oakes*** at para 63.

[16] There are two central criteria which must be satisfied in this analysis. First, the measure that is being challenged must be "of sufficient importance to warrant overriding a constitutionally protected right or freedom;" that is, the objective of the impugned legislation must relate to concerns which are "pressing and substantial in a free and democratic society before it can be characterized as sufficiently important": ***Oakes*** at para 69.

[17] The second criterion is that the Crown must show that the means chosen by Parliament are reasonable and demonstrably justified. This involves "a form of proportionality test." In other words, we must "balance the interests of society with those of individuals and groups": ***Oakes*** at para 70.

[18] The ***Oakes*** test is summarized by the Supreme Court of Canada in ***R v Bryan***, [2007] 1 SCR 527, 2007 SCC 12, as:

1. Pressing and Substantial Objective
2. Proportionality
   (a) Rational Connection
   (b) Minimal Impairment
   (c) Salutory and Deleterious Effects

[19] I shall, therefore, discuss the section 1 factors in this case by referring to the framework as set out in ***Bryan***.

A. Pressing and Substantial Objective

[20] The Crown says that the "public interest addressed by *SOIRA* is 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," citing ***R v Redhead***, 2006 ABCA 84 at para 36.

[21] That is not contested here by Mr. Ndhlovu.

[22] ***Redhead*** was decided before the amendments to *SOIRA* at issue here. The objective has not changed in *SOIRA* 2011 as to investigations. I note that the amendments added the word "prevention" along with "investigation". This is clearly intended to be another objective of the legislation. However, because this case does not involve prevention, I shall not comment nor make any findings with respect to whether that change in objectives is pressing and substantial.

[23] The public interest addressed by *SOIRA* 2004 is, therefore, the protection of society through the effective and quick investigation of crimes of a sexual nature by providing police with rapid access to information about known sex offenders (the Objective).

[24] I turn now to a discussion of the second criterion - proportionality.

B. Proportionality

[25] This discussion addresses the means that Parliament has chosen to address the Objective. The challenge here is not to the existence of the registry, but the means set out in the legislation to achieve the objective.

[26] For proportionality the court must "balance the interests of society with those of individuals and groups". An analysis of proportionality requires looking at three components: rational connection, minimal impairment, and salutary and deleterious effects: ***Oakes*** at para 70.

[27] The issues in this part of the discussion pertain to three changes made in the 2011 amendments to *SOIRA*: first, the removal of prosecutorial discretion; second, the removal of judicial discretion; and third, the increase of time on the registry to life for persons with two or more offenses.

[28] The *Criminal Code* in 2010, before the Amending Act, set out the discretion of the prosecution at s. 490.012

> **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 Registration Act* for the applicable period specified in section 490.013. (emphasis added)

[29] This discretion was removed in *SOIRA* 2011.

[30] The discretion of the sentencing judge in 2010 was set out at s 490.012(4) as an exception to s. 490.012(1):

> 490.012 …
>
> (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*.
>
> (5) The court shall give reasons for its decision.

[31] This section giving the sentencing judge discretion was removed in *SOIRA* 2011.

[32] Finally, *SOIRA* 2011 added:

> 490.013 …
>
> (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).

[33] Therefore, at issue here are the changes to SOIRA 2011: the removal of prosecutorial and judicial discretion to exempt offenders at the time of sentencing, and increasing the length of time a person with two offences will be registered.

[34] Have the changes in the means of implementation of the registry now gone too far?

[35] The Crown's essential argument is that the only way the Objective can be achieved is for **every** offender to be listed on the SOIRA registry because it is impossible to determine **with certainty** which offender will re-offend and which will not. The Crown sought to demonstrate this uncertainty by putting in evidence through an expert about recidivism. Mr. Ndhlovu also lead expert evidence on recidivism. There is no doubt that no one can say with certainty whether a particular sexual offender will reoffend. The evidence was also that we cannot predict with certainty which person in the general population will offend.

[36] "The inquiry into proportionality which consists in the final three stages of the ***Oakes*** test requires the Attorney General to provide more than the assertions which were acceptable at the first stage. Instead, the inquiry is led into questions of causation and may require more in the way of proof." ***Bryan*** at para 38.

[37] Were the means chosen by the government to achieve the objective proportional to the effect those means would have on sex offenders? When I ask this question, I am referring not to the benefit of the registry as it was established in 2004 – that is not before me. Rather, I am referring to the benefit of taking away all discretion from the prosecution and the judge as to whether, in circumstances set out in *SOIRA* 2004, an offender is to be put onto the registry, and the benefit of putting a sex offender on the registry for life.

1. Rational Connection

[38] "The rational connection stage of the test requires the Crown to "show a causal connection between the infringement and the benefit sought on the basis of reason or logic": see ***RJR-MacDonald***, at para 153, and ***Harper***, at para 104; ***Bryan*** at para 39.

[39] In ***Oakes*** the Supreme Court described this part of the test as "… measures which have been carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations": at para 70.

[40] The Crown suggests that the focus of the rational connection inquiry should be on the reason for infringing upon the *Charter* right and its relationship to the law's objective; that the rational connection here is not to the existence of the registry, but rather, to the removal of prosecutorial and judicial discretion. With this, I agree. I add to this to the imposition of life registration for a sexual offender with two offenses.[2] I will address each of these.

[41] I must find in the evidence put before me by the Crown that the government had a reason for the amendments at issue here. Is there a rational, causal connection between the *SOIRA* 2011 amendments and the Objective?

