

IN THE TERRITORIAL COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

- and -

CLAYTON CAPOT BLANC

**REASONS FOR DECISION
of the
HONOURABLE JUDGE GARTH MALAKOE**

Restriction on Publication

Identification Ban – See the *Criminal Code*, section 486.4.

By Court Order, information that may identify the victim must not be published, broadcast, or transmitted in any way.

NOTE: This decision is intended to comply with the identification ban.

Heard at: Yellowknife, Northwest Territories

Date of Decision: May 26, 2023

Date of Sentencing Hearing: March 17 and April 3, 2023

Counsel for the Crown: Nakita McFadden

Counsel for the Accused: Nicola Langille

[Application for exemption from registration
under the *Sex Offender Information Registration Act*]

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A. INTRODUCTION

A.1 Issue

[1] On March 17, 2023, Mr. Capot Blanc was sentenced after pleading guilty to six charges under the *Criminal Code* including four assaults (s. 266), an assault causing bodily harm (s. 267(b)) and a sexual assault (s. 271). I accepted a joint submission for a total period of incarceration of 20 months plus a probation order of two years.

[2] Although the period of incarceration and probation order were not at issue, Crown and defence disagreed as to whether the Court should make an order pursuant to s. 490.012(1) of the *Criminal Code* requiring that Mr. Capot Blanc comply with the *Sex Offender Information Registration Act*, S.C. 2004, c.10 (“*SOIRA*”).

[3] Counsel for Mr. Capot Blanc filed a Notice of Application on December 2, 2022, for an order pursuant to ss. 7 and 24(1) of the *Charter of Rights and Freedoms* seeking a constitutional exemption from the application of *SOIRA* to this accused.

[4] Mr. Capot Blanc was sentenced on March 17, 2023; however, my decision with respect to the *SOIRA* order was reserved. I heard his lawyer’s submissions on the same date. Because of a lack of time, the Crown’s submissions were adjourned until April 3, 2023.

[5] In the decision that follows, a reference to a section number in the absence of named legislation is a reference to the *Criminal Code*.

A.2 Organization

[6] The decision is organized as follows. The circumstances of the sexual assault for which Mr. Capot Blanc was convicted and sentenced are described. His personal history and criminal history are reviewed. The test which the majority in the Supreme Court of Canada in *R. v. Ndhlovu*, 2022 SCC 38 describes as being appropriate for determining whether a sex offender should be exempted from registration under *SOIRA* is examined. Then this test is applied to the circumstances of Mr. Capot Blanc and the circumstances of the sexual assault.

B. THE SEXUAL ASSAULT

[7] On February 10, 2022, Mr. Capot Blanc came up behind the female victim at an indoor location in Inuvik. The victim was working at this location. Mr. Capot Blanc grabbed her buttocks over her clothing and touched her side. The victim told him to stay back and she retreated to her office. When she came out, Mr. Capot Blanc said to her, "I want to do it with you." He had his tongue out. He also said, "I want to do it with you, you are so hot." The victim said that he should stop or she would call the RCMP. He responded, "You do whatever you want. The RCMP will not do anything with me."

[8] In her victim impact statement, the victim described the emotional impact resulting from the sexual assault as follows:

When this incident happened and the client was in my workplace I didn't want to go to work. I didn't want to have to look at him. When the RCMP said that he could not be on property when I work that made me feel better. I felt disgusting when I went to work and he would be there. I thank goodness he is not at my workplace anymore. I am a compassionate person that is why I got into this work and serving people at the [place of work]. I feed people because it is my job, I take care of the vulnerable people we serve this is my job. The offender takes this kindness and he interprets what is my service to others as my liking him in some other way. This left me questioning how do I do my job? How can I serve him without this constant harassment? No one else interprets me doing my job as an invitation to make these sexual gestures and comments,

This actually caused me to withdraw from my husband, our personal relationship suffered as I felt disgusting from what was happening. It's been 3 months now and everyday I am trying to cope with it, this has had lasting impacts that went beyond my workplace. I have trouble sleeping, and I am anxious. Each time the [workplace] door opens I look to see who is coming in - is it him? I find myself sometimes calling the [workplace] before going into work to check that he is not there, that's how anxious I've become. The day the offender did this he did not just hurt me - he hurt my family, my coworkers and the other clients at the [workplace]. Because I could not be my best self, I had to take time off work, I have [x] children to take care of and this impacted them, going through everything and having to go through court, a place I have never been and didn't understand. It has brought a lot of unnecessary stress upon us all.

