"Sexual Offender Information Registries: The Case for a Punishment-Based Framework"

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The Supreme Court of Canada concluded in R v Ndhlovu that a federal sex offender registry requiring all sex offenders be included therein deprived these offenders of liberty in a manner that violated the principle of fundamental justice prohibiting overbroad laws. In so concluding, the Court did not opine upon whether mandatory sex offender registry orders constitute "punishment" for constitutional purposes. I contend that the prior sex offender registries ought to have so qualified given their "serious", "onerous", and "considerable" impact on liberty, their mandatory nature, and overbroad impact on numerous offenders. Adopting a punishment-based framework for sex offender registries would have two important consequences: first, the broader objectives inherent to punishment analysis would shelter the sex offender registry laws from scrutiny for overbreadth; and second, the denunciatory and deterrent benefits inherent to such a framework would avoid any finding that the sex offender registries constitute "cruel and unusual" punishment. While any retroactive application would infringe section 11(i) of the Charter, narrow clauses excluding low-end offenders can be crafted in a way that would survive constitutional scrutiny. Parliament's recent reply to Ndhlovu following the adoption of Bill S-12 should therefore be assessed in light of the option to adopt a punishment-based framework that would have continued to make sex offender registry orders mandatory.

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Introduction

The *Sex Offender Information Registration Act* (*SOIRA*)[1] was enacted to allow judges sentencing sex offenders to require that they disclose various pieces of personal information and meet a series of reporting requirements for specified periods.[2] The original enactment nevertheless fell into disfavour because it built prosecutorial and judicial discretion into the provisions which resulted in nearly half of all sex offenders being exempted from the sex offender registry.[3] In response, Parliament amended section 490.012 of the *Criminal Code of Canada* (*Criminal Code*)[4] to require those convicted of certain "designated offences" be included within the sex offender registry.[5] Section 490.13(2.1) was also added to require anyone convicted of multiple sexual offences—regardless of whether they were sentenced for the acts concurrently or whether the acts formed part of the same broader transaction—to a lifetime sex offender registration order.

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1. *Sex Offender Information Registration Act*, SC 2004, c 10 [*SOIRA*].

2. See *Protecting Victims from Sex Offenders Act*, SC 2010, c 17 [*PVSOA*]. The Act came into force on April 15, 2011.

3. See House of Commons, Standing Committee on Public Safety and National Security, *Statutory Review of the Sex Offender Information Registry Act: Report of the Standing Committee on Public Safety and National Security*, 40-2 (7 December 2009) (Chair: Garry Breitkreuz) at 8–9 [House of Commons, Standing Committee] (noting that only 50 percent of offenders were required to include their name in the registry).

4. *Criminal Code*, RSC 1985, c C-46 [*Criminal Code*].

5. For a definition of "designated offence", see *ibid* s 490.011.

In *R v Ndhlovu* (*Ndhlovu*),[6] the Supreme Court of Canada considered whether these provisions were consistent with section 7 of the *Canadian Charter of Rights and Freedoms* (*Charter*).[7] While the Court unanimously concluded that section 490.013(2.1) of the *Criminal Code* was overbroad,[8] only a narrow majority came to the same conclusion with respect to section 490.012.[9] The majority's conclusion was based on the premise that some sexual offenders pose no realistic possibility of reoffending. This finding brought those individuals outside the legislation's aim of compelling information from sexual offenders for the purpose of helping the state prevent and investigate sexual offences.[10] In opposing this conclusion, the minority pointed to empirical evidence that it maintained demonstrated that all sex offenders pose some increased risk to reoffend. In addition, the fact that predicting recidivism cannot be done with any certainty warranted judicial deference to Parliament's decision to use prior sexual offending as a proxy for future offending.[11] Given the heightened harm inherent to sexual offences, the minority concluded that the laws were not overbroad because they were "reasonably necessary" to achieve Parliament's aims of investigating and preventing sex offences.[12]

The *Ndhlovu* case raises many pressing questions, all of which were made more urgent by the Supreme Court issuing a one-year suspended declaration of invalidity with respect to section 490.012 of the *Criminal*

6. 2022 SCC 38 [*Ndhlovu*].

7. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act* 1982 (UK), 1982, c 11 [*Charter*].

8. *Ndhlovu*, *supra* note 6 at para 144.

9. *Ibid* at paras 79–82.

10. *Ibid* at paras 77–111.

11. *Ibid* at paras 172–95.

12. It is notable that the majority and minority apply differing conceptions of overbreadth. The majority's application of the approach in *Canada (Attorney General) v Bedford*, 2013 SCC 72 [*Bedford*] requires that an arbitrary effect on even a single individual's life, liberty, or security violates section 7. The minority, relying on *R v Safarzadeh-Markhali*, 2016 SCC 14, applied the more lenient "reasonably necessary" conception of overbreadth, which effectively mirrors the minimal impairment branch of the section 1 test. See also *Ndhlovu*, *supra* note 6 at paras 77–78, 172. For my argument as to why neither of these conceptions of overbreadth qualify as a principle of fundamental justice, see Colton Fehr, "Rethinking the Instrumental Rationality Principles of Fundamental Justice" (2020) 58:1 Alta L Rev 133; Colton Fehr, *Constitutionalizing Criminal Law* (Vancouver: UBC Press, 2022) at 72–75; Colton Fehr, "Reflections on the Supreme Court of Canada's Decision in *R. v. Sharma*" (2023) 60:4 Alta L Rev 933 at 938–39, responding to *R v Tucker-Merry*, 2022 CanLII 106404 at paras 36–40 (NLPC); Colton Fehr, *Judging Sex Work: Bedford and the Attenuation of Rights* (Vancouver: University of British Columbia Press, 2024) at ch 5.

Code.[13] But perhaps the most interesting of these questions relates to the nature of sex offender registries. In Brown J's minority decision, he pointed to the majority's reasoning on the impact of the sex offender registry as evidence that, if pressed, the majority would conclude that the legislative scheme constituted punishment within the meaning of the *Charter*.[14] As the majority explicitly left this question open,[15] the question arises: should the sex offender registry—and especially the amendments recently adopted by Parliament in response to the *Ndhlovu* decision[16]—qualify as "punishment" under the *Charter*?

In this article, I contend that the prior sex offender information registry ought to have qualified as punishment but that the broader punitive objectives necessarily ascribed to these laws would have ensured that they survived constitutional scrutiny. This follows because categorizing the sex offender registry laws as punishment sidesteps any overbreadth argument. When posed as part of the offender's punishment, the objective of the law will be met as the sex offender registry will always serve at least a denunciatory function. The operative question therefore becomes whether a sex offender registry order runs afoul of the "gross disproportionality" standard governing section 12 of the *Charter*. In my view, such an argument will inevitably fail. While retroactive application of sex offender registries violates section 11(i) of the *Charter*, I contend that these negative effects could have been avoided by adopting exemption clauses for those to whom the prior law would have applied exclusively for punitive purposes. If persuasive, I further maintain that the availability of a punishment-based framework for sex offender registries is a preferable alternative to the discretion-based model re-adopted by Parliament in response to *Ndhlovu*. This follows given the serious risk that exercises of judicial discretion in the latter model will again result in the perpetuation of harmful stereotypes about who constitutes a "real sex offender".[17]

The broader political context within which I make my punishment-based proposal is also relevant to the article. I made a similar policy proposal when asked to provide testimony for the Standing Committee on Justice and

13. In contrast, *Criminal Code*, *supra* note 4 s 490.013(2.1), was struck down immediately. See *Ndhlovu*, *supra* note 6 at para 136.

14. *Ndhlovu*, *supra* note 6 at paras 167–68.

15. *Ibid* at para 58.

16. See Bill S-12, *An Act to Amend the Criminal Code, the Sex Offender Information Registration Act and the International Transfer of Offenders Act*, 1st Sess, 44th Parl, 2023 [Bill S-12]. The Bill received assent on 26 October 2023.

17. For a detailed review of this evidence, see *Ndhlovu*, *supra* note 6 at paras 182–95; Janine Benedet, "A Victim-Centred Evaluation of the Federal Sex Offender Registry" (2012) 37:2 Queen's LJ 437. I have also written post-*Ndhlovu* to demonstrate that judicial discretion continues to be applied inappropriately under the new laws. See Colton Fehr, "Unpacking Bill S-12: Pragmatic Compromise or Undue Deference?" (2025) 29 Can Crim L Rev 69.

Human Rights on the content of Bill S-12. The government's response was exemplified by the comments of Member of Parliament James Maloney, who observed that "within the confines of the majority judgment in the *Ndhlovu* decision, I am confident this was as far as the government could go with respect to automatic registration".[18] Needless to say, this response is inconsistent with my view as well as those of others who testified before the Standing Committee on Justice and Human Rights.[19] The confines of a brief legislative hearing nevertheless make it difficult for the plausibility of an alternative proposal to be explored by members of the Committee, and it is with these limitations in mind that I write this article.

The article unfolds as follows. In Part I, I trace the legislative history of the *SOIRA* provisions. In so doing, I provide a more detailed overview of the impetus for the *SOIRA* regime, its initial framing, and subsequent amendment. In Part II, I explain the Supreme Court's reasons for striking down the first *SOIRA* amendments and critically engage with the question of whether these regimes ought to be labelled punishment for constitutional purposes. As I answer this question in the affirmative, I conclude in Part III by unpacking the implications of adopting a sex offender registry that serves a dual investigative and punitive purpose. I then employ my conclusion that such a registry would survive constitutional scrutiny to critically evaluate the merits of Parliament's response to *Ndhlovu*: Bill S-12. Parliament's choice to re-instate significant judicial and limited prosecutorial discretion into the sex offender registry is undesirable in light of the problematic history of such exemptions in Canada and unnecessary given the constitutionality of the punishment-based framework I contend Parliament ought to have enacted.

