R v Lafferty, 2020 NWTSC 5

Date: 2020 02 27
Docket: S-1-CR-2018-000 031
S-1-CR-2018-000-033

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

-and-

DALTON LEE LAFFERTY

RULING ON CHALLENGE TO MANDATORY LIFETIME *SOIRA* ORDER

I) INTRODUCTION

[1] Several months ago, Dalton Lafferty pleaded guilty to two counts of sexual assault arising from incidents involving two different victims. The Crown proceeded by indictment on both charges. Mr. Lafferty faced, on each of them, a mandatory minimum sentence of imprisonment for 1 year. *Criminal Code*, R.S.C.1985, c. C-46, s. 271(a) (the *Criminal Code*). In addition, Sections 490.012 and 490.013(2.1) of the *Criminal Code* mandated that he be required, for the rest of his life, to comply with the requirements of the *Sex Offender Registration Act*, S.C. 2004, c.10 (*SOIRA*)

[2] Mr. Lafferty filed Applications challenging the constitutionality of both the mandatory minimum sentence and the mandatory lifetime *SOIRA* order.

[3] The sentencing hearing proceeded in two stages. On July 8, 2019, I heard submissions on the challenge to Section 271(a), as well as general sentencing submissions. The matter was adjourned to August 20, 2019, on the understanding that on that date, I would advise counsel of my conclusion on the challenge to

Section 271(a), sentence Mr. Lafferty, and deal with all ancillary orders except the *SOIRA* order. It was agreed that I would then hear submissions pertaining to the challenge to the mandatory *SOIRA* Order and issue a written decision in due course disposing of that aspect of the matter.

[4] On August 20, 2019, I sentenced Mr. Lafferty. *R v Lafferty*, 2019 NWTSC 38. I declared the mandatory minimum sentence set out at Section 271(a) to be of no force and effect, with Reasons to follow. Those Reasons are now reported at *R v Lafferty*, 2020 NWTSC 4. cor 1 (*Lafferty* 2020). I heard submissions on the *SOIRA* challenge and reserved my decision.

[5] For the following reasons, I have concluded that impugned provisions do not contravene the *Charter*.

II) THE *SOIRA* FRAMEWORK

[6] To put this matter in context, I begin with a brief overview of the framework established by *SOIRA* and the related *Criminal Code* provisions.

[7] The *Criminal Code* makes it mandatory for the sentencing court to make a *SOIRA* order when sentencing an offender for certain designated offences. *Criminal Code*, s. 490.012(1). The designated offences include a wide array of sexual offences.

[8] Offenders subject to *SOIRA* orders are required to register in person at designated registration centres and provide certain information including name, aliases, date of birth, gender, height and weight, distinguishing marks, address and contact information for residences, employment, volunteer organizations and educational institutions, driver's licence and passport numbers, and particulars of vehicles they use. Staff at the registration centres may request additional information and record observable characteristics of the offender. They may also require that the offender's photograph be taken. *SOIRA*, ss. 4-5.

[9] The reporting obligation is an ongoing one. Offenders must report annually for the duration of the order, and are also required to report changes in their circumstances to ensure that the information included in the registry is up to date. Regulations prescribe the reporting methods for different types of changes. *SOIRA*, s.4.1.

[10] Offenders are also required to notify the registration centre if they intend on being away from their primary residence for a period of seven days or more, and provide the addresses and locations where they expect to stay, in Canada and outside of Canada. *SOIRA*, s. 6.

[11] Failing to comply with these requirements is an offence punishable by a fine or imprisonment for up to 2 years. *Criminal Code*, s.490.031(1) and 490.0311 .

[12] *SOIRA* prescribes who is authorized to access the registry, for what purposes, and the circumstances under which information included in the registry may be disclosed. There are penalties for breaching these consultation and disclosure rules.

[13] An offender can apply for a termination of a *SOIRA* order after the passage of a certain period of time. That period of time varies depending on the duration of the order. *Criminal Code*, s. 490.015.

[14] The duration of the order is prescribed by Section 490.013 of the *Criminal Code*. The duration periods range from 10 years to life.

[15] Lifetime orders are mandated when the maximum penalty for the offence is life imprisonment. They are also mandated if an offender has already been subject to a *SOIRA* order or has been previously convicted of certain designated offences. Finally, and this is the situation that arises in Mr. Lafferty's case, a lifetime order is mandatory if an offender is convicted of more than one specified designated offences. *Criminal Code*, s. 490.013(2.1).

