Translated from the original French

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| Anctil c. R.  | 2021 QCCQ 7081 |
| COURT OF QUÉBEC |
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| CANADA |
| PROVINCE OF QUEBEC |
| DISTRICT OF QUÉBEC |  |
| LOCALITY OF QUÉBEC“Criminal and Penal Division” |  |
|  |  |
| No: | 200-01-219228-180 |
|  |
| DATE: | August 12, 2021 |
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| PRESIDING: THE HONOURABLE ALAIN MORAND, J.C.Q. |
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| JEAN-FRÉDÉRICK ANCTIL |
| Petitioner – Accused |
| v. |
| HER MAJESTY THE QUEEN |
| Respondent– Prosecutrixand |
| **ATTORNEY GENERAL OF QUEBEC**  |
| Impleaded party |
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| **DECISION ON AN APPLICATION FOR A DECLARATION OF INVALIDITY OF SS. 490.012(1) AND 490.013(2.1) OF THE *CRIMINAL CODE* UNDER S. 11(i) of the *Canadian Charter of Rights and Freedoms*)** |
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1. **OVERVIEW**

[1] The accused pleaded guilty to two counts of touching a person under 14 years of age, and inciting her to touch him, for a sexual purpose, between December 31, 1999, and January 1, 2000, contrary to ss. 151 and 152 of the *Criminal Code (Code)*. These offences are designated offences (ss. 490.011(1)(a)(ii) and (ii)) for the purpose of the order under s. 490.012(1) of the *Code*.

[2] The offences, which involved a 13-year-old girl who is still suffering the aftereffects, occurred over the course of the same relatively short event, when the accused was 18 years old. He has no prior criminal record for similar offences and the probation officer assessed his risk of sexual recidivism as lower than at the time of the event.

[3] At the sentencing hearing on June 14, 2021, the Court sentenced the petitioner to a term of imprisonment of 6 months and imposed various ancillary orders under s. 743.21(1) (non-communication order), s. 487.051(1) (DNA order), and s. 731(1)(b) (probation order). The prosecutor did not seek a prohibition order under s. 161 of the *Code*.

[4] Relying on s. 11(i) of the *Charter*, the defense filed a *Charter* application challenging the constitutionality of the mandatory order to comply with the *Sex Offender Information Registration Act* (the *SOIRA* or the *Act*) under s. 490.012(1), for the duration set out in s. 490.013(2.1), that is, for his lifetime.

[5] The petitioner argues that these provisions, taken together, constitute punishment within the meaning of the *Charter.* As such, the retrospective application of the *Act* andthe amendments that made registration mandatory for the petitioner’s lifetime after the commission of the offences violate his *Charter*-protected right under s. 11(i).

[6] The petitioner must meet the burden of proof on a balance of probabilities.

[7] The Court must decide if the retrospective application of these provisions violates s. 11(i) of the *Charter.* Two subsidiary issues arise.

1. **ISSUES**

[8] First, does the mandatory registration order under s. 490.012(1), coupled with s. 490.013(2.1), constitute punishment such that its retrospective application violates the right protected by s. 11(i) of the *Charter*?

[9] Second, if so, is it a reasonable limit justified under s. 1 of the *Charter*?

1. **THE STATUTORY REGIME**
2. **The purpose and principles of the *Act***

[10] The *SOIRA* was enacted under ss. 490.011 to 490.032 of the *Code*, added to Part XV under the heading, “Sex Offender Information”. The *SOIRA* came into force on December 15, 2004.

[11] The purpose and principles underlying the *Act* are set out in s. 2:

**Purpose**

**2 (1)**The purpose of this Act is to help police services prevent and investigate crimes of a sexual nature by requiring the registration of certain information relating to sex offenders.

**Principles**

**(2)**This Act shall be carried out in recognition of, and in accordance with, the following principles:

**(a)**in the interest of protecting society through the effective prevention and investigation of crimes of a sexual nature, police services must have rapid access to certain information relating to sex offenders;

**(b)**the collection and registration of accurate information on an ongoing basis is the most effective way of ensuring that such information is current and reliable; and

**(c)**the privacy interests of sex offenders and the public interest in their rehabilitation and reintegration into the community as law-abiding citizens require that

**(i)**the information be collected only to enable police services to prevent or investigate crimes of a sexual nature, and

**(ii)**access to the information, and use and disclosure of it, be restricted.

1. **Relevant provisions of the *Criminal Code* and the legislative history of the amendments**

[12] Section 490.012 originally provided that after sentencing, on the application of the prosecutor, the Court had to make an order requiring the person to comply with the *Act* for an offence designated in s. 490.011, unless the person fell under an exception by satisfying the court that, if the order were made, the impact on them, including on their privacy or liberty, would be grossly disproportionate to the public interest in protecting society through the effective investigation of crimes of a sexual nature, to be achieved by the registration of information relating to sex offenders (s. 490.012(4)).