I. Sex Offender Registries in Canada

While *SOIRA* was only passed in 2004, its inspiration derived from a similar Ontario statute known as *Christopher's Law*.[20] The federal regime nevertheless initially provided both prosecutors and judges with significantly greater discretion than its provincial counterpart by allowing them to avoid imposing a registration requirement on sex offenders in a variety of circumstances. The amendments to *SOIRA* at issue in *Ndhlovu* closed this gap by restricting the ability of sex offenders to avoid the registry

18. See *House of Commons Debates*, 44-1, vol 151, No 239 (25 October 2023) at 1710 (per James Maloney).

19. See *House of Commons Debates*, 44-1, vol 151, No 077 (17 October 2023). See especially the comments of Janine Benedet who testified in the same hearing with me. While she did not advocate for a punishment-based model, she made numerous astute suggestions that also went unheeded

20. *Christopher's Law (Sex Offender Registry)*, SO 2000, c 1 [*Christopher's Law*].

to circumstances where they could demonstrate that the appropriate sentence for their conduct would be an absolute or conditional discharge.

A. Christopher's Law

The province of Ontario passed *Christopher's Law* (*Act*) in recognition of the fact that "police services require access to information about the whereabouts of sex offenders in order to assist them in the important work of maintaining community safety".[21] It purported to achieve this end by providing "the information and investigative tools that . . . police services require in order to prevent and solve crimes of a sexual nature".[22] In so doing, the *Act* required that the relevant ministry establish a database with respect to sex offenders to store the names, dates of birth, addresses, and sex offences committed or for which they were found not criminal responsible.[23] *Christopher's Law* also allows regulators to require sex offenders to provide any other additional information to authorities prescribed by regulation. This general authority resulted in the police being able to compel a lengthy list of information from sex offenders and require that they periodically update this information.[24] To further its ends, *Christopher's Law* also required police to make reasonable efforts to verify an offender's address at minimum once a year, which often resulted in attending the individual's home.[25] Failure to comply with the *Act* without reasonable excuse could result in a maximum fine of $25,000 or a year's imprisonment for a first offence or two years imprisonment less a day and the same maximum fine for a subsequent offence.[26]

The duration of the provincial sex offender registration order varied depending on the nature of the offence committed. If the maximum sentence for their sexual offence was ten years or less, the offender must be on the registry for ten years.[27] The duration was extended to a life order if the offender was convicted or found not criminally responsible for an offence for which the maximum sentence is greater than ten years or if they were convicted or found not criminally responsible for more than one sexual offence.[28] As the provision only applies to those "convicted", however, anyone granted an absolute or

21. *Ibid*, Preamble.

22. *Ibid*.

23. *Ibid*, s 2.

24. *Ibid*. For the regulatory scheme, see *Christopher's Law (Sex Offender Registry)*, 2000 O Reg 69/01, s 2.

25. See *Christopher's Law*, *supra* note 20, s 4(2).

26. *Ibid*, s 11.

27. *Ibid*, s 7(1)(a).

28. *Ibid*, ss 7(1)(b)–(c).

conditional discharge for a sexual offence would not be subject to any registration order.[29] Similarly, any offender who received a pardon or criminal record suspension was no longer required to report to the sex offender registry,[30] although only those who received a pardon would have their information completely removed from the registry.[31] Importantly, however, these benefits were *only* provided to those convicted of an offence, rendering accused found not criminally responsible for a sexual offence because of a mental disorder incapable of being removed from the sex offender registry.[32]

The provisions of *Christopher's Law* prohibiting not criminally responsible individuals from exiting the registry was eventually struck down by the Supreme Court in *Ontario (Attorney General) v G*.[33] Applying the equality right in section 15 of the *Charter*, the Court concluded that the law drew a distinction on an enumerated ground between those individuals who do and do not suffer from a mental disability. This followed because convicted offenders had several means for being exempted from their registry obligations or removed from the sex offender registry while non-criminally responsible individuals possessed no such means.[34] In considering whether the law was discriminatory, the Court rejected the Crown's argument that the impugned laws "are based on statistical generalizations and 'empirical fact' and impose only 'modest' impacts on registrants".[35] Instead, it found that "[t]he distinctions drawn … reinforce and further the stigmatizing idea that those with mental illness are inherently and permanently dangerous and, in so doing, perpetuate the disadvantage they experience".[36] As a result, the impugned provisions were read down to avoid being applied to mentally disordered offenders who subsequently received an absolute discharge under the relevant *Criminal Code* provisions.[37]

B. SOIRA

Parliament enacted *SOIRA* in 2004, four years after the Ontario government's adoption of *Christopher's Law* and after a notable uptick in other provinces taking similar steps to increase public awareness of sex offenders in

29. *Ibid,* s 3. See also *Criminal Code*, *supra* note 4, s 730 (provides that discharged offenders are not "convicted" of the offence).

30. See *Christopher's Law*, *supra* note 20, s 7(4).

31. *Ibid*, s 9.1.

32. *Ibid*.

33. 2020 SCC 38.

34. *Ibid* at paras 50–52.

35. *Ibid* at para 64.

36. *Ibid* at para 65.

37. *Ibid* at paras 160–70. For a review of the relevant *Criminal Code* scheme for addressing not criminally responsible individuals, see *ibid* at paras 33–38.

their communities.[38] The purpose of the federal legislation was similar to its provincial counterpart: "to help police services prevent and investigate crimes of a sexual nature by requiring the registration of certain information relating to sex offenders".[39] To achieve these ends, the legislation stipulated that the sex offender registry was meant to provide police with rapid access to current and reliable information about sex offenders to help police investigate crimes where there is a reasonable suspicion that the offence was of a sexual nature.[40] The reasonable suspicion requirement to access the database and access being limited to state actors were important features of the scheme which were meant to strike a balance between law enforcement's investigative objectives and the liberty and privacy interests of sexual offenders.[41]

The punitive consequences of *SOIRA* were similar to *Christopher's Law* but less strict in two main ways. First, the duration of any sex offender registry order was more lenient because the federal regime allowed for an intermediary duration of twenty years in cases where the maximum sentence for the index offence was between ten and fourteen years.[42] Second, the punishment for violating a *SOIRA* order is more lenient than the provincial statute. Under the federal law, an offender who violated a sex offender registry order without reasonable excuse was liable to a maximum fine of $10,000, six months imprisonment, or both for a first offence.[43] While the fine remained constant for a subsequent offence, the maximum term of imprisonment was increased to two years.[44] The maximum prison sentence for a first offence was therefore half and the maximum fine less than half of the maximum for the provincial statute. This approach is peculiar given that the latter provision is a criminal law while the provincial provision is a regulatory offence.[45]

38. For a review of the various policies in British Columbia, Alberta, and Manitoba, see Vanessa Amyot, "Sex Offender Registries: Labelling Folk Devils" (2009) 55:1–2 Crim LQ 188.

39. See *SOIRA*, *supra* note 1, s 2(1).

40. *Ibid*, s 2(2).

41. *Ibid*. For a more thorough review of the state's responsibilities with respect to any data collected under *SOIRA*, see *ibid*, ss 8–12.

42. See *Criminal Code*, *supra* note 4, s 490.013(2–4).

43. *Ibid,* s 490.031(1)(a).

44. *Ibid,* s 490.031(1)(b).

45. This provision was later amended by *PVSOA*, *supra* note 2, but the fine stayed the same. The jail sentence, while raised, allowed for a two-year-less-a-day sentence if the offence is prosecuted via summary conviction, while an offence prosecuted by way of indictment permitted a single day longer of prison. This too is an odd way of framing the offence as proceeding by indictment is supposed to come with significantly more serious consequences.

The *SOIRA* regime also differed from *Christopher's Law* because it provided pathways for a sex offender to avoid the sex offender registry. First, sentencing judges were able to deny a *SOIRA* order if the offender established that the impact of the order on their privacy and liberty interests "would be grossly disproportionate to the public interest in protecting society through the effective investigation of crimes of a sexual nature".[46] As the registry was not made public, any deleterious effects on the offender's liberty and privacy interests necessarily arose from the various attendance, registration, and other requirements imposed on offenders by the legislation. While most offenders would be impacted equally, offenders who travel for work, live a rural lifestyle, or are homeless would be affected more dramatically by these requirements.[47] Any such impact was in turn balanced against the societal benefit of requiring sex offenders to register. As became evident in the jurisprudence, the latter factor was often used by sentencing judges to exempt individuals who they considered not to be "real" sex offenders. This tendency was troubling as the standard was frequently "defined so narrowly as to exclude offenders who sexually assaulted people they knew, child pornography users, opportunistic offenders, and historic offenders".[48]

Second, a *SOIRA* order could only be made if the prosecutor made an application to the court. In some cases, a prosecutor no doubt refrained from making such an application because they believed that a sex offender registry order would be unlawful given its grossly disproportionate impact on the offender. Sex offenders were nevertheless more likely to avoid the registry by convincing prosecutors to employ their discretion as a plea-bargaining tool.[49] Such an approach is not without its benefits. Using avoidance of the sex offender registry during plea-bargaining could feasibly have incentivized increased guilty pleas. Crown discretion may also have avoided improper acquittals as offenders were likely more prone to run

46. See *Criminal Code*, *supra* note 4, s 490.016(1)(b).

47. See e.g. *R v Casaway*, 2005 NWTSC 37 (Indigenous offender living off the land); *R v LS*, 2005 BCPC 353 (living in remote locations); *R v JDM*, 2006 ABCA 294 [*JDM*] (man with Fetal Alcohol Syndrome Disorder); *R v Desmeules*, 2006 QCCQ 16773 [*Desmeules*] (mental health issues).