[42] In this evidence I could find only one reason for these changes, and that pertains to the removal of prosecutorial discretion. The Crown put in no evidence to suggest that the government had any rationale to support its amendments to the legislation on the other two changes. Further, I could find no reason in the report of Parliament's Committee to support those changes.

[43] Prior to the changes to *SOIRA* in 2011, there was a review by Parliament: the *Statutory Review of the Sex Offender Information Registry Act*, December 2009, 40th Parliament, 2nd Session. This review led to the *Report of the Standing Committee on Public Safety and National Security* (the "Committee"); (the "Report"). I have also reviewed the Senate hearings on this subject searching for a basis for the proposed change. That is, I was searching for a rationale that the proposed changes would better achieve the Objective than the existing legislation.

[44] From my review of the Report and the Senate hearings, I could not find evidence that the measures taken would better achieve the Objective, or that the proposed changes were carefully designed to achieve the objective in question. Nor has the Crown provided any evidence of such. There was no discussion about whether the proposed measures would make any difference to the Objective. There was an underlying assumption that if an offender was put on the registry, it would make the life of investigating officers easier. However, I could find no objective evidence that this would, in fact, happen. There is no doubt that putting all offenders on a registry would ensure that their name was available to the police investigating a crime of a sexual nature. However, there was no evidence before the Parliamentary Committee, the Senate Committee, nor before me, to establish that there would be more arrests made more quickly as a result of the 2011 amendments.

[45] There were two experts called, one by the Crown and one by the Defense, whom I qualified.

[46] The Crown's expert, Dr. Hanson was qualified as a clinical psychologist to give expert opinion evidence about the behaviour, assessment, treatment, and management of adult sexual offenders; about the recidivism rate of sexual offenders, that is, about the assessment of the risk of a sexual offender reoffending; about the behaviour of sex offenders, that is, whether anything is known about where sex offenders tend to commit sexual offences; and the percentage of sex offences that occur where the offender is known to the victim. He was also qualified to give

[2] The Crown suggested in its submissions that I had not made a finding on this in ***Ndhlovu*** Part I. I did. I refer to para 119 ***Ndhlovu*** Part I.

evidence about research done on the impact of sex offender registries, generally, and of *SOIRA* particularly.

[47] The Defence called Dr. Zgoba who was qualified as an expert in criminal justice to give evidence about the treatment and management of sex offenders and sex offender recidivism rates; where sex offences tend to be committed; the behaviour of sexual offenders; whether sexual offences are committed on known or unknown victims; the impact of sex offender registries in general, and their efficacy. At present, she is a research scientist at the New Jersey Department of Corrections, supervisor of research and evaluation with her specific area of expertise being in sexual offending. She is one of two people in the world that has studied sex offender registries in both the United States and the United Kingdom.

[48] The evidence of the two experts is similar and it sheds light on the rationale for the registries and the rationale, if any, for the changes to the legislation.

[49] I will discuss recidivism here, because the Crown presumably put this evidence in for all three of the elements of proportionality. The evidence on recidivism pertains to the rational connection, but it also pertains to minimal impairment and salutary and deleterious effects.

[50] Dr. Hanson's evidence about recidivism rates came from an aggregate sample from international sources; they are not Canadian. Dr. Hanson, who has vast experience in this area in Canada, said there is no pure Canadian research, but the Canadian rates are roughly similar to the international averages.

[51] Dr. Hanson looked at rates of re-offence for a first-time sexual offender.

[52] The rate for first-time sex offenders is very close to the moderate range. Most individuals, 75 to 80%, have been convicted of one and only one sex offense. It is a smaller group of 20 to 25% who have a prior conviction. Therefore, the group of individuals who are on the registry with only one sentencing occasion for a sex offence would be the vast majority and recidivism rates would be very close to the average recidivism rates.

[53] Dr. Hanson gave evidence that the average recidivism rates after **five years** post release are between 10 and 15% of the individuals convicted of a sexual offence.[3] Dr. Hanson, of course, pointed out that this meant conversely between 85 and 90% of those who had been convicted of a sexual offence would **not** have been re-convicted. If one follows all those individuals for up to 15 years, a total of 20 to 25% will be re-convicted for a sexual offence. This means that in the fifth to fifteenth years, there were an additional 5 to 10% over the 10 to 15% in the first five years. These rates can be referred to as "**base rates**". From these statistics it is evident that re-offences occur more in the first five years after a sexual offence has been perpetrated than in the next ten years. It is equally evident that the vast majority of sexual offenders do not reoffend in the fifteen years after their release.

[54] He went on to explain that one could subdivide the total group of offenders based on simple characteristics and get differences in the recidivism rate. In the group where an offender has sexually offended against a nonconsenting female or male, the recidivism rates are similar to the overall rates. Where the offence is against a female child, the rates of recidivism are lower;

[3] Notably, in these numbers, Dr. Hanson has included sexual offences which are public indecency types of offences, such as prostitution, whereas *SOIRA* does not include those in its database.

against an unrelated boy the rates are substantially higher, that is, this offender is among some of the higher risk for sex offender recidivism. His evidence was that there is no **single** factor that will say whether a person is at a high risk or low risk for recidivism. Risk assessments need to consider multiple indicators. Taking a whole range of factors into account, the highest range is 40 to 50% recidivism, and the lowest is 2%.

[55] Dr. Hanson explained that this base rate changes taking into account certain identified risk factors. It is this research that has formed the basis of actuarial tools for assessing the risk for re-offence among sexual offenders.