III) ANALYSIS

[16] Mr. Lafferty's Notice of Motion states that his challenge is to Sections 490.012 and 490.013 of the *Criminal Code*. His submissions were, however, focused on mandatory lifetime orders stemming from Section 490.013(2.1). His challenge is based on Sections 7 and 12 of the *Canadian Charter of Rights and Freedoms* (the *Charter*).

1. Section 7

[17] Section 7 of the *Charter* provides that everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice. On a challenge based on this provision an applicant must first establish that the impugned law engages the right to

life, liberty or security of the person. Second, the applicant must establish that the deprivation is not in accordance with the principles of fundamental justice. *Carter v Attorney General of Canada*, 2015 SCC 5, para 55.

[18] The Crown concedes that the impugned provisions engage Mr. Lafferty's liberty interests. The issue is whether they do so in a way that is contrary to the principles of fundamental justice.

[19] The principles of fundamental justice include the requirement that laws must not be arbitrary, overbroad or grossly disproportionate. *Carter*, para 72. Mr. Lafferty's challenge is based on overbreadth and gross disproportionality.

[20] Provisions mandating *SOIRA* orders have been challenged in a number of cases, for the most part unsuccessfully. However, a challenge to Sections 490.012 and 490.013(2.1) succeeded in *R v Ndhlovu*, 2016 ABQB 595. Mr. Lafferty urges this Court to adopt the analysis in *Ndhlovu*. The Crown argues *Ndhlovu* was wrongly decided and relies on subsequent cases where courts have declined to follow it. *R v Long*, 2018 ONCA 282, application for leave to appeal dismissed [2019] S.C.C.A. No.330; *R v T.A.S.*, 2018 SKQB 183; *R v Jomphe*, 2018 QCCQ 5192; *R v B.P.M.*, 2019 BCPC 156. *Ndhlovu* is under appeal.

A. Overbreadth

[21] In an overbreadth analysis, the first step is identifying the purpose and the effect of the impugned legislation in the context of its overall legislative scheme. This is very important because whether a law is overbroad turns on the relationship between its purpose and its effect. *R v Moriarity*, 2015 SCC 55; *R v Safarzadeh-Markhali*, 2016 SCC 14, para 24.

[22] To identify the purpose and effect of the legislation, the court may look at statements of purpose contained in the legislation, the text, content and scheme of the legislation, and extrinsic evidence such as the history and evolution of the legislation. *Safarzadeh-Markhali*, para 31.

[23] The law's purpose should be characterized in a way that is neither too general nor so narrow that it amounts to a mere repetition of the impugned provision. The statement of purpose should be precise and succinct, focusing on the purpose of the provision subject to the constitutional challenge. *Safarzadeh-Markhali* paras 27-28.

[24] In *Ndholvu* the court articulated its conclusion about the purpose of the

legislation as follows:

> (...) I find that the purpose of the original Act is to protect vulnerable people including children in society, by allowing police quick access to current information on convicted sex offenders.
>
> *Ndhlovu*, para 87.

[25] I do not disagree that this is part of the broad purpose of the legislation, but I find this description does not meet the standard of precision evoked in *Moriarity* and *Safarzadeh-Markhali*. Articulating the purpose of the legislation in such a general way makes it more difficult to proceed to the rest of the analysis. For example, the statement of purpose adopted in *Ndhlovu* does not incorporate any reference to the duration of *SOIRA* orders, while Mr. Lafferty's challenge relies heavily on the fact that under the impugned provisions, he will be subject to a lifetime order.

[26] In *Long*, the Ontario Court of Appeal described the purpose of the legislation much more precisely:

> (...) The purpose of s. 490.031(2.1) of the *Criminal Code* is to further public safety by subjecting sex offenders who are at enhanced risk of re-offending to a longer period of registration. In the case of offenders (...) who fall within s.490.013(2.1), this means registration for life, subject to the right to apply for termination of the order after 20 years pursuant to s. 490.015(1)(c).
>
> *Long*, para 102.

[27] In my view, this level of precision in describing the goal of the legislation is more in line with the principles enunciated by the Supreme Court of Canada. I also agree with the substance of this description, in particular the fact that it reflects the connection between duration of *SOIRA* orders and the enhanced risk of re-offending.

[28] Having identified the goal of the legislation, the next step is to determine whether the impugned law goes further than reasonably necessary to achieve it. The focus of the analysis at that stage is the means chosen by Parliament to achieve its goal. In this case, that means is the removal of prosecutorial and judicial discretion as to the duration of *SOIRA* orders. *Long*, para 103.