[13] Under s. 490.012(5), the court had to give reasons for its decision on an application to exempt an offender from registration. Section 490.014 provided that these decisions could be appealed on any ground raising a question of law or mixed law and fact.

[14] Parliament conferred on the sentencing judge a discretionary power to apply the new legislation to any offender, including an offender who committed an offence before the coming into force of the amendments to the *Code*. The legislative intent was for these provisions resulting from the 2004 amendments to the *Code* to apply retrospectively, by providing that the order shall be issued after sentencing, irrespective of the date of the offence.

[15] The duration of the order under s. 490.012(1) or the obligation imposed on the offender depends on various factors, including the objective seriousness of the offence (s. 490.013(2)) and whether the offence is a second or subsequent offence (s. 490.013(4)).

[16] The offender may apply to the Court to have the order terminated under s. 490.015, subject to varying timelines. For 10-year orders, an application may be brought after 5 years (para. (1)(a); for 20-year orders, an application may be brought after 10 years (para. (1)(b)); and for lifetime orders, an application may be brought after 20 years (para. (1)(c)). A termination order may also be sought if the offender receives a pardon or a record suspension (subs. (3)).

[17] The offender who, without reasonable excuse, fails to comply with the order made under s. 490.012 is guilty of an offence and liable for a penalty including a term of imprisonment of 2 years, or 2 years less a day, depending on whether the Crown proceeds summarily or by indictment (s. 490.031).

[18] On April 15, 2011, the *Protecting Victims From Sex Offenders Act* (S.C. 2010, c. 17) came into force and significantly amended the existing regime, including the following aspects, which are relevant to the analysis.

[19] Orders under s. 490.012(1) became mandatory at the time of sentencing (or at other times set out under the amended s. 490.012(4)), for offenders convicted of designated offences under s. 490.011(1)(a)). Orders were no longer subject to prosecutorial discretion to bring an application for an order, and judges no longer had the discretion to grant exemptions.

[20] Parliament also added s. 490.03(2.1), which requires offenders to comply with the order for life if the offender is found guilty of more than one designated offence, as in the case at bar.

[21] Section 490.014 no longer provides a right of appeal from an order made under s. 490.012(1).

1. ***Obligations and Responsibilities under the SOIRA***

[22] The *Act* outlines, among other things, the obligations on sex offenders, the responsibilities of the persons who collect information, and the rules governing the management and use of this information.

1. Obligations on offenders

[23] Within seven days of the *SOIRA* order being made or the offender’s release from custody, the offender must report for the first time to a registration centre in the area where the offender’s main residence is located. Registration centres are designated in the Schedule to the *Quebec Sex Offender Information Registration Regulations* (SOR/2005-6) (the *Regulations*), (ss. 4(1) and (3) of the *Act*). The offender must report before leaving Canada (s. 4(4) of the *Act*).

[24] Subsequently, the offender must report to a registration centre in accordance with the requirements of s. 4.1(1) of the *Act*:

**4.1 (1)**A sex offender shall subsequently report to the registration centre referred to in section 7.1,

**(a)**within seven days after they change their main residence or any secondary residence or, if they are required to report to a registration centre designated under the [National Defence Act](https://laws-lois.justice.gc.ca/eng/acts/N-5), within 15 days after the change;

**(b)**within seven days after they change their given name or surname or, if they are required to report to a registration centre designated under the [National Defence Act](https://laws-lois.justice.gc.ca/eng/acts/N-5), within 15 days after the change;

**(b.1)**within seven days after they receive a driver’s licence or, if they are required to report to a registration centre designated under the [National Defence Act](https://laws-lois.justice.gc.ca/eng/acts/N-5), within 15 days after they receive it;