[56] I shall list some of the many factors Dr. Hanson discussed. One of the identified risk factors is age. Typically, if a person offends when they are young, they are more likely to re-offend - this is true for both sexual and nonsexual offences. A history of juvenile criminal activity for anything is a predictor of sex recidivism in the future. Lifestyle or employment instability are other risk factors. If they are involved in diverse sex crimes, they are more likely to reoffend. If they are involved in noncontact sex offences, they are more likely to reoffend. Victimization of strangers predicts higher risk. If a male victimizes a male, there is a higher likelihood of re-offence. Individuals who have unusual or atypical sexual interests are more likely to reoffend than those who have ordinary sexual interests. Other risk factors include serious personality disorder, anger, hostility, grievance, social problems, people in a conflicted relationship, people who have negative attitudes toward women, and poor cognitive problem-solving.

[57] Dr. Zgoba, the Defence expert, has been involved in research looking at the weight of variables for prediction of sex recidivism. Those variables that have the highest weight or the best predictive ability on sexual offence recidivism are prior sexual event history, stranger victims, male victims, and age. In this, she agrees with Dr. Hanson. The severity of the offence is not a predictor for recidivism. However, violent offenders tend to have a higher rate of recidivism.

[58] Protective indicators include an assessment of their social group and family, that is, who they are spending time with. Persons who have a positive influence in their life are less likely to reoffend.

[59] Dr. Hanson did not assess Mr. Ndhlovu. In fact, in a section 1 analysis, the issue is not the individual, but rather the overall effects of the government action. In this case, Mr. Ndhlovu is an example of the irrationality of the changes to *SOIRA* in 2011.

[60] By way of example, Mr. Ndhlovu is young. This is a predictor for future recidivism. He has no previous record for any offenses, including a juvenile record. This is, therefore, not a predictor of his offending again. He has demonstrated employment stability. His sexual crime was with a female friend. He has not victimized younger people, males, or strangers. Nor was there any evidence of unusual or atypical sexual interests. He does not have a personality disorder; he is neither angry nor hostile. He did not express any grievance. He comes from a stable family, who participate along with him in church activities. He continues to be so involved. He was supported by his family and by his church. In other words, he has positive influences in his life. Mr. Ndhlovu is an example of a person, if he were assessed, that would fall into a low risk for re-offence category.

[61] Dr. Hanson commented on the risk of a general offender being convicted for a sexual offence. He said that after five years about 2% of the general offender population is convicted of sex crimes.[4] That is similar to the lowest end of the sex offender group. Given that general offenders have a 2% risk of sexual offences, based on the logic of the Crown, all general offenders should also be included on the *SOIRA* registry. This is, of course, ridiculous.

[62] There was no other evidence on which the government could rely. Therefore, the actions of the government in removing judicial discretion appear to be arbitrary. There was no rational connection shown for this change to the legislation.

[63] Even if there is a rational connection between the registration of sexual offenders and the removal of judicial discretion, which I have found there is not, there is certainly not a minimal impairment.

Prosecutorial Discretion

[64] First, I shall address the removal of prosecutorial discretion. The Crown did not focus on this aspect of the changes to SOIRA 2011. The Committee found that about 50% of offenders found guilty of a sexual offence (or found criminally not responsible) were subject to an order for inclusion on the national registry. This was explained as the prosecution "forgetting" to apply. My review of the Committee's Report reveals a concern that prosecutors were not making enough applications to register sexual offenders. Further, the Report observed that the inclusion rate across the country varied by province and territory: the Report at p 8.

[65] My review of the Senate hearings revealed a similar concern. The evidence of Pierre Nezan, Officer in Charge, National Sex Offender Registry, Royal Canadian Mounted Police, was that a statistical analysis of the performance of the SOIRA centres in each province found that about 58% of the eligible offenders were being put forward by the prosecution for inclusion on the registry. The evidence before the government on this point suggested that, for whatever reason, the prosecution was not putting the majority of sexual offenders forward to the court for an order for registration. For this reason, it was suggested to government that registration of sexual offenders on the registry be mandatory: *Senate Standing Committee on Legal and Constitutional Affairs*, 22-4-2010, 4:45.

[66] Mr. Nezan opined that if registration was made mandatory, the numbers of sexual offenders placed on the registry would improve: *Senate Committee* 4:46. The underlying assumption appeared to be that improved numbers would lead to more convictions. That is, more persons would be "caught" through the registry. I could find no evidence to support this.

[67] Weighing and balancing these changes calls for deference by the court to the Parliament where there are two or more rational policy choices. [***M v H***, [1999] 2 S.C.R. 3 at para 78; ***Irwin Toy Ltd v Quebec (Attorney General)***, [1989] 1 S.C.R. 927, at pp. 993-94; ***R v Butler,*** [1992] 1 S.C.R. 452, at pp. 502-4; ***RJR-MacDonald Inc v Canada (Attorney General)***, [1995] 3 S.C.R. 199, at paras. 135-37].

[68] The Crown introduced no evidence as to why the prosecution only applied for registration of about 50% of sexual offenders. Nevertheless, it was open to the Parliament, even in the face of minimal evidence, to make a policy decision respecting prosecutorial discretion. In

[4] He could not give statistics about the rate of spontaneous sex crimes in the general population of young males with no criminal history at all. There is no such data available.

deference to the Parliament, I find that removal of prosecutorial discretion may be justified pursuant to s. 1. Certainly, if judicial discretion were left intact, removal of prosecutorial discretion may be justified.

