

**IN THE SUPREME COURT OF CANADA
(APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)**

BETWEEN:

ATTORNEY GENERAL OF ONTARIO

APPELLANT

-and-

G

RESPONDENT

-and-

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CANADIAN CIVIL LIBERTIES ASSOCIATION,
DAVID ASPER CENTRE FOR CONSTITUTIONAL RIGHTS,
EMPOWERMENT COUNCIL and
CANADIAN MENTAL HEALTH ASSOCIATION, ONTARIO**

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PART I – OVERVIEW AND STATEMENT OF FACTS

1. This case requires the Court to consider the constitutionality of Ontario’s sex offender registry (*Christopher’s Law*¹) as it applies to individuals found not criminally responsible by reason of mental disorder (NCR) who have been absolutely discharged by a provincial Review Board. The Ontario Court of Appeal correctly held that the mandatory and automatic inclusion of such individuals on the registry offends section 15 of the *Canadian Charter of Rights and Freedoms* and cannot be justified under section 1. CCLA submits that section 7 of the *Charter* is also unjustifiably infringed - the impugned registration requirements restrict liberty in a manner that is arbitrary and overbroad.

2. The Ontario Court of Appeal described Ontario’s sex offender registration scheme and its interactions with other statutes, noting the absence of any “exit ramps” for NCR accused who have been absolutely discharged, despite the existence of such ramps for offenders found guilty.² In particular, an offender may be absolutely discharged by the court pursuant to section 730(1) of the *Criminal Code*.³ In such a case, they are not convicted and are not subject to the registration requirements. In addition, individuals found guilty *and* convicted may eventually obtain a record suspension pursuant to the *Criminal Records Act*.⁴ Such discharged or record-suspended offenders are not on the registry, whereas absolutely discharged NCR accused remain there.

3. This differential treatment of offenders based on their NCR status offends the substantive equality guarantee of section 15. As the Ontario Court of Appeal held:

...the constitutional guarantee of substantive equality requires that those who have been found NCRMD in respect of designated offences and who have received an absolute discharge be afforded access to some form of individualized assessment as a precondition to their placement or maintenance on a sex offender registry. That is, there must be a process by which those persons can challenge the continued application of the sex offender registry legislation to them, having regard to their personal needs, capacities, and circumstances.⁵

¹ *Christopher’s Law (Sex Offender Registry)*, 2000, S.O. 2000, c. 1 [*Christopher’s Law*].

² *G. v. Ontario (Attorney General)*, 2019 ONCA 264 [ONCA decision].

³ R.S.C. 1985, c. C-46.

⁴ R.S.C. 1985, c. C-47.

⁵ ONCA decision, *supra* note 2, para 127.

4. CCLA agrees that this requirement flows from the guarantee of substantive equality but submits that it is also derived from the *Charter's* section 7 protection. The law's failure to create "exit ramps" for NCR accused has an impact on the liberty interest of the accused and is overbroad, thus offending the principles of fundamental justice.

PART II – OVERVIEW OF POSITION ON QUESTIONS IN ISSUE

5. CCLA submits that *Christopher's Law* infringes the right to equality under section 15 of the *Charter* and the right to life, liberty and security of the person under section 7 of the *Charter*. The CCLA further submits that neither infringement can be demonstrably justified.

6. CCLA supports the Respondent's position that a suspended declaration of invalidity does not preclude an individual remedy for the claimant.

PART III – ARGUMENT

I. Enduring Registration of Absolutely Discharged NCR Accused Violates s. 15

(A) Asymmetry of the registration requirements evidences s.15(1) violation

7. *Christopher's Law* requires registration by all individuals *convicted* of a designated offence *and* all those found NCR with respect to a designated offence. Significantly, those found guilty of an offence but absolutely discharged pursuant to section 730(1) of the *Criminal Code* are not subject to the registration requirement. Thus, neither an NCR accused nor an individual found guilty and absolutely discharged has been convicted, yet *Christopher's Law* requires registration of the former, but not the latter.⁶

8. As this Court has repeatedly acknowledged, "substantive equality" is section 15's "animating norm".⁷ In order to establish a violation of the section, the law must create a distinction

⁶ *R. v. Jayswal*, 2011 ONCJ 33 and *R. v. T.J.H.*, 2012 BCPC 115.

