

Court of Appeal: Effect of Sex Offender Registries Legislation on Mentally Ill Accused is Unconstitutional

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On April 4, 2019, the Court of Appeal for Ontario released its decision in *G v Ontario (Attorney General)*, finding that the presumptive effect of provincial and federal sex offender registry legislation was unconstitutional as it applies to persons who

1. have been found not criminally responsible on account of mental disorder (NCRMD) of a sexual offence; and
2. who have subsequently received an absolute discharge.

The court held that the sex offender registries infringe the right to equality under the law as guaranteed by section 15 of the *Canadian Charter of Rights and Freedoms* (the *Charter*): NCRMD persons who have received an absolute discharge were automatically added to the registries for life, without any ability for review of that placement. The court held that substantive equality requires that those found NCRMD and who have received an absolute discharge should have access to “individualized assessment” as a precondition to placement or maintenance on a sex offender registry.

In 2002, the appellant was found NCRMD in relation to four charges — two of which were charges of sexual assault. In August 2003, the Ontario Review Board determined that the appellant no longer represented a significant threat to the safety of the public and ordered that he receive an absolute discharge. Despite receiving an absolute discharge, the appellant was required to comply with various registration requirements pursuant to the federal *Sex Offender Information Registration Act* (SOIRA) and the provincial legislation, known as *Christopher’s Law*. Both pieces of legislation require persons convicted of, or found NCRMD in relation to, a sex offence to register with police and provide information including a current photograph and annual report.

Notably, section 730 of the *Criminal Code* and section 4 of the *Criminal Records Act* provide opportunities for persons found guilty (but not NCRMD) of a sexual offence to avoid placement on the registries established by SOIRA and *Christopher’s Law*. Section 730 of the *Criminal Code* permits a court, at the time of sentencing, to decline to enter a conviction if satisfied it is in the accused’s best interests and not contrary to public interest. In addition, the *Criminal Records Act* permits persons convicted of sexual offences to apply for a record suspension after a certain portion of their sentence has been completed. An NCRMD accused is neither convicted nor legally culpable, and consequently, these opportunities to avoid placement or maintenance on the sex offender registries are not available to them.

The appellant argued that the provincial and federal legislation was unconstitutional as they infringed upon his section 7 right to life, liberty and security of the person and his section 15 right to equality under the *Charter*. The court found that the legislation did not infringe the appellant’s right to life, liberty and security of the person under section 7 of the *Charter*. The court further found that there was a rational connection between the purpose of the legislation (to assist in the investigation and prevention of sexual offences by providing police with information as to the identity and location of persons who have previously

committed sexual offences) and its impact on the liberty interests of NCRMD accused who receive an absolute discharge.

However, the Court of Appeal found that the legislation did infringe on the appellant's right to equality as guaranteed under section 15 of the *Charter*, because it had a more significant effect on persons found NCRMD for sex offences when compared to persons found guilty of the same offences

Ultimately, the Court of Appeal found that *SOIRA* and *Christopher's Law* drew discriminatory distinctions based upon an enumerated ground – mental disability. Relying upon *R v Swain* and *Winko v British Columbia*, the Court of Appeal determined that the absence of any “exit ramp” from the sex offender registries for NCRMD accused reflected “an assumption that persons who committed criminal acts while NCRMD do not change, but rather pose the same ongoing and indeterminate risk they posed at the time of the offence”. The court held that substantive equality requires that those found NCRMD and who had received an absolute discharge should have access to an “individualized assessment” as a precondition to placement **or** maintenance on a sex offender registry.

Turning to section 1 of the *Charter*, the court held that both pieces of legislation did not minimally impair the NCRMD accused's equality rights and therefore could not be justified in a free and democratic society.

The Court of Appeal declared that the impugned provisions of *Christopher's Law* and *SOIRA* should be of no force or effect to the extent they are inconsistent with section 15 of the *Charter*. The court noted that there were several ways in which the legislation could be made compliant with section 15 and that there was a need for a co-ordinated response by both provincial and federal legislative bodies. The court's decision leaves the required amendments to the federal and provincial government.

The court's declaration of the registries' invalidity has not yet taken effect. Recognizing the potential danger to public safety caused by declaring the legislation immediately invalid and the time required to permit both governments to implement an appropriate amendments, the Court of Appeal has suspended its declaration of invalidity for 12 months.

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