Judicial Discretion

[69] The issue here is whether taking away the discretion of the sentencing judge is justified because it better achieves the Objective. I find that it does not.

[70] Is there a rational connection between including **all** sex offenders on the registry by removing judicial discretion and the pressing and substantial object of *SOIRA*, that is, providing police with rapid access to information about known sex offenders so that they will be able to find a new stranger offender whom they are seeking?

[71] The Crown says that judges cannot accurately determine, at the time of sentencing, who will and who will not reoffend and, therefore, cannot be expected to evaluate whether someone should or should not be on the *SOIRA* registry. "Accurately" means 100%. Therefore, the argument is, we should include every sex offender, and not give judges discretion, because of the uncertainty of knowing who will reoffend. Therefore, even the offenders who will never re-offend should be included just to catch the ones who will re-offend.

[72] From reading the transcripts of the hearings before the Senate, it is clear that Minister Toews[5] appealed to the Senate on the basis, among other things, that some offenders fell through the cracks because not every offender was on the registry. He gave no data to the Senate to support this contention.

[73] The Crown's argument mirrors the reasons given by Minister Toews to the Senate hearing.

[74] Dr. Hanson gave the opinion that no one has the ability to identify individuals who have a near certainty of reoffending and neither do they have the ability to determine that somebody would never reoffend. It is this opinion that the Crown relies on to support its contention that **all** sexual offenders should be on the registry and those that have two offenses should be on for life, regardless of the circumstances.

[75] However, Dr. Hanson compared otherwise intelligent laypeople (we hope that judges fall into that category, at least) to an unstructured professional judgement by forensic psychologists, psychiatrists, and mental health workers. Any risk assessment predicting future offending would be the same for the layperson and the other professionals. An assessment as to future risk does not require any specialized training. Dr. Hanson said that people who are not experts or who take an unstructured analysis approach tend to **over predict** risk. Dr. Hanson also pointed out that the actuarial tools used by trained professionals have only a slightly increased accuracy as to recidivism. I accept his opinion in this regard and note that a judge, therefore, would be more cautious than an expert using actuarial tools.

[76] There are no tools that will predict with 100% accuracy. However, Dr. Hanson explained that even the best statistical models are not going to give one a perfect prediction of people because people make decisions, change their mind, and life happens. Therefore, one cannot say with certainty whether an offender will or will not reoffend. One can only give a probability of reoffending somewhere between zero and 100%. Dr. Zgoba agreed with this.

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[5] Minister of Public Safety

[77] I accept the evidence of the experts that no one can determine with 100% certainty who will and who will not re-offend.

[78] With respect to judicial discretion, the Report recommended that judges be given discretion: the Report: Recommendation 2, p 9.

[79] Although some witnesses to the Committee recommended that prosecutorial discretion be removed and registration made automatic, other witnesses emphasized that if the prosecutorial discretion was removed, there should be continued judicial discretion to determine whether an order should be applied in view of the circumstances of the offence and the offender's profile: the Report at p 8.

[80] The Committee opined that "a judge should have the ability to depart from an automatic ruling in *rare* circumstances when he or she is convinced that the impact of the inclusion in the registry on the offender's privacy and liberty would be grossly disproportionate to the public interest": the Report at p 9. This recommendation reflected the existing s. 490.012(4) in the *Criminal Code*.

[81] The Senate Committee heard evidence from interest groups as well as experts. There was some evidence before the Senate Committee from persons not expert in the area who believed that judges should not be trusted and should not be given discretion.

[82] Is there a rational connection between removing judicial discretion and the Objective for the registry? The evidence concerning the accuracy of prediction of recidivism does not demonstrate a rational connection. There was no data to suggest that any offender not included on the registry had reoffended and that the police were not able to find the offender and make an arrest quickly.

[83] I find that a judge is capable of assessing the potential for recidivism of a particular sex offender that will be as accurate as any professional in an unstructured analysis. There is no causal connection proved by the Crown between the public interest of effective investigations of crime of a sexual nature and removing all discretion of judges in determining which of the offenders will be put on the registry as set out in *SOIRA* 2004. In other words, there is no rational connection between registering **every** sexual offender and the speed by which the police are able to make an arrest.

Registration for Life

[84] Is there a rational connection between achieving the Objective and putting someone on the registry for life if they have been convicted of two sexual offenses? As set out above, in the case before me, the amendments require me to put Mr. Ndhlovu on the registry for life.

[85] I find that there is no rational connection.

[86] As with removal of judicial discretion, there was no evidence before the Senate Committee, nor in the Report, nor before me, that suggested that putting an offender on the registry for life would assist the Objective. There was no evidence before me that keeping an offender on the registry for life would make any difference to investigations by police officers.

[87] In this discussion, rates of recidivism are important because keeping someone on the registry for life could be valuable if the likelihood of re-offence continued throughout the life of a sexual offender. However, if the likelihood of re-offence is minimal, then the cost of

maintaining the registry, both financial and the cost to the individual's s 7 rights, is not justified, and it can make the registry cumbersome and not as usable.

[88] The expert evidence before me from both the Crown expert, Dr. Hanson, and the Defense expert, Dr. Zgoba was largely consistent. Both of them agreed that the recidivism rates are low for sexual offenders and that re-offence risk drops off to background levels after 15 to 20 years of no re-offense after release. This is not nearly as long as lifetime registration.

