SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. Vitale*, 2021 NSSC 109

Date: 20210401
Docket: Halifax, No. 494271
Registry: Halifax

Between:

William Richard Vitale

Appellant

v.

Her Majesty the Queen

Respondent

Decision

Judge:	The Honourable Justice Peter P. Rosinski
Heard:	January 20, 2021, in Halifax, Nova Scotia
Counsel:	Kathryn Piché, for the Appellant Peter Dostal, Senior Crown Attorney for the Respondent

By the Court:

Introduction

[1] On September 17, 2018, Mr. Vitale pled guilty to two (summary conviction by consent - s. 606(4) *Criminal Code* - "*CC*") counts that he committed offences contrary to s. 163.1(4) of the *Criminal Code* between January 1, 2013 and December 31, 2013, and January 1, 2014 and December 31, 2014.[1]

[2] For these charges of possession of child pornography, a joint recommendation on sentence was approved by the Honourable Judge Michael B. Sherar. On August 14, 2019, Mr. Vitale was sentenced to 11 months custody and 2 years probation. He was also ordered to forfeit the child pornography material in question, provide a sample of his DNA, and as *mandatorily* required in such circumstances by s. 490.012 (1) *CC*, to register as a sex offender pursuant to the SOIRA (*Sex Offender Information Registration Act*, S.C. 2004, c. 10).

[3] Mr. Vitale unsuccessfully argued to Judge Sherar that s. 490.012(1) *CC* is unconstitutional. He claimed section 490.012 violates section 7 and section 12 of

[1] The ambit of what constitutes "child pornography" was recently canvassed by the court in *R v McSween*, 2020 ONCA 343.

the *Canadian Charter of Rights and Freedoms*, because it is arbitrary, overbroad and grossly disproportionate in effect - *inter alia*, because it allows a sentencing-judge no discretion in that regard, since SOIRA orders must be imposed on all offenders who commit "designated" offences per s. 490.011 and 490.012(1) *CC*.

By way of judicial review[2]

[2] Because there is no statutory right of appeal (regardless whether the matter proceeded as a summary conviction or an indictable offence). The current wording of s. 490.014 - Appeal, (in force since April 5, 2011), derives from an amendment found in S.C. 2010, c.17, s. 7. Previously the discretionary order in s. 490.012 could be appealed - See Justice Oland's statement for the court in *R v (W.) (J.J.)*, 2012 NSCA 96 at para. 51: "In a letter sent to the Court a month after the hearing of the appeal, the Crown correctly pointed out that section 5 of the *Protecting Victims from Sex Offenders Act*, which came into force April 15, 2011, eliminated the exemption under s. 490.012 (4) and made offenders found guilty of the designated offences subject to an order for automatic inclusion in the national registry. Any judicial discretion to decline to impose such orders for the reasons set out in the former s. 490.012 (4) vanished." Judicial review has been accepted as the appropriate procedural avenue to challenge a mandatory SOIRA order such as in the case at bar – See *R v Toth*, 2019 ABCA 200; *R v Ndhlovu*, 2016 ABQB 595 (where the court found a breach of section 7 of the *Charter* "insofar as [s. 490.012] does not provide the court with discretion to consider the circumstances of the particular offender and a particular crime when determining registration on the registry" – i.e. the legislation is overbroad and grossly disproportionate to its stated purposes. Having found a section 7 *Charter* breach the court did not feel it necessary to go on to consider the section 12 *Charter* arguments - see para. 13) and 2018 ABQB 277 (the Crown was unable to justify the legislation pursuant to section 1 of the *Charter*.) Notably, in the following two cases, appeal courts have found that a *civil* route of appeal was available because the relief sought by those accuseds was for a "stand-alone" declaration as to the constitutionality of provisions of the *Criminal Code*, and the relief they sought was not connected to their individual circumstances: *R v Ndhlovu*, 2018 ABCA 260 (s. 490.012) and *R v Boutilier*, 2016 BCCA 24 (where the trial judge found that s. 753(1) *CC* overbroad and in violation of section 7 of the *Charter* because it excluded consideration of an offender's future treatment prospects at the designation stage; however s. 753(4.1) did not violate s. 7 *Charter*. Moreover, neither section effected a violation of section 12 of the Charter. The judge went on to find the violation could not be justified under section 1 of the Charter. On the merits appeal, the appeal court found neither s. 753(1) or s.753 (4.1) *CC* unconstitutional. Their decision was upheld: *R v Boutilier*, 2017 SCC 64.) Although generally the prerogative writ of *certiorari* is only available for jurisdictional errors by statutory courts such as Provincial Court rather than for errors of law – see para. 21 in *R v Awashish*, 2018 SCC 45 - in this case, although there has been a final determination of guilt- see *R v Cunningham*, 2010 SCC 10 at para. 57- *R v Vavilov*, 2019 SCC 65 has clearly opened the door for a judicial review in the circumstances of this particular case.

[4] Mr. Vitale asks this court to conclude that s. 490.012(1) *CC* is unconstitutional, as he argued before Judge Sherar.[3]

[5] Bearing in mind that Mr. Vitale only challenges the constitutionality of s. 490.012(1) and argues that if unconstitutional no SOIRA order may be made against him, I am satisfied that the substance of the procedure here is civil and declaratory in nature, and therefore the Nova Scotia Supreme Court has the power to grant the relief sought.[4]

[6] I conclude that Judge Sherar made no reversible errors in his citation, interpretation and application of the relevant law.[5]

[7] Therefore, I dismiss Mr. Vitale's request for a declaration under s. 52 of the *Constitution Act*, 1982, that s. 490.012(1) *CC* is of no force and effect because it violates section 7 or section 12 of the *Canadian Charter of Rights and Freedoms*.

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[3] The Record herein includes: the December 10, 2018 sworn affidavit of Dr. Vitale - including Exhibits A, B and C being letters (December 22, 2016 and April 10, 2018) from psychologist Pauline Faulkner, psychiatrist Dr. Joseph Sadek, (March 26, 2018), and clinical psychologist Dr. Brad Kelln (April 9, 2018); An Agreed Statement of Facts per s. 655 *CC*.

[4] This decision addresses only the first stage of a bifurcated process agreed to by counsel – that is whether there has been a violation of section 7 or 12 of the *Charter*. If the court had found a violation, then the second stage would have been necessary – whether the State could justify the violations pursuant to section 1 of the *Charter*.

[5] Although Judge Sherar did not expressly reference the "reasonable hypothetical" put forward by Mr. Vitale, the issue was presented in both written form (p. 16 Crown brief) and in oral argument by the Crown and Mr. Vitale's counsel which preceded the oral decision by Judge Sherar. I conclude he did turn his mind to that aspect, and it was an oversight that he did not specifically reference his rejection of a violation of sections 7 and 12 under the reasonable hypotheticals analysis. Nevertheless, I will address this afresh below.

Standard of review

[8] This court is both a criminal trial court (for indictable criminal offences - and incidentally a summary conviction appeal court) and the only criminal court of first instance to which an application for judicial review may be made. It is only in the latter sense that Mr. Vitale brings his case before this court.

[9] Mr. Vitale argues that Judge Sherar erred in his citation, interpretation or application of the law when he concluded section 490.012(1) is not unconstitutional.

[10] Whether in the case of a criminal appeal or judicial review, where the court is undertaking a substantive review of a lower court's citation, interpretation and application of law in the context of "constitutional questions", a correctness standard of review prevails - *R v Vavilov*, 2019 SCC 65.

[11] Therein, the majority stated:

> II. Determining the Applicable Standard of Review
>
> 16 In the following sections, we set out a revised framework for determining the standard of review a court should apply when the merits of an administrative decision are challenged. It starts with a presumption that reasonableness is the applicable standard whenever a court reviews administrative- decisions.
>
> 17 The presumption of reasonableness review can be rebutted in two types of situations. The first is where the legislature has indicated that it intends a different standard or set of standards to apply. This will be the case where the legislature explicitly prescribes the

applicable standard of review. It will also be the case where the legislature has provided a statutory appeal mechanism from an administrative decision to a court, thereby signalling the legislature's intent that appellate standards apply when a court reviews the decision. *The second situation in which the presumption of reasonableness review will be rebutted is where the rule of law requires that the standard of correctness be applied. This will be the case for certain categories of questions, namely constitutional questions, general questions of law of central importance to the legal system as a whole and questions related to the jurisdictional boundaries between two or more administrative bodies*. The general rule of reasonableness review, when coupled with these limited exceptions, offers a comprehensive approach to determining the applicable standard of review. As a result, it is no longer necessary for courts to engage in a "contextual inquiry" (*CHRC*, at paras. 45-47, see also *Dunsmuir*, at paras. 62-64; *McLean*, at para. 22) in order to identify the appropriate standard.

…

51 Second, we note that not all legislative provisions that contemplate a court reviewing an administrative decision actually provide a right of appeal. *Some provisions simply recognize that all administrative decisions are subject to judicial review and address procedural or other similar aspects of judicial review in a particular context. Since these provisions do not give courts an appellate function, they do not authorize the application of appellate standards. Some examples of such provisions are ss. 18 to 18.2, 18.4 and 28 of the Federal Courts Act, which confer jurisdiction on the Federal Court and the Federal Court of Appeal to hear and determine applications for judicial review of decisions of federal bodies and grant remedies*, and also address procedural aspects of such applications: see *Khosa*, at para. 34. Another example is the current version of s. 470 of Alberta's *Municipal Government Act*, R.S.A. 2000, c. M-26, which does not provide for an appeal to a court, but addresses procedural considerations and consequences that apply "[w]here a decision of an assessment review board is the subject of an application for judicial review": s. 470(1).

…

C. *The Applicable Standard Is Correctness Where Required by the Rule of Law*

53 *In our view, respect for the rule of law requires courts to apply the standard of correctness for certain types of legal questions: constitutional questions*, general questions of law of central importance to the legal system as a whole and questions regarding the jurisdictional boundaries between two or more administrative bodies. *The application of the correctness standard for such questions respects the unique role of the judiciary in interpreting the Constitution and ensures that courts are able to provide the last word on questions for which the rule of law requires consistency and for which a final and determinate answer is necessary*: *Dunsmuir*, at para. 58.

54 When applying the correctness standard, the reviewing court may choose either to uphold the administrative decision maker's determination or to substitute its own view: *Dunsmuir*, at para. 50. While it should take the administrative decision maker's reasoning

into account -- and indeed, it may find that reasoning persuasive and adopt it -- the reviewing court is ultimately empowered to come to its own conclusions on the question.