C. CRIMINAL RECORD

[9] At the time of sentencing, Mr. Capot Blanc had a criminal record with 68 convictions, 19 of which were for violent offences. The earliest entry is an assault in December of 1996. He has received up to twenty-eight months in jail for an assault causing bodily harm. He has been convicted of offences each year since 1998 except for 2004, 2008, 2009, 2010, 2021 and 2022. In 2006 and 2007, he was convicted and sentenced on six uttering threat charges and an assault causing bodily harm (the assault causing bodily harm mentioned above for which he received 28 months) which resulted in a total sentence of four years, three months and twenty-nine days.

[10] The sexual assault before this Court is the first sexual offence on his record. As indicated earlier, it is one of six offences for which he was sentenced on March 17, 2023 and for which he received a global sentence of 20 months incarceration and 2 years probation. These offences took place between April 26, 2021 and February 24, 2022. At the time of sentencing, Mr. Capot Blanc had spent over a year (392 days) in remand.

D. PERSONAL CIRCUMSTANCES

[11] Mr. Capot Blanc is 42 years old (d.o.b. June 14, 1980) and of Inuvialuit descent. He was born in Tuktoyaktuk. He moved to Inuvik when he was 19 and when his mother wanted to pursue a career in social work in Inuvik. She died in 2000 and her death was difficult for him. After her death, his alcohol consumption increased as did his criminal offending. Mr. Capot Blanc says that his father was responsible for many positive things in his life and some bad things. His father died 10 years ago.

[12] Mr. Capot Blanc has two children on Vancouver Island (21 and 11) and a third child in the Northwest Territories (23).

[13] Mr. Capot Blanc finds employment on a regular basis. He has worked as a labourer for E. Gruben Transport and for his uncle, Vern McLeod. Mr. Capot Blanc filed three letters of support from his friend Ryan Yakeleya; a former counsellor, Maria Julia Amestoy; and a friend and supporter, Loretta Rogers, who is “willing to take Clayton in and love him like family and support him through his journey to becoming a better person in our community.”

[14] His parents and grandparents all attended residential school as did other family members. There was alcohol and violence in Mr. Capot Blanc's home. He witnessed his father brutally abuse his mother, both physically and emotionally on a regular basis. Mr. Capot Blanc did not ask his family members about their residential school experience but through his own counselling and introspection, recognizes that residential school survivors are not able to show their emotions and when they do, nobody acts like they care. As a result, they act out. He feels that his treatment at the hands of his parents, who carried these scars of residential school, accounts for his own behaviour to some extent.

[15] In a psychological/psychiatric assessment report dated Mar 11, 2010, the author stated:

CAPOT-BLANC was devastated when his mother succumbed to cancer when he was twenty-years old. It was at this point in his life where everything changed for him. He turned to alcohol to cope with his tragic loss, which led to a 'who cares' attitude, poor decision making, and ultimately violence and chaos. Upon exploring his past and the reasons behind his use, CAPOT-BLANC began to realize that his lack of emotional control, his poor choices and his lack of consequential thinking were having a significant negative impact upon his life. Having said that, he indicated he did not wish to quit drinking. He seemed at times to be ambivalent about his desire, and need, to change his ways. He expressed pride, and laughed inappropriately at times, when discussing how he could easily intimidate others, despite his smaller size, and how he could back his threats up with the use of violence. Also, he noted that once he starts hurting someone, he has a hard time stopping, even when they are clearly incapacitated or unconscious. Further, he discussed how he has no fears and cannot be intimidated himself.

[16] Although the report is thirteen years old, it seems to characterize Mr. Capot Blanc in way which is confirmed by his actions while committing the six offences that were before the Court for sentencing on March 17, 2023.

E. THE TEST FOR AN EXEMPTION

[17] Section 490.012(1) requires the Court to make an order for an offender to comply with *SOIRA* if the offender has been convicted of sexual assault.