**(b.2)**within seven days after they receive a passport or, if they are required to report to a registration centre designated under the [National Defence Act](https://laws-lois.justice.gc.ca/eng/acts/N-5), within 15 days after they receive it; and

**(c)**at any time between 11 months and one year after they last reported to a registration centre under this Act.

[25] Under s. 4.1(2), the offender must report to the registration centre in person at the designated registration centre if they are in Canada. If they are outside Canada at one of the times required by s. 4.1(1), they must report to the registration centre within seven days following their return (s. 4.3(1)) or by telephone, facsimile, or electronic mail to the Centre québécois d’enregistrement des délinquants sexuels de la Sûreté du Québec (CQEDS) (s. 4.1(2) of the *Act*; s. 2(1) of the *Regulations*).

[26] Section 5 of the *Act* lists the information that must be provided by the offender when reporting to a registration centre, as well as the additional information the offender could be required to provide at the request of the person collecting the information:

**5 (1)**When a sex offender reports to a registration centre, they shall provide the following information to a person who collects information at the registration centre:

**(a)**their given name and surname, and every alias that they use;

**(b)**their date of birth and gender;

**(c)**the address of their main residence and every secondary residence or, if there is no such address, the location of that place;

**(d)**the address of every place at which they are employed or retained or are engaged on a volunteer basis — or, if there is no address, the location of that place — the name of their employer or the person who engages them on a volunteer basis or retains them and the type of work that they do there;

**(d.1)**if applicable, their status as an officer or a non-commissioned member of the Canadian Forces within the meaning of subsection 2(1) of the [National Defence Act](https://laws-lois.justice.gc.ca/eng/acts/N-5) and the address and telephone number of their unit within the meaning of that subsection;

**(e)**the address of every educational institution at which they are enrolled or, if there is no such address, the location of that place;

**(f)**a telephone number at which they may be reached, if any, for every place referred to in paragraphs (c) and (d), and the number of every mobile telephone or pager in their possession;

**(g)**their height and weight and a description of every physical distinguishing mark that they have;

(**h)** the licence plate number, make, model, body type, year of manufacture and colour of the motor vehicles that are registered in their name or that they use regularly;

**(i)**the licence number and the name of the issuing jurisdiction of every driver’s licence that they hold; and

**(j)**the passport number and the name of the issuing jurisdiction of every passport that they hold.

**(3)**When a sex offender reports to a registration centre in person, the person who collects the information referred to in subsection (1) may record any observable characteristic that may assist in identification of the sex offender, including their eye colour and hair colour, and may require that their photograph be taken.

[27] Section 5.1 of the *Act* requires a sex offender to notify a person who collects the information at the registration centre of any change in the information they have provided under s. 5(1)(d) within seven days after the date of the change.

[28] Section 6 of the *Act* outlines the notifications that must be provided by a sex offender to the registration centre if they will be away from their main residence as follows:

**6 (1)**Subject to subsection (1.1), a sex offender other than one who is referred to in subsection (1.01) shall notify a person who collects information at the registration centre referred to in section 7.1

**(a)**before the sex offender’s departure — of the dates of their departure and return and of every address or location at which they expect to stay in Canada or outside Canada — if they expect not to be at their main residence or any of their secondary residences for a period of seven or more consecutive days;

**(b)**within seven days after their departure — of the date of their return and of every address or location at which they are staying in Canada or outside Canada — if they decide, after departure, not to be at their main residence or any of their secondary residences for a period of seven or more consecutive days or if they have not given a notification required under paragraph (a); and

**(c)**before departure or, if it is later, within seven days after the day on which the change is made — of a change in address, location or date.

**Sex offender convicted of sex offence against child**

**(1.01)**Subject to subsection (1.1), a sex offender who is convicted of a sexual offence against a child shall notify a person who collects information at the registration centre referred to in section 7.1

**(a)**before the sex offender’s departure — of the dates of their departure and return and of every address or location at which they expect to stay in Canada — if they expect not to be at their main residence or any of their secondary residences for a period of seven or more consecutive days;

**(b)**before their departure, of the dates of their departure and return and of every address or location at which they expect to stay outside Canada;

**(c)**within seven days after their departure — of the date of their return and of every address or location at which they are staying in Canada — if they decide, after departure, not to be at their main residence or any of their secondary residences for a period of seven or more consecutive days or if they have not given a notification required under paragraph (a);

**(d)**without delay, after their departure — of the date of their return and of every address or location at which they are staying outside Canada — if they decide, after departure, to extend their stay beyond the date of return that they indicated in the notification they gave under paragraph (b) or if they have not given a notification under paragraph (b); and

**(e)**of a change in address, location or date, before their departure or

**(i)**if the change is made after their departure and they are staying in Canada, within seven days after the date on which the change is made, or

**(ii)**if the change is made after their departure and they are staying outside Canada, without delay after the date on which the change is made.