[89] Dr. Hanson said that he is not aware of any recidivism study conducted on people who either were or were not on the registry between the enactment of *SOIRA* in 2004 and the amendments enacted in 2011. Canadian registration status has not been used in any variable recidivism studies that Dr. Hanson was aware of. In other words, there was no study by the federal government to determine whether the existing enactment had made a difference to recidivism rates or that increasing the length of registration would make any difference to the speed by which the police could investigate a sexual crime.

[90] The Crown argues that having two offences makes a person more at risk to commit another sexual offence. First, there was no evidence before me nor the Committee that suggested this was true. Further, there is a difference between two convictions for two offences that have occurred over time and the one before me, where Mr. Ndhlovu was at a sex party and thereafter pled guilty to two offences, one of which was minor and both of which occurred at that party. The evidence of Dr. Hanson on the recidivism of an offender who was being sentenced for a second offence was related to historical subsequent offences, not similar to the circumstances before me.

[91] Dr. Hanson said that after 10 years offence free, a substantial portion of the sex offender group has crossed something he termed as a "dissident threshold". That means that the risk for that group is so low as to be negligible, or at the population risk level. After 20 years, just about all sexual offenders have crossed that "dissident threshold".

[92] Dr. Zgoba said that after the 15 to 20 year mark offence-free, a sex offender has the same risk level as the general population. This is a reason, she said, it lacks utility to put an offender on a life-time registry. She said that this was ultimately a misuse of resources. She gave evidence based on research published in Canada that every five years an offender is in the community offence-free, recidivism decreases by 50%. Further, sexual offenders tend to "age out" which is typical for any offence. Finally, most re-offences tend to occur in the first 3 to 5 years.

[93] Therefore, it cannot be said that putting a sex offender on the registry for more than 20 years is rational unless there is something about the offender and/or the offense that would lead a judge to determine that for the safety of society, that offender should be so registered. This approach requires judicial discretion.

[94] The measure appears to me to be punitive.

Conclusion

[95] The Crown has not established on a balance of probabilities that there is a rational connection between the amendments, being removal of judicial discretion and putting an offender with two offences on the registry for life, and the Objective.

[96] I turn now to a consideration as to whether those measures minimally impair the rights and freedoms of Mr. Ndhlovu or anyone in his position.

2. Minimal Impairment

[97] The question at this stage of the analysis is "whether the limit on the right is reasonably tailored to the objective. The inquiry into minimal impairment asks 'whether there are less harmful means of achieving the legislative goal' … The burden is on the government to show the absence of less drastic means of achieving the objective 'in a real and substantial manner'": ***Carter v. Canada (Attorney General)***, 2015 SCC 5 at para 102.

[98] I note here that the issue we are addressing is whether the elimination of prosecutorial discretion and judicial discretion minimally impairs the rights at issue. This does not mean that there must be no impairment to an offender. Similarly, it does not mean that there is no limit to the actions of the government. Even if the measures are rationally connected to the objective, those measures should minimally impair the right in question: ***Oakes*** at para 70. Here, the right is privacy and liberty. But it also means minimal in the sense of incursion into the life of an offender commensurate with the seriousness of the crime and the circumstances of that offender.

[99] I set out in detail in ***Ndhlovu Part 1*** how the privacy and liberty of Mr. Ndhlovu was affected by a lifetime registration on the SOIRA registry.

[100] There was evidence before the Senate Committee about the proposed legislation's incursions into the privacy of a sexual offender.

[101] The federal Privacy Commissioner appeared before the Senate Committee on April 15, 2010 on the Committee's review of the proposed enactment. She expressed concern that it was critical, given the proposed incursions into privacy, to evaluate beforehand "whether the measures that were being proposed were necessary. She asked whether the intrusions into privacy are proportional to the benefits to be derived from a law enforcement and public safety perspective." She stated that she had in 2009:

> ... recommended a formal evaluation of the effectiveness of the legislation and the registry by an independent third party. This has not happened; rather, the government has simply proposed an expansion of the existing regime." *Senate Standing Committee on Legal and Constitutional Affairs*, 15-4-2010, 3:75.

[102] Further, the Privacy Commissioner testified that:

> The RCMP officer in charge of the National Sex Offender Registry testified before the House standing committee last spring that they have not solved any crimes where the offender was unknown. When asked about statistics regarding the use of the registry to solve crimes, he testified that there have been a few cases where the offender/suspect was already known to the investigating body and the registry was used to provide updated information, such as a photograph or address, which advanced the investigation. It has not helped in any cases where the crime was unsolved and the offender was unknown.
>
> As this suggests, there is little or no evidence that the registry is effective. The Ontario sex offender registry has been operational for almost 10 years. In 2007, the Ontario Auditor General observed, "there is little evidence demonstrating the effectiveness of registries in reducing sexual crimes or helping investigators to solve them and the ministry has yet to establish performance measures for its registry.