(1) Constitutional Questions

55 *Questions regarding the division of powers between Parliament and the provinces, the relationship between the legislature and the other branches of the state, the scope of Aboriginal and treaty rights under s. 35 of the Constitution Act, 1982, and other constitutional matters require a final and determinate answer from the courts. Therefore, the standard of correctness must continue to be applied in reviewing such question*s: *Dunsmuir*, para. 58; *Westcoast Energy Inc. v. Canada (National Energy Board)*, [1998] 1 S.C.R. 322.

56 *The Constitution -- both written and unwritten -- dictates the limits of all state action. Legislatures and administrative decision makers are bound by the Constitution and must comply with it.* A legislature cannot alter the scope of its own constitutional powers through statute. Nor can it alter the constitutional limits of executive power by delegating authority to an administrative body. In other words, although a legislature may choose what powers it delegates to an administrative body, it cannot delegate powers that it does not constitutionally have. The constitutional authority to act must have determinate, defined and consistent limits, which necessitates the application of the correctness standard.

57 Although the *amici* questioned the approach to the standard of review set out in *Doré v. Barreau du Québec*, 2012 SCC 12, [2012] 1 S.C.R. 395, a reconsideration of that approach is not germane to the issues in this appeal. However, *it is important to draw a distinction between cases in which it is alleged that the effect of the administrative decision being reviewed is to unjustifiably limit rights under the Canadian Charter of Rights and Freedoms (as was the case in Doré) and those in which the issue on review is whether a provision of the decision maker's enabling statute violates the Charter* (see, e.g., *Nova Scotia (Workers' Compensation Board) v. Martin*, 2003 SCC 54, [2003] 2 S.C.R. 504, at para. 65). *Our jurisprudence holds that an administrative decision maker's interpretation of the latter issue should be reviewed for correctness, and that jurisprudence is not displaced by these reasons.*
[My italicization added]

[12] In this judicial review, I will employ a correctness standard in scrutinizing Judge Sherar's citation, interpretation and application of the relevant statutory

authority and the *Canadian Charter of Rights and Freedoms*. To the extent that he had to make factual findings, these are subject to a "reasonableness" standard.[6]

Mr. Vitale's position

[13] Before Judge Sherar, his position was as follows:[7]

> [Mr. Vitale's counsel submitted]
>
> "So I ask the court to find a violation of both section 7 and 12 of the Charter for declaration that section 490.012 is unconstitutional and no force and effect to the extent that it does not allow for judicial discretion not to make a sex offender registry order, and it's further requested that the court exercise its discretion not to make an order in Dr. Vitale's case. And if granted, Dr. Vitale reserves the right to respond to any section 1 [Charter] analysis… arguments offered by the Crown at a later date."

[14] Judge Sherar summarized Mr. Vitale's position as:

> "Section 490.012(1) of the *Criminal Code* creates a mandatory requirement that in order to comply with the provisions of SOIRA be imposed when an offender receives a sentence for possession of child pornography under section 163.1(4) CC. The imposition of such a SOIRA order has not always been mandatory. Under SOIRA's enactment in 2004, section 490.012(4) CC provided an exception that dictated that a court was not required to make a SOIRA order if the impact of an order on the offender would be grossly disproportionate to the public interest and societal protection through effective crime investigation. This

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[6] In contrast, in the case of a criminal appeal the standard of review would be: 45 "This is also consistent with the recent decision of this Court in ***Housen*** *v. Nikolaisen*, [2002] 2 S.C.R. 235, 2002 SCC 33 (S.C.C.). The appreciation of whether the admission of evidence would bring the administration of justice into disrepute is a question of mixed fact and law as it involves the application of a legal standard to a set of facts. In ***Housen***, *supra*, at para. 37, Iacobucci and Major JJ., for the majority, held that "[t]his question is subject to a standard of palpable and overriding error unless it is clear that the trial judge made some extricable error in principle with respect to the characterization of the standard or its application, in which case the error may amount to an error of law." - *R v Buhay*, 2003 SCC 30. I do not see any material distinction between use of the "reasonableness" standard and the "palpable and overriding error" standard ,but I will employ the former as it is arguably more favourable to Mr. Vitale.

[7] See transcript of Judge Sherar's decision on October 30, 2019 at pages 23 and 31-33.

> exception to the mandatory nature of the SOIRA order under section 490.012(1) CC provided judicial discretion and allowed judges to consider individual circumstances in deciding whether to make such an order. The exception was subsequently removed in a 2010 amendment to the *Criminal Code* that was proclaimed in force on April 15, 2011.
>
> The applicant makes two constitutional arguments on this application. *First*, subsection 490.012 CC curtails liberty and security of the person in a way that infringes section 7 of the Charter. *Mandatory registration deprives an individual of their liberty and security of the person through onerous reporting requirements, measures taken by the police, stigma and fear of information leaks. Section 490.012 CC violates the principles of fundamental justice in that it is overbroad, arbitrary, and grossly disproportionate.* **This section is overbroad in that it captures people it was never intended to capture – the offenders who pose no or little risk to public safety or security and will never reoffend. The effective [effect of this?] section ['s?] inclusion has no logical connection to the law's objective.**
>
> **Further, the effect of this provision on many offenders is grossly disproportionate to the legislative goal of protecting the public. Laws that circumvent liberty and security of the person in a way that is overbroad, arbitrary or grossly disproportionate do not comport the principles of fundamental justice and constitute a violation of section 7 of the Charter**… [*Second*] Section 490.012 CC constitutes *a cruel and unusual treatment contrary to section 12 of the Charter*. Imposing a mandatory SOIRA order on an offender who poses no threat to society and has little to no chance of reoffending results in grossly disproportionate treatment."
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> [My italicization and building added]

[15] In his March 16, 2020, filed brief, Mr. Vitale reiterates his general position, and goes on to specifically suggest Judge Sherar erred in law in stating that "this Court adopts and applies the reasoning of Justice Fitzpatrick in *R v Long*, 2015 ONSC 4509, and in particular paragraph 72 to and including the conclusion at

paragraph 107. For the purposes of brevity, I will not read those into the record, but I would incorporate that reasoning into this decision."[8]

[16] Mr. Vitale argues that *Long* is distinguishable because it dealt with the constitutionality of section 490.013(2.1) *CC*.

[17] Let me address now why I conclude Judge Sherar did not err in law in referencing Justice Fitzpatrick's reasons in *Long.*

[18] His counsel stated before Judge Sherar (p.9):

> The Court: But you do agree, I presume, that someone who is convicted of one of these offences is a greater risk than the population in general… We don't impose this order on just any citizen, it's a citizen who's been convicted, in this case, of a charge under section 163… We don't know what's going to happen to Mr. Vitale… But past antecedent behaviour tends to be the predictor for future activity… When it comes to punishment, don't we look at their antecedent behaviour as demonstrated in a criminal record?
>
> His counsel: Two points to that. The first is that I would submit that I don't think we can take judicial notice of that… no evidence is before the court in terms of this enhanced risk.… The second is that while the concept of enhanced risk may have its place in some cases, it's not relevant, I would submit, in consideration of whether section 490.012 specifically is constitutional. For example in *R v Long*, that's the one where they were considering I think it was 490.013 of the Code, where they were looking at whether the mandatory lifetime registration, in situations where someone is convicted of two offences, whether that is constitutional. Rightfully so in that case, they might have considered the idea of enhanced risk… But that's not the section that we're challenging… So, in other words, while that might be true of Dr. Vitale's case that he was convicted of two offences, two points: one being it was both [charges/convictions] came forward in the same sentencing…

[8] Justice Fitzpatrick was upheld by the Court of Appeal: *R v Long*, 2018 ONCA 282 - leave to appeal dismissed January 9, 2020, [2019] SCCA No. 330.

The Court: But that's what the result is going to be though.… If I do impose the order, it would be for life because he's been convicted of two offences.

His counsel: That's correct, but what I'm speaking to is this concept of enhanced risk… That only rightfully, if at all, is considered in *R v Long* where the purpose would've been… to consider the idea of enhanced risk because that provision of the Code required lifetime registration when someone has been convicted of 2 offences. We're not dealing with that provision today. What we are dealing with is 490.012 which is mandatory registration even if someone had only been convicted of one offence. So, although in the specific case Dr. Vitale has two convictions, we need to consider whether section 490.012 violates [the Charter] in its own right."

[19] During the Crown submissions to Judge Sherar, we see the following exchange (p. 24):

"The Court: So, what about the argument between section 490.012 and 490.013 – do you see a difference?

Crown counsel: Respectfully, I would say it's really a distinction without a difference. Both require mandatory registrations, be it for a first-time conviction or for an individual whose convicted of multiple offences. I will distinguish the facts in *Long* as identified by my friend. In *Long*, the accused sexually assaulted his employee over the span of I think two or three hours... but it wasn't a scenario where he was convicted, came back and got a second conviction, it was the facts relating from the same transaction if you will. So, in terms of the distinction between the two [*Long* and *Vitale*], I don't really see a difference. As indicated in jurisprudence, those who commit sexual offences are a higher risk to reoffend than anybody else, and I would submit whether it's a lifetime or whether it's for 10 years, it is what it is…

The Court: Anything else?

Crown counsel: No, thank you.

The court: With respect, any reply, counsel?

His counsel: No, Your Honour.

Decision (orally)

> I've drafted some preliminary remarks. I had read the materials and I had read the decision of Judge van der Hoek."[9]

[20] I will next recite the paragraphs that Judge Sherar relied upon/adopted from Justice Fitzpatrick's reasons in *Long* where he was examining whether sections 490.013 (2) or 490.013 (2.1) *CC* (which both deal with the *mandatory duration* of *mandatorily imposed* SOIRA orders) violated either section 7 or 12 of the *Charter of Rights*:[10]

> "Is s. 490.013(2.1) unconstitutional under s.7 of the *Charter*?
>
> 72 The Appellant argues that s. 490.013(2.1) is unconstitutional under s.7 of the *Charter* because it is: a) arbitrary; b) overly broad; and c) grossly disproportionate.
>
> 73 Section 490.012 requires that a person convicted of a designated offence (defined in s.490.011(1)) must be ordered to comply with *SOIRA*. Sections 490.013(2) and (2.1) deal with the duration of a registration order made under *SOIRA*. They read:
>
> > 490.013 (2) An order made under subsection 490.012(1) or (2)

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[9] Referring to *R v David Redden* – an unreported decision rendered May 2, 2017 in Truro, Provincial Court, a transcription of which was prepared by Verbatim Inc., certified court transcriber Margaret Livingstone Registration number 2006 – 16, on September 3, 2019 and forwarded to this Court by the Crown on May 4, 2020. Therein, Judge van der Hoek stated (p. 26): "The other issue that was raised by your counsel was whether I should impose the mandatory SOIRA order.… This was an interesting argument because you're taking the position that the mandatory nature of this registration violates section 7 and 12 of the Charter [she found section 490.012 is not arbitrary, not overly broad and isn't grossly disproportionate contrary to section 7 or to section 12 of the Charter]. The issue has been considered by other courts higher than my level. The Ontario Superior Court of Justice in *Long* in 2015 found that the provisions were not arbitrary even though the court's discretion has now been removed in a sense that it's mandatory." From the materials available to me, it is unclear whether Judge Sherar was aware of, and if so, had a copy of the Ontario Court of Appeal reasons (released March 22, 2018) in *Long* 2018 ONCA 282.