490.012 (1) When a court imposes a sentence on a person for an offence referred to in paragraph (a), (c), (c.1), (d), (d.1) or (e) of the definition "designated offence" in subsection 490.011(1) or renders a verdict of not criminally responsible on account of mental disorder for such an offence, it shall make an order in Form 52 requiring the person to comply with the *Sex Offender Information Registration Act* for the applicable period specified in section 490.013.

[18] On October 28, 2022, the Supreme Court of Canada in *Ndhlovu* declared s. 490.012 (and s. 490.013(2.1)) to be unconstitutional since they violated s. 7 of the *Charter* in a way that cannot be justified in a free and democratic society. The Court said that the declaration of invalidity for s. 490.012 would take effect in one

year. The Court also granted Mr. Ndhlovu an exemption to s. 490.012 pending its declaration of invalidity. In other words, Mr. Ndhlovu did not have to register in the sex offender registry.

[19] In *Ndhlovu*, the Supreme Court accepted that Mr. Ndhlovu was at little risk to reoffend. It did not impose the *SOIRA* order because there was “no connection between subjecting Mr. Ndhlovu to a *SOIRA* order and the objective of capturing information about offenders that may assist police prevent and investigate sex offences.” [Para. 141].

[20] The Supreme Court in *Ndhlovu* decided that requiring every offender who commits a “designated offence” (which includes a sexual assault under s. 271) to be subject to *SOIRA* is overbroad. The reporting requirements of *SOIRA* affects the s. 7 *Charter* rights of such an offender. As the Supreme Court stated, “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 the threat of prosecution and imprisonment all interfere with what it means to be free in Canada.” [para. 5]. The Court then determined that there are some offenders for which there was no public interest in having them report.

[21] The purpose of s. 490.012 is to capture information about offenders that may assist police prevent and investigate sex offences [*R. v. Cusick*, ONCJ 590 at para. 121; *Ndhlovu* at para. 73].

[22] The Supreme Court did not immediately declare s. 490.012 to be invalid but suspended the declaration for 12 months. This suspension was a recognition that despite s. 490.012 being constitutionally invalid, there is a need to impose *SOIRA* orders on offenders including those at a high risk of recidivism since failure to do so “could therefore endanger the public interest in preventing and investigating sexual offences committed by high-risk offenders.” [para. 139]

[23] In my view, *Ndhlovu* clearly allows for a s. 24(1) *Charter* exemption to be given for a sexual offender who is at little risk to reoffend. The Supreme Court also recognizes the other end of the spectrum which is “high-risk offenders” or offenders “at a high risk of recidivism.” They are offenders for which registration under *SOIRA* serves a purpose.

[24] Is a s. 24(1) *Charter* exemption available for a sexual offender who is not at the “little risk to reoffend” end of the spectrum? In my view, it is. Earlier in *Ndhlovu*, the Court stated that an offender, who was already registered and whose rights under s. 7 of the *Charter* were violated, could seek to be removed from the registry and would be removed “if they can demonstrate that *SOIRA*’s impacts on their liberty bears no relation or is grossly disproportionate to the objective of s.

490.012” [para. 140]. From this, I take it that if there is a risk that the sexual offender will reoffend, a *SOIRA* order shall be imposed unless he demonstrates that its impact on his liberty is grossly disproportionate to the objective of s. 490.012.

[25] In the discussion that follows, I consider first the argument that Mr. Capot Blanc is at a low risk to offend; and then second, even if he is not at a low risk to offend, he should be granted an exemption, since registration of Mr. Capot Blanc under *SOIRA* serves no useful purpose for preventing and investigating sexual offences.

F. ANALYSIS

F.1 Risk to Re-offend

[26] Counsel for Mr. Capot Blanc make the following submissions with respect to his seeking an exemption based on the unlikelihood of him re-offending:

- (a) Mr. Capot Blanc is 42 years old and is being sentenced for his first sexual offence;
- (b) Mr. Capot Blanc touched a woman on the buttocks over her clothing. This is a sexual assault which is at lowest end of the spectrum of seriousness [see para. 35 of *Ndhlovu*];
- (c) Despite having a long criminal record, this is the first sexual offence that Mr. Capot Blanc has committed;
- (d) The Court should ask itself the question, “when Parliament ultimately redrafts this legislation, will the new legislation include a sexual offender like Mr. Capot Blanc?”;
- (e) A high risk of sexual recidivism cannot be inferred from the type of offence committed by Mr. Capot Blanc; and
- (f) The Court does not need expert evidence to assess Mr. Capot Blanc’s risk of re-offending with respect to a sexual offence.