[29] Mr. Lafferty argues that Section 490.013(2.1) is overbroad because it applies to offenders who do not in fact, pose an enhanced risk of re-offending. He uses the example of a youthful offender who commits two relatively minor sexual offences

within a short timeframe and is nonetheless subject to a lifetime order. He also points out that the provision applies to offenders who, like him, are sentenced for two offences at the same time. He argues that this is not the same as being what he calls a "true recidivist", namely, someone who commits a sexual offence, is convicted and sentenced for it, and later commits a second one.

[30] This argument is the one that prevailed in *Ndhlovu*. The court concluded that the impugned legislation was overbroad because it applies to offenders who do not actually present a risk to re-offend.

[31] The court drew an analogy with Section 179(1)(b) of the *Criminal Code*, which was at issue in *R v Heywood*, [1994] 3 S.C.R. 761. Section 179(1)(b) provided that a person convicted of certain sexual offences and who was subsequently found "loitering in or near a school ground, playground, public park or bathing area" was guilty of vagrancy. A majority of the Supreme Court of Canada concluded that this provision was overbroad, among other reasons, because of who it applied to:

> Section 179(1)(b) is overly broad in respect to the people to whom it applies. It applies to all persons convicted of the listed offences, without regard to whether they constitute a danger to children.
>
> (...)
>
> The effect of this section is that it could be applied to a man convicted at age 18 of sexual assault of an adult woman who was known to him in a situation aggravated by his consumption of alcohol. Even if that man never committed another offence, and was not considered to be a danger to children, at the age 65 he would still be banned from attending, for all but the shortest length of time, a public park anywhere in Canada. The limitation on liberty in s.179(1)(b) is simply much broader than is necessary to accomplish its laudable objective of protecting children from becoming victims of sexual offences.
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> *Heywood*, paras 61-62.

[32] The court in *Ndhlovu* concluded that the same was true of the lifetime requirement to comply with *SOIRA*, using a similar hypothetical:

> The Crown concedes in its brief that the registry will ultimately catch some sex offenders who do not re-offend. I am satisfied that Mr. Ndhlovu is likely one of these offenders. Therefore, an analogy may be drawn between the above statement from *Heywood* and this case.

> The current legislation will have the effect of requiring Mr. Ndhlovu to register as a sex offender for life, as a result of committing sexual assault of two adult women, known to him, in situation aggravated by his consumption of alcohol when he was 19. Even if he never committed another offence, and is not considered a danger to society, at the age of 65, he would still be required to report annually to the police, and be reminded of his label as a "sex offender", and risk being included as a subject in criminal investigations in his neighbourhood. He will also have had to report any travel plans, changes to his personal information, or residence to the police throughout that time.

> The resulting limitation of liberty is broader than necessary to accomplish the objective of assisting in the investigation of sexual crimes, and thus overbroad.

Ndhlovu, paras 115-116.

[33] In an overbreadth analysis the issue is whether the law goes further than necessary to achieve the legislative purpose. In this case I would frame the question as follows: does the combined effect of Sections 490.012 and 490.013(2.1) result in lifetime *SOIRA* orders applying to offenders who do not present an enhanced risk of re-offending? The issue is not, in my view, whether the provisions catch offenders who will not re-offend. They most certainly will, as we know that not 100 percent of offenders re-offend. The key issue, in light of the purpose of the legislation, is whether they will catch offenders who do not present an *enhanced risk* of re-offending.

[34] Assessing risk of re-offence is a notoriously difficult exercise. This is not an area where certainty can be achieved. In that context, the issue really comes down to whether Parliament was entitled to assume that an individual convicted of two sexual offences presents a greater risk of committing sexual crimes than an individual who is convicted of only one such offence, thereby justifying a longer period of registration.

[35] In *Long*, the court was presented with conflicting arguments on that point, each side invoking common sense in support of its position:

> (...) we are faced with conflicting arguments appealing to "common sense". The Crown, on the one hand, asks us to infer that an individual who is convicted of more than one designated sexual offence has a greater propensity to commit sexual crimes than an individual who is convicted of only one such offence.

> The appellant, on the other hand, supported by the intervener, advances reasonable hypothetical scenarios to argue that the appropriate inference to be drawn is this: in some cases, an individual who is convicted of committing two sexual offences, particularly two of which are minor and proximate in time, is at no greater risk of re-offending than an individual who commits only one such offence.
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> *Long*, paras 128-129.

[36] The court concluded that Parliament was entitled to draw the inference that conviction for more than one sexual offence is logically probative of an offender's enhanced propensity to commit further sexual offences. It found that given that assessment of future risk is inherently imprecise, it was open to Parliament to conclude that the commission of two or more offences is a reasonable proxy for an enhanced risk of re-offending and warranting a longer registration period. *Long*, paras 130 and 140.