48. *Ndhlovu*, *supra* note 6 at para 182. Justice Brown described a litany of cases that improperly exempted offenders from the sexual assault registry. This strongly suggested that judges—likely due to biases against sexual assault victims—were unlikely to exercise their discretion appropriately. See also Benedet, *supra* note 17 at 447–62. Benedet provides a more detailed review of the relevant case law.

49. This is likely true as exemptions were quite rare given the onerous standard the offender was required to meet, and the bulk of sex offenders who avoided the registry did so by way of plea bargain. I expand upon the latter point below.

a trial if the consequences of conviction were thought to be too onerous.[50] This would be consistent with the American experience wherein prosecutors often allow sex offenders to plead to a lesser, non-sex-based assault offence to avoid being placed on the registry.[51] Allowing for prosecutors to simply take the registry off the table during plea-bargaining was preferable as it avoided the tendency to use the plea-bargaining process to circumvent the sexual nature of the offence, a practice that is likely much more upsetting to victims as it denies that a sexual violation ever occurred.

Finally, the federal sex offender registry differed from the provincial statute with respect to how an order may be terminated. While the provincial regime relied strictly on the pardon and record suspension procedure, the federal regime permitted orders to be terminated at various intervals during the order. In particular, section 490.016(1)(b) of the *Criminal Code* provided that

> [t]he court shall make a termination order if it is satisfied that the person has established that the impact on the person of continuing an order or an obligation, including on their privacy or liberty, would be grossly disproportionate to the public interest in protecting society through the effective prevention or investigation of crimes of a sexual nature, to be achieved by the regist[ry].[52]

Offenders became eligible to apply for a termination order after half of their registration term was served or, in the case of multiple orders or a life order, after twenty years of the most recent order elapsed.[53] While offenders were also eligible to apply for a termination order upon receiving a record suspension or pardon, the federal regime did not render such a termination order automatic and provided no clear standard for a judge to determine whether such an order would be appropriate.[54]

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50. See Benedet, *supra* note 17 at 446–47, citing Elizabeth Letourneau et al, "The Effects of Sex Offender Registration and Notification on Judicial Decisions" (2010) 35:3 Crim Just Rev 295.

51. *Ibid*.

52. See *Criminal Code*, *supra* note 4, s 490.016(1)(b).

53. *Ibid*, s 490.015. If the application failed, they could also re-apply after a further five years elapsed, or they received a record suspension or pardon. See *Criminal Code*, *supra* note 4, s 490.015(5).

54. *Ibid*, s 490.015(3). As this subsection uses the same language of "termination order", it is arguable that the standard ought to be the same as for other termination orders: gross disproportionality. However, the fact that a record suspension or pardon was granted also suggests that this high threshold may be inappropriate given the significant reform that must be demonstrated to warrant such an order. I am unaware of any case law considering this issue.

C. 2011 Amendments

A study on the efficacy of *SOIRA* by the Standing Senate Committee on Legal and Constitutional Affairs revealed that nearly half of those convicted of a sexual offence avoided the sex offender registry.[55] As Janine Benedet later demonstrated, however, "[o]nly a small portion of that gap is based on judicial exceptions . . . [which suggests] that most of the gap is based on the exercise by Crown counsel of the discretionary power not to seek registration".[56] Taken alongside the highly problematic reasoning of many judges exercising their discretionary powers alluded to earlier,[57] Parliament as a whole expressed serious and legitimate concern about the efficacy of the sex offender registry if prosecutorial and judicial discretion were preserved. While plea-bargaining benefits likely accrued from providing prosecutors with discretion, Parliament unanimously concluded that these benefits were outweighed by the reduced ability of the sex offender registry to achieve its laudable objectives.

In response to this problematic exercise of legal discretion, Parliament passed the *Protecting Victims from Sex Offenders Act*.[58] The main feature of the legislation was the removal of prosecutorial and judicial discretion to avoid a sex offender registry order when a person is convicted of a designated offence as defined under section 490.011(1)(a) of the *Criminal Code*.[59] In addition, Parliament passed section 490.13(2.1). This provision required that anyone convicted of multiple sexual offences comply with a lifetime sex offender registration order.[60] Importantly, this provision applied to offenders convicted of multiple sex offences regardless of whether they were sentenced for the acts concurrently or whether the acts formed part of the same broader transaction. Similar to orders under section 490.012, this order could only be rescinded after twenty years elapsed and only if the impact on the offender's liberty and privacy interest violated the gross disproportionality standard.[61] Finally, Parliament added that *SOIRA* served a "preventative" in addition to an "investigative"

55. See House of Commons, Standing Committee, *supra* note 3.

56. See Benedet, *supra* note 17 at 447.

57. *Supra* note 49.

58. *PVSOA*, *supra* note 2.

59. This included twenty-seven different offences. See *Ndhlovu*, *supra* note 6 at para 3. It also included the ability to apply for a sex offender registry order where an accused committed an offence listed in 490.011(b) and (f) if the Crown proved beyond a reasonable doubt that the offence was committed with the intent to commit one of the twenty-seven listed offences. Notably, *Christopher's Law*, *supra* note 20, does not contain such a provision.

60. *Ndhlovu*, *supra* note 6 at para 3.

61. See *Criminal Code*, *supra* note 4, s 490.015(1)(c).

function and repealed the requirement that police must possess a reasonable suspicion that a sex crime was committed before accessing the registry.[62]

II. *SOIRA* and the *Charter*

The mandatory nature of the Ontario and federal sex offender registries attracted near-immediate academic scrutiny.[63] Litigants also challenged these provisions by maintaining that an absence of judicial discretion rendered the provision violative of sections 7 and 12 of the *Charter*.[64] This framing was sensible as the limited jurisprudence delineating the scope of the term punishment left it unclear whether the provisions engaged section 12. The fact that the sex offender registry laws impacted the offender's liberty interests more broadly nevertheless ensured that they would be subject to scrutiny for consistency with the principles of fundamental justice. While these challenges were successful in *Ndhlovu*, the Supreme Court also made *obiter* comments strongly suggesting that the impugned sex offender registry provisions constituted punishment.

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62. See *SOIRA*, *supra* note 1, s 2.

63. See e.g. Natalie Cuffley, "Tattooing Sex Offender on His Forehead" (2003) 6 Crim Reports (6th) 134 at 135 (contending that public access to sex offender registries would endanger sex offenders and likely violate ss 7, 11, 12, and 15 of the *Charter*); Heather Davies, "Sex Offender Registries: Effective Crime Prevention Tools or Misguided Responses?" (2004) 17 Crim Reports (6th) 156 (questioning the efficacy of sex offender registries—and publicly available registries in particular—as they provide the community with a false sense of security and result in vigilantism which can inhibit rehabilitative efforts. The author also provides a truncated discussion of the constitutionality of the sex offender registries and asserts without much discussion that they constitute punishment); Yeshe Laine, "The Interplay between *Christopher's Law* and the *Sex Offender Information Registration Act*" (2007) 52:3 Crim LQ 470 (rejecting many of the public policy and constitutional arguments against use of sex offender registries); Mercedes Perez & Anita Szigeti, "Sex Offender Information Registries and the Not Criminally Responsible Accused: Have We Cast Too Wide a Net?" (2008) 25 Windsor Rev Legal Soc Issues 69 (contending that including not criminally responsible individuals within the sex offender registry primarily violates sections 7 and 12 of the *Charter*); Amyot, *supra* note 38 (contending that the public policy arguments for sex offender registries are inefficacious and reviewing various alternative policy proposals for reducing recidivism). Policy-based and constitutional concerns were also raised before these registries were adopted. See e.g. Cheryl Hanna, "Living with Risk: The American Experience with Sex Offender Legislation" (1997) 46 UNBLJ 153 (detailing the early American experience on sex offender registries and the principles animating debates over their efficacy and constitutionality).

64. Most notably, see *R v Dyck*, 2008 ONCA 309 [*Dyck*].

A. R v Ndhlovu

Despite the offender in *Ndhlovu* raising challenges at trial under both sections 7 and 12 of the *Charter*, the majority of the Supreme Court restricted its analysis to the former provision.[65] That section provides everyone with 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".[66] In order to establish a violation, the applicant must prove that the impugned law engages an individual's life, liberty, or security of the person interests. If so, then the law must be consistent with the principles of fundamental justice as that term has been developed in the Court's jurisprudence.[67] Explaining the concept of "liberty", the Court observed that it "protects against physical restraint ranging from actual imprisonment or arrest . . . to the use of state power to compel attendance at a particular place".[68] While the Crown conceded that the registry engaged the liberty interest, it contended that "the infringement is limited, analogous to fingerprinting, and exists only to the extent *SOIRA* compels attendance at a particular time and place".[69]

A majority of the Supreme Court rejected this argument. Its reasons for so doing are worth outlining in detail as they applied not only to the section 7 argument but also are central for determining whether sex offender registries constitute punishment. In assessing the impact of the registries on sex offenders, the Court concluded that these registries require offenders to provide an "extensive" amount of personal information, including

> their name, date of birth, gender, the address of their principal and secondary residences, the address of every place of employment or volunteer location, the name of their employer or volunteer supervisor and a description of the work done, the address of every educational institution at which they are enrolled, their height and weight, a description of every physical distinguishing mark that they have, and the licence plate number, make, model, body type, year of manufacture and colour of every vehicle registered in their name or that they use regularly. . . . They must also report a contact phone number for each location where they can be reached and

65. *Ndhlovu*, *supra* note 6 at para 58.