[27] I accept the submission that expert evidence, although useful, is not necessarily required for this Court to perform the type of risk analysis required here [*R. v. Luis*, 2022 CM 4016 at para. 126 and *R. v. Cusick*, 2022 ONCJ 590 at para. 122]. I do not accept the submission that I should be guided by anticipating whether Mr. Capot Blanc would be caught by future *Charter*-compliant legislation.

[28] With respect to the effect of the Supreme Court suspending the declaration of invalidity of s. 490.012 of *SOIRA* for one year, I accept the Crown submission that the baseline presumption is that the law continues to operate as is until new legislation is put in place by Parliament. However, the Supreme Court in *Ndhlovu* clearly identified circumstances where subjecting an accused to the reporting requirements of *SOIRA* is a violation of s. 7 of the *Charter*. If Mr. Capot Blanc is able to demonstrate that he falls within the bounds delimited by the Supreme Court as breaching the *Charter*, then he should be granted an exemption.

[29] As a point of clarification, I recognize that, for the purposes of this Decision, the issue is not the risk of Mr. Capot Blanc committing another offence under the *Criminal Code* but rather, the risk of Mr. Capot Blanc committing a “designated offence” as defined in s. 490.011 of *SOIRA*. When I use the term, the “risk of Mr. Capot Blanc re-offending,” in the absence of anything else, this means his risk of committing a sexual offence.

[30] The burden is on Mr. Capot Blanc to satisfy me, on a balance of probabilities, that he is at a low risk of re-offending. He has not done so.

[31] The evidence before this Court is that he has committed a sexual assault, which although on the lower end of the spectrum of seriousness of sexual assault, carries many of the characteristics of his other non-sexual offences and the characteristics described in his 2010 psychological/psychiatric assessment report. Sexual assault is an assault. Mr. Capot Blanc acted impulsively. His actions and words were violent and intimidating. His reference during the sexual assault to his lack of fear of the RCMP also indicated the “who cares?” attitude referred to in the psychological report and that he is not intimidated by others or the potential consequences of his actions.

[32] Mr. Capot Blanc is asking the Court to view this sexual assault as a “one off” in that it is unlikely to happen again. In my view, it is equally consistent with being the first of further sexual offences, given the pattern of his offending and his psychological characteristics. If, in the future, he were to be presented with a similar situation that led to the sexual assault of the victim on February 10, 2022, there is a substantial risk that he would act or react in the same way.

[33] I find that Mr. Capot Blanc is at a moderate risk of re-offending, i.e., committing another “designated offence” as that term is defined in s. 490.011.

[34] Therefore, this is not a situation where the offender is at little risk to reoffend and where there is no connection between subjecting the offender to a *SOIRA* order and the objective of capturing information about offenders that may assist police prevent and investigate sex offences. Rather it is a situation where the

Court must decide whether requiring Mr. Capot Blanc to register under *SOIRA* will further this objective in any meaningful way and what impact this registration will have on Mr. Capot Blanc's liberty.

F.2 Are the Impacts of *SOIRA* Grossly Disproportionate?

F.2.1 Introduction

[35] Even where there is a moderate risk that Mr. Capot Blanc may re-offend, it may be that *SOIRA*'s impact on his liberty is grossly disproportionate to the objective of s. 490.012, i.e., capturing information about offenders that may assist police prevent and investigate sex offences

[36] In this regard, Mr. Capot Blanc makes the following submissions:

- (a) Mr. Capot Blanc lives in a small community, is known to the residents of the community and there is no problem locating him;
- (b) His DNA and fingerprints are already on national data bases;
- (c) Mr. Capot Blanc is often homeless. He is addicted to substances. The impacts of the requirements of *SOIRA* are particularly onerous to him;
- (d) If Mr. Capot Blanc were to be registered under *SOIRA*, there is no benefit to the police with respect to prevention and investigation of sexual offences, given the type of sexual offence that Mr. Capot Blanc is at risk of committing.