> A 2009 study of New York's Sex Offender Registration and Notification Act concluded that there was no significant impact on total arrests, arrests for subsequent sex offenses or on the number of first-time arrests for sex offending. Similarly, a 2009 state-funded study of New Jersey's sex offender registration and notification law,… Megan's law, probably the first of its kind, concluded that the system failed to either deter sexual crimes or reduce the number of victims. These studies are among many that raise serious questions about the effectiveness of sex offender information registries from an economic and public safety perspective. Their conclusions also strongly support our [Privacy Commissioner] recommendation last spring that the Canadian registry be assessed for effectiveness for the same reason, as well to evaluate whether its numerous privacy incursions are justifiable.
>
> In May 2009, five years after the implementation of the legislation, our office received a privacy impact assessment of the National Sex Offender Registry from the RCMP.… It addressed some of the concerns we expressed about internal handling and verification of personal information, as well as greater transparency about the operation of the program. It did not, however, address the broader question of the overall effectiveness of the system.
>
> No information is available about the total or current costs of the program, the extent to which the registry is used and whether it is effective in preventing or solving sexual offenses.
>
> The proposed expansion of the current sex offender Registry system, without an adequate assessment of its effectiveness, is a questionable approach to the serious challenge of protecting the public from sex offenders while ensuring that Canadians' constitutional rights to privacy are respected: *Senate Standing Committee on Legal and Constitutional Affairs*, 15-4-2010, 3:75 – 3:76

[103] At the hearing before me, the Crown did not present any evidence on the questions and issues raised by the Privacy Commissioner before the Senate Committee. I take it that the Crown did not put that evidence before me because it does not exist.

[104] Dr. Hanson stated that he had carefully looked for, and not found, any literature or even casual reports on the consequences and efficacy of *SOIRA* before 2011. He had talked to the RCMP and it had not identified any research reports, analyses, or unpublished reports that addressed the efficacy of the Canada sex offender registry. Therefore, there is no research to justify removing judicial discretion from an assessment of an appropriate length of time for a sexual offender to be placed on the registry.

[105] The statistical evidence before me by Dr. Hanson and Dr. Zgoba reveals that very few sexual offenders are ever convicted for a second time. This means that the very large majority of sexual offenders that are put on the registry will not assist the police in their investigation of a stranger sexual assault. We must remember that statistically, most sexual offenders are known to the victim.

[106] Laws that impinge on life, liberty or security of the person must not be arbitrary, overbroad, or have consequences that are grossly disproportionate to their object: ***Carter*** at para

72. Therefore, an analysis at this stage must consider whether the Objective is disproportionate to the particular incursion into the individual's privacy.

[107] In ***Hutterian Brethren of Wilson Colony v Alberta***, 2009 SCC 37 the Court said the following:

> The question at this stage of the s. 1 proportionality analysis [minimal impairment] is whether the limit on the right is reasonably tailored to the pressing and substantial goal put forward to justify the limit. Another way of putting this question is to ask whether there are less harmful means of achieving the legislative goal.

[108] I shall now discuss whether removal of judicial discretion minimally impairs the individual's right to privacy or liberty.

Judicial Discretion

[109] The question is, therefore, whether the means chosen by the government in *SOIRA* 2011 were necessary to achieve the Objective. There were less drastic means set out in s 491.012(4) of *SOIRA* 2004 that provided for limited judicial discretion in particular circumstances: "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."

[110] The Crown produced no evidence that suggested that judicial discretion had caused any difficulty for the police in their investigations of sexual offences. As discussed above, Dr. Hanson pointed out that there had been no research on the impact of *SOIRA* 2004. Further, the Crown did not provide any evidence of what was before Parliament to support the removal of judicial discretion. Therefore, there was no reason for the government to remove judicial discretion.

[111] The evidence given, as discussed above, suggested that judges are capable of making judgments about risk for particular offenders. As set out above, the Crown expert said that educated lay persons (including judges) were as capable of making an unstructured risk assessment as were trained professionals. The only difference in the accuracy of risk assessment could be found when an actuarial tool was used by a trained professional, but the difference in risk assessment was not marked. Further, the unstructured risk assessment by a judge or a trained professional was more cautious than when an actuarial tool was used.

[112] Judicial discretion permits the court to assess whether the imposition of a period of time on the registry is justified in the particular circumstance of the offence and the offender. Section 490.012(4) of the *Criminal Code*, in existence from 2004 to 2011, gave the judiciary the obligation to weigh those factors to ensure that the court "... 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, ...". The court's discretion was restricted by the legislation, a policy decision that the Parliament was entitled to make without taking away entirely the liberty of the offender.This mechanism ensured that there would be minimal impairment in the circumstances addressed in the section. Completely removing that discretion means that the impairment cannot be minimized in appropriate circumstances.

[113] The elimination of prosecutorial discretion, on the other hand, can be seen as a minimal impairment, as long as discretion remains with the Court. The evidence that only about 50% of those convicted of sexual assault are on the Registry suggests that there was a legitimate concern about ensuring that applications are made by the prosecution for all convicted sexual offenders. The rights of a sexual offender would be minimally affected if there is some ability to address individual circumstances with judicial discretion.

[114] The Crown has not met its burden in showing that the impairment of rights created by eliminating judicial discretion is minimal. There are less harmful means of achieving the legislative goals and those were set out in s. 491.012 in the *SOIRA* 2004 legislation. The elimination of prosecutorial discretion is, however, saved by s. 1 of the Charter, as long as there is judicial discretion.

Life Registration on SOIRA

[115] The Crown has not demonstrated that the registration of Mr. Ndhlovu, or someone like him on the *SOIRA* registry for life is proportional to the pressing and substantial objective of enabling the police to have a database of offenders to which they can turn when faced with a sexual offence and an unknown sexual offender.

[116] Mr. Ndhlovu submits that the government has infringed the *Charter* by requiring a court to put an offender on the registry for life if that offender has been convicted of two offenses. The *Criminal Code* does not say "a previous offense." In the case before me, Mr. Ndhlovu has pled guilty and been convicted of two offenses on the same indictment arising from the same set of circumstances with two women, one of the offences considered to be minor. This is caught by the legislation and there is no discretion in the court (or the Crown) to put Mr. Ndhlovu on a registry for a shorter period of time. He must be put on the registry for life with all the reporting and personal restrictions that entails.