66. *Charter*, *supra* note 7, s 7.

67. *Ndhlovu*, *supra* note 6 at para 49, citing *Carter v Canada (Attorney General)*, 2015 SCC 5 at para 55.

68. *Ibid* at para 51, citing *R v Malmo-Levine*, 2003 SCC 74 at para 89; *Fleming v Ontario*, 2019 SCC 45 at para 65; *R v Beare*, [1988] 2 SCR 387 at 402, 1988 CanLII 126 (SCC).

69. *Ndhlovu*, *supra* note 6 at para 52.

> every mobile phone and pager in their possession. . . . They must supply information relating to all driver's licenses and passports they may hold. The registration centre may take their photograph and record their eye colour and hair colour.[70]

The Supreme Court of Canada further observed that the sex offender registry requires offenders to update their information in person annually.[71] In addition, they must attend the registry in person to report any changes to their primary or secondary addresses and name, as well as when they receive a new driver's licence or passport.[72] Similarly, offenders must notify the registry of any change in employment or volunteer status within seven days of the change.[73] Offenders are further required to notify the registry if they will be absent from their residence(s) for seven or more consecutive days.[74] This includes notifying the registry of their departure and return dates and every address at which they intend to stay, both within Canada and internationally.[75] To enforce these requirements, police are permitted to conduct random compliance checks to verify the information on the registry which may be conducted at the offender's home or other less discrete places, such as their place of employment.[76] If found non-compliant, offenders are liable to serious fines and potential jail time as detailed earlier, with jail sentences commonly being implemented.[77]

Despite several appellate courts concluding that these effects are "modest",[78] a majority of the Supreme Court of Canada in *Ndhlovu* disagreed. Instead, the majority concluded that "the impact on anyone subject to *SOIRA*'s reporting requirements is considerable".[79] The incursions impacted sex offenders "liberty of movement and choice, mobility, and freedom from state monitoring or intrusion in our personal lives", while the "scope of the personal information registered, the frequency at which offenders are required to update their information, the ongoing monitoring by the state, and, of course, the threat of

70. *Ibid* at para 39, citing *SOIRA*, *supra* note 1, ss 5(1)(a)–(j), 5(3).

71. See *SOIRA*, *supra* note 1, ss 4(3), 4.1(1).

72. *Ibid*, ss 4.1(1)(a)–(b).

73. *Ibid*, ss 5(1)(d), 5.1.

74. *Ibid*, ss 6(1)(a)–(b).

75. *Ibid*, s 6(1)(a). Section 6(1)(b) imposes similar requirements if the offender decides after departure to extend their trip.

76. See *Ndhlovu*, *supra* note 6 at para 43.

77. See e.g. *R v Caruana*, 2016 ONCJ 367; *R v Firingstoney*, 2017 ABQB 343; *R v Callahan*, 2021 CanLII 41952 (NLPC); *R v DT*, 2021 CanLII 85816 (NLPC).

78. See e.g. *R v Cross*, 2006 NSCA 30 at paras 50, 66; *R v SSC*, 2008 BCCA 262 at para 46; *Dyck*, *supra* note 64 at paras 104–06; *R v Debidin*, 2008 ONCA 868 at para 82; *R v Long*, 2018 ONCA 282 at para 147.

79. *Ndhlovu*, *supra* note 6 at para 45.

imprisonment make the conditions onerous".[80] In the majority's view, the sex offender registry therefore "cannot be compared to reporting requirements that 'routinely occur as part of the everyday life' such as those associated with filing income tax forms, obtaining a driver's licence or a passport, or registering with banks or telephone companies".[81] The Court also reiterated that the impact on sex offenders is even weightier when the laws are considered in relation to those who travel often, live in remote locations, or are homeless.[82]

As the sex offender registry engages the liberty interest, the *SOIRA* regime was further tested for compliance with the principle of fundamental justice prohibiting laws from operating in an overbroad manner. A law violates this principle when it deprives even a single person of a threshold interest in a way that is disconnected from the impugned law's objective.[83] In defining the law's objective, the Court unanimously rejected the Alberta Court of Appeal's framing of the law's purpose as ensuring all sex offenders are registered. This approach, the Court held, "fails to adequately distinguish between ends and means, which forecloses any separate inquiry into the connection between them".[84] A reading of *SOIRA*'s preamble and text instead revealed that the impugned laws simply sought to help police prevent and investigate sex offences.[85]

To illustrate the impugned law's overbreadth, the majority relied upon reported case law and existing social science evidence. The former argument relied heavily upon *R v TLB* (*TLB*).[86] In that case, the offender was in a wheelchair due to cerebral palsy and required daily assistance to meet her basic needs.[87] She was pressured to make images and engage in sexual intercourse with her six-year-old son by a male pedophile she met online.[88] Accordingly, the offender "engaged in sexual contact with her son, placing his penis in her mouth" and then proceeded to "send nude, sexually exploitive pictures of her son to [the male] via a webcam, and received child pornography images from [him] on more than one occasion".[89] She ultimately plead guilty to charges of sexual interference as well as possession and transmission of child pornography.[90]

80. *Ibid*.

81. *Ibid* responding to *Dyck*, *supra* note 64 at para 110.

82. *Ibid* at para 47, citing *JDM*, *supra* note 47, at para 9; *Desmeules*, *supra* note 47.

83. See *Ndhlovu*, *supra* note 6 at para 78, citing *Bedford*, *supra* note 12 at paras 113, 123.

84. *Ndhlovu*, *supra* note 6 at para 72. For further analysis, see para 160 (reasons of Brown J).

85. *Ibid* at para 76.

86. 2006 ABQB 533 [*TLB ABQB*]; 2007 ABCA 135 [*TLB ABCA*].

87. See *TLB ABQB*, *supra* note 86 at paras 8–9.

88. *Ibid* at paras 2–7.

89. See *ibid* at para 3.

90. *Ibid* at para 4.

Under the initial *SOIRA* regime, it was held that a sex offender registration order would be grossly disproportionate based on her circumstances and a psychologist's report concluding that she was highly unlikely to reoffend.[91] In the majority's view, the *TLB* case illustrated the overbreadth of the *SOIRA* regime as "[t]here is no increased risk that an offender like T.L.B. would ever commit another sex offence".[92]

The majority of the Supreme Court of Canada also engaged in a review of the social science evidence on sex offender recidivism in support of its finding that the laws are overbroad. Relying on the trial judge's findings of fact, the majority observed that expert evidence suggests that "there is no perceptible difference in sexual recidivism risk at the time of sentencing between the lowest-risk sexual offenders — the bottom ten percent — and the population of offenders with convictions for non-sexual criminal offences".[93] For both categories of offenders, "about two percent of individuals . . . commit a sexual offence over the next five years".[94] The majority further explicitly found that the evidentiary record failed to prove that prior sex offenders are any more likely to commit a sex offence than members of the general public.[95] It followed, the majority concluded, that "there is no connection between subjecting [some sex offenders] to a *SOIRA* order and the objective of capturing information that may assist police prevent and investigate sex offences because they are not at an increased risk of reoffending".[96]

The impugned sex offender registry provisions were further held to be unjustifiable under section 1 of the *Charter*. While the sex offender registry's objectives were "pressing and substantial" and their means "rationally connected" to their objective in some cases,[97] the challenged laws were found not to be minimally impairing of rights or to strike a reasonable balance between their salutary and deleterious effects.[98] To meet the former threshold, the law must interfere with the relevant section 7 interests "as little as reasonably possible

91. See *TLB ABQB*, *supra* note 86 at para 65.

92. *Ndhlovu*, *supra* note 6 at para 89.

93. *Ibid* at para 91. A critique of risk assessment for sex offenders is outside the scope of this article. It is nevertheless important to note that the suggestion that predictions can be accurately made pertaining to which offenders pose no risk of re-offence is contested.

94. *Ibid*.

95. *Ibid* at para 96.

96. *Ibid* at para 92. The majority also concluded that the difficulty of predicting recidivism did not cure any overbreadth, but rather was a factor to consider under the section 1 analysis. See paras 102–10.

97. *Ibid* at paras 120–21.

98. *Ibid* at paras 122–35.

in order to achieve the[ir] legislative objective".[99] If any alternative measures "substantially" achieve the legislative objective while not infringing rights, then those measures must be adopted.[100] The conceded fact that restoring judicial (not prosecutorial) discretion would lead to a very high inclusion rate in the registry suggested that Parliament's objective could be substantially achieved without a mandatory registration order.[101] In cases where discretion is inappropriately exercised, the usual appellate process would operate to correct judicial error.[102] Given this conclusion, it unsurprisingly followed that the law did not balance its salutary and deleterious effects. As the Crown failed to adduce evidence of the law's positive effects, the "serious", "onerous", and "considerable" impact of the laws on sex offenders outweighed any hypothetical benefits of the registry.[103]

B. SOIRA as "Punishment"

The majority's decision in *Ndhlovu* overturned several appellate courts concluding that the sex offender registries resulted in a modest impact on sex offenders' liberty interests.[104] The majority nevertheless avoided making any explicit finding as to whether *SOIRA* orders constitute punishment under sections 11 and 12 of the *Charter*.[105] Writing for a four-judge dissent, Brown J observed that "[i]f the majority is correct that *SOIRA* orders have a 'serious' and 'considerable' impact on an offender's liberty, the test for punishment . . . would likely be met".[106] In Brown J's view, the majority's judgment would therefore result in the sex offender registry engaging section 11(i) of the *Charter* "such that no one convicted of a sexual offence prior to 2004 could be required to register on the *SOIRA* registry, and that Parliament could not enact a new *SOIRA* law that expressly applies retroactively".[107]

The American experience interpreting the term punishment in the sex offender registry context is informative of how this issue should be framed in

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99. *Ibid* at para 122, citing *RJR-MacDonald Inc v Canada (Attorney General)*, [1995] 3 SCR 199 at para 160, 1995 CanLII 64.

