PROVINCIAL COURT OF NOVA SCOTIA

Citation: R. v. J.W., 2010 NSPC 43

Date: [20100706]
Docket: 1991450
Registry: New Glasgow

Between:

Her Majesty the Queen

v.

J.W.

Restriction on publication: **Pursuant to Section 486 C.C.C. there is a ban on the publication of the identity of the Accused and the Complainant**

Judge: The Honourable Judge T. K. Tax

Heard: May 19, 2010
July 6, 2010 - Decision Re SOIRA Exemption

Charge: Section 271(1)(b) CC

Counsel: Edward Joseph McNeill, for the Crown
Stephen Robertson, for the Defence

INTRODUCTION:

[1] On May 19, 2010, J.W. was granted a 15 month conditional discharge in respect of a charge of sexual assault, contrary to section 271(1) of the **Criminal Code of Canada**. The decision of the Court is now reported at **R. v. J.W.**, 2010 NSPC 40.

[2] After granting J.W. a conditional discharge, the Defence made an application for an exemption from the reporting and registration requirements of the **Sex Offender Information Registration Act ("SOIRA")** pursuant to subsection 490.012(4) of the **Criminal Code of Canada**.

[3] The issue for the Court to determine in this aspect of the case of **R. v. J.W.** is whether he has satisfied the court that the impact of an order to report and register under **SOIRA** on his privacy or liberty interests 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 his information as a "sex offender" under **SOIRA**.

ANALYSIS:

[4] As part of their sentencing submissions, the Crown asked the court to make an order to compel J.W. to comply with the requirements of the Sex Offender Information Registration Act ("**SOIRA**"). The Crown's application for that order was made pursuant to section 490.012(1)of the **Code**, which requires the Court to make

that order as soon as possible after the Court has imposed a sentence on a person, for a designated offence referred to in paragraph (a),(c), (c.1), (d) or (e) of section 490.011 of the **Code**. The charge of sexual assault contrary to section 271 of the **Code** is listed in subparagraph 490.011(a)(xvi) as a "designated offence" and there is no doubt that the Crown could apply for this **SOIRA** order.

[5] In addition, since this offence was prosecuted summarily, if an order is made, the duration of that order shall be for a period of 10 years (See section 490.013(2)(a) of the **Code**).

[6] During both counsel's submissions, a question arose whether J.W. could be required to comply with reporting requirements of the **SOIRA** for 10 years since the Court had granted a conditional discharge. In this case, if J.W. successfully completes the period of 15 months on probation, then pursuant to subsection 730(3) of the **Code**, the discharge will become absolute and he would be "deemed not to have been convicted of the offence." However, it is apparent that Parliament contemplated and clearly answered this issue in section 4(2)(b) of the **SOIRA** which requires a person who is subject to an order to report within 15 days after they receive an absolute or conditional discharge.

[7] I have also noted that a person who is subject to a **SOIRA** order may apply for termination of that order pursuant to section 490.015(1) of the **Code**, but in the

circumstances of this case the earliest date upon which J.W. could apply for such termination order, if the court makes this order, is once five years have elapsed since the order was made.

[8] Although section 490.012(1) of the **Code** is framed in mandatory terms, Parliament has provided an exception to that requirement to make a **SOIRA** order if the provisions of section 490.012(4) of the **Code** are met. That section provides as follows:

> "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 the information relating to sex offenders under the Sex Offender Information Registration Act."

A) PROCEDURAL ISSUES

[9] At the sentencing hearing, the Defence applied for a **SOIRA** exemption, and made oral submissions in support of its application pursuant to section 490.012(4) of the **Code.** The Court asked whether the Crown was maintaining its earlier request for an order that J.W. comply with the requirements of the **SOIRA**, and the Crown Attorney confirmed that their position had not changed. As a result, the Court following the process outlined in **R. v.Turnbull**, 2006 NLCA 66 (CanLii) at

paragraphs 37 and 38, asked the Defence counsel whether he wished to call any further evidence on this aspect of the sentencing hearing. The Defence indicated that they did not wish to call any further evidence; they would rely upon the evidence at trial, the pre-sentence report and the letters of reference submitted on the sentencing hearing as well as the findings of fact and conclusions made by the Court in granting J.W. a conditional discharge. The Crown was asked whether they wished to call any further evidence on this application and the Crown Attorney indicated that they did not intend to do so.

[10] Further written submissions were filed by the Defence on May 20, 2010. The Crown was asked to provide any further written submissions by June 9, 2010 if they wished to specifically respond to the Defence request for an order under section 490.012(4) of the **Code**. The Crown decided not to file any further submissions in response to the Defence position on this aspect of the case.