[29] Under s. 6(2) of the *Act* and s. 2(2) of the *Regulations*, an offender may provide the notification required under s. 6 to a registration centre by registered mail or by telephone, facsimile, or electronic mail to the CQEDS, or in person.

1. Responsibilities of Persons Who Collect Information and Management and Use of the Information

[30] Sections 8 to 16 of the *Act* contain a set of restrictive rules relating to the collection, confidentiality, registration, retention, consultation, and disclosure of the information. These provisions also specify persons authorized to exercise powers under the *Act* and their responsibilities respecting the information of offenders.

[31] This part of the *Act* relates to the implementation of its purpose, in accordance with its principles, and particularly those that protect the privacy interests of offenders.

[32] Section 17 of the *Act* creates an offence liable on summary conviction to a fine of not more than $10,000 or to imprisonment for a term of not more than 6 months, or both, for contravening any of ss. 16(1) to 16(5) of the *Act*, which govern the requirements for managing and using the information.

1. **THE REGULATIONS AND THE CENTRE QUÉBÉCOIS D’ENREGISTREMENT DES DÉLINQUANTS SEXUELS**

[33] Section 14 of the *Act* provides that the Royal Canadian Mounted Police is to administer the database. Section 18 confers on the lieutenant governor in council of a province the ability to make regulations respecting the means of reporting or providing notification and authorizing persons to collect and register information, as well as designating places as registration centres.

[34] In Quebec, s. 3 of the *Regulations*, which are made under s. 18 of the *Act*, authorizes members of the Sûreté du Québec (SQ), members of a municipal police force, and members of a native police force to collect information. Section 4 authorizes the CQEDS, under the aegis of the SQ, to register the information.

1. **PROCEDURES FOR ADMINISTERING THE REGIME IN QUEBEC**

[35] During the hearing, Mr. Éric Métivier, an officer of the SQ and a managing sergeant (s*ergent gestionnaire)* with the CDEQS, testified that his main duties were to ensure compliance with the rigorous requirements of the *Act* and coordinate policing activities under the *Act* in Quebec.

[36] More specifically, he described certain procedures put in place in order to enforce the *Act* and the *Regulations*.

[37] When reporting to the registration centre, an offender will meet in a closed room, confidentially, with the principal responding officer or their alternate, both of whom have received specific online training given by the École nationale de police du Québec.

[38] When the offender first reports to a registration centre, the responding officer records all the information collected, in accordance with ss. 3 and 5 of the *Act*, using a standard form entitled *Inscription au Registre national des délinquants sexuels (RNDS)* (Registration in the National Sex Offender Registry (NSOR)).If the officer has reasonable grounds to suspect that the person is not a sex offender within the meaning of the *Act*, and no other proof of identity is satisfactory, the officer may take digital fingerprints from the person in order to confirm their identity (s. 9(2) of the *Act*).

[39] Next, using another official form, the officer reads to the offender the legal obligations of registered sex offenders and the procedures for providing the required notifications under the *Act*.

[40] In the 30 days after the offender reports for the first time, the responding officer or another officer will visit the address provided by the offender unannounced to verify it. The officer verifies the information with the offender directly, or if he is absent, with another person present who is related to him or who is living there, while respecting the confidentiality of the information. Any change of address will be subject to the same verification process.

[41] The verifying officer then fills out a report to validate the address, using another official form.

[42] After completing these three steps, that is, registering the information, informing the offender of his legal obligations, and confirming the offender’s address, the responding officer sends the three completed forms to the CQEDS by secure electronic means so that the information can be registered in the database. Upon receipt of the information, a notice to destroy the documents is sent to the station, since the Centre is the only entity authorized to retain the information. If the registration centre is an SQ station, the CDEQSensures that the notice is acted upon.