[10] In *Long*, the Ontario Sex Offender Registry was in issue. While it has some differences from the *Criminal Code*/ Federal Sex Offender Registry, the arguments made were virtually identical to those made before Judge Sherar in the case at Bar. Inherent in an examination of the overbreadth/gross disproportionality aspects during the section 7 *Charter* analysis by Judge Sherar (taking him as having applied the analysis outlined by Justice Fitzpatrick to the case at Bar) is that he considered the circumstances of all potential offenders who might be caught by the wording of s. 490.012 *CC*. Effectively, this is an application of the "reasonable hypothetical" analysis.

(*a*) ends 10 years after it was made if the offence in connection with which it was made was prosecuted summarily or if the maximum term of imprisonment for the offence is two or five years;
(*b*) ends 20 years after it was made if the maximum term of imprisonment for the offence is 10 or 14 years; and
(*c*) applies for life if the maximum term of imprisonment for the offence is life.

(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).

74 Section 7 of the Charter provides:

> 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.

75 **The legal framework that governs the analysis of a constitutional challenge under s.7 was set out by the SCC in *Canadian Foundation for Children, Youth & the Law v. Canada (Attorney General),* 2004 SCC 4 (S.C.C.). There are three steps in the analysis. The applicant must demonstrate:**

a) That he has legal standing to bring the challenge;

b) That the law results in the deprivation of life, liberty, or security of the person; and
c) That the deprivation is not made in accordance with principles of fundamental justice.

76 In this case, the first and second issues are not contested. The Appellant has standing and the *SOIRA* requirements are clearly an interference with an individual's liberty.

77 **The only live issue is whether the Appellant has established on a balance of probabilities that the law is contrary to principles of fundamental justice.**

78 Before embarking on this analysis, I want to note that my conclusions in no way reflect a finding by me that the Appellant committed essentially one offence of sexual assault, which the Crown particularized as three counts. If required to, I would have held the contrary to be true, namely that the offences were appropriately charged as three separate incidents. The Appellant cannot rationalize his actions as constituting one offence merely because each incident was separated by only a few hours and involved the same behaviour. However, this finding is unnecessary for the purposes of my analysis given the Appellant is entitled to rely on a constitutional defence of any legislation directly affecting him regardless of whether it leads to unconstitutional result in his particular circumstances (see *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 at paras. 40-44).

79 **Legislation that is arbitrary or overly broad will infringe section 7.**

80 **In order to be found arbitrary, there must be no connection between the object of the law and the impugned effect on the individual (*Bedford v. Canada (Attorney General),* 2013, SCC, 72 [*Bedford*] at para. 111).**

81 **The purpose of *SOIRA* is described in s.2(1) of the Act**:

> **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.
> (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.

82 **The purpose of the law is to further public safety by enabling police to keep track of sex offenders. In order to balance the privacy interests of the offender, the information collected is only to facilitate police investigations of sex crimes with access to this information otherwise restricted.**

83 **Clearly, the information collected can make it easier to investigate sex crimes by identifying individuals who, by virtue of past convictions, may be considered suspects in similar crimes. The underlying assumption is that individuals convicted of sex crimes have an increased propensity to commit sex crimes in the future and that the number of offences committed is probative of propensity to reoffend. This does not seem controversial. It is a matter of common sense and experience that past behaviour predicts future conduct.**

84 **It cannot be said that the *SOIRA* legislation is arbitrary. I am supported in my conclusion by the decision in *R v. Dyck,* 2008 ONCA 309 ["*Dyck*"].**

85 In *Dyck*, the Court dealt with a constitutional challenge to the Ontario Sex Offender Registry, also known as *Christopher's Law*. *Christopher's Law* was introduced by the Ontario legislature and came into effect on April 23, 2001. Similar to *SOIRA*, it requires anyone convicted of a designated sex offence to register with the police as a designated sex offender. The designated offences captured by the legislation, as well as the registration and reporting requirements, including the duration of time for which the offender must stay registered, are largely similar to the current requirements under *SOIRA*.

86 **In *Dyck*, the court expressly found there was a rational connection between the purpose of the legislation and the means employed (see paras. 99 - 100). As far as I am concerned, the statements made in those paragraphs about the existence of a rational connection are determinative of the issue.**
87 If there is a rational connection between the harm the legislation seeks to prevent and the means employed, it is not arbitrary. There is a rational connection between the objective of the *SOIRA* legislation (crime prevention and detention, particularly sexual offences against children) and the means employed (requiring individuals with more than one conviction to register for longer periods than people with a single conviction).

88 The Appellant contends that the object of the law is not accomplished by its wording because the imposition of a lifetime *SOIRA* registration is tied to the manner in which the Crown particularizes the information (in this case as three offences instead of one) and the number of offence convictions.

89 It is an undisputed requirement of our criminal justice system that the Crown must exercise discretion at various points throughout a prosecution.

90 Most recently, in *R. v. Anderson,* 2014 SCC 41, the SCC affirmed the principle that prosecutorial discretion is a necessary part of a properly functioning criminal justice system and constitutes an indispensable device for the effective enforcement of the criminal law (para. 37). Such discretion refers to the use of powers that constitute the core of the Attorney General's office, in particular, all decisions regarding the nature and extent of the prosecution (paras. 39-40). It includes the decision to charge multiple offences (para. 44).

91 The SCC held that prosecutorial discretion is reviewable for abuse of process and *only* for abuse of process. Concepts used to describe conduct amounting to an abuse of process include situations where the Crown acts with "flagrant impropriety" or "undermines the integrity of the judicial process" or "results in trial unfairness" or acts with "improper motives" and in "bad faith" (para. 49). In short, abuse of process refers to "Crown conduct that is egregious and seriously compromises trial fairness and/or the integrity of the justice system" (para. 50).

92 As such, it is well settled that the exercise of Crown discretion is inherent in our criminal justice system and it is not reviewable absent an abuse of process. Crown discretion is exercised in a variety of matters throughout a prosecution and many of the

decisions made by the Crown can affect the accused's liability. These include, for example, the decision whether to charge greater or lesser charges, whether to proceed by summary conviction or indictment, including where proceeding by way of indictment carries minimum or stiffer penalties, whether to file a Notice of Increased Penalty, whether to accept a plea to common assault where sexual assault is charged etc.

93 That there may be an element of Crown discretion in terms of the number of offences charged does not detract from the basic premise that people who commit more than one offence are at higher risk of reoffending. It is important to note that, ultimately, it is the number of convictions following a plea or trial that determine the *SOIRA* requirements not the number of offences charged. There is an element of Crown discretion at almost every stage of the criminal process, including the charging decision, that can impact sentence. However, that does not render the process arbitrary.

94 Absent an abuse of process argument, the discretion of the Crown is not a live issue. I note that no abuse of process argument was brought at trial and none was advanced on this appeal.

95 **To summarize, I find that the purpose of the law is rationally connected to its effects. The law is not arbitrary and does not violate *Charter* section 7. The purpose is to facilitate police investigations of sex crimes by maintaining information on previously convicted sex offenders. Those convicted of more than one offence are subjected to a longer registration period (life rather than 10 or 20 years) on the basis of the presumption that they have a greater propensity to reoffend.**

96 **The Appellant also attacks the constitutionality of s. 490.013(2) on the basis that it is overly broad. The concept of over-breadth overlaps with arbitrariness but remains distinct from it.** The SCC explained the meaning of over breadth relative to arbitrariness in *Bedford*:

> 108 arbitrariness and overbreadth...target the absence of connection between the law's purpose and the s. 7 deprivation.
>
> 112 Overbreadth deals with a law that is so broad in scope that it includes *some* conduct that bears no relation to its purpose. In this sense, the law is arbitrary *in part*. At its core, overbreadth addresses the situation where there is no rational connection between the purposes of the law and *some*, but not all, of its impacts...
>
> 113 Overbreadth allows courts to recognize that the law is rational in some cases, but that it overreaches in its effect in others.
>
> 117 ... it may be helpful to think of overbreadth as a distinct principle of fundamental justice related to arbitrariness, in that the question for both is whether there is *no connection* between the effects of a law and its objective. Overbreadth simply allows

> the court to recognize that the lack of connection arises in a law that goes too far by sweeping conduct into its ambit that bears no relation to its objective.

97 **In order to succeed, the Appellant must not simply demonstrate that the law overreaches but that it is grossly disproportionate. I am not satisfied that the *SOIRA* legislation is.**

98 A law will be grossly disproportionate where the purpose of the law is "totally out of sync" with the deprivation suffered under s.7. The court must balance the negative effect on the individual against the purpose of the law and not against the societal benefit achieved (*Bedford*, paras. 119, 121).

99 **The question of over-breadth in these circumstances has also been addressed by the OCA in *Dyck*.**

100 **The appellant in *Dyck* argued that the law was an unconstitutional violation of section 7 of the *Charter* because it was overly broad. In particular, the appellant claimed that the law "is broader than necessary to accomplish its objectives because it sweeps into the Registry *all* offenders convicted of designated sex offences without regard to whether they are likely to re-offend or not and without regard to whatever other legitimate reasons may exist in their individual case for an exemption" (para. 92).**

101 Justice Blair, who wrote for a unanimous three-member panel, held that, while *Christopher's Law* creates an intrusion into an offender's liberty, the deprivation of liberty is in accordance with principles of fundamental justice and is not overly broad. Justice Blair highlighted that the ultimate standard is one of gross disproportionality. This requires that, in order to succeed, it is insufficient that the appellant prove that the law goes further than is strictly necessary or that it is disproportionate to the objective at issue. Rather, the appellant must demonstrate that the effect of the law is grossly disproportionate to its objectives. This is a high threshold that accords the legislature substantial deference in choosing measures to protect legitimate state interests.

102 **Justice Blair concluded that the appellant failed to establish that *Christopher's Law* is overly broad because the law represents a rational measure designed to further legitimate state interests of community protection.** The court accepted the findings of the trial judge that: 1) sex offences are particularly prevalent in our society and they cause physical, psychological, and emotional harm; 2) sex offenders are prolific offenders who are likely to re-offend; and, 3) a prior conviction for a sex offence is a reliable indication of risk and a proper method of assessing that risk.