[37] To answer the question of whether the impacts on Mr. Capot Blanc of being subject to a *SOIRA* order are grossly disproportionate to the objective of s. 490.012, the following issues must be addressed:

- (a) What are the reporting requirements of a *SOIRA* order?
- (b) What are the impacts of these requirements on Mr. Capot Blanc?
- (c) What are the benefits, if any, to the prevention and investigation of sexual offences of Mr. Capot Blanc being subject to a *SOIRA* order?
- (d) What does "grossly disproportionate" mean?
- (e) Are the impacts of a *SOIRA* order on Mr. Capot Blanc's liberty grossly disproportionate to the objective of s. 490.012?

F.2.2 Requirements of a *SOIRA* Order

[38] The reporting requirements of an order made pursuant to s. 490.012(1) are described in detail in *Ndhlovu*:

39 Registered offenders are subject to many reporting requirements. Following an order made pursuant to s. 490.012(1), offenders must report in person to a registration centre, which are police stations designated with administering the registry in a geographic region. At the centre, the offender must provide extensive 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 (*SOIRA*, s. 5(1)). They must also report a contact phone number for each location where they can be reached and every mobile phone and pager in their possession (s. 5(1)(f)). 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.

40 Offenders must update their information in person yearly (ss. 4(3) and 4.1(1)). They must also report in person at the registration centre any changes in primary or secondary address and name. They must also report in person if they receive a driver's licence or passport (s. 4.1(1)).

41 Moreover, offenders must notify the registration centre within seven days of any change regarding their employment or volunteering information (ss. 5(1)(d) and 5.1). They must also notify the registration centre if they intend to be away from their primary or secondary residence for seven or more consecutive days (s. 6(1)). Specifically, offenders must notify the registration centre, before departure, of their departure and return dates and of every address or location at which they expect to stay, whether the addresses or locations are in or outside Canada (s. 6(1)(a)). Similar reporting requirements are imposed on offenders who decide, after departure, not to be at their primary or secondary residence for seven or more consecutive days (s. 6(1)(b)).

42 Failing to comply with *SOIRA* brings serious consequences for offenders. The *Criminal Code* makes it an offence for an offender to fail to comply with *SOIRA*'s reporting obligations without "reasonable excuse" (s. 490.031(1)). Non-compliance with any of these conditions may result in prosecution, with penalties of up to 2 years' imprisonment, up to \$10,000 in fines, or both (s. 490.031(1)). The risks are clearly high for offenders if they fail to adhere to *SOIRA*'s numerous requirements.

43 Further, police officers conduct random compliance checks to verify the information on the registry. At a minimum, offenders are subject to at least one annual verification of their residential address. Det. Hove of the EPS also testified the current policy in Edmonton was to restrict compliance checks to the offender's primary residence, although *SOIRA* does not restrict where these checks are carried out. Nothing, as a result, prevents officers from showing up at an offender's place of employment. Thus, as the sentencing judge found, 'offenders on the registry will be subject to further police interference due to the investigatory, and now preventative steps taken by police officers in relation to sex crimes' (ABQB reasons (2016), at para. 59).

[39] In Mr. Capot Blanc's case, he is a resident of Inuvik, Northwest Territories, a town of 3,200 people. He would report to the RCMP detachment in Inuvik.

F.2.3 Impact of *SOIRA* Order

[40] In *Ndhlovu*, the Supreme Court makes some general comments about the impact of the reporting requirements of *SOIRA*. The Court found that these requirements have considerable impact on an individual's privacy and liberty while also recognizing that the impact varied depending on an individual's circumstances:

44 A number of appellate courts have concluded *SOIRA*'s reporting requirements have a "minimal" or "modest" impact on registered offenders (see *Long*, at para. 147; *R. v. Debidin*, 2008 ONCA 868, 94 O.R. (3d) 421, at para. 82; *R. v. Dyck*, 2008 ONCA 309, 90 O.R. (3d) 409, at paras. 104-6; *R. v. Cross*, 2006 NSCA 30, 241 N.S.R. (2d) 349, at paras. 50 and 66; *R. v. C. (S.S.)*, 2008 BCCA 262, 234 C.C.C. (3d) 365, at para. 55). The Court of Appeal in this case, while finding that the measures were "not strictly modest", equated registration to everyday reporting obligations.