⁷ *Withler v. Canada (Attorney General)*, 2011 SCC 12, para 2 [*Withler*].

based on an enumerated or analogous ground. That distinction must then create or perpetuate a disadvantage.⁸ CCLA submits that both prongs of the test are met in this case.

9. The equality analysis no longer requires a mirror comparator group.⁹ However, it is still instructive to compare the circumstances of an NCR accused who has been absolutely discharged under s. 672.54 of the *Criminal Code*,¹⁰ to those of an individual who has been found guilty of a designated offence and absolutely discharged pursuant to s. 730(1) of the *Code*. The statutory aims of both kinds of absolute discharge, and the circumstances of both kinds of absolutely discharged people, are similar. Yet the registration requirements for the two kinds of absolutely discharged people are different. This difference flows only from NCR accused's mental disability, an enumerated ground under s. 15(1). And it operates to the detriment of absolutely discharged NCR accused.

10. Looking at both types of absolute discharge together reveals that neither the absolutely discharged NCR accused, nor the absolutely discharged criminal offender, has been convicted of a designated offence, although both have been found to have committed the offence. Despite their distinct purposes, the test for granting an absolute discharge and the test employed by a Review Board share a common core: both are concerned with balancing the best interests of the public and those of the offender/accused. Moreover, both forms of absolute discharge are intended to mark an end to the criminal law's authority over the individual.

11. An absolute discharge following a finding of guilt assumes a person is of "good character." The purpose of the provision is to free the guilty accused from the burden of a criminal record, where deterrence and rehabilitation are not considered necessary.¹¹ This is analogous in many ways to the situation of an individual found NCR. The NCR verdict reflects a legislative

⁸ See *Quebec v. A*, 2013 SCC 5, para 323.

⁹ See *Withler*, *supra* note 7, para 40.

¹⁰ *Supra* note 3

¹¹ *R. v. Fallofield*, [1973] B.C.J. No. 559 (CA), para 21; *R. v. McInnis*, [1973] O.J. No. 2124 (CA), para. 5

recognition that, by reason of mental disorder, the accused is not “guilty” of a crime.¹² The NCR accused is only absolutely discharged when the Review Board has determined that there is no longer a significant threat to the safety of the public. Both types of absolutely discharged people may, in the aggregate, have a higher risk of future offending than people who have never been criminally charged. However, both types of absolute discharge represent a judicial or quasi-judicial determination that, at the moment of the discharge, neither type of absolutely discharged person requires ongoing engagement with, or supervision by, arms of the justice system to achieve the goals of the criminal law.

12. The similarities between the two types of absolutely discharged individuals end when it comes to their criminal fault. The offender discharged under s. 730(1) has been found guilty of an offence, which means they had *mens rea*. By contrast, the NCR accused is incapable of *mens rea*, and so has *no moral blameworthiness* in respect of their offending conduct. This meaningful difference between the two types of absolutely discharged people serves to magnify the unfairness of the inclusion of discharged NCR accused on the registry, an inclusion which flows from their status as persons with mental illness.

13. Notwithstanding the similarities between the two types of absolute discharges, the registration requirements remain different. This asymmetry in registration requirements is based only on the enumerated ground of mental illness. It creates and perpetuates disadvantage for those who are subject to it. Enduring registration presumes dangerousness based on a mental illness, disadvantages NCR accused by treating them as legally guilty, and perpetuates the prejudice and stereotyping which the *Charter’s* equality guarantee seeks to displace. The Court of Appeal was correct in its determination that enduring registration for absolutely discharged NCR accused violates s. 15(1) of the *Charter*.

¹² *Winko v. British Columbia (Forensic Psychiatric Institute)*, [1999] 2 S.C.R. 625, para 31 [Winko].