[43] Only seven people at the CQEDS are authorized to process the information in question, namely the managing sergeant, four specialist sergeants (*sergents spécialisés),* and two civilian agents whose duties are more limited.

[44] At the offender’s request, they will be sent a copy of the information collected under ss. 5 and 6 and registered in the database, by mail or another means agreed to by the sex offender, unless they have waived their right to receive a copy (s. 11 of the *Act*). The offender may submit a request to correct any information they believe is inaccurate (s. 12 of the *Act*).

[45] When a peace officer wants to access the registry in the course of investigating an offence of a sexual nature or to prevent a sexual offence, they must fill out a written request to the Service de la coordination des enquêtes en crimes majeurs(the major crimes division)*,* using the official form and indicating the nature of the investigation and the methods used, among other information.

[46] Each request is first reviewed by the managing sergeant who will familiarize himself with the file. If the first requirement is met, that is, the request is to assist in the investigation or prevention of an offence of a sexual nature, the officer will assign the request to a specialist sergeant, who then communicates with the investigator to confirm that the other requirements of the *Act* are met. If they are not, the request is denied.

[47] Before continuing the process, the specialist sergeant ensures that the offender in question is free from custody.

[48] The officer then does a database search, applying the strictest standards of confidentiality, using the fewest possible search terms. The officer then sends the information to the investigator by secure electronic mail, ensuring that the investigator understands the obligations relating to the confidentiality of the information, and the protection of the privacy interests of offenders.

[49] For example, all the information gathered by investigators in the course of an investigation that is no longer relevant must be destroyed. At the conclusion of the investigation, they must also destroy any other information they relied upon, subject to the exceptions set out in s. 16(4) of the *Act*.

1. **ANALYSIS**

 **THE FIRST ISSUE**

1. Is the mandatory registration order under s. 490.012(1) a punishment within the meaning of the *Charter*?

[50] At the outset, it is useful to recall the words of Martin J. in *Boudreault* (2018), at para. 38, where she held that punishment should have the same meaning under ss. 11 and 12 of the *Charter*.

[51] Some ancillary orders constitute punishment. In *Poulin* (2019), at paragraph 38, Martin J. described a few: the timing of eligibility for parole, pre-sentence custody, conditions governing the “faint hope” regime, and weapons prohibition orders.

[52] Added to this list are the prohibitions under ss. 161(c) and (d) (*K.R.J.*, 2016), orders under ss. 161(a) and (b) (*R*. *v*. *J.D*., 2021, ONCA 376), and the victim surcharge (*Boudreault*, 2018).

[53] Martin J. also refers to sanctions that have been found not to constitute punishment in other decisions, such as orders to provide a DNA sample for forensic DNA analysis, provincial driving suspensions imposed in response to criminal convictions, and orders to comply with the *Sex Offender Information Registration Act.*

[54] However, without commenting on their merits, she observed that these latter decisions were rendered prior to *K.R.J.*

[55] In *Thériault* (2009), at paragraph 25, the Court of Appeal of Quebec found that the order to comply with the *SOIRA* did not qualify as punishment. Writing for the Court, Doyon J.A. supported his conclusion by relying on the two-part test developed by the Supreme Court in *Rodgers* (2006): the statutory framework is not in furtherance of the purpose and principles of sentencing and does not form part of the arsenal of sanctions available to the Court to which an accused may be liable in respect of a particular offence.

[56] At paragraph 29 of his decision*,* Doyon J.A. also referred to two decisions, *Berthelette* (2006) and *Dompierre* (2008), where the Court of Appeal came to the same conclusion. Doyon J.A. also cited four other decisions from various appellate courts across the country that made the same finding (paras. 26-28, 30).

[57] In the 2016 ruling in *K.R.J*., the Supreme Court modified the two-part test from *Rodgers*, on which previous case law relied, for determining whether a consequence amounts to punishment. According to the Court, the protection of the public is insufficient to conclude on this point and the analysis must include the impact of the sanction on the offender.

[58] Karakatsanis J. wrote:

[41] Thus, I would restate the test for punishment as follows in order to carve out a clearer and more meaningful role for the consideration of the impact of a sanction: a measure constitutes punishment if (1) it is a consequence of conviction that forms part of the arsenal of sanctions to which an accused may be liable in respect of a particular offence, and either (2) it is imposed in furtherance of the purpose and principles of sentencing, or (3) it has a significant impact on an offender’s liberty or security interests.