45 With respect, we cannot agree. Rather, the impact on anyone subject to *SOIRA*'s reporting requirements is considerable. The requirements impact privacy and liberty, personal interests that are fundamental to society: liberty of movement and choice, mobility, and freedom from state monitoring or intrusion in our personal lives. 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 imprisonment make the conditions onerous. They simply 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 (see *Dyck*, at para. 110).

46 Additionally, the cost of compliance varies from offender to offender based on their life circumstances. While *SOIRA*'s reporting requirements are always serious, offenders whose job requires regular, prolonged travel will frequently need to take additional measures to remain in compliance. Even worse, offenders who experience homelessness, substance use issues, and cognitive or mental health challenges may find compliance extremely difficult (see, e.g., *R. v. J.D.M.*, 2006 ABCA 294, 417 A.R. 186, at para. 9; *R. v. Desmeules*, 2006 QCCQ 16773, at paras. 25-27 (CanLII)). Quite simply, we must recognize the full scope of the restrictions that are imposed by *SOIRA* orders -- both physical and informational -- to properly assess the constitutionality of ss. 490.012 and 490.013(2.1). [emphasis added]

[41] Mr. Capot Blanc's background is one of prolonged periods of jail, substance abuse and periods of homelessness. According to his letters of support, when he is not in custody, he looks for work and takes different jobs on a steady basis. Clearly, the reporting requirements with respect to residence and employment impact him more than they would impact someone who had a stable residence and employment. In other words, the "cost of compliance" is higher for Mr. Capot Blanc in this regard. As the Supreme Court stated at para. 56 of *Ndhlovu*:

For persons experiencing homelessness or frequent changes in housing, complying with *SOIRA*'s requirement in s. 4.1(1)(a) to report in person any changes to the location of their "main" residence (regardless of whether they have a formal address) is an extremely onerous obligation, that can be virtually impossible to respect, even more so since it can last for their lifetime.

[42] Further, Mr. Capot Blanc is an Inuvialuit man who has been in trouble with the law for many years. His relationship with the RCMP is tenuous at best and has been conflictual in the past. There is some stigma for him to have to go to the RCMP detachment on a regular basis to report. As the Court stated in *R. v. Redhead*, 2006 ABCA 84:

[31] Other factors might include unique individual circumstances such as a personal handicap, whereby the offender requires assistance to report: *R. v. J.D.M.*, [2005] A.J. No. 1258, 2005 ABPC 264 at para. 48. Courts have also considered the intangible effects of the legislation, including stigma, even if only in the offender's mind; the undermining of rehabilitation and reintegration in the community; and whether such an order might result in police harassment as opposed to police tracking: *J.D.M.*, *ibid.*; *A.G.N.*, *supra* at para. 21; *R. v. Have* (2005), 194 C.C.C. (3d) 151, 2005 ONCJ 27 at para. 12.

[43] On his criminal record, Mr. Capot Blanc has six convictions for failing to comply with an undertaking, one conviction for failing to comply with a recognizance and 13 convictions for breaching a condition of a probation order. Given this background of failing to comply with court orders, it is difficult to see how Mr. Capot Blanc will readily comply with the onerous reporting requirements of *SOIRA*.

[44] During their submissions for the same sentence, Crown and defence both acknowledged the significant *Gladue* factors in Mr. Capot Blanc's life and the difficult circumstances he experienced while growing up. In my view, this background, while lessening Mr. Capot Blanc's moral blameworthiness in respect to the offences for which he was sentenced is also a factor which makes compliance with the reporting requirements of a *SOIRA* order more difficult. Hence, an ongoing requirement to report to the RCMP detachment in Inuvik goes beyond a simple administrative interaction for someone with this background.

F.2.4 Benefits of a *SOIRA* Order

[45] In making its decision regarding the exemption from a *SOIRA* order, the Court has the circumstances of the offences for which he was sentenced, his criminal history, his personal circumstances, the 2010 psychological report, the letters of support and the victim impact statements. No evidence was called by either Mr. Capot Blanc or the Crown with respect to how a *SOIRA* order would assist the police in preventing or investigating sexual offences.