B) BURDEN OF PROOF

[11] It is clear from the case of **R. v. D.B.M.** ,[2006] NS CA 18 at paragraphs 9 and 12 that the offender bears the evidentiary burden of establishing that he or she falls within the exception outlined in section 490.012(4) and that the public interest in investigating crimes of a sexual nature is "clearly and substantially outweighed" by the impact on the offender's privacy and security interests. The Newfoundland and

Labrador Court of Appeal came to a similar conclusion on this point in the case of **R. v. Turnbull**, *supra*, at paragraph 36 as did the Alberta Court of Appeal in the case of **R. v. Redhead**, 2006 ABCA 84 (CanLii) at paragraph 26.

[12] In particular, the Nova Scotia Court of Appeal in **D.B.M.**, *supra* at paragraph 12, concluded that the nature of the inquiry conducted by the trial court is "individualized" and the burden was on the offender to establish, by evidence on the record, that he or she falls within the exception. The court added, however, that evidence of the specific impact of the **SOIRA** order on the offender was <u>not</u> necessarily required.

[13] Likewise, the Newfoundland and Labrador Court of Appeal in **Turnbull**, *supra* at paragraph 36 concluded that there was no onus on the offender to separately adduce evidence directed solely at establishing the impact of the **SOIRA** order. Chief Justice Wells speaking for the Court of Appeal stated that nothing in subsection 490.012(4) prevents a court from relying <u>alone</u> on the evidence called at trial and on the sentencing hearing, in the process of making its determination under that subsection.

[14] I note here that the Nova Scotia Court of Appeal in **D.B.M**. and the Newfoundland and Labrador Court of Appeal in **Turnbull**, came to a different conclusion than the Alberta Court of Appeal in **Redhead,** *supra,* at paragraphs 34 and 35, on the issue of the Defence burden to adduce evidence of the specific impact of the

SOIRA order on the offender. I therefore conclude that the law in Nova Scotia has been established by our Court of Appeal in the **D.B.M**. case, and that the approach of the Alberta Court of Appeal in **Redhead** has not been followed in this province.

C) INDIVIDUALIZED NATURE OF COURT'S ANALYSIS

[15] The Nova Scotia Court of Appeal found guidance for its interpretation of section 490.012(4) in **D.B.M**., *supra,* from the principles outlined in its earlier decision in **R. v**. **Jordan,** [2002] N.S.J. NC.O. 20 which concerned the application of the similarly worded exemption contained in section 487.051(2) of the **Criminal Code** relating to provision of a DNA sample. The Nova Scotia Court of Appeal observed that in **R. v. R.C.**, [2005] SCC 61, the Supreme Court of Canada had endorsed its "highly contextual" and "individualized" approach in **Jordan,** *supra,* and then applied that analysis in **D.B.M.** to the issue of an exemption from **SOIRA** registration.

[16] Mr. Justice Fish, in authoring the majority judgment in **R.C.**, *supra*, determined at paragraphs 29 to 31 that the inquiry of the court is "highly contextual" and must take into account not only that the offence was a primary designated offence but also the particular circumstances of the offence and the character and profile of the offender. Fish J. added that other factors which may be relevant to the court in conducting its analysis would include the criminal record of the offender, the nature of the offence and the circumstances surrounding its commission as well as the impact such order

would have on the offender's privacy and security of the person. He pointed out that this was not an exhaustive list and that the court's inquiry is necessarily "individualized." In the end, the court has discretion to exempt the offender from the requirements of registration if it is satisfied that the offender has established gross disproportionality which in the Supreme Court of Canada's view meant that the offender had the onus of showing that the public interest was "clearly and substantially outweighed" by the individual's privacy and security interests.

[17] The Newfoundland and Labrador Court of Appeal, in delivering its decision in **Turnbull**, *supra,* had the benefit of reviewing both the **D.B.M.** and **Redhead** cases. It is clear from their decision that with respect to the analysis to be conducted by a court under section 490.012(4) of the **Code**, the Newfoundland and Labrador Court of Appeal disagreed with the analytical approach to the issue of gross disproportionality suggested by the Alberta Court of Appeal.

[18] Chief Justice Wells concluded in **Turnbull**, *supra* , at paragraph 31, that the focus of the inquiry by the court is not on whether there is a public interest in having the offender registered, but rather on whether the impact on the offender would be grossly disproportionate to the public interest. Wells CJNL went on to add that there was no conceivable way that an offender could establish gross disproportionality between the impact on him or her of an order requiring registration and the public

interest in protecting society through the effective investigation of crimes of sexual nature without establishing either: no impact or a very low level of impact, on the public interest of his or her not being registered. As part of the assessment that a trial court should conduct, Chief Justice Wells stated at paragraph 33:

> "That, essentially requires consideration of such factors as: the record of the offender; the nature of the offence; circumstances surrounding the offence; whether the offence was committed many years earlier and the record of the offender in the interim; and any other factors bearing on the potential impact of that specific offender not being registered."