100. *Ibid* at para 122, citing *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37 at paras 55, 60.

101. *Ibid* at para 124 ("the Crown concedes that restoring judicial discretion in the registration process would allow for a 90 percent inclusion rate of offenders in the registry").

102. *Ibid* at paras 124–25.

103. *Ibid* at paras 75, 132–35.

104. *Ibid* at para 45, citing jurisprudence, *supra* note 75.

105. *Ibid* at para 58.

106. *Ibid* at para 167.

107. *Ibid* at para 168.

Canada.[108] The oft-cited starting point is the United States Supreme Court's decision in *Smith v Doe* (*Smith*).[109] In describing when state action constitutes punishment, the majority held that courts must first "ascertain whether the legislature meant the statute to establish 'civil' proceedings".[110] As American courts are "ordinarily [required to] defer to the legislature's stated intent," it follows that "'only the clearest proof' will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty".[111] A variety of factors are relevant in making this determination including whether the type of consequence at issue "has been [historically] regarded . . . as a punishment; imposes an affirmative disability or restraint; promotes the traditional aims of punishment; has a rational connection to a nonpunitive purpose; or is excessive with respect to this purpose".[112] Applying this test, the majority held that the impugned sex offender registries did not

108. For a snapshot of the voluminous academic debate, see e.g. Wayne A Logan, "Liberty Interests in the Preventive State: Procedural Due Process and Sex Offender Community Notification Laws" (1999) 89:4 J Crim L & Criminology 1167; Alex B Eyssen, "Does Community Notification for Sex Offenders Violate the Eighth Amendment's Prohibition against Cruel and Unusual Punishment? A Focus on Vigilantism Resulting from 'Megan's Law'" (2001) 33 St Mary's LJ 101; Michele L Earl-Hubbard, "The Child Sex Offender Registration Laws: The Punishment, Liberty Deprivation, and Unintended Results Associated with the Scarlet Letter Laws of the 1990s" (1996) 90:2 Nw UL Rev 788; Chiraag Bains, "Next-Generation Sex Offender Statutes: Constitutional Challenges to Residency, Work, and Loitering Restrictions" (2007) 42:2 Harv CR-CLL Rev 483; Catherine L Carpenter, "The Constitutionality of Strict Liability in Sex Offender Registration Laws" (2006) 86 BUL Rev 295; Jane A Small, "Who Are the People in Your Neighbourhood? Due Process, Public Protection, and Sex Offender Notification Laws" (1999) 74:5 NYUL Rev 1451; Doron Teichman, "Sex, Shame, and the Law: An Economic Perspective on Megan's Laws" (2005) 42 Harv J on Legis 355.

109. 538 US 84 (2003) [*Smith*]. Notably, subsequent challenges to aspects of sex offender registries have succeeded, but these concerned the constitutionality of various features that constituted "searches" under the Fourth Amendment (*Grady v North Carolina*, 575 US 306 (2015)) or unduly restricted freedom of speech under the First Amendment (*Packingham v North Carolina*, 582 US 98 (2017)).

110. See *Smith*, *supra* note 109 at 92, citing *Kansas v Hendricks*, 521 US 346 at 361 (1997) [*Hendricks*].

111. See *Smith*, *supra* note 109 at 92, citing *Hudson v United States*, 522 US 93 at 100 (1997) [*Hudson*]; *United States v Ward*, 448 US 242 at 249 (1980); *Hendricks*, *supra* note 110 at 361; *United States v Ursery*, 518 US 267 at 290 (1996); *United States v One Assortment of 89 Firearms*, 465 US 354 (1984) at 365.

112. See *Smith*, *supra* note 109 at 97, citing *Kennedy v Mendoza-Martinez*, 372 US 144 (1963) at 168–69.

constitute punishment as their legislative purpose was to serve an administrative function by aiding police in preventing and investigating sex offences and was adequately tailored to that objective.[113]

A minority in *Smith* nevertheless came to the opposite conclusion, or provided substantive disagreement with the majority's reasons, while agreeing with the disposition of the case. Justice Sotamayor fell into the latter category. In her view, "[t]he fact that the *Act* uses past crime as the touchstone, probably sweeping in a significant number of people who pose no real threat to the community, serves to feed suspicion that something more than regulation of safety is going on".[114] She continued, noting that "when a legislature uses prior convictions to impose burdens that outpace the law's stated civil aims, there is room for serious argument that the ulterior purpose is to revisit past crimes, not prevent future ones".[115] Justice Stevens similarly wrote that "[i]t is clear beyond peradventure that these unique consequences of conviction of a sex offence are punitive".[116] This followed because the sex offender registries "share three characteristics, which in the aggregate are not present in any civil sanction. The sanctions (1) constitute a severe deprivation of the offender's liberty, (2) are imposed on everyone who is convicted of a relevant criminal offence, and (3) are imposed only on those criminals".[117] While this was sufficient for the registries to constitute punishment, Stevens J nevertheless thought "it equally clear . . . that the State may impose registration duties and may publish registration information as a part of its punishment of this category of defendants . . . [because] these aspects of their punishment are adequately justified by two of the traditional aims of punishment—retribution and deterrence".[118]

Justice Ginsburg, with Breyer J concurring, agreed that the legislation was punitive in nature because its "registration and reporting provisions are comparable to conditions of supervised release or parole" and the legislation focused more on imposing consequences for past guilt than on protecting citizens from future crimes.[119] Justice Ginsburg also viewed it as important that the law overshot any public protection objective. As she wrote, "[t]he *Act* applies to all convicted sex offenders, without regard to their future dangerousness. And the duration of the reporting requirement is keyed not to any determination of a particular offender's risk of reoffending, but to whether

113. See *Smith*, *supra* note 109 at 97.

114. *Ibid* at 109.

115. *Ibid*.

116. *Ibid* at 112.

117. *Ibid*.

118. *Ibid* at 114.

119. *Ibid* at 115–16.

the offense of conviction qualified as aggravated".[120] Justice Ginsburg further placed significant weight on the fact that the reporting requirements at issue were "exorbitant" and the legislature's failure to make provision "for the possibility of rehabilitation".[121] As she observed, "[o]ffenders cannot shorten their registration or notification period, even on the clearest demonstration of rehabilitation or conclusive proof of physical incapacitation".[122] For these reasons, Ginsburg and Breyer JJ concluded that the sex offender registries constituted punishment for the purposes of constitutional analysis.[123]

In determining whether a particular measure constitutes punishment under the *Charter*, the Supreme Court of Canada developed a much less deferential test than the American Supreme Court. As opposed to showing significant deference to legislative declarations that a law is regulatory, the Court developed a two-part test that prioritizes the effect of the law.[124] First, the measure must be "a consequence of conviction that forms part of the arsenal of sanctions to which an accused may be liable in respect of a particular offence".[125] If this threshold element is established, then the measure must meet a second disjunctive test requiring that the offender prove that either the legislation "is imposed in furtherance of the purpose and principles of sentencing" or "it has a significant impact on an offender's liberty or security interests".[126] Elaborating upon the latter requirement, the Court concluded that "a consequence of conviction must significantly constrain a person's ability to engage in otherwise lawful conduct or impose significant burdens not imposed on other members of the public".[127] Relying on the Ontario Court of Appeal's reasons in *R v Hooyer*,[128] the Court agreed that "a prohibition that significantly limits the lawful activities in which an accused can engage, where an accused can go, or with whom an accused can communicate or associate, would sufficiently impair the liberty and security of the accused to warrant characterizing the prohibition as punishment".[129]

As sex offender registries are clearly a consequence of being convicted for a sex crime, it should first be asked whether the legislation is "imposed in furtherance of the purpose and principles of sentencing".[130] The standard for

120. *Ibid* at 116–17.

121. *Ibid* at 117.

122. *Ibid*.

123. *Ibid* at 117–18.

124. See *R v KRJ*, 2016 SCC 31 [*KRJ*].

125. *Ibid* at para 41.

126. *Ibid*.

127. *Ibid* at para 42.

128. 2016 ONCA 44 [*Hooyer*].

129. *KRJ*, *supra* note 124 at para 42, citing *Hooyer*, *supra* note 128 at para 45.

130. *Ibid* at para 41.

so proving in the American context requires the "clearest of proof" of punitive effect to depart from evidence establishing that the legislature intended to pass a regulatory scheme.[131] I am unaware of Canadian appellate jurisprudence outlining the extent to which a litigant must prove that the effect of legislation is punitive. In my view, however, the American standard ought not be adopted. This follows because the prohibition against retroactive punishment afforded by the *Charter* would become significantly diluted if this standard were adopted. A "large" and "liberal" conception of rights compels a lower threshold, such as proof on a balance of probabilities that the effect of the legislation substantially furthers the principles and purpose of sentencing.[132] Applying this lower threshold, it would be imperative to assess the actual consequences of the sex offender registry on sex offenders and ask whether those consequences can be tied to the purpose and principles of sentencing.