[37] This analysis was followed in *R v T.A.S.*, 2018 SKQB 183. The offender in that case was convicted of Sexual Interference and faced a mandatory *SOIRA* order for a period of 20 years through the combined effect of Sections 490.012(1) and 490.013. He challenged the provisions as being contrary to Section 7, on the basis that the impugned provisions catch offenders with little or no risk to re-offend. Largely adopting the analysis in *Long*, the court dismissed that challenge.

[38] The conclusion reached in *Long* is also in line with the conclusion reached in an earlier case, *R v Dyck*, 2008 ONCA 309. The impugned provisions in that case were those of a provincial registration scheme very similar to *SOIRA*. The challenge was also based on Section 7. The Ontario Court of Appeal found that the legislation was not overbroad even though it applied to a class of persons who may never re-offend.

[39] With respect for those who hold the contrary view, on the issue of overbreadth, I find the analysis in *Long* compelling and I adopt it. It was open to Parliament, in furtherance of the objectives of this legislation, to mandate a longer registration period for offenders who have committed two or more sexual offences, on the basis that the commission of two or more offences is a reasonable proxy for enhanced risk of re-offending. Having done so does not render the impugned provisions overbroad.

B. Gross disproportionality

[40] A law is grossly disproportionate and contrary to Section 7 if the seriousness of the deprivation of liberty is "completely out of sync" with the objective of the measure. The focus of the inquiry is on the impact that the measure has on the rights of the party who alleges the breach. The standard is a high one. *Carter*, para 89.

[41] Mr. Lafferty argues that this standard is met, using again the example of an offender who has been convicted of two minor sexual offences as a young adult, and continues to be required, well into his or her 60's or 70's, to comply with *SOIRA* reporting requirements.

[42] The answer about whether the gross disproportionality threshold is met depends in large measure on how one views the seriousness of the legislation's impact on offenders' liberty interests.

[43] In *Ndhlovu*, the court concluded that the impact was significant, taking into account not only the scope of the reporting requirements, but also the other deleterious effects on offenders, such as the impact of random compliance checks, the risk of information being divulged during those checks, and the potential far reaching effects on an offender's privacy. The court concluded that cumulatively, these effects were onerous. By contrast, in *Long* and *Dyck*, the courts found that the effect of registration on an offender's liberty is modest.

[44] For the purpose of the analysis, I agree that in assessing the impact of the measure on the offenders, regard must be had not only to the reporting requirements but also to some of the other impacts, as was noted in *Ndhlovu*.

[45] While I may not agree entirely with characterizing the cumulative impact as "modest", I also disagree with the conclusion reached in *Ndhlovu* as to how significant it is. *SOIRA* orders do not prevent individuals from going anywhere or from doing anything. They do not, as did the impugned provisions in *Heywood*, make it an offence to simply be in a certain place. They do impose a burden on individuals, but in my view that burden is not "completely out of sync" with the objective of the measure.

[46] For those reasons, I conclude that Mr. Lafferty's challenge based on Section 7 must fail.

2. Section 12

[47] I addressed the legal framework that governs Section 12 challenges in my decision granting Mr. Lafferty's challenge to Section 271(a) of the *Criminal Code*. *Lafferty* (2020), paras 4-9. The same framework applies to his Section 12 challenge of Sections 490.012 and 490.013(2.1).

[48] The first issue that arises is whether Section 12 is engaged at all. Mr. Lafferty argues that *SOIRA* orders constitute punishment or, at minimum, treatment. The Crown disputes this assertion.

[49] The Supreme Court has recently clarified what constitutes punishment for the purposes of Section 12:

> (...) a measure constitutes punishment if (1) it is a consequence of conviction that forms part of the arsenal of sanctions to which an accused may be liable in respect of a particular offence, and either (2) is imposed in furtherance of the purpose and principles of sentencing, or (3) it has a significant impact on an offender's liberty or security interests.
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> *R v K.R.J.,* 2016 SCC 31, para 41.

[50] The Crown concedes that *SOIRA* orders are a consequence of conviction, but argues that they are not aimed at furthering the purposes and principles of sentencing: rather, they are intended to provide investigative tools to the authorities and are aimed at crime prevention. The Crown also argues, as it did in the context of the Section 7 challenge, that *SOIRA* orders do not have a significant impact on offenders' liberty or security interests.

[51] A number of cases, decided before *K.R.J.,* concluded that *SOIRA* orders do not constitute punishment. *Dyck*; *R v Rouschop*, 2005 O.J. NO.1336; *R v Cross*, 2006 NSCA 30, leave to appeal refused [2006] S.C.C.A. No. 161; *R v S.S.C.*, 2008 BCCA 262.