[19] In **Turnbull**, *supra*, Wells CJNL said at paragraph 38 that, in conducting the analysis and weighing the evidence heard at trial and on the sentencing hearing, the court should determine the manner and extent to which:

> "(a) making of the order might impact on
> (i) the privacy and liberty of the offender,
> (ii) the abilities or limitations of the offender,
> (iii) the offender as a result of the stigma of being registered,
> (iv) the potential for rehabilitation and reintegration of the offender in the community, and
> (v) any other significant characteristic of the offender; and
>
> (b) failure to make the order might impact the public interest."

[20] From my review of **D.B.M.**, **Turnbull** and **Redhead** cases, a court should conduct an individualized and highly contextual analysis of the evidence in assessing

whether to exempt an offender from the requirements of the **SOIRA** registration, along the following lines:

> (i) assess the impact of registration on the applicant, including the present and future impact on their privacy and liberty interests. Although not being an exhaustive list, other impacts which may also be considered include personal handicaps, the stigma of registration, the importance of rehabilitation and reintegration into the community, economic impacts and the possibility of police harassment;
>
> (ii) assess the effect that an exemption of this particular offender from registration would have on the public interest in protecting society through the effective investigation of crimes of a sexual nature. In this regard, the **SOIRA** presumes a public interest in registering sexual offenders, but in considering this issue, the court may have regard to factors such as any prior related record and the circumstances of those prior criminal offences, the risk of re-offence and the potential nature of the criminal charge if there was to be a re-offending act; and
>
> (iii) conduct an analysis to determine if the effect of registration on the applicant is grossly disproportionate to the public interest in having that person registered in the databank.

D) ANALYSIS AND BALANCING OF COMPETING IMPACTS

[21] In conducting this analysis, I am mindful that section 4 of the **SOIRA** requires "sex offender" to report to the registration center on an ongoing basis after an order is made, within 15 days of changing their residence or their name and yearly since the last time they reported to a registration center under the Act. In addition, a "sex

offender" shall not leave Canada before making a report to a registration center.

[22] Pursuant to section 5 of the **SOIRA**, a "sex offender" is required to give detailed personal information regarding their name, any aliases, date of birth, addresses where they reside and work or go to school, their contact information and their height weight and any physical distinguishing marks.

[23] In addition, section 6 of the **SOIRA** requires a "sex offender" to provide detailed information of every address or location where they will be if they are away from their main residence for a period of 15 consecutive days as well as notifying the registration center of the date they intend to leave Canada and of their actual return to Canada, if they are outside of Canada for at least 15 consecutive days.

(i) Impact on J.W.'s privacy and liberty interests

[24] At the present time, J.W. is living and working in this county, and he has put his plans on hold for joining the Canadian Forces until such time as he has complied with requirements of the probation order and the conditional discharge is made absolute. He advised the court that he wished to enroll in the Canadian Forces, but was concerned that a criminal conviction for a sexual assault would have severe repercussions for a military career. Given the fact that I have ordered a 15 month conditional discharge, the impact of this order on him would have significant consequences on his privacy and liberty interests for the balance of the 10 year period

during which the order would be in force. As mentioned previously, J.W. may apply to terminate a **SOIRA** registration and reporting order, but the earliest date upon which that application could be advanced is in approximately 5 years.

[25] J.W. has expressed a strong desire to join the Canadian Forces and has taken steps toward fulfilling that long-standing career goal. Based upon the evidence at trial and at the sentencing hearing, I have every reason to believe that he will become a member of the Canadian Forces shortly after the 15 month period on probation has expired. As a member of the Canadian Forces, J.W. will, no doubt, be required to make frequent changes of his primary residence due the changing locations of his basic training, ongoing training and field maneuvers as well as placements on tours of duty. These frequent changes, which may be in remote locations inside or outside of Canada, will no doubt have a significant impact on his ability to comply with the **SOIRA** reporting obligations.

[26] In addition, I have no doubt that the circumstances of this offence which resulted from what I have previously objectively characterized at the lower end of sexual assaults would result in a significant ongoing stigma for J.W. if he was ordered to comply with the registration and reporting requirements of the **SOIRA**.

[27] The stigma of registration and reporting would, in my opinion, also impact on the numerous steps taken by J.W. towards his rehabilitation and reintegration into this

community. During the sentencing submissions, Defence counsel provided numerous letters of reference and support for J.W. from members of the community that spoke of his community minded spirit and his good character. It is clear to me that he has strong community support for his rehabilitation and reintegration into the community and moreover, his family and those community members continue to provide support to J.W. to pursue his goal of joining the Canadian Forces. With this strong family and community support, I find that registration and reporting under the **SOIRA** would have a significant impact on J.W.'s effort to rehabilitate himself.