(B) Section 15 requires individualized assessment of risk

14. An NCR finding is not a finding of criminal guilt. It is also “not a finding of dangerousness. It is rather a finding that triggers a balanced assessment of the offender’s possible dangerousness and of what treatment-associated measures are required to offset it.”¹³ Due to the “difficulty and context-specificity” of predicting whether an NCR accused will offend in the future, Parliament created a “flexible scheme that is capable of taking into account the specific circumstances of the individual NCR accused,” including “a system of specialized Review Boards charged with sensitively evaluating all the relevant factors on an ongoing basis and making, as best as it can, an assessment of whether the NCR accused poses a significant threat to the safety of the public.”¹⁴

15. In *Winko*, this Court held that an individualized assessment of dangerousness is necessary both to justify *any* restrictions on the liberty of an NCR accused *and* to avoid the discriminatory assumption that an NCR accused is at risk of committing a future offence or should be treated the same as someone who intentionally committed a criminal act.¹⁵ *Winko* stands for the proposition that Part XX.1 only survives scrutiny under ss. 7 and 15 because of this individualized assessment of dangerousness. The registry’s automatic and mandatory inclusion of NCR accused who have been absolutely discharged fatally undermines this carefully balanced scheme. The Court of Appeal for Ontario correctly recognized that Part XX.1 of the *Criminal Code* is an example of legislation that treats people differently in order to further the aims of substantive equality. *Christopher’s Law’s* automatic and mandatory inclusion of NCR accused who have been found to present no significant threat to the public is the antithesis of a scheme that would ensure substantive equality. The Court of Appeal below was correct in deciding that the absence of an individualized assessment of dangerousness as a prerequisite to enduring registration violates equality interests for absolutely discharged NCR accused. In CCLA’s submissions, it also does so to the detriment of the liberty interests protected by the *Charter*.

¹³ *Ibid.*, para 43.

¹⁴ *Ibid.*, para 59.

¹⁵ *Ibid.*, para 57. The majority in *Winko* stated clearly that if a “finding of significant risk cannot be made, there is no power in Part XX.1 to maintain restraints on the NCR accused’s liberty.”

II. Enduring Registration of Absolutely Discharged NCR Accused Violates s. 7

16. CCLA submits that in the instant case, the Court of Appeal erred in its analysis of the liberty deprivation at issue, and consequently in its determination that that deprivation was in accordance with the principles of fundamental justice. CCLA further submits that the Court below erred in its s. 7 analysis by analogizing the circumstances of discharged NCR accused to those of other registered criminal offenders, and by failing to view the section 7 claim through an equality lens.

(A) The principles of fundamental justice are contravened because registration as a “sex offender” has a significant impact on liberty

17. The Court of Appeal for Ontario below recognized, and the Appellant Crown has agreed, that continued inclusion on the registry engages the liberty interests of absolutely discharged NCR accused.¹⁶ However, the Court’s characterization of that liberty interference as “modest” led it to conclude that the deprivation of liberty at issue was in accordance with the principles of fundamental justice.¹⁷ The holding distinguishes between the significant liberty deprivation caused by the undischarged NCR accused being under the Review Board’s jurisdiction under Part XX.1, and the “much more modest” liberty interference caused by registration post-discharge. Because ongoing registration is less liberty-violative, the Court reasoned, it does not require sensitive individualized assessment of ongoing risk to satisfy the principles of fundamental justice (whereas the more liberty-violative requirements of Part XX.1 do, per *Winko*). Actuarial risk is held to be an adequate proxy for individually-assessed ongoing risk in the context of diminished liberty intrusion, one that is in accord with the principles of fundamental justice.¹⁸

18. By contrast to the Court of Appeal’s narrow view, other Canadian courts have decided that registration does represent a meaningful deprivation of liberty. These courts have held that the cumulative effects of the annual in-person reporting requirements, the continuing obligation to report changes, the depth of required information, the length of time for which registration is

¹⁶ ONCA decision, *supra* note 2, para 87. See also *R. v. Long*, 2018 ONCA 282, para 59.

¹⁷ *Ibid.*, paras 99-100.

¹⁸ *Ibid.*

imposed, the consequences of breaching (which may include being charged and incarcerated), and the potential for random police checks, render the intrusion on liberty significant.¹⁹

19. The CCLA submits that registration is onerous and meaningfully intrudes on the liberty of registered people. This may be particularly true for mentally disordered individuals. As the Court of Appeal recognized, the registration requirement placed on NCR accused may have a uniquely detrimental impact on them, serving to undermine the progress that led to the absolute discharge and erecting new barriers to the individual's recovery and reintegration into society.²⁰ When the true extent of liberty deprivation occasioned by registry requirements is recognized, particularly in the absence of an individualized assessment of risk, overbreadth is revealed.²¹ Onerous, liberty-violative registry requirements represent overreach when they have no rational connection to the purposes of the legislation. There is no rational connection between registration for those who do not actually pose a risk of committing further sexual offences and the legislative objective of assisting in investigation and prevention of sexual offences.²² In the absence of an individualized assessment of risk, registration deprives absolutely discharged NCR accused of liberty in a manner that is not in accordance with the principles of fundamental justice.