103 The Court held that the Ontario legislature acted rationally, pursuant to the legitimate state interest of community protection, by creating a sex offender registry that can track the whereabouts of past sex offenders. **Importantly for purposes of this appeal, the Court held that, even though numerous offenders caught by the reporting requirements will**

ultimately never re-offend, the law was still not overly broad because "there is a presumptive risk of harm to potential victims of all ages posed by persons convicted of sex offences" and there is no way to know in advance which sex offenders will re-offend. Additionally, the Court held that an individualized risk assessment is not a *Charter* requirement (paras. 100, 106, 123). Further, the Court emphasized that, once it is determined that there is more than a minimal risk of harm, Parliament and the legislatures are entitled to make policy choices within a reasonable range of alternatives (para. 124).

104 **In addition to finding that *Christopher's Law* was a logical response to the risk created by recidivist sex offenders, Blair J.A. held that the liberty interests affected by the reporting requirements are modest in comparison to the important state interest at issue and in light of the fact that the subject offender will already have been tried and convicted of a designated offence**. In particular, Blair J.A. noted that the reporting requirements are limited in their informational scope and do not prohibit the offender from going anywhere or doing anything. Any stigma associated with the requirement to register is also minimal, especially because it is confidential and the information contained in the Registry is strictly limited to use by police personnel for crime prevention and law enforcement purposes.

105 Finally, Justice Blair noted that the entire reporting process takes no more than fifteen to twenty minutes and is no more intrusive than the informational component of other state-imposed registrations (e.g., in relation to income tax filings, voting registrations, obtaining a driver's licence, passport, health card, licence plate, etc.).

106 **Following *Dyck*, I conclude that s. 490.013(2.1) is not overly broad or grossly disproportionate to the purpose of the law**. The fact that it may subject an offender to a lifetime registration where he committed a designated sex offence that could reasonably be particularized by the Crown as one or two counts does not constitute a grossly disproportionate effect on the offender's liberty interests. The liberty deprivations and any stigma associated with the reporting requirements are minimal, and in no way outweigh -- let alone disproportionately outweigh -- the important state objectives of protecting the community from recidivist sex offenders.

107 **In conclusion, there is no breach of *Charter* section 7.**"

[My bolding added]

[21] The Ontario Court of Appeal, upheld Justice Fitzpatrick, and stated, 2018 ONCA 282 (application for leave to appeal dismissed – January 9, 2020- [2019] SCCA No. 330):[11]

> A. INTRODUCTION
>
> 1 *This appeal concerns the constitutionality of s. 490.013(2.1) of the Criminal Code*, R.S.C. 1985, c. C-46, which requires an offender convicted of more than one designated offence to comply with the *Sex Offender Information Registration Act*, S.C. 2004, c. 10 ("*SOIRA*"), for life.
> …
> 5 **This appeal is therefore focused on whether the deprivation of liberty is in accordance with the principles of fundamental justice. The appellant argued that two principles of fundamental justice were violated, namely overbreadth and gross disproportionality.** He did not pursue his submission that the provision was arbitrary in oral argument before this court.
>
> 6 For the reasons that follow, *I conclude that there has been no violation of the appellant's s. 7 rights.* **Section 490.013(2.1) of the Criminal Code is neither overbroad nor grossly disproportionate**.
> …
>
> 88 *SOIRA* and the sex offender information provisions of the *Criminal Code* (ss. 490.011 to 490.032), together with the federal *Sex Offender Information Registration Regulations* (see, for example, the *Ontario Sex Offender Information Registration Regulations*, SOR/2004-306), set out a comprehensive scheme for the registration of information about

[11] In the case before me, Mr. Vitale very heavily relies on the reasoning by Justice Moen in *Ndhlovu* (her conclusions that s. 490.012 *CC* is overbroad and grossly disproportionate were overturned on appeal - 2020 ABCA 307 - albeit, Mr. Vitale agrees with Justice Khullar's dissent). Notably, **Justice Moen in *R v Ndhlovu***, 2016 ABQB 595**, concluded that mandatory SOIRA orders are not arbitrary**: "As stated by Fitzpatrick J in *Long* 'clearly the information collected can make it easier to investigate sex crimes by identifying individuals who, by virtue of past convictions, may be considered suspects in similar crimes' – paragraph 83 - **[Justice Fitzpatrick] further noted that it was a matter of 'common sense and experience' that individuals who are convicted of sex crimes have an increased propensity to commit sex crimes in the future.** In my view, **it is not the case that there is no connection between providing police with up-to-date information on previous sex offenders and the goal of investigating and preventing sexual crimes."** (paras. 91-92). Furthermore, she stated at paragraph 75: "I note that in 20 years the offender can make an application to be removed from the registry. However, I cannot presume that at that time he will be granted such an application. *Therefore, I am treating this application as a challenge to a lifetime registration.* I find that the offender subject to a SOIRA order is deprived of his liberty, and, in particular, that a SOIRA order for life to be imposed on Mr. Ndhlovu will deprive him of his liberty for the balance of his life." I observe that the criteria in section 490.016 for a s. 490.015 termination order, mirror the SOIRA (2004 version) "exemption" criteria. My emphasis added throughout.

sex offenders. The scheme is plainly designed to ensure that the information 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.

89 *This court, and other appellate courts, have emphasized that while one of the underlying rationales for the enactment of SOIRA was to facilitate the investigation of sexual offences by keeping track of sexual predators, the regime is not limited to "likely recidivists or sexual predators"*: see *R. v. Debidin*, 2008 ONCA 868, 94 O.R. (3d) 421, at paras. 70, 77. See also: *S.S.C.*, at para. 43; *R. v. Redhead*, 2006 ABCA 84, 56 Alta. L.R. (4th) 15, at paras. 36-38. *The scheme of the legislation evinces a concern about the apprehension of sex offenders and prevention of sexual offences, particularly, but by no means exclusively, in relation to offences against children and other vulnerable groups.*
…

R. v. Ndhlovu
115 The appellant also referred us to *Ndhlovu*, in which Moen J. of the Alberta Court of Queen's Bench concluded that s. 490.012, which makes *SOIRA* registration mandatory, infringed s. 7 of the *Charter* because it was both overbroad and grossly disproportionate insofar as it removes judicial discretion to refuse to place on the registry offenders who present no risk of re-offending.
…
118 *Mr. Ndhlovu challenged the mandatory nature of SOIRA orders under s. 7 of the Charter*. In considering the *Charter* issues, Moen J. found that the reporting requirements of *SOIRA* were "significant" and onerous, referring to *Redhead*, at para. 33; *S.S.C.*; *R. v. Have*, 2005 ONCJ 27, 194 C.C.C. (3d) 151; and the judgment of the SCAJ in this case.

119 *She found that the law was not arbitrary; there is a rational connection between requiring sex offenders to provide up-to-date information and the goal of investigating and preventing sex crimes*. She agreed, at para. 91, with the SCAJ's observation that "the information collected can make it easier to investigate sex crimes by identifying individuals who, by virtue of past convictions, may be considered suspects in similar crimes", and that as a matter of common sense and experience, individuals who are convicted of sex crimes have an increased propensity to commit sex crimes in the future.

120 While acknowledging that there was a statistical probability that a sex offender will re-offend, *she concluded, at para. 119, that the law was overbroad because it captured individuals who have little or no chance of re-offending*:

> In my view, the mandatory registration for all sex offenders upon conviction of two or more offences, without regard to the seriousness of the offences or the offender's propensity to reoffend is overbroad. The goal of the legislation is to assist police with investigating past crimes and preventing new ones. The Crown conceded that the Registry captures individuals who will never re-offend. In my view, including offenders on the Registry who have little to no chance of reoffending bears no relation to protecting the public. Subjecting all offenders, regardless of their future

> risk, to onerous reporting requirements, random compliance checks by the police, and internal stigma, goes further than what is necessary to accomplish the goal of protecting the public, and is therefore overbroad.

121 *In reaching this conclusion, Moen J. rejected the Crown's argument that the mandatory inclusion of all offenders in the registry was connected to the law's purpose because it was impossible to know in advance which offenders would re-offend and which would not. She concluded that this type of argument was more appropriately brought under s. 1 of the Charter.*

122 In light of her conclusion that s. 490.012 breached s. 7, Moen J. declined to make any *SOIRA* order with respect to Mr. Ndhlovu.

Relevance of *Dyck* and *Ndhlovu*

123 **Ultimately, neither case put to us deals with the issue before this court. Both dealt with different provisions and addressed a different concern -- namely, the mandatory requirement that SOIRA orders be imposed on all offenders convicted of a designated offence.** I turn now to my analysis of the provision at issue in this appeal.

Is s. 490.013(2.1) overbroad?

124 The question before this court on the overbreadth analysis is whether there is some connection between the purpose of s. 490.013(2.1) and all of its effects. As noted above, for a law to be overbroad, there must be no connection between its effects and its purpose in some cases.

125 The legislation at issue in this appeal involves the assessment of the risk of future harm, an exercise that is inherently imprecise. The onus is on the appellant to establish that, in some cases, there is no rational connection between the purpose and the effect of the law. The Supreme Court in *Bedford* described, at para. 119, the ultimate question as "whether the evidence establishes that the law violates basic norms because there is *no connection* between its effect and its purpose" (emphasis in original). As the Supreme Court observed, "[t]his standard is not easily met": *Bedford*, at para. 119.

126 **The purpose of s. 490.013(2.1) of the Criminal Code, as I have found, is to further public safety by subjecting sex offenders who are at *enhanced* risk of re-offending to *a longer period of registration*.**

127 No issue was taken with the premise underlying SOIRA that sex offenders as a group present a greater risk of committing future sexual offences than the rest of the population: see *Dyck*, at paras. 100, 105; *Redhead*, at para. 38. **While there is no evidence in the record to support the proposition that offenders who are convicted of more than one**

> **designated offence are at enhanced risk of re-offending, there is also no evidence to the contrary**.
>
> 128 **Instead, we are faced with conflicting arguments appealing to "common sense".** The Crown, on the one hand, asks us to infer that an individual who is convicted of more than one designated sexual offence has a greater propensity to commit sexual crimes than an individual who is convicted of only one such offence.
>
> [My italicization and bolding added]

[22] I am satisfied that generally speaking there is a difference between the analysis required regarding whether section 7 or 12 of the *Charter of Rights* are violated by s. 490.012 (per section 2(1) of the *Sex Offender Information Registration Act*, reads: "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."); **and**

S. 490.013 (the purpose of which was stated by CJ Strathy in *Long* at para.126 as: "is *to further public safety by subjecting sex offenders who are at enhanced* risk of re-offending to *a longer period of registration*.").

[23] However, those two provisions, s. 490.012 (which governs which offenders shall be subject to the *Sex Offender Information Registration Act*) and s. 490.013 (which governs the start and duration of SOIRA orders), are both subject to the single and same statement of "Purpose" in s. 2 of the SOIRA.

