BCRB APPROACH TO SUPREME COURT OF CANADA DECISION IN SHOKER [2006] SCC 44

1. Facts (NOTE this is not an NCRMD case)

Shoker was convicted of break and enter with intent to commit sexual assault. He was sentenced to a term of imprisonment followed by a period of probation. The probation order prohibited the possession and consumption of alcohol and narcotics. To monitor his compliance it required the accused to submit to urinalysis, blood test or breathalyser test on demand of a peace officer. A positive test result would amount to a breach of probation.

2. British Columbia Court of Appeal

The **BC Court of Appeal** held that there was authority to include a monitoring condition in a probation order, but that it was contrary to S.8 of the ***Charter*** (unreasonable search or seizure), to compel the provision of bodily samples, without a specific authorizing "regulatory or statutory framework" to sanction and govern the process.

3. *Mazzei v. BC* (2006) BCCA, 321

Before the ***Shoker*** matter reached the **Supreme Court of Canada**, this appeal by Mr. Mazzei, against an on-demand or random urinalysis screening condition in his disposition, reached the BC Court of Appeal.

Without the benefit of the Supreme Court's later decision in ***Shoker***, the BCCA concluded that the BCRB had the authority under S.672.54(c) of the ***Code*** to impose a random urinalysis condition, saying that such a condition facilitates risk assessment and therefore, falls within the Review Board's powers (***Mazzei***, par.40):

> In order to fulfill their statutory mandate to protect the public and manage an NCR accused's safety risk, Review Boards must have jurisdiction to order drug testing conditions. Such conditions allow Review Boards to assess treatment and rehabilitation plans; assist the Review Board in managing and supervising NCR accused persons; and eventually assist in community reintegration. Giving the words of the statute their ordinary meaning and taking the overall purpose of Part XX.1 of the Criminal Code into account, I am of the view that the Review Board has jurisdiction to impose condition number 8.

The Court did not feel the testing condition infringed Mr. Mazzei's S.8 Charter Rights because under his custodial disposition/circumstances, Mr. Mazzei had a significantly diminished "expectation of privacy".

The **BCCA** distinguished Mr. Mazzei's circumstances from ***Shoker*** because:

(i) Unlike a breach of probation which is an "offence (S.733.1), a breach of a disposition order does not provide for a prescribed sanction, though it may have practical consequences such as restrictions on privileges. However such restrictions are to protect the public and to assist in rehabilitation and are not punitive.

(ii) ***Shoker*** authorized urinalysis as well as blood or breath samples. The Review Board's condition was limited to urinalysis, which the Court considered relatively non-invasive and without insult to the accused's dignity or reasonable privacy.

(iii) The testing would be conducted by medical professionals in a hospital setting, not by probation or police officers as in ***Shoker***.

(iv) Most importantly, according to the Court, FPH's screening policy and procedures though lacking in statuary authority provide standards that were absent in ***Shoker***.

4. *Shoker* [2006], SCC 44

After the BCCA handed down its reasons in ***Mazzei***, the **Supreme Court of Canada** released its reasons in the ***Shoker*** appeal. The SCC ultimately dismissed the appeal, but on the basis that there was no authority in the ***Criminal Code*** to allow for the search and seizure of bodily substances as part of a probation order, rather than on the basis of a S.8 infringement (which was the basis for the BC Court of Appeal's decision and which was not addressed by the majority in the SCC). As I note below, there is some uncertainty as to the implications of ***Shoker*** for the BCRB, given that the SCC overturned the BC Court of Appeal's reasoning as to the requisite degree of statutory authority required to ground a search and seizure condition in a probation order.

5. Comment

I am not convinced of the criminal sanction rationale discussed at 3(i) above distinguishes ***Mazzei*** from ***Shoker***. The timing of the SCC's decision in ***Shoker*** unfortunately leaves the question unresolved. In ***Mazzei***, the BC Court of Appeal appears to ignore that S.127 of the ***Code*** does provide a charge for "disobeying a lawful order", even if that the section has been hardly or even ever been used.

Practical experience suggests that an NCR may well experience a loss of liberties due to a failed drug test either via return to hospital, transfer to a more secure unit, or even as a change in legal status from a conditional to a custodial disposition. We also know the consequences of a positive drug test are not always imposed solely due to either treatment or public safety concerns.

Such a substantive loss of liberty cannot, in my view, be dismissed as of no consequence, simply because drug testing for an NCR is deemed necessary to "protect the public" or for the accused's "rehabilitation". Such a diminution of an NCR accused's liberty interests appears to run counter to at least 15 years of jurisprudence which emphasizes those very interests.

While a hospitalized NCR accused obviously enjoys a diminished expectation of privacy, there is no clear rationale why he/she would have a lower privacy expectation than an inmate in a penal institution where testing has to be carried out under an express regulatory scheme.

It is at least arguable that the result can be justified because the Review Board has a broader authority under the ***Code*** to impose "appropriate" conditions which are specifically required to balance the NCR's rights and public protection, than is provided a sentencing judge. In other words, express statutory provisions authorizing search and seizure are not required given the BCRB's mandate to balance and protect the liberty (and privacy) interests of an NCR.

6. Implications for BCRB Practice

Given the sequence of the decisions it is a bit difficult to clearly determine the implications for the BCRB's practice in imposing testing conditions.

If ***Mazzei*** properly states the current law, then the Board has the authority to impose random or on demand **urinalysis** conditions in a **custodial** disposition.

I would suggest, however, that the circumstances of a conditionally discharged accused under S.672.54(b) are far closer to those of a probationer. Certainly there should be no significant differences in their respective expectations of privacy.

Given a heightened expectation of privacy under a conditional discharge disposition then, the Board should probably refrain from "on demand" testing and rely on the "reasonable grounds" to suspect or "reason to believe" language sanctioned in ***Mazzei,*** which is still lower than a "reasonable and probably grounds to believe" standard.

Even then, and perhaps most importantly, the BCRB should ensure that such testing is carried out pursuant to proper procedures and safeguards.

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