It is not difficult to establish a connection between *SOIRA* orders and the sentencing purpose of protecting the public and the sentencing principles of denunciation and deterrence.[133] The latter principles are especially relevant as the *Criminal Code* provides that they must be prioritized given the exploitive nature of sex crimes and their dramatic impact on women and children.[134] Sex offender registries almost certainly serve a denunciatory function. By virtue of requiring the offender to incur deprivations of liberty for a lengthy period, society is continuously expressing its disapproval of the offender's past conduct. This militates in favour of *SOIRA* orders qualifying as punishment as the order is not temporally limited to the period during which a reasonable apprehension that the offender will reoffend can be established. While Canada's sex offender registries do not serve to "shame" offenders in the same way as publicly available American

131. See *Smith*, *supra* note 109 at 92.

132. For a review of *Charter* interpretation, see *R v Big M Drug Mart Ltd*, 1985 CanLII 69 (SCC).

133. See *Criminal Code*, *supra* note 4, s 718.1.

134. *Ibid,* ss 718.01, 718.04.

registries,[135] sex offender registries accessible only by police can also serve "to formally and officially label an offender as a 'registered sex offender'".[136] As Janine Benedet observes, "the personal stigma of registration is one that many offenders strain to avoid".[137] In this way, sex offender registries serve to denounce the sex offender's conduct by providing them with intermittent reminders of their offence and its impact on the victim and community.

Similarly, requiring sex offenders to incur serious, onerous, and considerable intrusions onto their liberty interests strongly suggests that Parliament is trying to deter the offender and others who come to learn of this consequence from committing a sex offence.[138] The fact that failure to comply with a *SOIRA* order constitutes a crime bolsters this view.[139] In *Smith*, however, the majority of the American Supreme Court questioned the weight that ought to be placed on any deterrent effect when deciding whether sex offender registries constitute punishment. While the state conceded that sex offender registries serve a deterrent function, the majority did not agree that this fact alone meant that the law was punitive.[140] As Kennedy J observed, such an argument "proves too much . . . [because] [a]ny number of governmental programs might deter crime without imposing punishment".[141] Citing *Hudson v United States*,[142] Kennedy J agreed that "[t]o hold that the mere presence of a deterrent purpose

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135. See e.g. Benedet, *supra* note 17 at 442–45. As she observes, these registries are generally available to any citizen who wishes to access them and tend to disclose a significant amount of personal information about the sex offender. In *Smith*, *supra* note 109 at 111, Stevens J described this information in representative legislation as follows: a registrant must provide "his address, his place of employment, the address of his employer, the license plate number and make and model of any car to which he has access, a current photo, identifying features, and medical treatment-at least once a year for 15 years. If one has been convicted of an aggravated offense or more than one offense, he must report this same information at least quarterly for life. Moreover, if he moves, he has *one* working day to provide updated information. Registrants may not shave their beards, color their hair, change their employer, or borrow a car without reporting those events to the authorities. Much of this registration information is placed on the Internet. In Alaska, the registrant's face appears on a webpage under the label 'Registered Sex Offender.' His physical description, street address, employer address, and conviction information are also displayed on this page".

136. See Benedet, *supra* note 17 at 445.

137. *Ibid*.

138. See *Ndhlovu*, *supra* note 6 at paras 45, 54, 56, 83.

139. See *Criminal Code*, *supra* note 4, s 490.031.

140. See *Smith*, *supra* note 109 at 102.

141. *Ibid*.

142. *Supra* note 108.

renders such sanctions 'criminal' . . . would severely undermine the Government's ability to engage in effective regulation".[143] While true, the fact that deterrence remains one plausible effect of the legislation still pushes the balance in favour of a finding that *SOIRA* orders constitute punishment. If the effect of the legislation was modest, as prior appellate courts held, the argument that the sex offender registries sought to deter the offender, or others, would lose much of its force.[144]

These arguments relating to denunciation and deterrence are bolstered by comparing *SOIRA* orders to other means which clearly constitute punishment. Probation orders are the most intuitive example. In *Smith*, the majority of the American Supreme Court nevertheless rejected this analogy. While recognizing that "[t]his argument has some force", Kennedy J rightly observed that probation orders entail numerous mandatory conditions which can result in the revocation of the order and the accused being sentenced on the original offence if any conditions are breached.[145] A similar rule applies to breaches of probation orders in Canada.[146] While breaches of *SOIRA* orders are an offence, they cannot result in the offender effectively being "re-sentenced" for the initial offence.[147] While an important observation, it ought not be given substantial weight in determining whether a consequence constitutes punishment. Instead, two facts arising from the comparison of sex offender registry and probation orders continue to militate in favour of finding the former orders punishments: first, the two orders impose similar initial conditions—probation conditions often being less restrictive than those under the sex offender registry;[148] and second, the breach of either provision constitutes an offence under the *Criminal Code*.

The history of the federal sex offender registry laws is also relevant to determining whether *SOIRA* orders constitute punishment. Importantly, the first *SOIRA* regime's stated objective was to allow law enforcement to gather

143. See *Smith*, *supra* note 109 at 102, citing Hudson, *supra* note 111 at 105.

144. See *Ndhlovu*, *supra* note 6 at para 44.

145. See *Smith*, *supra* note 109 at 101.

146. See *Criminal Code*, *supra* note 4, s 732.2(5) (allowing judges to change terms of order or revoke the initial order and impose any other available sentence).

147. *Ibid*, s 490.031. I use the phrase "re-sentenced" but in fact a person subject to a probation order will have their sentence "suspended", which permits the court to revisit the offence if the accused is unduly non-compliant with the probation order. See *ibid*, s 732.2(5).

148. *Ibid*, s 732.1. Per section 732.1(2), the minimum conditions are that offenders "keep the peace and be of good behaviour", "appear before the court when required to do so by the court", and "notify the court or the probation officer in advance of any change of name or address, and promptly notify the court or the probation officer of any change of employment or occupation". While optional conditions are also often added under section 732.1(3), they do not necessarily give rise to as onerous an order as the sex offender registry.

information for investigative purposes only.[149] This suggests that the initial law was exclusively intended to be regulatory in nature as it only contemplated being used as a means to solve crimes. *SOIRA*'s subsequent expansion to include a preventative purpose nevertheless aligned more with the aims of sentencing. While "prevention" in this context is no doubt linked to the ability of police to thwart criminal activity before it occurs, it could also be understood as attempting to protect society by deterring current (and potentially would-be)[150] offenders from committing future sex crimes.[151]

Perhaps the best evidence, however, that the sex offender registries served a substantially punitive function is the fact that they were overbroad. Writing in *Smith*, Ginsburg J placed significant weight on the fact that the impugned legislation caught swaths of sex offenders who posed no reasoned risk of reoffending as the existence of these orders can only be justified by relying upon other criminal justice objectives.[152] The most intuitive of those objectives are denunciation and deterrence. This argument applies with equal force in the Canadian context as the majority in *Ndhlovu* found that a substantial number of sex offenders were required to comply with the registry regardless of whether they posed any reasoned risk of reoffending. The prior laws, then, were arguably enacted not only to help police prevent and investigate crime, but also to protect the public from sex offenders by denouncing and deterring further sexual offences.

Before addressing how the conclusion that the prior *SOIRA* orders constitute punishment should have impacted Parliament's response to *Ndhlovu*, one further point is worth highlighting: the analysis offered above did not treat the second element of the Supreme Court of Canada's test for punishment disjunctively. Instead, I treated the impact of sex offender registries on these offenders' liberty interests as relevant to whether legislation not explicitly designated as punishment has the effect of furthering the aims of sentencing. As I illustrated, the effects of the law are particularly relevant when considering whether a state-imposed consequence denounces or deters conduct in a meaningful way. It will not achieve these aims in the usual course unless it results in a significant intrusion on the offender's liberty or security interests. As such, it may be prudent to meld the two aspects of the second disjunctive element of the

149. See *SOIRA*, *supra* note 1, s 2(1).

150. I remain highly skeptical of general deterrence's efficacy. See Colton Fehr, "Instrumental Rationality and General Deterrence" (2019) 57:1 Alta L Rev 53. General deterrence nevertheless continues to find support in the legislation and jurisprudence. See *Criminal Code*, *supra* note 4, s 718(b); *R v Hills*, 2023 SCC 2 at para 161; *R v Hilbach*, 2023 SCC 3 at paras 72, 107.

151. For a similar argument made outside the constitutional context, see Benedet, *supra* note 17 at 442–45.

152. See *Smith*, *supra* note 109 at 117.

punishment test. Put differently, absent clear intention on behalf of the legislature to label a consequence as punishment, the question should be whether the effect of the legislation tends to substantially further the principles and purposes of sentencing given the actual consequences of the legislation on the relevant offenders.[153]

III. Implications

Bill S-12 was passed as a direct response to the Supreme Court's decision in *Ndhlovu*, although the Bill also served to amend the publication ban provisions, create new arrest powers for those in breach of *SOIRA* orders, and adopted several other policies outside the scope of this article.[154] While these amendments are important, I want to focus on the merits of Parliament's laws amending *SOIRA* to be in compliance with *Ndhlovu*. I contend that those amendments recreate many of the prior issues under the first *SOIRA* regime. A better response would have been to preserve the prior regime while explicitly acknowledging that sex offender registry orders serve a dual investigative and punitive function. While this approach raises issues under section 11(i) of the *Charter*, retroactive application of the sex offender registry could be avoided if appropriate exemption clauses were enacted.

A. Bill S-12

The main provisions in Bill S-12 are a direct response to the Supreme Court of Canada's reasons in *Ndhlovu*. These amendments provide courts with discretion to exempt a sex offender from *SOIRA* and dramatically narrow the circumstances where an order would be mandatory. With respect to the latter amendments, only two scenarios exist where an order remains mandatory. First, a judge must order that an individual who committed a primary offence—a lengthy list of offences that are inherently sexual in nature[155]—comply with *SOIRA* if three circumstances are met: the offence was prosecuted by indictment; the offender was sentenced to a minimum of two years imprisonment; and the victim was under eighteen years of age.[156] Second, courts must make a *SOIRA* order if the prosecutor establishes that the offender committed a primary offence and was previously convicted of a primary offence or previously required to comply

153. I have elsewhere questioned whether the disjunctive element of the punishment test is coherent. See Colton Fehr, "Unpacking the Implications of Remand Time Constituting Punishment" (2024) 62:1 Alta L Rev 67 at 73–74.