[52] Referring to those authorities, *Long* appeared to take it as a given that the requirement to register under *SOIRA* is not punishment. *Long*, para 53. *Long* was decided after *K.R.J.* but as there was no Section 12 challenge in that case, the issue of *K.R.J.*'s effect on the characterization of *SOIRA* orders for Section 12 purposes was not argued.

[53] In a more recent case, the Ontario Court of Appeal considered a challenge of

the *SOIRA* provisions as they apply to a person found to be not criminally responsible due to mental disorder. The challenge was based on both Section 7 and Section 15. The Court followed the reasoning in *Dyck* and *Long* in concluding that Section 7 was not infringed. In so doing, the court commented about *SOIRA* orders not constituting a punishment or treatment:

> The registration and reporting requirements in *SOIRA* and *Christopher's Law* are not imposed as punishment or treatment (…) Instead they are directed at promoting public safety through the creation and maintenance of a databank that facilitates the effective investigation and prevention of sexual crimes. Because of the purpose behind the registries, an individualized assessment of risk, though crucial in imposing treatment or punishment, is not required to conform with the principles of fundamental justice. In this sense, sex offender registries are akin to legislation requiring the provision of fingerprints, photographs, or DNA. (…)

G v Ontario (Attorney General), 2019 ONCA 264, para 81 [citations omitted]. The matter is now on reserve in the Supreme Court of Canada, but only on the Section 15 issue. *Ontario (Attorney General) v. G.*, [2019] S.C.C.A. NO.138.

[54] *Long* and *G* appear to have treated the concepts of punishment and treatment together. However, in *R v Rodgers*, 2006 SCC 15, the Supreme Court of Canada had drawn a distinction between the two when it was called upon to decide whether DNA sampling constitutes punishment for the purposes of other provisions of the *Charter*. In finding that punishment does not encompass every potential consequence of being convicted of a criminal offence, the Court contrasted punishment and treatment, referring specifically to Section 12 of the *Charter*:

> (...) the protection afforded by s. 11 must be contrasted with s. 12 of the *Charter* that protects against cruel and unusual "treatment" or punishment. For example, DNA sampling, ordered as a consequence of conviction, would undoubtedly constitute a "treatment" and, if the physical method for obtaining a DNA sample were cruel and unusual, redress could be obtained under s. 12.
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> *Rodgers*, para 63.

Rodgers was not referred to in *Long* and *G.*

[55] Whether or not *SOIRA* orders constitute punishment, viewed through the *K.R.J.* lens, is not determinative because based on *Rodgers*, a distinction must be drawn between punishment and treatment. In my view, if DNA sampling falls under the scope of treatment, the registration and reporting requirements that stem from *SOIRA* orders do as well. For that reason, irrespective of whether *SOIRA*

orders constitute punishment, I agree with Mr. Lafferty that Section 12 is engaged.

[56] The bigger problem for Mr. Lafferty on his Section 12 challenge is having mandatory lifetime *SOIRA* characterized as "cruel or unusual" within the meaning of Section 12. To offend Section 12, a measure must be "so excessive as to outrage standards of decency" and "abhorrent or intolerable" to society. *R v Nur*, 2015 SCC 15; *R v Lloyd*, 2016 SCC 13; *R v Morrison*, 2019 SCC 15. As I have stated already, I accept that the reporting requirements under *SOIRA* are not trivial. Neither is being subject to them for a lifetime. However, that is a far cry from finding that they are grossly disproportionate.

[57] Gross disproportionality in the context of Section 12 is conceptually distinct from gross disproportionality in the context of Section 7. The threshold is not described using the same language. But in both cases the bar is set very high and ultimately, the threshold is very similar. Mr. Lafferty's challenge under Section 12 fails for the same reasons that it did on the "gross disproportionality" branch of the test under Section 7.

III) CONCLUSION

[58] For these reasons, I conclude that Sections 490.012 and 490.013(2.1) do not contravene the *Charter*.

[59] That being so, an Order will issue requiring Mr. Lafferty to comply with the requirements of *SOIRA* for life. I hereby direct the Clerk of the Court to prepare the Order and to take the necessary steps to ensure that Mr. Lafferty is fully aware of the obligations that this Order will place on him when he is released from custody, as well as his right to apply for a termination order in due course.

L.A. Charbonneau
J.S.C.

Dated in Yellowknife, NT this
27th day of February 2020

Counsel for the Crown: Martha Chertkow and Alexander Godfrey
Counsel for the Accused: Charles Davison

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