

CANADA / JUDGMENT

R. v. Towler

2023 BCSC 1209

COURT

Supreme Court of British Columbia

DECIDED

16 June 2023

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2023 BCSC 1209 R. v. Towler

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Towler,

2023 BCSC 1209

Date: 20230616

Docket: 80557-4, 80557-5

Registry: New Westminster

Rex

v.

Jaimie Frank Towler

Before: The Honourable Madam Justice Marzari

Oral Reasons for Judgment

In Chambers

Counsel for the Crown (Respondent):

N. Reithmeier

Counsel for the Defence (Applicant):

S. Williams

Place and Date of Trial/Hearing:

New Westminster, B.C.

June 16, 2023

Place and Date of Judgment:

New Westminster, B.C.

June 16, 2023

- [1] THE COURT: Mr. Towler applies pursuant to s. 24(1) of the Charter for a constitutional exemption to his current registration under the Sex Offender Information Registration Act, S.C. 2004, c. 10 [SOIRA]. Mr. Towler was made the subject of a 20-year order pursuant to s. 490.012, which is a mandatory registration requirement under that provision. In this somewhat unique case, the Crown takes the position that he has discharged his onus to establish a breach of his Charter rights, and agrees that he should be granted the remedy that is sought.
- [2] This application, therefore, comes before me as an uncontested application. Because the application raises significant Charter issues with respect to an already registered offender, perhaps for the first time in British Columbia (although a similar application has been raised before in the context of a sentencing), I have given careful consideration to this application. I have concluded that Mr. Towler has established a deprivation of his liberty rights that bears no relation to the purposes of SOIRA as articulated in *R. v. Ndhlovu*, 2022 SCC 38, and is therefore entitled to a personal remedy pursuant to s. 24(1) of the Charter to be discharged from the reporting requirements and mandatory registration under SOIRA. I am going to set out my reasons for making that finding.
- [3] In August 2018 Mr. Towler was convicted after a trial of sexual assault. The reasons of Justice Cullen in brief established that Mr. Towler was found beyond a reasonable doubt to have sexually assaulted a door-to-door salesperson at his dwelling in 2016.
- [4] In a report dated January 2019, the applicant, Mr. Towler, was assessed by a psychiatrist, Dr. Robert Ley, for the purposes of sentencing. The report details the applicant's personal circumstances, his psychological condition and, amongst other things, considers his prospective risk to sexually reoffend. Included in that report are the following pertinent conclusions:

In regard to Mr. Towler's risk for sexual crime recidivism, in my opinion, his risk is negligible. This clinical estimate is strongly influenced by my perception and belief that Mr. Towler is not a sexual predator or an opportunistic, sexually aggressive man. It is my clinical estimate that Mr. Towler's risk for sexual crime recidivism is very low.

When I applied the SVR-20 criteria to Mr. Towler and his sexual crime, that application yields an estimate that he represents an extremely low risk for sexual crime recidivism. Essentially, Mr. Towler has none of the risk factors in terms of his personal history and psychosocial adjustment that are associated with sexual offending.

In short, Mr. Towler does not have the psychosocial features that typify sexual offenders, and as a result Mr. Towler is most accurately viewed as a very low risk for future sexual crime recidivism or criminality generally.

- [5] In February 2019, Mr. Towler, in part with the assistance of this report, was sentenced to a six-month term in jail, and I think it is notable that Cullen J. at that time imposed no period of probation. I take that as an indication of Cullen J.'s likely acceptance of the above statements in the clinical and forensic psychologist's report. Mr. Towler was, however, subject to s. 490.012 of the Criminal Code, R.S.C. 1985, c. C-46 which requires his registration under the SOIRA regime for a period of 20 years.
- [6] On November 28, 2022, after the Ndhlovu decision came down, Mr. Towler made an application without the assistance of counsel for a constitutional exemption pursuant to s. 490.012 on the basis of the grounds set out in Ndhlovu.
- [7] On the evidence that is before me, there is no indication that Mr. Towler has been the subject of any new criminal allegations in British Columbia since he completed his jail sentence, and the materials before the court generally indicate that Mr. Towler has a longstanding history of prosocial activity in the community (outside his convicted offence, of course) including longstanding employment and volunteering commitments prior to his conviction, and that same prosocial behaviour has continued since then on the affidavit materials before me.
- [8] In his affidavit Mr. Towler swears to experiences as a result of SOIRA that engage his liberty interests. He describes the police checks and reporting as humiliating and embarrassing. He swears to difficulty finding work since his conviction, which he does not directly attribute to SOIRA alone, but which he submits are likely related to both his SOIRA registration and his conviction. He also swears to the registration requirements affecting his ability to move about.
- [9] The Crown in this case does not take any issue that there has been a breach of Mr. Towler's liberty rights.
- [10] In Ndhlovu, and particularly paras. 37 to 47 and 55 to 57 of that case, the Supreme Court of Canada describes various restrictions on liberty arising from the SOIRA regime, including the reporting regime and restrictions on the ability to travel, reporting all of one's locations, et cetera. I find that these restrictions also apply to Mr. Towler's circumstances.
- [11] I find that these comments in Ndhlovu, together with Mr. Towler's affidavit evidence, establishes that there is a significant deprivation of Mr. Towler's liberty as a result of his mandatory registration. The real question is whether or not Mr. Towler is entitled to the remedy set out in Ndhlovu pursuant to s. 24(1) on the basis that his continued registration bears no relation to the purposes of SOIRA.