154. See e.g. Bill S-12, *supra* note 16.

155. For a list of such offences, see *ibid*, s 6.

156. *Ibid*, s 7.

with *SOIRA*. Both provisions are nevertheless subject to an exception if the designated offence they committed constituted a "secondary" offence. In this circumstance, the Crown must both proceed by indictment and prove beyond a reasonable doubt that the offence was committed for a sexual purpose before a mandatory order will be issued.[157]

In all other circumstances, courts are required to impose a sex offender registry order unless the offender establishes that such an order would be either overbroad or grossly disproportionate as applied to that offender.[158] Given the judicial bias arising under the jurisprudence applying the prior exemptions, Bill S-12 also provides a series of factors that are relevant to determining whether an exemption to the sex offender registry ought to be granted. In particular, it provides that the sentencing judge must consider:

i. the nature and seriousness of the designated offence;
ii. the victim's age and other personal characteristics;
iii. the nature and circumstances of the relationship between the person and the victim;
iv. the personal characteristics and circumstances of the person;
v. the person's criminal history, including the age at which they previously committed any offence and the length of time for which they have been at liberty without committing an offence;
vi. the opinions of experts who have examined the person; and
vii. any other factors that the court considers relevant.[159]

While these factors provide some guidance to judges, I agree with Janine Benedet who suggested, over a decade ago, that *irrelevant* factors should also be legislated given the clear problems with judicial bias in determining the appropriateness of exemptions to the sex offender registry.[160] In particular, Benedet suggests that legislation might list as irrelevant the fact that the "victim knew the offender before the offence; that the act was 'opportunistic' rather than 'predatory'; that the offender has ceased the occupation or activity that brought him in contact with the victims; . . . that he was intoxicated; and that the offence did not involve multiple victims or additional bodily harm".[161] While these suggestions are prudent, Benedet's recommendation to exclude the fact that

157. *Ibid*.

158. *Ibid*.

159. *Ibid*.

160. See Benedet, *supra* note 17 at 473. Notably, this approach is taken with applications for production of third-party records in sex assault cases. See *Criminal Code*, *supra* note 4, ss 278.1–278.3. Professor Benedet and I also both made this proposal during our testimony at the Standing Committee on Justice and Human Rights.

161. See Benedet, *supra* note 17 at 473.

"the offender is of otherwise good character or standing in the community" goes too far.[162] While her concern about offenders being excluded based on their social class standing is legitimate,[163] this objective could be achieved by simply including reference to "standing in the community" in any list of excluded factors. An offender's "good character" is inherently relevant to determining whether the offender is likely to reoffend as it speaks to whether an individual is willing to take rehabilitation with respect to their sexual crimes seriously. However, Benedet is correct that good character itself cannot be viewed as a determinative factor as many sex offenders use their character as a means for grooming their victims.[164]

B. A Punishment-Based Framework

Bill S-12 departs significantly from the prior *SOIRA* laws by providing judges with ample discretion to exempt sex offenders to whom the law applies in an overbroad or grossly disproportionate manner. In my view, this aspect of the new legislation significantly impacts whether the new *SOIRA* scheme will constitute punishment. This follows because removing discretion was one of the key elements militating in favour of my earlier conclusion that the prior sex offender registry regime constituted punishment. Building on Ginsburg J's comments, I contended that the fact that the law caught a significant number of sex offenders for whom the order would not meaningfully serve its purpose strongly implied that denunciation and deterrence objectives were being colourfully pursued by the previous amendments. As Bill S-12 crafts exemptions for these offenders, its stated objectives of helping police prevent and investigate sex offences can be taken at face value. Any specific deterrent effect on individual offenders therefore strikes me as ancillary in this new legislative context. If true, then Bill S-12 likely avoids the question of whether a punishment-based framework for sex offender registry orders would survive constitutional scrutiny.

The latter question is nevertheless worth asking in its own right: could mandatory registration orders, if viewed as prudent by a future government, simply be re-enacted if Parliament declared them to serve punitive functions alongside helping police prevent and investigate crime? Conceptualized in this way, it is not sensible to speak of overbreadth under section 7 of the *Charter*. While the proposed amendments obviously engage liberty, overbreadth has never required a law to achieve *each one* of its aims. A connection to one of its

162. *Ibid*.

163. *Ibid* at 456–58.

164. *Ibid* at 473.

purposes[165]—assuming there are multiple purposes—is sufficient to avoid an overbreadth argument. Given the clear connection between the objectives of denunciation and deterrence, the question in cases where *SOIRA* orders do not serve preventative or investigative law enforcement purposes becomes whether the impact of the order on the sex offender is grossly disproportionate. This question, given its focus on punishment, necessarily implicates section 12 of the *Charter*.

The conclusion of the trial judge in *Ndhlovu* that a *SOIRA* order imposed grossly disproportionate effects on some sex offenders might nevertheless be thought to imply that a similar conclusion would follow under section 12 of the *Charter* given that the same standard is employed in both contexts.[166] But such an argument ignores the fact that different objectives are relevant in the context of a punishment analysis, namely, denunciation and deterrence. The value of achieving these objectives is clear—they can serve as a reminder to sex offenders of the stigma imposed on them by their conviction and, even if there is minimal concern that the specific offender will reoffend, they may serve the role of generally deterring future sex offenders.[167] These salutary effects must nevertheless be compared to the serious, onerous, and considerable impact on sex offenders' liberty interests caused by the sex offender registries. In my view, the question of whether this balance is grossly disproportionate should be rejected given three safeguards in the current legislative scheme.

First, the impugned laws have always permitted low-end offenders to avoid registration on the sex offender registry. This possibility follows from the fact that only those convicted of an offence are subject to *SOIRA*. As offenders who are discharged under section 730 of the *Criminal Code* are not convicted, any truly low-end sex offenders will not be subject to a

165. Typically, the courts distill the law into a single objective. However, it is possible for laws to pursue multiple objectives under an overbreadth analysis. See e.g. *R v NS*, 2022 ONCA 160; *Canadian Alliance for Sex Work Law Reform v Attorney General*, 2023 ONSC 5197 (litigating the constitutionality of the new sex work laws); *R v Kloubakov*, 2023 ABCA 267.

166. See *R v Ndhlovu*, 2016 ABQB 595 at paras 120–30.

167. See *supra* note 146; I am skeptical of the efficacy of general deterrence. But my point here is a doctrinal one, and the Supreme Court appears to accept that general deterrence is a legitimate sentencing aim.

SOIRA order.[168] As for offences that are too serious to warrant a discharge, I do not think that these offenders are treated in a cruel and unusual manner when ordered to comply with the sex offender registry. As Benedet observes, "[i]f we have taken the step of criminally prosecuting someone for his sexual violation of another person, and the court which convicts him is of the view that the case is not so unusual that a discharge is warranted or available, we have already made a judgment that the offender's actions are a serious transgression".[169] In these circumstances, "[w]e have also recognized that this type of violence is overwhelmingly gendered, and that it represents a major impediment to the equality of women and [children]".[170]

A second legislative safeguard that exists relates to the ability of sex offenders to apply for a termination order. As section 490.015(1) states, a judge must issue a termination order "if it is satisfied that the person has established that the impact on them of continuing an order or an obligation, including on their privacy or liberty, would be grossly disproportionate to the public interest in protecting society through the effective prevention or investigation of crimes of a sexual nature".[171] This legislation could readily be modified to include punishment in addition to any investigative benefits of sex offender registries. Importantly, the offender's eligibility begins at either halfway through a ten- or twenty-year period depending on the relative seriousness of their crime or after twenty years when the order is for life.[172] In addition, a sex offender may apply for termination at any point if they have been granted a record suspension or

168. See *R v Dyck,* 2005 CanLII 47771 at para 125 (ONSC) (suggesting offenders such as "an eighteen-year-old boy who is charged with sexual assault on the basis of an unwanted kiss" would meet this standard). See also *R v Berseth*, 2019 ONSC 888 (offender was a young university graduate with no record who grabbed a woman's crotch over her clothing and was sentenced to a fifteen-month conditional discharge); *R v Burton*, 2012 ONSC 5920 (absolute discharge upheld on appeal where a forty-nine-year-old put his hand up the victim's skirt and rubbed her leg on a public bus); *R v Tillman*, 2010 SKPC 2 (absolute discharge imposed for grabbing a teenage babysitter from behind and pulling her towards the offender in a sexual manner); *R v JW,* 2010 NSPC 40 (a fifteen-month conditional discharge granted for a young offender who aggressively pinned the victim against a wall, took off her shirt, and forced her to touch his penis). See also the case cited in the latter case at para 28. I should also note that I do not necessarily agree that all of these offenders were appropriately sentenced. The cases nevertheless illustrate my broader point that discharges are available and would avoid imposition of sex offender registry order.

169. See Benedet, *supra* note 17 at 474.

170. *Ibid*.