[46] In this regard, Mr. Capot Blanc’s counsel urges me to accept the evidence and conclusions of the Supreme Court in *Ndhlovu*. Although I recognize that *Ndhlovu* case arose in the context of the Edmonton Police Department, I accept that the conclusions regarding the usefulness of the sexual offender information registry have some applicability to the RCMP in Inuvik.

[47] The following conclusions of the Supreme Court of Canada in *Ndhlovu* are important when determining the benefits of a *SOIRA* order in Mr. Capot Blanc’s case:

- (a) There is some evidence from studies in the United States that registries may assist the police in detaining offenders more quickly if they reoffend; however, the registries in the US are public and therefore not comparable to *SOIRA* [para. 132].
- (b) It is unclear how *SOIRA* could prevent a sex offence [para. 133].
- (c) When *SOIRA* came into force [in 2004], it was largely seen as a tool to help police stop the sexual abuse and abduction of children, a type of investigation where “time is of the essence.” [para. 32]

[48] The following excerpt from Duncan J. in *R. v. Have*, 2005 ONCJ, 194 C.C.C. (3d) 151 is also informative as to when the registry is useful:

15 . . . There is an aspect of crime prevention in that registration in itself is thought to act as a deterrent to potential offenders. But the main purpose of registration is to further public safety by permitting police to keep track of sex offenders living or working in the local community. This information may be useful in the investigation of future sex related crimes by identifying individuals who, by reason of past convictions, may be considered suspect in such crimes. The model is the predatory stranger offender who “hunts” from areas close to his home or work. Registration is particularly valuable to enable quick response in cases of child abduction by a stranger, where time is of the essence to prevent murder.

In summary, the assumption underlying the scheme is that a person who has committed this type of offence in the past may have a propensity to commit a similar offence in the future. **Registration of such persons is valuable in cases of offences committed locally by strangers to the victim. The value of a registry to investigation of other types of sex related offences is less apparent.** [Emphasis added.]

[49] At para. 109 of *Ndhlovu*, the Supreme Court states:

109 Moreover, judges make risk assessments routinely, including those informed by expert assessments. Notwithstanding these assessments may not be certain, they are capable of being well informed by an individual’s personal circumstances and the best expert evidence. Clearly, there are instances where a sentencing judge can reasonably conclude that it is remote or implausible that an offender’s information will ever prove useful to police.

[50] Earlier, I stated that Mr. Capot Blanc was of moderate risk to commit a sexual offence in the future. This conclusion was based on his criminal history, the types of non-sexual offences that he has committed in the past, the nature of the sexual assault that he did commit and his personal characteristics; in particular, his lack of fear and his tendency to use intimidation and violence.

[51] Given Mr. Capot-Blanc's background, a *SOIRA* order will likely have no deterrent effect on his offending in the future. Should he commit a sexual offence in the future, it will almost certainly be characterized by the same characteristics of his previous non-sexual offences and the February 10, 2022 sexual offence, i.e., intimidating and overt with no attempts to conceal his identity or apparent fear of being caught.

[52] In my view, it is remote or implausible that Mr. Capot-Blanc's information that is captured pursuant to *SOIRA* will ever prove useful to police in preventing or investigating a sexual offence.

F.2.5 “Grossly Disproportionate”

[53] With respect to the meaning of “grossly disproportionate”, I am informed by and adopt the explanation of Justice Watt in *R. v. Debiden*, 2008 ONCA 868:

[61] To rebut the presumption of a *SOIRA* order by establishing the exception under s. 490.012(4), the offender must establish more than a simple imbalance between the impact of an order on him or her and the public interest described in the subsection. A simple preponderance of individual impact over public interest is not sufficient to rebut the presumptive effect of s. 490.012(1). It is only where the balance reveals that the individual impact is grossly disproportionate to the public interest that the presumption of s. 490.012(1) is rebutted.

[62] In everyday speech, “grossly” means plainly, obviously, excessively, to a startling degree, flagrantly or glaringly. The term “disproportionate” means simply out of or lacking proportion.

