SUPREME COURT OF CANADA

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Case in Brief: *R. v. Ndhlovu*

Judgment of October 28, 2022 | On appeal from the Court of Appeal of Alberta
Neutral citation: 2022 SCC 38

The Supreme Court finds the mandatory and lifetime registration on the sex offender registry unconstitutional.

This ruling has important implications for the registration of sex offenders.

The *Sex Offender Information Registration Act (SOIRA)* came into force in 2004. It created a national sex offender registry. To place an offender on the registry, a Crown prosecutor had to apply for a "*SOIRA* order". The judge would then decide to grant the order or exclude the offender from the registry. Judges had discretion to determine if the effect of the order on the offender's privacy or liberty would exceed the public interest in protecting society.

In 2011, Parliament changed the law. It removed the discretion of the Crown and the sentencing judge to exclude an offender from the registry. Since then, section 490.012 of the *Criminal Code* has required the mandatory registration of anyone found guilty of a sexual offence. This means the personal information of every sex offender must be added to Canada's national registry. Section 490.013(2.1) also imposed a mandatory registration for life, for those who committed more than one such offence.

In 2015, Eugene Ndhlovu pled guilty to two counts of sexual assault against two people at a party four years earlier when he was 19-years-old. The trial judge sentenced him to six months in jail, to be followed by three years of probation. After reviewing Mr. Ndhlovu's history and the evidence, the judge found he was unlikely to re-offend. However, due to the legislative changes in 2011, Mr. Ndhlovu was automatically subject to a lifetime registration on the national sex offender registry.

After his sentencing, Mr. Ndhlovu challenged the constitutionality of sections 490.012 and 490.013(2.1) of the *Criminal Code*. The judge concluded that those provisions violated section 7 of the *Canadian Charter of Rights and Freedoms* (the *Charter*), which guarantees everyone the right to life, liberty and security of the person.

The Crown then asked the court to decide if the provisions could be acceptable under section 1 of the *Charter*. That section permits courts to find otherwise unconstitutional laws justifiable in a free and democratic society. The judge concluded that sections 490.012 and 490.013(2.1) could not be saved by section 1. She then declared the provisions to be without force or effect and did not order Mr. Ndhlovu to register himself. The Crown appealed that decision to the Court of Appeal of Alberta. It found the provisions were constitutional. Mr. Ndhlovu then appealed to the Supreme Court of Canada.

The Supreme Court allows the appeal.

Sections 490.012 and 490.013(2.1) of the *Criminal Code* are unconstitutional.

Writing for a majority of the judges, Justices Andromache Karakatsanis and Sheilah L. Martin said the two provisions of the *Criminal Code* violate section 7 of the *Charter* in a way that cannot be justified in a free and democratic society. These provisions infringe on the right to liberty protected under section 7 of the *Charter,* "because registration has a serious impact on the freedom of movement and of fundamental choices of people who are not at an increased risk of re-offending". Registering offenders who are not at risk of committing a future sex offence is disconnected from the purpose of registration, which is to capture information about offenders to help police prevent and investigate sex offences.

As such, the majority has declared the provisions unconstitutional. They said the declaration of invalidity for section 490.012 will take effect in one year. The finding for section 490.013(2.1) takes effect immediately and is considered invalid from the time it was enacted in 2011.

As for Mr. Ndhlovu, the judges granted him an exemption to section 490.012 pending its declaration of invalidity. This means he does not have to register in the sex offender registry.

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Breakdown of the decision: ***Majority*****:** Justices Karakatsanis and Martin allowed the appeal (Justices Rowe, Kasirer and Jamal agreed) | ***Dissenting in part:*** Justice Brown would have allowed the appeal in part, finding section 490.012 constitutional and section 490.013(2.1) unconstitutional (Chief Justice Wagner and Justices Moldaver and Côté agreed)

More information (case #39360): Decision | Case information

Lower court rulings: judgment on constitutionality, judgment on whether constitutional violation was justified under section 1 of the *Charter* (Court of Queen's Bench of Alberta) | appeal (Court of Appeal of Alberta)