[24] When either of those sections are challenged as arbitrary, overbroad or grossly disproportionate contrary to section 7 (and 12) of the *Charter*, it is because they are alleged to effect deprivations of liberty or security of the person in a manner *not* "in accordance with the principles of fundamental justice".

[25] As Chief Justice Strathy stated in *Long*:

> 60 The s. 7 analysis does not end here. As the Supreme Court observed in *Carter*, at para. 71, laws regularly interfere with life, liberty and security of the person. The question is whether the law does so in a way that violates our basic values, described as the principles of fundamental justice. That is the central issue in this case.
>
> 61 **All three of these principles of fundamental justice -- arbitrariness, overbreadth and gross disproportionality -- hinge on the connection between the purpose of the legislation and its effect on the individual.**
>
> [My bolding added]

[26] Therefore, s. 2 SOIRA which describes the *purpose* of the legislation is intrinsic to a consideration of the constitutionality of both ss. 490.012 (which offenders shall be subject to SOIRA) and 490.013 *CC* (for how long such offenders will be subject to SOIRA).

[27] On a review of Justice Fitzpatrick's reasons in *Long*, where he was dealing with the constitutionality of s. 490.013, it is apparent that he thereby also incidentally considered the law applicable to a determination of the constitutionality of s. 490.012.

[28] When Judge Sherar "adopted" Justice Fitzpatrick's reasons in *Long*, I am satisfied that he did so very well appreciating that Justice Fitzpatrick was, strictly speaking, dealing with the constitutionality of s. 490.013, and that he was not directly dealing with the constitutionality of s. 490.012. I am further satisfied that Judge Sherar adopted *only* the legal principles and analysis relevant to the arguments of arbitrariness, overbreadth and gross disproportionality *in relation to* s. *490.012 CC.*[12]

[29] He thereby identified the proper legal principles. The remaining question for me becomes did he interpret and apply them correctly in this case? I find that he did.

[30] Let me then excerpt the core reasoning Judge Sherar expressed:

> "Respectfully, this court does not accept the suggestion or position of the defendant. This court concludes that section 490.013 and 490.012 does not offend… or breach the provisions of section 7 of the Charter of Rights and Freedoms. In particular, this Court adopts and applies the reasoning of Justice Fitzpatrick in *R v Long*, 2015 ONSC 409, and in particular paragraph 72 to and including the conclusion at paragraph 107. For the purposes of brevity, I will not read those into the record, but I would incorporate that reasoning into this decision…
>
> The fact is the defendant fits the definition of a sex offender and he will have to deal with that… It is not unexpected that a person so designated will face and experience

[12] Moreover, the fact that Judge Sherar referenced the *Redden* decision which exclusively dealt with s. 490.012, tends to reinforce my conclusion that his reasons were made *in relation to s. 490.012 CC.* Incidentally, I observe that when reference is made to the "impact" or "effects" on offenders of the SOIRA regime, it can hardly be disputed that the longer the duration, which could be for 10 years, 20 years, or a lifetime per s. 490.013 *CC*, the greater its "effects" on offenders.

embarrassment. However, the registering and requirement of ongoing reporting by a sex offender, especially one involved with child pornography, confidentially and privately providing to police authorities that information is a reasonable price to pay when balanced with the prevention and detection of sexual crimes involving children and their images.… Supervision and detection of such convicted persons requires just as much oversight as other members of society. If there was contemplated an exception to the mandatory order, this case would not meet any reasonable threshold. The defendant also argues that the mandatory imposition of a SOIRA order constitutes a cruel and unusual sentence under section 12 of the Charter of Rights and Freedoms.… This court is bound by the Nova Scotia Court of Appeal in *R v Cross* [2006 NSCA 30], which has determined that SOIRA orders are not a punishment. Judge van der Hoek, in an unreported decision, *R v Redden*, dated May 2, 2017, considered section 12 of the Charter argument regarding a mandatory SOIRA order for another section, 164.1 offence, and after reviewing the authorities concluded:

> 'treatment or punishment that is disproportionate or merely excessive is not cruel and unusual. It must be excessive so as to outrage the standards of decency. The test is stringent and demanding and is met only on rare and unique occasions.'

Her Honour impliedly concluded that the test under section 12 had not been met under the provisions of section 490.011 CC [sic]. I would concur that the mandatory requirement that the defendant register and keep registering under the provisions of the SOIRA for the rest of his natural life, subject to possible termination of the order after 20 years, do not outrage the standards of decency such that Canadians would find it abhorrent or intolerable."[13]

[31] Mr. Vitale has relied heavily on Justice Moen's reasons in *R v Ndhlovu*, 2016 ABQB 595 in relation to the constitutional validity of s. 490.012 *CC*.[14]

[13] Judge van der Hoek in *Redden* was also addressing s. 490.012 *CC*.

[14] Her decision was overturned by two of three members of the Alberta Court of Appeal on September 3, 2020: 2020 ABCA 307. They found s. 490.012 constitutional. Justice Khullar agreed with Justice Moen that the sections 490.012(1) and 490.013(2.1) *CC* are unconstitutional, however Justice Khullar noted that "I arrive at that conclusion as a result of a different analytical path, explained below." - para. 151. Whereas Justice Moen concluded the continuing effects of reporting requirements on an offender were "significant" (paras. 52 and 124) Justice Khullar concluded those effects involved "'considerable' impact on Mr. Ndhlovu's privacy and liberty rights" - para. 190.

[32] She found that the continuing effects on an offender of the reporting requirements were not, as the Ontario Court of Appeal concluded in *R v Dyck*, 2008 ONCA 309, "modest", but rather that they are "significant"(paras. 52 and 124).[15]

[33] Justice Moen did not find the SOIRA requirements to be contrary to section 7 of the Charter because they were arbitrary - para. 92.

[34] She concluded that the mandatory inclusion of all sex offenders is contrary to the principles of fundamental justice, specifically "the resulting limitation of liberty is broader than necessary to accomplish the objective is of assisting in the investigation of sexual crimes, and thus overbroad. I am not satisfied including people like Mr. Ndhlovu on the registry will "[help] police services prevent and investigate crimes of a sexual nature" (s. 2 SOIRA)." (para. 116)

[35] She also concluded that "the effects of SOIRA orders on certain offenders are grossly disproportionate to the aim of protecting the public." (para. 130)

[36] She did not go on to consider whether the effects of SOIRA orders violated section 12 of the *Charter*, saying at para. 131:

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[15] Notably, the Ontario legislation at issue in *Dyck* contains no exemption or termination mechanisms.

> "I have found that SOIRA breaches section 7 of the Charter, insofar as it does not provide the court with discretion to consider the circumstances of the particular offender and a particular crime when determining registration on the registry. Therefore, I do not have to consider Mr. Ndhlovu's argument on section 12 of the Charter."

[37] Casting an eye over the landscape of the relevant jurisprudence, I am not satisfied that Justice Moen's conclusions regarding the constitutional validity of section 490.012 are correct – and I do not adopt them. I prefer as persuasive the tenor of the reasons of the majority in *Ndhlovu*, 2020 ABCA 307, which are consistent with Judge Sherar's reasons.[16]

[38] I bear in mind that the Supreme Court of Canada (2020 SCC 38) affirmed the Court of Appeal's decision in *G v. Ontario (Atty. Gen.)*, 2019 ONCA 264, which involved consideration of whether Ontario's sex offender registry regime that required individuals convicted or found not criminally responsible on account of mental disorder of sexual offences was discriminatory insofar as there was no opportunity for exemption for those offenders who were found NCRMD **and** had been granted an absolute discharge. The Supreme Court agreed that the provisions were contrary to section 15 (1) of the *Charter*, however the court permitted a

[16] See also Justice Charbonneau's reasons in *R v Lafferty*, 2020 NWTSC 5, to similar effect.

suspended declaration of unconstitutionality, being satisfied an identified public interest would otherwise be compromised.[17]

[39] More significant to the case at Bar are the following comments of Justice Karakatsanis speaking for six of the nine justices:

> *C. Does Christopher's Law Infringe the Right to Life, Liberty and Security of the Person?*
>
> 77 Given that I have concluded that *Christopher's Law* violates s. 15(1) in its application to persons found NCRMD and that G's s. 7 claim does not extend beyond those persons, it is not necessary to address whether *Christopher's Law* also violates s. 7. As I will explain, because *the privacy and liberty interests of those found NCRMD* are the very interests that are unequally burdened by *Christopher's Law, they inform the remedy for the breach of s. 15(1). It is therefore not necessary to determine whether there is also a breach of s. 7 in order to inform the appropriate remedy.* Further, addressing some of the s. 7 arguments would have an impact on the broader issue of the nature of the registry's effects on all registrants and whether the entire scheme complies with s. 7; such determinations are best left for another case.
>
> 78 *Even so, these reasons should not be taken as agreeing with the Ontario Court of Appeal's approach to s. 7 in this case, or in Dyck and Long. Those approaches rest on the conclusion in those cases that the legislation's intrusion on liberty is "modest", a conclusion that has been challenged. I make no further comment on this point, given that a s. 7 challenge to the federal sex offender registry is currently before the courts* (see *R v. Ndhlovu,* 2020 ABCA 307 (Alta. C.A.), rev'g 2016 ABQB 595, 44 Alta. L.R. (6th) 382 (Alta. Q.B.)).
>
> [My italicization added]

[17] See also the harbinger words of Justice Moldaver's decision dismissing a requested stay of the Ontario Court of Appeal's decision in 2019 SCC 36, wherein he stated: "In particular, I adopt the words of Doherty JA at paragraph 155 of his reasons in which he states: '… As I read this record, it is difficult to envision a constitutionally compliant legislative scheme that would not result in [the Respondent] being removed from the registries and exempted from the requirement of any further compliance with them': 2019 ONCA 264."