(B) The section 7 analysis was not considered through an equality lens

20. The Court of Appeal's analysis of the Respondent's s. 7 claim erroneously focused on its prior decisions in *Dyck* and *Long*. The Court relied on its earlier holdings that the registries did not require an individualized assessment for convicted individuals, and then went on to hold that absolutely discharged NCR accused could not be meaningfully distinguished for the purposes of the s. 7 claim.²³ With respect, this approach ignored the real, different, and potentially more

¹⁹ See e.g. *R. v. Redhead*, 2006 ABCA 84 at para 33; *R. v. Ndhlovu*, 2016 ABQB 595 at paras 45-6 and 52.

²⁰ ONCA decision, *supra* note 2, para 134.

²¹ Re overbreadth, see *Carter v. Canada (Attorney General)*, 2015 SCC 5 [*Carter*], para 73; *Canada (Attorney General) v. Bedford*, 2013 SCC 72 [*Bedford*], para 123

²² Re characterization of the legislative purpose of registration, see ONCA decision, *supra* note 2, para 71; *R. v. Long*, 2018 ONCA 282 [*Long*], para 102; *R. v. Dyck*, 2008 ONCA 309 [*Dyck*], paras 99, 105.

²³ ONCA decision, *supra* note 2, paras 79-81.

detrimental impact of registration on NCR accused, and it failed to view the section 7 claim through an equality lens. Moreover, CCLA submits that the analysis and holdings below in relation to s. 15 apply with equal force to the claims advanced under s. 7.

21. The Ontario Court of Appeal held that s. 7 did not require an individualized assessment before an NCR accused could be included on a sex offender registry. Pursuant to s.15(1) of the *Charter*, however, such an assessment *was* required to meet the demands of substantive equality. The Court held that the two sections of the *Charter* engage different considerations. While CCLA agrees with this general statement, the distinction drawn by the Court of Appeal in this case is, with respect, unpersuasive.

22. The Court's holding that an individualized assessment is required was not premised solely on s. 15 of the *Charter*. Rather, the Court grounded the requirement in large part in the rights and respect for the dignity of mentally disordered accused required by Part XX.1 of the *Criminal Code*, as interpreted by this Court in *Winko*. As this Court held in that case, this part of the *Code* signals Parliament's intention that "the NCR accused is to be treated with the utmost dignity and afforded the *utmost liberty* compatible with his or her situation".²⁴ Although primarily a s. 15 case, *Winko* dealt in a fundamental way with restrictions on the liberty interests of an NCR accused. CCLA submits that, in the instant case, a finding that the equality guarantee has been unjustifiably infringed also leads to the conclusion that s. 7 has been violated.

23. As this Court held in *Bedford*²⁵ and *Carter*,²⁶ the s. 7 inquiry is not concerned with the consequences of the law on society as a whole and instead is focused on the deprivation of life, liberty, or security of the person as it affects the claimant. The Court of Appeal's refusal – at the s. 7 stage - to seriously consider the claimant's circumstances as an individual with a mental illness was an error that should be rectified by this Court. As this Court held in *Carter*, the focus in the s.

²⁴ *Winko*, *supra* note 12, para. 42 (emphasis added).

²⁵ *Bedford*, *supra* note 21.

²⁶ *Carter*, *supra* note 21.

7 overbreadth analysis is “not on broad social impacts, but on the impact of the measure *on the individuals whose life, liberty or security of the person is trammelled.*”²⁷

24. Indeed, the Court below recognized, in its section 15(1) analysis, the significant impact that registration might have on a person found NCR:

The automatic imposition of long-term sex offender registry orders based on the prior commission of a designated offence by a person found NCRMD not only ignores the fact that the NCRMD person was not culpable in the commission of the crime, it has the real potential to undermine the very progress that led to the absolute discharge by the ORB. It is not far-fetched to suggest that, in some cases, the sex offender registry legislation will erect new barriers to the NCRMD person’s continued recovery and reintegration into society – one of the goals of Part XX.1 of the *Criminal Code* – at the very moment that the individual is declared by the ORB to be no longer subject to the criminal law power. Persons found NCRMD go from being treated in an individualized manner that recognizes their mental disability, to being treated in the same generalized fashion as morally culpable offenders, without any regard for their mental disability or their unique status in the eyes of the criminal law. This perpetuates rather than alleviates their systemic disadvantage.