171. See *ibid*, s 490.016(1).

172. See *Criminal Code*, *supra* note 4, s 490.015(1). See also s 490.015(2) which provides that a life order when a second order is made only allows for application of a termination order after twenty years serving the second order.

a pardon.[173] A sex offender whose application is refused is allowed to re-apply after a further five years have elapsed, or they subsequently receive a pardon or record suspension.[174]

A final safeguard derives from the broader sentencing laws in the *Criminal Code*. Under these provisions, an offender who is sentenced for a sexual offence and required to comply with the sex offender registry will be given some non-insignificant sentence. At the lowest end, a suspended sentence will be imposed with various probation conditions. In practice, however, short jail sentences are not uncommon given the impact of the offence on the victim. As a gross disproportionality analysis must take into account the global sentence imposed, it is possible that any truly harsh impact on an offender when weighed against the denunciatory and deterrence benefits of requiring the offender comply with *SOIRA* could be offset by reducing other aspects of the discretionary sentence. While I think such a circumstance would rarely arise in practice,[175] this final safeguard provides a substantial protection against any grossly disproportionate punishments resulting from a mandatory sex offender registry requirement.

It may nevertheless be countered that sex offender registries constitute a cruel and unusual method of punishment. As the Supreme Court of Canada explained in *R v Bissonnette*,[176] this "second prong of the protection afforded by s. 12 concerns a narrow class of punishments that are cruel and unusual by nature".[177] Such punishments will '"always be grossly disproportionate' because they are intrinsically incompatible with human dignity".[178] Given the connection between sex offender registry orders and traditional sentencing aims, this argument is difficult to accept without evidence that it causes consequences that are unusual and harsh aside from the normal consequences of the registries. While the impact on sex offenders is serious, so too is the offending conduct. Even if a mandatory order would be disproportionate in some cases, it is difficult to conceive of a case where the current private sex offender registry system would amount to a denial of human dignity based on the ascertainable effects of the order alone.

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173. *Ibid*, s 490.015(3).

174. *Ibid*, s 490.015(5).

175. See *Ndhlovu*, *supra* note 6 at para 46. The majority raised that those who travel for work, live a rural lifestyle, or are homeless as offenders who would be affected more dramatically by sex offender registry requirements. If such an offender committed a low-end sexual assault, this scenario might be appropriate for reducing other aspects of the sentence.

176. 2022 SCC 23.

177. *Ibid* at para 64.

178. *Ibid* at para 69, citing *R v Smith*, [1987] 1 SCR 1045 at 1073, 1987 CanLII 64 (SCC).

A significantly stronger argument under the methods track of section 12 of the *Charter* could be developed if the sex offender registries were made public. The vigilantism triggered by the availability of such information—including some vigilantes murdering sex offenders—and the extreme ostracization these laws cause—subjecting sex offenders to widespread discrimination based on employment, housing, and other aspects of social life—may well undermine the dignity interests of sex offenders.[179] Any grossly disproportionate effect would derive in no small part from the fact that these American-style sex offender registries catch all offenders, not just those who pose a serious public safety risk. While the police practice of disclosing a significant danger posed by a specific offender released into the community strikes me as reasonable,[180] a blanket registry would be much more vulnerable to constitutional challenge given the breadth of offenders it places in jeopardy and the extent to which it interferes with these offenders' ability to reintegrate into society. A review of the evidence for engaging with this question is nevertheless unnecessary given the fact that only private sex offender registries currently exist in Canada.

C. Retroactive Application

Another consequence of finding that the sex offender registry constitutes punishment under the *Charter* pertains to Parliament's desire to have the registry apply retroactively. As Brown J observed in *Ndhlovu*, any retroactive application of a punishment-based sex offender registry would clearly run afoul of section 11(i) of the *Charter*.[181] That section provides any person found guilty of an offence with a right to the benefit of the lesser punishment if the punishment "has been varied between the time of commission and the time of sentencing".[182] Unfortunately, the question of whether *SOIRA* orders constitute punishment was not raised by either party at the Supreme Court hearing in *Ndhlovu*.[183] While the argument was raised before the trial judge, she found that a consideration of section 12 was unnecessary as the impugned provisions

179. For an excellent review of many of these incidents in the United States, see Michelle A Cubellis, Douglas N Evans & Adam G Fera, "Sex Offender Stigma: An Exploration of Vigilantism against Sex Offenders" (2018) 40:2 Deviant Behavior 225.

180. Various pieces of provincial legislation permitting these types of disclosures exist in Canada. Such legislation has been upheld the two times it was constitutionally challenged. See *Clubb v Saanich (Corporation Of The District)*, 1996 CanLII 8417 (BCSC); *Whitmore v Ontario (Attorney General)*, 2000 CanLII 22747 (ONSC). Public sex offender registries differ as they apply indiscriminately without regard to whether the specific offender poses a significant risk to the public and are therefore much more vulnerable to challenge under the *Charter*.

181. *Ndhlovu*, *supra* note 6 at para 168.

182. *Charter*, *supra* note 7, s 11(i).

183. *Ndhlovu*, *supra* note 6 at para 58.

unjustifiably violated section 7.[184] The Alberta Court of Appeal also did not consider the issue in any detail although the majority tersely dismissed any suggestion that *SOIRA* orders constitute punishment.[185]

While retroactive application of a punishment is a significant intrusion on rights, it is notable that appellate courts have accepted that breaches of section 11(i) of the *Charter* can be justified under section 1.[186] If such an argument were to be applied to the sex offender registry, the historical context of these provisions would be of significance. When the provisions were first enacted, it was unclear whether *SOIRA* orders would eventually constitute punishment under the *Charter*. The American Supreme Court's decision that public registries do not constitute punishment also implied that the significantly less punitive private registries would not give rise to consequences that warrant the punishment label. Moreover, as my earlier review demonstrated, appellate authorities in Canada consistently held that the impact of the registries on the offenders were modest which heavily weighed in favour of a finding that sex offender registry orders were not punishment for constitutional purposes. The majority of the Supreme Court of Canada's decision to overturn that line of jurisprudence provided Parliament with an entirely new and likely unanticipated context within which to consider the appropriate legislative response. This context, when combined with the important aims served by *SOIRA* orders, would arguably render any infringement justifiable under section 1 of the *Charter*.

Alternatively, a provision like the recently adopted section 490.04 of the *Criminal Cod*e could be tailored to avoid any impact of retroactive application altogether. This provision allows for those who are subject to a sex offender registry order under the 2011 amendments to be exempted from that order and have their information deleted from the registry if the order applied at the time it was made in an overbroad or grossly disproportionate manner.[187]

184. *Ibid* at para 131.

185. See *R v Ndhlovu*, 2020 ABCA 307 at para 164. The Court dismissed this suggestion because of the legislative statement of purpose that *SOIRA* orders were meant to serve non-punitive purposes. Yet, this ignores the fact that the effect of these provisions can be sufficient to constitute punishment per the majority's reasons in *Ndhlovu*.

186. See e.g. *R v Simmonds*, 2018 BCCA 205; *R v Dell*, 2018 ONCA 674. Retroactive limitations on the "faint hope" clause for first-degree murderers to seek reduced parole ineligibility periods after serving fifteen years of their twenty-five-year minimum parole ineligibility period constituted punishment under section 11(i) of the *Charter*. In effect, the impugned laws permitted judicial screening of such applications before they were sent to a jury for consideration, a limitation that did not exist when the faint hope clause was initially passed. The British Columbia Court of Appeal found that Parliament's desire to not needlessly revictimize the families of victims rendered the law justifiable under section 1 of the *Charter*. The Ontario Court of Appeal, however, found the same provisions unjustifiable and therefore struck the provisions to the extent that they applied retrospectively.

187. See Bill S-12, *supra* note 16, s 32.

If the 2011 amendments were re-enacted and affirmed to serve dual punitive and investigative purposes, Parliament may be able to avoid any issue under section 11(i) of the *Charter* by modifying section 490.04 to only allow for retroactive sex offender registry orders when courts imposed them for strictly investigative purposes. Evidence of any reasoned risk of reoffending would be sufficient evidence thereof, while evidence to the contrary would strongly militate in favour of a finding that the provisions were adopted strictly for punitive purposes. By adopting such a clause, Parliament would best ensure that anyone who received an order under the new provisions or who committed an offence before the new law came into force but was sentenced under the new regime were subject to such an order for administrative purposes only. This would no doubt result in many "low-end" offenders who committed their offences prior to Bill S-12 coming into effect being exempted from the registry. This effect, however, is likely something Parliament must accept.

Conclusion

Parliament's use of sex offender registries has been limited to private registries aimed at helping police investigate and prevent sex offences. The first amendments to *SOIRA* nevertheless met the threshold for qualifying as punishment under the *Charter*. The Supreme Court of Canada's decision to avoid deciding the constitutional fate of these provisions based on whether they constituted punishment was justified given the lack of argument on this point. If the Crown had raised this possibility, it is nevertheless probable that the prior sex offender registry laws would have been upheld given their broader objectives of denouncing and deterring sex offences. Such a conclusion under the 2011 amendments would nevertheless have resulted in all orders issued retroactively violating section 11(i) of the *Charter* given the absence of a provision like the recently-adopted section 490.04 of the *Criminal Code*.

Unfortunately, Parliament's response to the *Ndhlovu* decision in Bill S-12 did not adopt a hybrid approach to sex offender registries. By mirroring the Court's decision with its legislation, Parliament passed on an invaluable opportunity to explicitly promote all of the positive investigative and punitive aims of sex offender registries. While providing guidance on how courts should exercise discretion with respect to exempting sex offenders from the registries is an improvement from the first *SOIRA* regime, the guidance provided by these provisions is inherently vague. It is thus likely to reproduce many of the problematic aspects of the initial *SOIRA* legislation criticized by Benedet and the dissenting justices in *Ndhlovu*. If this proves true, it is hoped that Parliament reconsiders whether it ought to provide mandatory *SOIRA* orders for all of those convicted of a sex offence. For the reasons expressed herein, such a policy can readily be adopted without running afoul of the *Charter*.