[40] As I find it helpful to the resolution of the issue before me, I include a summary of the dispute as referenced in Justice Doherty's reasons for the court in *Ontario v G*:

> I. OVERVIEW
>
> 1 The appellant was found not criminally responsible on an account of mental disorder ("NCRMD") on two charges of sexual assault and two related charges in June 2002. He was absolutely discharged by the Ontario Review Board (the "ORB") in August 2003.
>
> 2 The finding that the appellant was NCRMD in respect of sexual offences made him subject to the provincial sex offender registry, which was established in 2001 pursuant to *Christopher's Law (Sex Offender Registry),2000*, S.O. 2000, c. 1. When the federal sex offender registry legislation came into force in December 2004, the appellant also became subject to the provisions in that Act: *Sex Offender Information Registration Act*, S.C. 2004, c. 10 ("*SOIRA*"). The appellant is required, under both registries, to personally register with the police and provide the information required by the applicable statues and regulations. The appellant must give the police a current photograph and report annually. He must advise the police of any change in the data he has provided, including any change of address. Failure to comply with any of the requirements is an offence potentially punishable by imprisonment.
>
> 3 Because the appellant was found NCRMD in respect of two sexual assaults, he remains subject to the sex offender registry provisions in *Christopher's Law* for the rest of his life. Similar provisions in *SOIRA* also impose a lifetime order. However, *SOIRA* contains provisions allowing the appellant to apply to a court for a termination of the *SOIRA* order. The appellant can apply for a termination order in 2022, 20 years after he was found NCRMD.
>
> 4 This court has upheld the constitutionality of both the provincial and federal sex offender registries as applied to persons convicted of sexual offences: see *R. v. Dyck*, 2008 ONCA 309, 90 O.R. (3d) 409; *R. v. Long*, 2018 ONCA 282, 45 C.R. (7th) 98. *The appellant does not challenge the constitutionality of the registries as applied to all persons found NCRMD. He does, however, challenge those provisions as they apply to persons found NCRMD who have received an absolute discharge from the ORB.*1
>
> 5 The appellant, supported by the interveners, submits that various aspects of both legislative schemes violate the appellant's rights under ss. 7 and 15 of the *Canadian Charter of Rights and Freedoms*.2 The appellant further submits that the infringements of those constitutional rights cannot be justified under s. 1 of the *Charter*.

6 Both the Federal and Provincial Attorneys General argue that the registries are *Charter*-compliant. They further contend that if there is a breach of s. 7 or s. 15, those breaches can be justified under s. 1.

7 The appellant's arguments failed before the application judge. *Like the application judge, I would reject the appellant's s. 7 arguments.* However, I would hold that aspects of the legislation do violate the appellant's rights under s. 15 of the *Charter*, and that those violations cannot be justified under s. 1. I would declare the provisions of no force or effect as applied to persons found NCRMD who have received an absolute discharge. I would suspend that declaration of invalidity for 12 months. I would further hold that the suspension of invalidity should not apply to the appellant. His name should be removed from the registries and he should not be subject to those registries in the future

…
27 *SOIRA also provides that persons who are required to register may apply for a termination order: Criminal Code, s. 490.026. Someone who is subject to a lifetime order, like the appellant, may apply for a termination order 20 years after he was found NCRMD: s. 490.026(3).* If the application is unsuccessful, the person may bring a further termination application five years after the refusal of the initial application: *Criminal Code*, s. 490.026(5). *A person may also apply for a termination order under SOIRA if he has received a record suspension or pardon: Criminal Code, s. 490.026(4).* If a termination order is made, the offender's information is removed from the registry.

28 An application for a termination order is made to a judge. The judge applies the same test that is applied on an application for an exemption order: see *Criminal Code*, s. 490.027(1).

29 Christopher's Law does not contain provisions allowing registered persons to apply for a termination order. Section 9.1 of the Act does, however, provide for automatic deletion from the provincial registry if the offender receives a pardon or record suspension in respect of all sexual offences that led to his placement on the registry.

30 *Persons found NCRMD are not convicted of any crime. Consequently, provisions in Christopher's Law or SOIRA that depend on the offender having been granted a pardon or record suspension have no application to persons found NCRMD.*

…
B. THE CONSTITUTIONAL ARGUMENTS

(i)The Section 7 Claim

67 Section 7 declares:

> 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.

68 A s. 7 claim has two elements. First, claimants must demonstrate that the impugned legislation or state conduct deprives them of "life", "liberty", or "security of the person". If claimants clear that hurdle, they must show that the state-caused deprivation is inconsistent with the principles of fundamental justice. The concepts of arbitrariness, overbreadth, and gross disproportionality have emerged as the principles of fundamental justice most commonly invoked when legislation is challenged: see *Bedford*, at paras. 93-123; *Long*, at paras. 55-57.

…

81 *As fundamental as the distinction between persons found NCRMD and persons convicted is, I do not think it makes the principles set out in Dyck and Long inapplicable to the s. 7 analysis in this case.* **The registration and reporting requirements in *SOIRA* and *Christopher's Law* are not imposed as punishment or treatment**: *Long*, at para. 53; *Dyck*, at paras. 79-83; *R. v. Warren*, 2010 ABCA 133, 477 A.R. 370, at paras. 17-21. **Instead, they are directed at promoting public safety through the creation and maintenance of a databank that facilitates the effective investigation and prevention of sexual crimes. Because of the purpose behind the registries, an individualized assessment of risk, though crucial when imposing treatment or punishment, is not required to conform with the principles of fundamental justice**. In this sense, sex offender registries are akin to legislation requiring the provision of fingerprints, photographs, or DNA6 : *Dyck*, at para. 123. As the sex offender registries do not constitute punishment or treatment, I do not regard the s. 7 analysis in *Winko*, which requires an individualized assessment of the offender for the purposes of determining the proper disposition under Part XX.1, as applicable to the imposition of ancillary orders like those contemplated by the sex offender registries.

…

88 I agree with the respondents' characterization of the appellant's claim as an overbreadth argument. The appellant and interveners submit that while the application of the sex offender registry legislation to persons found NCRMD serves the public protection purpose animating the legislation, that purpose is not served by applying the legislation to persons found NCRMD who have received an absolute discharge. They argue that, for that subgroup of persons, there is no connection between the impact of the legislation and the purpose of the legislation: *Bedford*, at para. 112.

…

96 **I have no difficulty in concluding that sex offender registry legislation that reaches persons who have committed a designated offence and who pose either some risk of committing a serious crime or a significant risk of committing a non-serious crime has not overshot its purpose. In my view, the granting of an absolute discharge to a person found NCRMD cannot be equated with a finding that a person who was found**

NCRMD in respect of a designated offence and received an absolute discharge poses no or even little risk of committing another designated offence.

…
99 **The much more modest intrusions on individual liberty imposed by *Christopher's Law* and *SOIRA* do not, however, depend on or reflect any finding or prediction as to the risk of reoffending tailored to the individual and the specific circumstances. Instead, those provisions are predicated on a statistical connection between the commission of a designated offence and the heightened risk of committing another designated offence.** On Dr. Hanson's evidence, which the application judge accepted, that connection exists for persons found NCRMD who have been absolutely discharged just as it exists for NCRMD persons who have not been discharged, and for persons convicted of designated offences.

100 **Long and Dyck accept that a prior conviction for a designated offence, although a long way from demonstrating that a particular offender will reoffend, is a sufficient proxy for the risk of reoffending so as to constitutionally justify the modest intrusion on individual liberty affected by the registration and reporting requirements of the sex offender registry legislation.**
101 The appellant cannot demonstrate the absence of a rational connection between the purpose of the legislation and its impact on the liberty interest of persons found NCRMD who have received an absolute discharge. **The s. 7 claim must fail.**

[My italicization and bolding added]

Conclusion regarding Judge Sherar's reasons[18]

[41] I am satisfied that Judge Sherar correctly cited, interpreted and applied the relevant legal principles in coming to his conclusions that s. 490.012 *CC* does not violate section 7 or 12 of the *Charter of Rights*. His factual conclusions *vis-à-vis* Mr. Vitale's circumstances and in relation to the arguments he has made regarding

[18] There has been some uncertainty within the jurisprudence regarding the application of the principles of *stare decisis*, namely whether, and when appropriately, the decision of one member of the Superior Court in the same jurisdiction regarding the constitutionality of legislation is binding upon other members of that court. This has helpfully been addressed in *R v Sullivan*, 2020 ONCA 333, paras. 31-40 (leave to appeal granted December 23, 2020 - SCC file # 32790) yet still remains controversial in its application - for example see *R v AM*, 2020 ONSC 8061 per Justice V. Christie; and *R v Bickford*, 2020 ONSC 7510 per Justice Quigley.

the constitutionality of s. 490.012 *CC* are not unreasonable, and therefore I must respect those.

A fresh analysis

[42] To the extent that it could be argued that Judge Sherar erred in law, on my own fresh examination of the constitutionality of s. 490.012 *CC*, applying the principles I have cited herein, I am satisfied that the provision is not arbitrary, overbroad, or grossly disproportionate so as to be a violation of section 7 or section 12 of the *Charter of Rights*.

[43] Let me briefly elaborate.

[44] Before April 15, 2011 SOIRA orders could only be imposed if:

1. the prosecution made an application therefor
2. the offences committed were “designated” offences
3. and the court was not “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."

[45] After April 15, 2011, once an offender is sentenced for a "designated offence", the legislation simply provided that the court "shall make an order".

[46] The stated purpose of the SOIRA (s. 2) was amended from "The purpose of this Act is to help police services investigate crimes of a sexual nature by requiring the registration of certain information relating to sex offenders" to "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". This had the effect of enabling authorized persons to consult the registry for prevention or investigation of crimes of a sexual nature.

[47] The reporting requirements were also amended and expanded to ensure up-to-date information about an offender is available. Only the first reporting instance must be in person. Nova Scotia has telephone reporting available for all but the initial reporting requirement.

[48] The general section 7 Charter framework was canvassed in *Canada (Attorney General) v Bedford*, 2013 SCC 72:

117 **Moving forward, however, it may be helpful to think of overbreadth as a distinct principle of fundamental justice related to arbitrariness, in that the question for both is whether there is *no connection* between the effects of a law and its objective. Overbreadth simply allows the court to recognize that the lack of connection arises in a law that goes too far by sweeping conduct into its ambit that bears no relation to its objective.**

118 An ancillary question, which applies to both arbitrariness and overbreadth, concerns how significant the lack of correspondence between the objective of the infringing provision and its effects must be. Questions have arisen as to whether a law is arbitrary or overbroad when its effects are *inconsistent* with its objective, or whether, more broadly, a law is arbitrary or overbroad whenever its effects are *unnecessary* for its objective (see, e.g., *Chaoulli*, at paras. 233-34).

119 **As noted above, the root question is whether the law is inherently bad because there is *no connection*, in whole or in part, between its effects and its purpose. This standard is not easily met.** The evidence may, as in *Morgentaler*, show that the effect actually undermines the objective and is therefore "inconsistent" with the objective. Or the evidence may, as in *Chaoulli*, show that there is simply no connection on the facts between the effect and the objective, and the effect is therefore "unnecessary". Regardless of how the judge describes this lack of connection**, the ultimate question remains whether the evidence establishes that the law violates basic norms because there is *no connection* between its effect and its purpose.** This is a matter to be determined on a case-by-case basis, in light of the evidence.