[59] She added at paragraph 42 that to have a significant impact on an offender’s constitutionally protected liberty or security interests (the additional alternative branch of the test), the 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. These restrictions could include limiting where an offender can go, or with whom an offender can communicate or associate. If a prohibition sufficiently impairs the liberty or security of a person, it may be characterized as punishment.

[60] In *Canada* *v*. *Bedford* (2013), the Supreme Court set out the circumstances under which trial judges can depart from precedent established by a higher court, which in this instance is the Court of Appeal of Quebec. The Supreme Court noted that the matter may be revisited “if new legal issues are raised as a consequence of significant developments in the law, or if there is a change in the circumstances or evidence that fundamentally shifts the parameters of the debate” (para. 42).

[61] Following the evolution of the test since *K.R.J*. as to whether a measure constitutes punishment, the Court of Appeal of Quebec in *Brodeur*
(2018), an appeal concerning sentencing for sexual offences, considered the validity of the ancillary orders made by the trial judge. The Court wrote as follows on the order to comply with the *SOIRA*:

[TRANSLATION]

[30] The question that therefore arises is whether in light of the new test, the order to register under the sex offender registry can still be considered a term of the sentence, as opposed to a punishment.

[62] That said, the Court abstained from answering the question given the absence of a constitutional challenge and the existence of a right of appeal from the order.

[63] Since *Thériault,* Parliament has substantially amended the *SOIRA* as follows:

* the order under s. 490.012(1) has become mandatory; the prosecutor may no longer assess whether to seek an order to comply with the *SOIRA* in light of the circumstances, and the judge no longer has the discretion to exempt the offender from registration by weighing the impact on the offender’s liberty against the interest in protecting the public.
* s. 490.013(2.1) now provides that the duration of the order is for the life if the offender is sentenced for more than one offence, as in the case at bar; and
* the right of appeal has been repealed.

[64] In addition, in *K.R.J*., the Supreme Court restated the test, adding a third branch dealing with the impact on the liberty and security of offenders, which could be determinative in certain cases such as this one, where the second branch of the test no longer applies.

[65] As a result, the Court concludes that the legislative amendments brought to the *Act*, coupled with the restatement of the test from the case law, allow a court of first instance to revisit the matter, even if it has already decided by the Court of Appeal.

**APPLICATION OF THE TEST**

[66] In line with the decisions of the Court of Québec in *Delage*,[[1]](#footnote-1) *Naud*,[[2]](#footnote-2) *Senneville*,[[3]](#footnote-3) *Cantin-Fradet*,[[4]](#footnote-4) *Genest*,[[5]](#footnote-5) *Landry*,[[6]](#footnote-6) and *Gagnon*,[[7]](#footnote-7)the Court concludes that the mandatory order to comply with the *SOIRA* (s. 490.012(1)) for the lifetime of the offender constitutes punishment for the purposes of the *Charter*.

[67] The first branch of the test is satisfied since the order is a consequence of conviction and is among the sanctions to which an accused may be liable under ss. 151 and 152 of the *Code*.

[68] As for the second branch, the purpose of the *Act* is to help police services prevent and investigate crimes of a sexual nature by requiring the registration of certain information relating to sex offenders, while respecting strict rules governing confidentiality.

[69] In *K.R.J*., Justice Karakatsanis underlined at paragraph 40 that a definition of punishment that focuses heavily on the objective of the sanction obscures the inquiry, and she reiterated at para. 52 that the fact that an order may have a public-protection purpose is not, on its own, not determinative.

[70] She specified at para. 51 that sanctions can be consistent with the purpose and principles of sentencing (which is not the case in this instance) and can have a significant impact on an offender’s constitutionally protected interests – although, both are not necessary to satisfy the test (see also paragraph 42).

[71] As for the third branch, the Court believes that the mandatory order, for the life of the petitioner, or at best for 20 years, has a significant impact on the right to liberty. The order significantly constrains a person’s ability to engage in otherwise lawful conduct and imposes significant burdens on them not imposed on other members of the public.

[72] The obligations on offenders under ss. 4, 5 and 6 of the *Act* for which non-compliance is an offence are more than “insignificant” or “trivial” limitations of rights (*K.R.J*. at para. 42). They impose significant burdens not suffered by other members of the public, through binding requirements to report and to provide information and notifications. An offender registered on the *Registry* is also subject to random police checks over long periods of time, and may also be targeted by investigations with seemingly similar suspects.