[117] The evidence about recidivism as discussed above was valuable in assessing whether putting someone on the registry for life would assist the police in investigating sexual offences.

[118] The evidence of the experts was that most sexual offences are committed against someone known to the victim. Certainly, in the case before me that was true.

[119] Logically, the police would not need the registry to find the perpetrator of a sexual offence when the victim knows the offender. Having a registry would not assist the police in these cases to find the stranger who had committed a sexual assault. The registry is primarily valuable in tracking down unknown offenders. It apparently has assisted police to locate someone who is known because of the updated personal information.

[120] The question then is, what value is there to the police to have a name on the registry when someone is convicted of an offense against someone they know? Also, what value is there in having someone on the registry for life who, by all statistical analysis, is not likely to offend once five years has passed and who will not offend once 15 or 20 years have passed?

[121] This takes us to an analysis of recidivism rates which give us valuable data as to how many people reoffend and when they reoffend. I discussed those data above as the base rate for sexual offence recidivism. As I said earlier, from these statistics it is evident that re-offences occur more in the first five years after a sexual offence has been perpetrated than in the next ten

years. It is equally evident that the vast majority of sexual offenders do not reoffend in the fifteen years after their release.

[122] In the Senate Committee hearings, Dr. Paul Fedoroff, Director, Sexual Behaviours Clinic, Royal Ottawa Health Care Group gave evidence relying on Dr. Hanson's research. He pointed out to the Committee the same statistics I have set out herein as given by Dr. Hanson. He stated to the Committee that the rate of sexual offences around the world is decreasing. Finally, he recited research that showed that "the majority of offences occur during the first year a sex offender is released into the community. The risk of reoffending drops for every year that person is in the community and has not reoffended." *Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs*, Third and fourth meetings on: Bill S-2, An Act to amend the Criminal Code and other Acts, April 21, 2010 and April 22, 2010; 22-4-2010, 4:7, 4:8.

[123] Dr. Hansen pointed out that, as time goes on, the likelihood of recidivism decreases. The longer a sexual offender remains offence free, the less likely they are to reoffend, that is, the greatest likelihood of re-offence is within the first five years. Further, Dr. Hanson said that the likelihood of recidivism is roughly cut in half every five years that the individual is offense free in the community.

[124] It was Dr. Hansen's belief, expressed at trial, that rather than considering all sexual offenders as continuous, lifelong threats, society would be better served when legislation and policies consider the cost/benefit break point after which resources spent tracking and supervising low-risk sexual offenders are better re-directed toward the management of high-risk sexual offenders, crime prevention, and victim services.

[125] The evidence establishes that the mandatory imposition of a lifetime registration does not minimally impair the rights of a person convicted of two sexual offences. A person convicted of a minor sexual assault and a more serious assault in the same time frame, as occurred here, is subject to the same severe consequences as someone convicted of two serious sexual assaults on two separate occasions. This is not minimal impairment. While the Court owes deference to the legislature and s. 1 does not require perfectly tailored legislative solutions, this mandatory imposition of lifetime registration, no matter the circumstances, is not tailored at all. I conclude that the lifetime imposition of mandatory registration is not a minimal impairment.

(a) Salutary Benefits and Deleterious Effects

[126] This stage of the ***Oakes*** analysis "weighs the impact of the law on protected rights against the beneficial effect of the law in terms of the greater public good": ***Carter*** at para 122.

[127] The first three stages set out above are anchored in an assessment of the law's purpose. This fourth stage takes "full account of the severity of the deleterious effects of a measure on individuals . . .'" ***Hutterian Brethren*** at para 76.

[128] The Crown suggests that this stage of the analysis should take into account the "proportionality between the deleterious and the salutary effects of the measures" citing ***R v Dagenais v Canadian Broadcasting Corp***, [1994] 3 SCR 835. This part assesses the severity of the deleterious effects of a measure on individuals or groups.

[129] There must be proportionality between the effects of the measures and the objective identified as of "sufficient importance": ***Oakes*** at para 70. ***Oakes*** discusses how far the court must go in its inquiry into those effects. There is no doubt that the effect of any impugned

measure will infringe the *Charter*. The inquiry must go further than this. "Even if the impugned measure passes the first two parts of the proportionality test, the measure may, nonetheless fail at this third test. The more severe the deleterious effects of a measure, the more important the objective must be if the measure is to be reasonable and demonstrably justified in a free and democratic society": ***Oakes*** at para 71.

[130] The question is: does the government need a database that includes all sexual offenders to achieve its objective? And do some of the offenders need to be registered for life? The Crown put in no evidence to support that the additional measures included in *SOIRA* 2011 would enhance the ability of the government to achieve its objective over the measures already contained in *SOIRA* 2004. The Crown argues that Parliament determined that judicial discretion undermined the effectiveness of the *SOIRA* registry. However, I have no evidence of this.

[131] The evidence from Dr. Hanson and Dr. Zgoba on recidivism demonstrates that there are a large number of offenders, if all sex offenders are put on the registry, that will never offend again. The requirements for reporting and their privacy interests do not justify everyone being on the registry.

[132] The Crown cited a number of cases decided before the 2011 amendments. I am not considering those cases because they simply agree that the 2004 statute had a minimal impact on offenders. I am not deciding that point.

[133] Dr. Zgoba was involved in research on the effects of registries on recidivism rates in the USA. There was no effect on recidivism rates.