The potentially adverse consequences of the application of the sex offender registry provisions to persons found NCRMD who have received an absolute discharge is apparent on the facts of this case. The ORB decided that the appellant was entitled to an absolute discharge. In the ORB’s view, the criminal law no longer had any legitimate claim to exercise authority over the appellant. No one questions the ORB’s decision. In hindsight, it appears to have been the correct decision. However, at the very same time as the ORB released the appellant from the authority of the criminal law, *Christopher’s Law* and *SOIRA* automatically imposed mandatory, lifelong sex offender registry orders on the appellant. Those orders, unlike all of the decisions made by the ORB, were imposed without any consideration of the effect they would have on the appellant’s mental health and continued recovery. On this record, those orders had a negative impact on the appellant’s mental health.²⁸

25. Moreover, CCLA submits that a purposive reading of the *Charter* requires that s. 7 claims be considered in light of the equality guarantee in s. 15, particularly where the claim is being advanced on behalf of a member of a marginalized group.²⁹ Indeed, this Court has already

²⁷ *Ibid.*, para 85 (emphasis added).

²⁸ ONCA decision, *supra* note 2, paras 134-5

²⁹ See Shaun O’Brien, Nadia Lambek, Amanda Dale, “Accounting for Deprivation: The Intersection of Sections 7 and 15 of the *Charter* in the Context of Marginalized Groups” 35 Nat’l

recognized the relevance of equality in assessing section 7 claims. In *New Brunswick (Minister of Health) v. G.(J.)*, L’Heureux-Dubé J. held that “the rights in section 7 must be interpreted through the lens of ss. 15 and 28, to recognize the importance of ensuring that our interpretation of the Constitution responds to the realities and needs of all members of society.”³⁰ Indeed, there is support in the case law and academic commentary for the proposition that substantive equality is, itself, a principle of fundamental justice and should be recognized as such for the purposes of s. 7.³¹

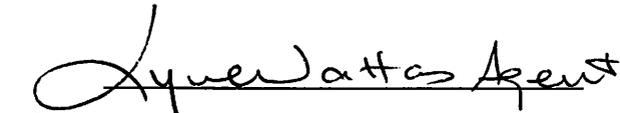
PART IV – SUBMISSIONS ON COSTS

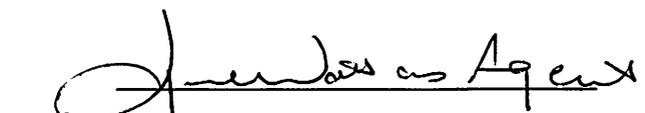
26. The CCLA does not seek costs and asks that no costs be awarded against it.

PART V – ORDER SOUGHT

27. The CCLA submits that *Christopher’s Law* infringes both ss. 7 and 15 of the *Charter* and that neither infringement can be demonstrably justified. CCLA supports the Respondent’s position that a suspended declaration of invalidity does not preclude an individual remedy for the claimant.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 5th day of February, 2020.


for Cara Faith Zwibel


for Jill R. Presser

J. Const. L. 153 at 173-176. See also Kerri A. Froc, “Constitutional Coalescence: Substantive Equality as a Principle of Fundamental Justice” (2011-12) 42 Ottawa L. Rev. 411.

³⁰ [1999] 3 S.C.R. 46, para 113. See also *Inglis v. British Columbia (Minister of Public Safety)*, 2013 BCSC 2309 at para 377.

³¹ See Froc, *supra* note 29 at 436-442.

PART VI – TABLE OF AUTHORITIES & LEGISLATION

Cases	Paras of factum
<i>Canada (Attorney General) v. Bedford</i> , 2013 SCC 72	19, 23
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<i>New Brunswick (Minister of Health) v. G.(J.)</i> , [1999] 3 S.C.R. 46	25
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<i>R. v. Ndhlovu</i> , 2016 ABQB 595	18
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Secondary Sources	
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