[73] The strict requirements governing the confidentiality of the information at the stages of collection, registration, transmission, retention, access, disclosure, and use do not factor into the analysis because they are not relevant to either branch of the test as to whether a consequence is a punishment, when the right to liberty is at stake.

1. The right protected by s. 11(i) of the *Charter*

[74] There is a common law presumption, based on the rule of law and procedural fairness, that an accused must be tried and punished under the substantive law in force at the time the offence was committed, rather than the law in force at any other time, such as at trial or sentencing (*Dineley* at para. 10).

[75] Along with s. 11(g) — which protects an accused’s right
“not to be found guilty on account of any act or omission unless, at the time of the act or omission, it constituted an offence” — s. 11(i) constitutionally enshrines the fundamental notion that criminal laws should generally not operate retrospectively (*K.R.J*. at para. 22).

[76] Section 11(i) also enshrines two specific protections, one stipulating that an offender should not be retrospectively subjected to a heavier punishment than the one applicable at the time the person committed the offence, and the other guaranteeing that, where the law provides a more favourable punishment at the time of the offender’s sentencing than it did at the time of the offence, the offender is entitled to the benefit of this more favourable, current punishment (*Poulin*, para. 60).

1. Infringement of s. 11(i)

[77] Parliament intended the provisions of the *SOIRA*, including the mandatory order under s. 490.012(1) of the *Code*, which is a punishment, to apply retrospectively.

[78] This retrospective application violates s. 11(i) of the *Charter*.

**THE SECOND ISSUE**

1. Is the limitation of the right protected by s. 11(i) justified under s. 1 of the *Charter*?

[79] In *Oakes* (1986), Dickson CJ stated that to establish the existence of a reasonable limitation to a *Charter* right, two central criteria must be satisfied: first, the legislative objective must be sufficiently important to warrant overriding a *Charter*-protected right and, second, the means chosen must be demonstrably justifiable in a free and democratic society.

* 1. The limitation

[80] In the case at bar, the measure infringing s. 11(i) is the retrospective application of the mandatory order to comply with the *SOIRA* for life(ss. 490.012(1) to 490.013(2.1)).

* 1. The objective of the *SOIRA*

[81] It follows that the objective of the retrospective operation of s. 490.012(1) — the infringing measure — is to better protect society from the risks posed by offenders, like the petitioner, who committed one of the designated offences in ss. 490.011(1)(a), (c), (c)(i), (d), (d.1) or e) before, but were sentenced after, the *Act* came into force.

* 1. Proportionality

[82] The proportionality requirement has three aspects:

* There must be a rational connection between the measures under review and the objective;
* The limit must minimally impair the right or freedom in question;
* There must be a proper balance between the effects of the limiting measures and the legislative objective.
1. Rational connection

[83] In assessing the proportionality of a law, a degree of deference is required; s. 1 requires only that the limits be “reasonable” (*K.R.J*. at para. 67).

[84] At this first step of the proportionality inquiry, the government must demonstrate that the means used by the limiting law are rationally connected to the objective of the law. To establish a rational connection, the government need only show that there is a causal connection between the infringement and the benefit sought on the basis of reason or logic (*K.R.J*. at para. 68.)

[85] There is a rational connection between the protection of society against the risks of sexual violence posed by an offender, whose offences predate the entry into force of the *Act* and the 2011 amendments, and retrospectively giving sentencing judges the power to impose the constraints of the *Act* onan offender who presents a risk of reoffending (*K.R.J*. at para. 75).

[86] In addition, *Friesen*, a leading case rendered in 2020, is convincing on the need to provide law enforcement with all reasonable means available to protect society against sexual violence, which is often difficult to detect and investigate and which causes immense harm to victims.

1. Minimal impairment

[87] The question at this second stage is whether the mandatory order under s. 490.012(1) to subject the petitioner to the *Act* for his lifetime is minimally impairing to the constitutional right; that is, is the limit reasonably tailored to the objective? If there are alternative, less harmful means of achieving the objective in a real and substantial manner, the law does not meet the minimal impairment test (*K.R.J.* at para. 70).

[88] First, as regards this question, the strict rules governing confidentiality for the management and use of the information have little impact, as explained above.