*(ii) Impact on the Public Interest if **SOIRA** Exemption Granted*

[28] In essence, the second part of the analysis to be conducted by the court requires the judge to determine what the impact would be on the public interest if <u>this particular offender</u> was exempted from the **SOIRA** requirements of registration and reporting. While there is a defined public interest in the effective investigation of sexual offenders which is presumptively served by a **SOIRA** order, the court must determine whether the exemption of <u>this offender</u> would have little or no impact on that defined public interest and legislative purpose of a **SOIRA** order.

[29] Looking at the relevant factors, J.W. had no prior record as either a young person under the **Youth Criminal Justice Act** or the **Criminal Code of Canada**. There is no evidence whatsoever, nor is there any reasonable basis to conclude that

he has a propensity to commit further sexual offences. He is a very youthful first time adult offender, and based on the evidence which I heard at the trial and on the sentencing hearing, I have found that he is a very low risk to re-offend and commit an offence of a sexual nature in the future.

[30] I have earlier described the nature and circumstances of the offence in question, and I note that J.W. was well known to the victim of the offence as they were both young teenagers who were in a boyfriend and girlfriend relationship at the time. The offence was not "predatory" in nature, but rather, it arose out of an impulsive action, a failure to heed the request of his girlfriend and to exercise appropriate self-control. There was no issue of taking advantage of any age disparity between the victim and J.W. , and I do not find that there is any basis to conclude from the circumstances of this case that J.W. would, if placed in some position of trust in the future, breach that trust and commit a sexual offence.

[31] Furthermore, J.W. has accepted responsibility for the offence, expressed his remorse and has seriously reflected on his own behaviour as well as being counseled by family members. He will have the benefit of 15 months of counseling, treatment or programs to assist in his rehabilitation during his probationary period. In addition, J.W. enjoys a great deal of community support which were advanced through the letters of reference submitted at the sentencing hearing, and no doubt, those community

members will assist in his rehabilitation. I find that this extensive community support also leads me to conclude that J.W. will be successful in his rehabilitation and successfully reintegrate himself into the activities of the community as a productive citizen.

[32] As a result, I conclude that there would be little to no impact on the public interest of maintaining a sexual offender registry for the purpose of the effective investigation of crimes of a sexual nature, if J.W. was exempted from the reporting and registration requirements of the **SOIRA**.

(iii) Balancing Impacts and Assessing Gross Disproportionality

[33] At the outset, it is important to note that Parliament has established a very high threshold for an offender to meet in order to be exempted from the requirements of the **SOIRA** pursuant to subsection 490.012(4) of the **Code**. I acknowledge that it would be difficult for an offender to establish that the impact on their privacy and liberty interests would be "grossly disproportionate" unless there was either no impact or a low level of impact on the public interest if he or she were not so registered.

[34] The Nova Scotia Court of Appeal in **D.B.M.**, *supra*, at paragraph 9 held that "grossly disproportionality" for the purpose of section 490.012(4) of the **Code** would be established where the public interest is "clearly and substantially outweighed" by

the individual's privacy and security interests. The Alberta Court of Appeal in **Redhead**, *supra*, at paragraph 43 determined that the term "grossly disproportionate" meant a "marked and serious imbalance" and that determination was endorsed by the Newfoundland and Labrador Court of Appeal in **Turnbull**, *supra*, at paragraph 38.

[35] After analyzing the present and future impacts on J. W's privacy and liberty interests and doing the analysis to determine the impact on the public interest if J.W. was not required to register and report on an ongoing basis under the **SOIRA**, I have concluded that the impact on him would be "grossly disproportionate" to the public interest in protecting society through the effective investigation of crimes of a sexual nature by ordering him to comply with the provisions of the **SOIRA**. It is my view that, J.W's privacy and liberty interests clearly and substantially outweigh the public interest in ordering him to register and report on a regular and ongoing basis to a **SOIRA** registration center.

[36] Pursuant to subsection 490.012(5) of the **Code,** the court is required to give reasons for its decision if satisfied that the offender established that, if an order were made the impact on them would be grossly disproportionate to the public interest in protecting society through the effective investigation of crimes of a sexual nature. In reaching my conclusion that J.W. has satisfied me of the gross disproportionality, I am mindful of the fact that the public interest is not necessarily served by the

registration of a particular offender if the registration of that offender would have little or no impact on the investigation of crimes of a sexual nature. I am satisfied that this is one of those cases.

[37] In the circumstances of this case and after considering all of the factors relevant to the issue to be determined under section 490.012(4) of the **Code**, I have concluded that the Defence has satisfied me on the evidence from the trial and at the sentencing hearing that gross disproportionality has been established, and accordingly, the Crown's application to have J.W. ordered to comply with the registration and reporting requirements of the **SOIRA** is hereby dismissed.

. . . .
THEODORE K. TAX
A Judge of the Provincial Court
For the Province of Nova Scotia