- [12] Mr. Towler bears the burden of first, establishing that inclusion on the registry breaches his rights to s. 7 by showing that the imposition of a SOIRA deprives him of liberty, and second, that the deprivation does not accord with the principles of fundamental justice. In this case that would mean, as I read Ndhlovu, that he must show that his registration bears no relation to the purpose of the legislation.
- [13] With respect to the bears no relation test, the purpose of s. 490.012 is described in Ndhlovu as to capture information about offenders that may assist police to prevent and investigate sex offences. Registration of an offender who is not an increased risk of committing a future sex offence has been found by the Supreme Court of Canada to not be connected to this purpose. As was stated by the Supreme Court of Canada at para. 76:
- [76] In sum, SOIRA was not enacted with complete or total registration as an end in itself. It was enacted to help police prevent and investigate sex offences. The purpose of both challenged measures in the Criminal Code is closely tied to this overall purpose. The specific purpose of s. 490.012 is to capture information about offenders that may assist police prevent and investigate sex offences. The means to achieve this purpose is mandatory registration. Section 490.013(2.1) was similarly designed to give police a longer period of access to information on offenders at a greater risk of reoffending. ...
- [14] At the end of para. 79, the majority of the Supreme Court comes directly to the point:
- Registering offenders who are not at an increased risk of reoffending bears no connection to this purpose.
- [15] There has been a number of cases that have considered the Ndhlovu decision. In British Columbia we have the decision of R. v. Hart (June 1, 2023), Vancouver 32077-2 (B.C.S.C), where Justice Skolrood described the purpose of the regime at paras. 41 and 42:
- [41] The SOIRA regime requires a registered offender to comply with reporting and disclosure requirements that the Supreme Court of Canada described as "numerous, invasive and extensive":
- [42] In Ndhlovu, a majority of the court found that the mandatory registration requirements of SOIRA violated s. 7 of the Charter and that the violation could not be justified pursuant to s. 1. The Court suspended the declaration of invalidity of s. 490.012 for one year, and held that the declaration would apply prospectively. However, the Court noted that offenders who were subject to the mandatory requirements could apply to the Court for a Charter remedy....
- [16] This is what brings us here. In that case Skolrood J. ultimately found that the offender who had been convicted of sexual assault as a result of a sexual act that went beyond the consented to sexual activity, was entitled to an exemption under SOIRA on the basis that he was at a low risk to reoffend, and his registration did not advance the objectives of the SOIRA regime.

- [17] I have also been provided with a decision of Justice Monahan of the Ontario Superior Court in *R. v. Shokouh*, 2023 ONSC 1848, where the offender was convicted of possession and distribution of images of child abuse. In that case Justice Monahan also granted an exclusion from the SOIRA regime in a situation where the offender had taken considerable rehabilitative steps, and the psychiatric report concluded that the offender was at a low risk for committing further child pornography offences, and at a very low risk for committing any sexual offences against a child. I am indebted to the careful analysis provided by Justice Monahan in that decision but I will not repeat it here for the purposes of time.
- [18] I have already found, that Mr. Towler has established primarily based on the *Ndhlovu* decision that the SOIRA regime engages s. 7 of the Charter and gives rise to a deprivation of his liberty. The question for me is really whether or not Mr. Towler's personal circumstances and risk of reoffence bears any relation to the purposes of the regime.
- [19] At the time of sentencing, Mr. Towler's likelihood to reoffend was characterized by Dr. Ley as likely as low as any professional would be willing to conclude: using words such as "negligible", "very low", "extremely low risk", and "none of the risk factors that one would expect to be present". The only assessment that could be lower than that, in my view, would be that there was no risk of reoffend, which of course would be an impossible and doubtful conclusion for a psychiatrist to make.
- [20] As such, I find that Mr. Towler's registration, pursuant to the *Ndhlovu* decision bears no relation to the legislative purpose of the SOIRA registry.
- [21] I will note that Mr. Towler also has the option pursuant to *Ndhlovu* to argue that his registration is grossly disproportionate to the purposes of the regime, and there is substantial authority on the application of the grossly disproportionate exemption that predates *Ndhlovu*. It may even predate the legislation that is struck down by *Ndhlovu*, or some of it.
- [22] I find that it is not necessary in this case for me to consider whether Mr. Towler is also entitled to an exemption under that line of authority. My concern is that any consideration of the grossly disproportionate line of authority post-*Ndhlovu* (and *Ndhlovu* may well have some influence on that pre-existing analysis), should be done in a contested application and not in an uncontested application. In any event, it is unnecessary for me to consider that line of authority, and I restrict myself in this case to the question of whether Mr. Towler's registration bears any relation to the purposes of the SOIRA registry.
- [23] For the reasons I have just set out, I find that does not. I find that Mr. Towler has demonstrated that his inclusion on the SOIRA registry bears no relation to the purpose of the registry. In light of the evidence in this case, and the significant deprivation of liberty that was found in *Ndhlovu* as a result of the registration, I find that Mr. Towler's registration does not accord with the principles of fundamental justice. The s. 7 violation is made out. Mr. Towler's application is granted and his registration under SOIRA and its related obligations are terminated.

[24] I have a draft order here that has been prepared with the assistance of both counsel, as I understand it, and it sets out that: I am satisfied that s. 490.012 infringes on Mr. Towler's rights under s. 7; that an individual remedy would not undermine the purpose of suspending a s. 52(1) declaration; and, that Mr. Towler will no longer be required to be registered under the SOIRA. I am satisfied that that is an appropriate order to make in this case, and I am signing it.

"Marzari J."

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