[63] The phrase “grossly disproportionate” is familiar in connection with claims of infringement of the guarantee against cruel and unusual treatment or punishment in s. 12 of the *Canadian Charter of Rights and Freedoms*. Those authorities teach that “grossly disproportionate” is a very stringent and demanding standard, one not easily satisfied, something rare and unique: *R. v. Goltz*, 1991 CanLII 51 (SCC), [1991] 3 S.C.R. 485, [1991] S.C.J. No. 90, at p. 502 S.C.R.; *R. v. Smith*, 1987 CanLII 64 (SCC), [1987] 1 S.C.R. 1045, [1987] S.C.J. No. 36, at p. 1072 S.C.R.

[64] The phrase “grossly disproportionate” also appears in the exception s. 487.051(2) makes to presumptive DNA orders for certain primary designated offences. DNA orders follow conviction of primary designated offences unless the offender establishes that the impact of the order on the offender's privacy and personal security would be “grossly disproportionate” to the defined public interest. To establish the exception and thus gain exemption from the presumptive order, an offender must show that the public interest is

clearly and substantially outweighed by the offender's privacy and security interests: *R. v. C. (R.)*, 2005 SCC 61 (CanLII), [2005] 3 S.C.R. 99, [2005] S.C.J. No. 62, at para. 31.

[54] The “grossly disproportionate” standard is a very stringent and demanding standard. In this case, Mr. Capot Blanc must show that the benefit of his *SOIRA* registration in preventing and assisting police to investigate sexual offences is clearly and substantially outweighed by the infringement on his privacy and liberty interests.

F.2.6 Is the Impact of *SOIRA* Order Grossly Disproportionate?

[55] If there was any useful law enforcement benefit to subjecting Mr. Capot Blanc to the reporting requirements of a *SOIRA* order, then this might very well be a situation where the standard of “gross disproportionality” has not been met. However, for the reasons stated above, a *SOIRA* order would impose onerous reporting requirements on Mr. Capot Blanc and time and effort on the part of the RCMP to receive, monitor and enforce his reporting. With respect to the public interest or benefit, a *SOIRA* order which required Mr. Capot Blanc to register would result in negligible or no assistance to the RCMP in preventing or investigating sexual offences, in general; and specifically, would not prevent Mr. Capot Blanc from offending in the future or if he did, it would not assist the RCMP in investigating the offence.

G. CONCLUSION

[56] I have found that Mr. Capot Blanc is not at a low risk for committing another sexual offence. However, if he does commit another sexual offence, the offence will be characterized by the same characteristics of his previous non-sexual offences and the February 10, 2022 sexual offence, i.e., intimidating and overt with no attempts to conceal his identity or apparent fear of being caught. In this regard, he is at low risk for committing a sexual offence for which registration under *SOIRA* would have any significant benefit in preventing or investigating.

[57] For the reasons stated, Mr. Capot Blanc has demonstrated that *SOIRA*'s impact on his liberty is onerous to the extent that it is grossly disproportionate to the objective of s. 490.012; i.e., to prevent or assist the RCMP in investigating sexual offences. Specifically, registering Mr. Capot Blanc under *SOIRA* would not prevent him from offending in the future and if he did, it would provide minimal to no assistance to the RCMP in investigating the offence.

[58] As stated, this conclusion is based on the specific constellation of Mr. Capot Blanc's personal circumstances, the nature of his sexual offending, the reporting requirements of *SOIRA*, the effect of these requirements on Mr. Capot Blanc and

how the capturing of this data is used for the prevention and investigating of sexual offences. It is the combination of these factors which allow me to say that the disproportionality test set out by the Supreme Court of Canada in *Ndhlovu* has been satisfied.

[59] The application by Mr. Capot Blanc for an exemption to the requirements of s. 490.012 is granted. He will not be subject to a *SOIRA* order.

Garth Malakoe
T.C.J.

Dated at Yellowknife, Northwest
Territories, this 26th day of May,
2023.

**IN THE TERRITORIAL COURT OF THE
NORTHWEST TERRITORIES**

BETWEEN:

HER MAJESTY THE QUEEN

- and -

CLAYTON CAPOT BLANC

REASONS FOR DECISION
of the
HONOURABLE JUDGE GARTH MALAKOE

Restriction on Publication

Identification Ban – See the *Criminal Code*,
section 486.4.

By Court Order, information that may identify the
victim must not be published, broadcast, or
transmitted in any way.

NOTE: This decision is intended to comply with the
identification ban.

[Application for exemption from registration
under the *Sex Offender Information Registration Act*]