120 **Gross disproportionality asks a different question from arbitrariness and overbreadth. It targets the second fundamental evil: the law's effects on life, liberty or security of the person are so grossly disproportionate to its purposes that they cannot rationally be supported. The rule against gross disproportionality only applies in extreme cases where the seriousness of the deprivation is totally out of sync with the objective of the measure.** This idea is captured by the hypothetical of a law with the purpose of keeping the streets clean that imposes a sentence of life imprisonment for spitting on the sidewalk. **The connection between the draconian impact of the law and its object must be entirely outside the norms accepted in our free and democratic society.**

121 **Gross disproportionality under s. 7 of the *Charter*** does *not* consider the beneficial effects of the law for society. It **balances the negative effect on the individual against the purpose of the law, *not* against societal benefit that might flow from the law.** As this Court said in *Malmo-Levine*:

> In effect, the exercise undertaken by Braidwood J.A. was to balance the law's salutary and deleterious effects. In our view, with respect, that is a function that is more properly reserved for s. 1. These are the types of social and economic harms that generally have no place in s. 7. [para. 181]

> 122 Thus, gross disproportionality is not concerned with the number of people who experience grossly disproportionate effects; **a grossly disproportionate effect on one person is sufficient to violate the norm.**
>
> 123 **All three principles — arbitrariness, overbreadth, and gross disproportionality — compare the rights infringement caused by the law with the objective of the law, not with the law's effectiveness.** That is, they do not look to how well the law achieves its object, or to how much of the population the law benefits. They do not consider ancillary benefits to the general population. Furthermore, none of the principles measure the percentage of the population that is negatively impacted. The analysis is qualitative, not quantitative. **The question under s. 7 is whether *anyone's* life, liberty or security of the person has been denied by a law that is inherently bad; a grossly disproportionate, overbroad, or arbitrary effect on one person is sufficient to establish a breach of s. 7.**
>
> [My bolding added]

[49] The "reasonable hypothetical" construct (explained in *R v Nur*, 2015 SCC 15, arising in the context of mandatory minimum sentencing provisions – and critically commented upon by the minority: Rothstein, Moldaver and Wagner JJ) - has come under further pointed criticism recently: see *R v Hills*, 2020 ABCA 263.

[50] Nevertheless, the law as it stands is as Chief Justice McLachlin stated in *Nur*:[19]

> 46 To recap, a challenge to a mandatory minimum sentencing provision on the ground it constitutes cruel and unusual punishment under s. 12 of the *Charter* involves two steps. First, the court must determine what constitutes a proportionate sentence for the offence having regard to the objectives and principles of sentencing in the *Criminal Code*. Then, the court must ask whether the mandatory minimum requires the judge to impose a sentence that is grossly disproportionate to the fit and proportionate sentence. If the answer

[19] The approach in *Nur* 2015 SCC 15 and *R v Lloyd*, 2016 SCC 13 was reiterated in the 7:2 majority judgement of Justice Martin in *R v Boudreault*, 2018 SCC 58.

is yes, the mandatory minimum provision is inconsistent with s. 12 and will fall unless justified under s. 1 of the *Charter*.

(2) Whose Situation Is Considered in the Section 12 Analysis?

47 We have seen that a s. 12 challenge to a mandatory sentencing provision compares a fit and proportionate sentence for the offence with the sentence imposed by the mandatory minimum. At this point, a question arises — a question that is at the heart of this case. In analyzing the constitutionality of a mandatory minimum sentencing provision, who does the court take as the offender? Does the court consider only the offender who brings the s. 12 challenge? Or should it also, if necessary, consider how the provision impacts on other persons who might reasonably be caught by it?

48 Nur and Charles do not argue that the mandatory minimum terms of imprisonment in s. 95(2) are grossly disproportionate as applied to them. Rather, they argue that these mandatory minimum terms of imprisonment violate s. 12 as they apply to other offenders. Against this, the Attorney General of Ontario, supported by other Attorneys General, argues for a test that puts the primary or exclusive focus on the offender before the court. (The Attorney General of Ontario says the analysis should ask whether the mandatory minimum is grossly disproportionate having regard to the purpose and gravity of the offence as manifested in *actual* common instances of committing the offence, as well as the *actual* case before the court (A.F. (Nur), at para. 41). The Attorney General of British Columbia goes further, asserting that only the circumstances of the offender should be considered.)

49 **For the reasons that follow, I conclude that excluding consideration of reasonably foreseeable applications of a mandatory minimum sentencing law would run counter to the settled authority of this Court and artificially constrain the inquiry into the law's constitutionality.**

50 To confine consideration to the offender's situation runs counter to the long and settled jurisprudence of this Court relating to *Charter* review generally, and to s. 12 review in particular.

[51] A succinct summary of the steps in a section 12 Charter analysis (though in the case of a “punishment” rather than an alleged s. 12 Charter “treatment” - the Ontario Court of Appeal did not consider SOIRA or its Ontario equivalent to be a “treatment” - I will consider it so to allow for a fuller analysis) was set out by the

majority in *R v Hilbach*, 2020 ABCA 332 (leave granted to SCC on March 11, 2021- SCC Case No. 39438):

> [35] The Supreme Court of Canada in ***Nur***, paras 46, 56, 57, 62, 65, 77, confirmed in ***Lloyd***, set out a detailed procedure for a s 12 analysis. See also ***Goltz***, 515 (SCR); ***Ford***, para 10; ***Newborn***, paras 42-44; ***Ookowt***, para 36:
>
> > 1) The court must determine what constitutes a proportionate sentence for the individual offender having regard to the objectives and principles of the sentencing provisions in the *Criminal Code*;
> > 2) The court must then ask whether the mandatory minimum requires the judge to impose a sentence upon that individual offender that is grossly disproportionate to the fit and proper sentence; [although the Crown elected to proceed on both offences by summary conviction procedure, s. 490.013(2.1) CC makes no distinction and requires a lifetime duration of reporting - bearing in mind the evidence presented in this case, I conclude a lifetime order would not be grossly disproportionate in effect upon Mr. Vitale.]
> > 3) If the answer to step 2 is yes, the mandatory minimum provision is inconsistent with s 12 and will fall pursuant to s 52(1) of the *Constitution Act, 1982* unless justified under s 1 of the *Charter*;
> > 4) If the answer to step 2 is no, the court then may consider how the law might impact on third parties in other reasonably foreseeable applications of the law: is it reasonably foreseeable that the mandatory minimum will impose sentences that are grossly disproportionate to some people's situations, grounded in judicial experience and common sense, excluding fanciful or remote situations and mere speculation; [I conclude it is not reasonably foreseeable that a lifetime order will be grossly disproportionate in effect upon persons who will be sentenced pursuant to the present legislation – bearing in mind the availability of an application for termination after 20 years – s. 490.015(1)(c) CC.]
> > 5) If the answer to step 4 is yes, the mandatory minimum provision is inconsistent with s 12 and will fall pursuant to s 52(1) of the *Constitution Act, 1982* unless justified under s 1 of the *Charter*; and
> > 6) If the answer to step 4 is no, the mandatory minimum sentence will withstand *Charte*r scrutiny.

[52] The circumstances of Mr. Vitale include that he pled guilty to two *separate* counts of possession of child pornography contrary to s. 163.1 *CC*. He thereby admitted the essential elements of that offence. The first count related to his

possession of child pornography between January 1 and December 31, 2013; the second count related to his possession of child pornography between January 1 and December 31, 2014. It must be borne in mind that *each day* Mr. Vitale possessed child pornography constituted a new offence – each time he retrieved child pornography from the Internet constituted a new offence.

[53] To consider the seriousness of the offence, one must look to what was done, rather than what Mr. Vitale did not do.

[54] The Agreed Statement of Facts included that: "the amount of material seized by the police is the equivalent of approximately 75 laptop computers filled to capacity"; "approximately 99.9% of the child pornography flagged by the police consists of illustrations and cartoon images"; "the vast majority of child pornography flagged by the police investigation consists of illustrations and cartoon images depicting sex acts between underage fictional characters, as opposed to photos and video of real people (as captured by cameras). Some of the storyboard and comics are incest-based acts comprised of parent and child relationships."

[55] I am satisfied that Mr. Vitale repeatedly accessed and deliberately collected this child pornography over a lengthy time-period, and did so purely for personal

reasons. I infer this behaviour was motivated by his personal sexual interests between January 1, 2013 and December 31, 2014 when he was in his early 70s. This pattern of behaviour suggests a determined deliberateness given his accessing, downloading, sorting, burning onto discs, and maintaining the child pornography collection in question.[20]

[56] The fact that offenders have no prior criminal record is sometimes considered to be a mitigating factor on sentencing.[21]

[57] On April 14, 2019, Mr. Vitale was sentenced on a joint recommendation to 11 months custody and two years probation.

[58] In summary, it cannot be said that the legislation is arbitrary as interpreted by the jurisprudence or unconstitutionally overbroad – there is clearly a semblance of a connection between the purpose of the legislation and its effects in relation to

[20] See also the Agreed Statement of Facts: "However, starting in 2009 Dr. Vitale put [child] pornography on separate disks." Despite the evidence presented by Mr. Vitale, I conclude his risk of committing further child pornography offences remains at a significant level.

[21] With all due respect, I think it is much more appropriate to consider it a neutral factor in relation to first time sexual offenders. What is the significance in any given case of a first offender, that there is no previous criminal record? If an offender has done positive things in the past, that is reasonably considered a mitigating factor. The mere fact that the offender does not have previous convictions is not something they should be rewarded by characterizing that factor as one that should mitigate or lessen the sentence for the offence committed. A similar rationale was articulated by Justice Derrick in *R v Dawson*, 2021 NSCA 29 at para. 69 in relation to large scale premeditated frauds, and by Justice Saunders in relation to good behaviour while on release conditions: *R v Chase*, 2019 NSCA 36 at para. 37. The lack of a previous criminal record in sexual offender sentencings has been held by our courts to both be a mitigating factor, and to be a neutral factor.

Mr. Vitale, and in respect of any reasonably hypothetical offender caught by the regime; nor that it is grossly disproportionate as envisaged by section 7 of the Charter – the regime's effects on the life, liberty or security of the person of Mr. Vitale or any reasonably hypothetical offender caught by the regime is not so grossly disproportionate to its purpose(s) that it cannot rationally be supported.