[134] Further, Dr. Zgoba's research has also found that the vast majority of juvenile sex offenders do not go on to be adult sex offenders. This evidence demonstrates that a young person is not a danger to society and that having their name on a registry for life will serve no purpose in assisting the police to find a suspect in a sex offence by someone unknown.

[135] Dr. Zgoba gave evidence, which I accept, that being on a registry can have a deleterious effect on the offender. This is particularly important when considering putting an offender on a registry for life. In a research project in which Dr. Zgoba was involved in the UK, questions were centred on how persons who were registered on a registry were reacting to/feeling about being on the registry. The registry in the UK protects the identity of the registrant, as does the Canadian registry. She stated that those persons were asked questions about hopelessness, stress, anxiety and other negative feelings. The persons registered were fearful that the system would evolve into one similar to the USA where their names would be published generally to the public.

[136] Dr. Zgoba described for the UK how the media was able to get information about sex offenders on the registry and publish that information, notwithstanding that it was protected information. However, she gave the opinion that if the UK did not follow the practice in the USA of publishing the names of sexual offenders, the potential negative consequences of the registry on the offenders registered would be minimized.

[137] Here there are alternative means of achieving the Objective. This is demonstrated in *SOIRA* 2004. Given the circumstances of this case, I do not need to balance the Objective against the deleterious effects. I have already examined and accepted the objective.

[138] As to the deleterious effects, because there are alternative means of achieving the objective, which have already been demonstrated, I do not have to do a "head to head" analysis

as to whether *SOIRA* exacts too much from the sex offender. This case is not about a challenge to *SOIRA* as a whole. Rather it is about the impairment to Mr. Ndhlovu and whether there are alternatives that are less deleterious to the offender and that achieves the objective.

[139] One can also question the value of the registry compared to the costs of having everyone on the registry. Here, the opinion of the Crown expert, Dr. Hanson, is important. As set out above Dr. Hanson opined that "blanket policies that treat all sex offenders as "high risk" waste resources by over-supervising lower risk offenders and risk diverting resources from the truly high-risk offenders who could benefit from increased supervision and human service." In cross-examination, Dr. Hanson agreed with a statement he had made earlier that:

> "rather than considering all sexual offenders as continuous, lifelong threats, society would be better served when legislation and policies consider the cost/benefit breakpoint after which resources spent tracking and supervising low-risk sexual offenders are better re-directed towards the management of high-risk sexual offenders, crime prevention, and victim services."

[140] Dr. Zgoba agreed with Dr. Hanson's opinion.

[141] In ***Ndhlovu***, 2016, I also noted that ***Redhead*** found that the reporting requirements at that time, before the amendments, were considerable. Before the amendments in 2011, the reporting requirements under *SOIRA* were a substantial infringement on an offender's liberty especially considering that the reporting requirements under *SOIRA* are enforceable by prosecution and imprisonment: at paragraph 46. I found that the reporting requirements under the old legislation were significant. Under the *SOIRA* 2011, they are even more significant.

[142] There is no doubt that including all persons convicted of a sexual offence, regardless of the nature of the offence or the circumstances in which it has been committed, will give the police a larger database from which they can glean potential suspects when another crime is committed. However, that benefit measured against the impairment of the offender's liberty is simply not justified.

IV. Miscellaneous

[143] The Crown called evidence of some witnesses concerning how the registry operates today. Although this was interesting, it did not address the question before the court. Rather it bolstered the evidence put before the court in ***Ndhlovu***, 2016 for the purposes of the analysis as to whether section 7 of the *Charter* had been breached. I have already made my finding on that point and will not revisit it here.

V. Conclusion

[144] There is no doubt that there is a benefit to society in the police being able to identify sexual offenders quickly. When Parliament was debating this legislation initially, it was clear that the members were concerned about identifying sex offenders relating to children. It was especially ugly cases which led to legislators and Parliament promulgating legislation for registration of sex offenders.

[145] The Supreme Court of Canada has considered section 1 issues relating to mandatory minimum sentences. The court has found that the net was too wide and suggested that

"Parliament could provide for judicial discretion to allow for a lesser sentence where the mandatory minimum would be grossly disproportionate and would constitute cruel and unusual punishment.": ***R v Lloyd*** 2016 SCC 13 at paragraph 35.

[146] The net for registration of sexual offenders is also too wide.

VI. Remedy

[147] I declare that the removal of judicial discretion from the *Criminal Code* respecting the registration of sexual offenders on *SOIRA* registry is unconstitutional and I hereby strike down s 490.012 of the *Criminal Code*.

[148] I declare that s 490.013(2.1), concerning a lifetime on the Registry if convicted of more than one offence, is unconstitutional and I hereby strike down subsection 490.013(2.1).

[149] With respect to Mr. Ndhlovu, given that the section under which I would have placed him on the registry is no longer valid, I will not direct that he comply with *SOIRA*. Further, if it is necessary, given that I have found the requirements of the *Criminal Code* and *SOIRA* as set out above are overbroad and grossly disproportionate (see ***Ndhlovu Part I***), I decline to direct him to comply with *SOIRA*.

Heard on April 10, 11, 12 and 18, 2017.

Dated at the City of Edmonton, Alberta this 9th day of April 2018.

A. B. Moen
J.C.Q.B.A.

Appearances:

Mr. Jason R Russell
Ms. Carrie-Ann Downey
(Justice and Solicitor General)
for the Crown/Respondent

Mr. Elvis Iginla, Mr. Christopher Bataluk
(Iginla & Company)
for the Accused/Applicant