[89] The mandatory order under s. 490.012(1) for all sex offenders completely ignores the sentencing principles outlined in ss. 718.01 to 718.2 of the *Code* and drawn from the case law, in particular the principle of proportionality and the cardinal rule of sentence individualization.

[90] The provision is drafted to apply indiscriminately to all sex offenders, subject to certain differences in duration, regardless of the circumstances of the offence, the individualized assessment of the risk of recidivism, and the personal circumstances of the offender.

[91] Thus, it fails the test whereby a measure must be carefully designed to impair a *Charter*-protected right as little as reasonably possible.

[92] The same reasoning holds true for s. 490.013(2.1).

[93] In *K.R.J*, at paragraphs 70 to 76, Karakatsanis J. concluded that the minimal impairment test was met as regards the retrospective application of ss. 161(c) and (d), the provisions at issue, because s. 161 confers on the court a highly discretionary power to impose prohibitions only when a judge is satisfied that the specific offender poses a continued risk to children upon his release and that the order can be adapted, namely to limit its duration to correspond to an offender’s circumstances. As noted in paragraph 72: “No risk, no retrospective order.”

[94] In order to assess the risk of recidivism of an offender, the Court, as part of sentencing proceedings, can make an order under s. 721 of the *Code* for a pre-sentencing report. Probation officers are experienced in assessing an accused’s risk of recidivism. In addition, in matters of sexual offences, the probation officer may call on an expert or a multidisciplinary team specializing in sexual disorders. If the offender refuses to participate in the assessment, as is his right, and the defense does not present expert evidence on the issue, the Court will be justified in considering that the risk of recidivism exists.

[95] Not all sex offenders are dangerous, incorrigible sexual deviants. Sometimes an order to comply with the *Act* under s. 490.012(1) for a shorter period than that provided for in s. 490.013 may prove to be a sufficient measure in the circumstances. Without minimizing the impact on the victims, some sexual offences consist of a single inappropriate gesture that can be explained by a lack of maturity or a momentary error of judgment. There are accused who acknowledge their wrongdoing and express regret, and whose awareness is raised by the legal system. Others agree to participate in programs for the treatment of sexual disorders, as part of a probationary follow-up. Even in cases like these, rehabilitation has been shown to be possible.

c) Proportionality of effects

[96] Since the Court is of the view that the provisions in question do not satisfy the minimal impairment test, it is not necessary to proceed to the third aspect of the proportionality test.

1. **THE DECISIONS UNDER APPEAL**

[97] Some decisions relied on by the prosecution that concern the constitutionality of ss. 490.012(1) and 490.013 in light of ss. 7 and 12 of the *Charter,* are under appeal.

[98] The judgments cited at paragraph 66 are or will be under appeal and the appeals will be heard at a joint hearing being scheduled before the Court of Appeal of Quebec.

[99] In *R.* v. *Ndhlovu*,[[8]](#footnote-8) the majority concluded that ss. 490.012 and 490.013(2.1) do not violate s. 7 of the *Charter*. The dissenting judge held that the provisions violate s. 7 and are not justified under s. 1 of the *Charter*.

[100] On May 12, 2001, the application for leave to appeal to the Supreme Court was granted. The Attorney General of Quebec has filed a notice of intervention on a constitutional question.

1. **CONCLUSION**

[101] The mandatory order to comply with the *SOIRA* under s. 490.012(1) for life in accordance with s. 490.013(2.1) is a punishment, and its retrospective application infringes the petitioner’s rights protected under s. 11(i) of the *Charter*. It is not a reasonable limit justified under s. 1 of the *Charter*.

[102] As a result, the Court declares the order inapplicable with respect to the petitioner.

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1. 2019 QCCQ 1125. [↑](#footnote-ref-1)
2. 2020 QCCQ 1202. [↑](#footnote-ref-2)
3. 2020 QCCQ 1204. [↑](#footnote-ref-3)
4. 2021 QCCQ 1056. [↑](#footnote-ref-4)
5. 2021 QCCQ 1057. [↑](#footnote-ref-5)
6. 2021 QCCQ 1846. [↑](#footnote-ref-6)
7. (16 July 2021), District of Rimouski 100-01-022964-197 (CQ), Richard Côté J. [↑](#footnote-ref-7)
8. 2020 ABCA 307. [↑](#footnote-ref-8)