[59] I reiterate what Chief Justice McLachlan said in *R v Nur*, 2015 SCC 15 during the s. 12 Charter analysis regarding mandatory minimum sentences for s. 95 *CC*:

> 54 A few years later in *R. v. Goltz*, [1991] 3 S.C.R. 485 (S.C.C.), the Court, per Gonthier J. for the majority, confirmed that a s. 12 review of mandatory minimum sentencing laws may look at cases other than that of the offender, and commented on the scope of that review. Laws should not be struck down as unconstitutional on the basis of examples that were unlikely ever to arise. The focus must be on "*reasonable hypothetical circumstances*, as opposed to far-fetched or marginally imaginable cases" (p. 506 (emphasis in original)). The Court upheld a minimum sentence of seven days' imprisonment for driving while prohibited.
>
> 55 Once again, in *Morrisey*, the majority of the Court, per Gonthier J., stressed that the "reasonableness of the hypothetical cannot be overstated" (para. 30). The Court upheld a four-year mandatory minimum sentence for criminal negligence causing death by using a firearm.
>
> 56 These are the only three cases to directly address the question of what cases, or "hypotheticals", the court should consider on a s. 12 challenge to a mandatory minimum sentencing provision.[1] In my view, they do not establish that the jurisprudence is "irreconcilable". A single theme underlies *Goltz* and *Morrisey* — the only two cases to discuss the issue in detail — reasonable foreseeability. When Gonthier J. in *Goltz* speaks of the "reasonable hypothetical" he is speaking of *a situation that may reasonably be expected to arise* — not "marginally imaginable", not "far-fetched", but "reasonable". The early case of *Smith* is not inconsistent in words or result with the theme developed in *Goltz* and *Morrisey* — in determining whether mandatory minimum sentencing laws

violate s. 12, it is appropriate to consider how the law may impact on third parties in reasonably foreseeable situations.

57 **Unfortunately, the word "hypothetical" has overwhelmed the word "reasonable" in the intervening years**, leading to debate on how general or particular a hypothetical must be, and to the unfortunate suggestion that if a trial judge fails to assign a particular concatenation of characteristics to her hypothetical, the analysis is vitiated. With respect, this overcomplicates the matter. **The question is simply whether it is reasonably foreseeable that the mandatory minimum sentence will impose sentences that are grossly disproportionate to some peoples' situations,** resulting in a violation of s. 12. The terminology of "reasonable hypothetical" may be helpful in this regard, but **the focus remains squarely on whether the sentence would be grossly disproportionate in reasonably foreseeable cases.** At its core, the process is simply an application of well established principles of legal and constitutional interpretation.

58 I conclude that the jurisprudence on general *Charter* review and on s. 12 review of mandatory minimum sentencing provisions supports the view that a court may look not only at the offender's situation, but at other reasonably foreseeable situations where the impugned law may apply. I see no reason to overrule this settled principle.

[My bolding added]

[60] Moreover, presuming SOIRA orders could be found to arguably constitute cruel *and* unusual "treatment" (rather than "punishment"),[22] the imposition thereof

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[22] See the reasons in *R v Cross*, 2006 NSCA 30 - leave refused [2006] 2 SCR vi (note) - where the court concluded that the SOIRA obligation "is not burdensome" (para. 66) and that is not a "punishment" within s. 11(i) of the Charter (para. 84). Notably however, the court qualified their general statement as follows: "where the registration requirements would be particularly burdensome for an offender and approach a punitive sanction, the exemption provision provides relief from its operation… There may be an unusual case where, due to the unique circumstances of the offender, the impact of the order could constitute the "severe handling" or "harsh treatment" that is characteristic of punishment. In such an event the exemption provision [the pre-April 15, 2011 provision] would suffice to relieve the offender from such effect…" (para. 85)… "I am satisfied that the exemption clause provides adequate protection in the exceptional situation where the impact of the order on the offender could otherwise be punitive." (para. 86). A more expansive approach to the s. 12 Charter reference to "punishment or treatment" can be found in *R v KRJ*, 2016 SCC 31 in relation to the statutory interpretation and characterization of the retrospective operation of the 2012 *Criminal Code* amendments to sections 161(1)(c) and (d) making them applicable to those who offended *before* the amendments came into force. The court concluded that those subsections "constitute punishment for the purposes of s. 11(i) of the Charter." Importantly, therein the court stated under the title "Do laws primarily aimed at public protection necessarily fail to satisfy the second branch of the *Rogers*' test" ([2006] 1 SCR 554 regarding the taking of DNA samples)where the court developed a two-part test for determining whether a consequence amounts to "punishment" under section 11(i) of the Charter.) The *KRJ* court concluded: "for these reasons, sanctions intended to advance public safety do not constitute a broad exception to the protection s. 11(i)

on Mr. Vitale is not grossly disproportionate, nor is it in relation to "reasonable" hypotheticals. To be clear, the asserted "reasonable" hypothetical offender put forward by Mr. Vitale at para. 103 of his March 16, 2020 brief, is not a "reasonable" fact pattern: an 18-year-old male, with no prior criminal record, a high achieving high school student, attending first-year university on a full scholarship and an active volunteer in a hospital, in possession of exactly one Japanese anime illustration found to constitute "child pornography". A fictional female in the image was found by the court to be between 15 and 17 years of age. The potential defences did not apply and the offender received the mandatory minimum sentence.

[61] The majority stated in *Nur*:

> "61 To be sure, the language of "reasonable hypotheticals" in the context of mandatory minimum sentences and the exaggerated debate that has surrounded the term has led some to fear that the potential for finding a law inconsistent with the *Charter* is limited only by the bounds of a particular judge's imagination. This fear is misplaced. **Determining the reasonable reach of a law is essentially a question of statutory interpretation. At**

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affords and may qualify as punishment… In my view, the s. 11(i) test for punishment must embody a clearer, more meaningful consideration of the impact a sanction can have on an offender (para. 36)… Thus I would restate the test for punishment as follows in order to carve out a clearer and more meaningful role for the consideration of the impact of a sanction: *a measure constitutes punishment if (1) it is a consequence of conviction that forms part of the arsenal of sanctions to which an accused may be liable in respect of a particular offenders, and either (2) it is imposed in furtherance of the purpose and principles of sentencing, or (3) it has a significant impact on an offender's liberty or security interests.*" (para. 41). [My italics added] Notably, s. 161 is contained in Part V– Sexual Offences and is entitled "Order of Prohibition". Arguably, according to the reasons in *KRJ*, SOIRA orders do not qualify as punishment. Nevertheless, Mr. Vitale fastens his argument as well on to the word "treatment" in section 12 Charter, which reads: "Everyone has the right not to be subjected to any cruel and unusual treatment or punishment." The wording is plain however: "cruel *and* unusual treatment". This explains the very stringent threshold that must be met before a conclusion of "gross disproportionality" can be reached.

bottom, the court is simply asking: What is the reach of the law? What kind of conduct may the law reasonably be expected to catch? What is the law's reasonably foreseeable impact? Courts have always asked these questions in construing the scope of offences and in determining their constitutionality.

62 The inquiry into cases that the mandatory minimum provision may reasonably be expected to capture must be grounded in judicial experience and common sense. **The judge may wish to start with cases that have actually arisen** (I will address the usefulness of reported cases later) **and make reasonable inferences from those cases to deduce what other cases are reasonably foreseeable**. **Fanciful or remote situations must be excluded**: *Goltz*, at p. 506. **To repeat, the exercise must be grounded in experience and common sense**. Laws should not be set aside on the basis of mere speculation.

63 Not only is looking at the law's impact on persons whom it is reasonably foreseeable the law may catch workable — it is essential to effective constitutional review. Refusing to consider reasonably foreseeable impacts of an impugned law would dramatically curtail the reach of the *Charter* and the ability of the courts to discharge their duty to scrutinize the constitutionality of legislation and maintain the integrity of the constitutional order. The protection of individuals' rights demands constitutional review that looks not only to the situation of the offender before the court, but beyond that to the reasonably foreseeable reach of the law. Testing the law against reasonably foreseeable applications will prevent people from suffering cruel and unusual punishment in the interim until the mandatory minimum is found to be unconstitutional in a particular case.

…

66 I turn now to some of the ancillary debates surrounding how a court should proceed where mandatory minimum sentencing laws are challenged under s. 12 on the basis of their reasonably foreseeable application to others.

67 The first debate concerns the degree of "likelihood" required to satisfy the reasonable foreseeability test. The Attorney General of Ontario argues that the s. 12 question is whether it is *likely* that the *general application* of the offence would result in the imposition of a grossly disproportionate sentence amounting to cruel and unusual punishment (A.F. (Nur), at para. 66). She says the Court of Appeal erred by failing to confine itself to common instances of conduct caught by the provision and basing its decision on unlikely scenarios (para. 68-73). These instances create a presumption of constitutionality that can be defeated only by showing that the offender before the court would suffer cruel and unusual punishment (para. 68).

68 **The reasonable foreseeability test** is not confined to situations that are likely to arise in the general day-to-day application of the law. Rather, it **asks what situations may reasonably arise**. It targets circumstances that are foreseeably captured by the minimum conduct caught by the offence. **Only situations that are "remote" or "far-fetched" are excluded**: *Goltz*, at p. 515.Contrary to what the Attorney General of Ontario suggests there

> is a difference between what is foreseeable although "unlikely to arise" and what is "remote [and] far-fetched" (A.F. (Nur), at para. 66). Moreover, adoption of the likelihood standard would constitute a new and radically narrower approach to constitutional review of legislation than that consistently adhered to since *Big M*. The Court has never asked itself whether a projected application of an impugned law is common or "likely" in deciding whether a law violates a provision of the *Charter*. To set the threshold for constitutional review at common or likely instances would be to allow bad laws to stay on the books.
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> [My bolding added]

[62] It is important to not lose sight of the distinction between: forms of true "punishment", such as "sanctions" which have as their primary objectives, denunciation and deterrence of the conduct at issue, which are sentencing principles; and the imposition of a SOIRA order which has as its primary objective, a salutary public purpose, the prevention and investigation of future sexual offences.[23]

[63] I dismiss the application requesting an order for a writ of *certiorari* quashing the SOIRA order herein, and a declaration under section 52 (1) of the *Constitution Act*, 1982, that section 490.012 of the *Criminal Code* is of no force and effect.

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[23] I find Justice Charbonneau's well-written and succinct decision in *R v Lafferty*, 2020 NWTSC 5 to largely reflect the tenor of my own views *vis-à-vis* Mr. Vitale's arguments - I disagree with Justice Khullar's criticisms in *Ndhlovu* at paras. 195-6. While the bare purpose is succinctly set out in section 2 of the SOIRA, that does not preclude a more robust articulation of the purpose of the legislation, which is consistent with the use of interpretive aids and contextual understanding, when considering the constitutional validity of the legislation. I also similarly find persuasive the core reasoning authored by Justices Schultz and Slatter in *R v Ndhlovu*, 2020 ABCA 307 (leave to appeal filed October 23, 2020 - SCC Case No. 39360). In assessing the constitutionality of s. 490.012 and SOIRA generally, one must also take account of the reasons in *R v Friesen*, 2020 SCC 9, which emphasize the deeper understanding of the psychological harm caused by sexual offenders, which properly include those in possession of child pornography in relation to actual human beings.

Rosinski, J.