Indexed as:

R. v. Shoker

Her Majesty The Queen, Appellant;
v.
Harjit Singh Shoker, Respondent, and
Attorney General of Canada and Criminal Lawyers' Association (Ontario), Interveners.

[2006] 2 S.C.R. 399
[2006] S.C.J. No. 44
2006 SCC 44
File No.: 30779.

Supreme Court of Canada

Heard: February 14, 2006;
Judgment: October 13, 2006.

Present: McLachlin C.J. and Bastarache, Binnie, LeBel, Fish, Abella and Charron JJ.
(44 paras.)

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Catchwords:

Criminal law — Sentencing — Probation — Accused convicted of entering a dwelling house with intent to commit sexual assault and sentenced to incarceration followed by two years of probation subject to conditions — Probation order requires accused to abstain from consumption and possession of alcohol and non-prescription narcotics and to provide bodily substances on demand by probation officer or peace officer to monitor compliance with abstention condition — Whether sentencing judge had jurisdiction under Criminal Code to authorize search and seizure of bodily substances as part of probation order — Criminal Code, R.S.C. 1985, c. C-46, ss. 732.1(3)(c), 732.1(3)(h).

Summary:

The accused was convicted of breaking and entering a dwelling house with intent to commit sexual

assault. A psychological pre-sentencing report revealed that accused blamed his drug use for his behaviour and recommended requiring the accused to submit to random urinalysis to manage his risk in the community. The accused was sentenced to imprisonment followed by probation. The probation order required that he abstain [page400] absolutely from the consumption and possession of alcohol and non-prescription narcotics and, to determine compliance with the abstention condition, that he submit to urinalysis, blood tests or breathalyzer tests upon the demand of a peace officer or probation officer. The order also stated that any positive reading would be a breach of the abstention condition. A majority of the Court of Appeal held that ss. 732.1(3)(*c*) and 732.1(3)(*h*) of the *Criminal Code* grant a sentencing judge statutory authority to include a monitoring condition in a probation order but that compelling the accused to provide bodily samples, in the absence of a governing regulatory or statutory framework, is contrary to s. 8 of the *Canadian Charter of Rights and Freedoms*. The Court of Appeal also held that the sentencing judge had no jurisdiction to predetermine that a positive reading was a breach of probation.

Held: The appeal should be dismissed.

Per McLachlin C.J. and Binnie, Fish, Abella and Charron JJ.: The majority of the Court of Appeal was correct to delete that part of the probation order compelling the accused to provide bodily samples and stating that any positive reading will be a breach of probation. Although a condition requiring abstention from consumption and possession of alcohol and non-prescription narcotics is authorized under the *Criminal Code*, and was reasonable in the accused's circumstances, the sentencing judge had no authority under ss. 732.1(3)(*c*) and 732.1(3)(*h*) of the *Code* to authorize a search and seizure of bodily substances as part of a probation order. Nor did he have jurisdiction to predetermine that any positive reading would constitute a breach of probation. [para. 3] [para. 17] [para. 26]

Section 732.1(3)(*c*), which allows an abstention condition, defines a criminal offence, but enforcement powers are not implicit from the simple creation of an offence. While the power to demand bodily samples and the resulting analyses would undoubtedly assist in the enforcement of a s. 732.1(3)(*c*) abstention condition, it cannot be implied on that basis. Under s. 732.1(3)(*h*), a court is given a broad power to craft other reasonable conditions for the purpose of protecting society and for facilitating the accused's reintegration into the [page401] community. However, s. 732.1(3)(*h*) is not unlimited and must be read in context. The conditions set out in s. 732.1(3) can assist in delineating the scope of this residual provision. These listed conditions relate to conduct, or abstention from conduct, the fulfilment of which has no incriminating consequence for the probationer. When a condition may pose a risk, such as participating in a treatment program, the consent of the probationer is required. Conditions compelling bodily samples to facilitate the gathering of evidence for enforcement purposes do not simply monitor the probationer's behaviour and, as such, are of a different kind and, because of their potential effect, absent the probationer's consent to such conditions, raise constitutional concerns. The seizure of bodily samples must be subject to stringent standards and safeguards to meet constitutional requirements. Where Parliament authorizes the collection of bodily samples, it uses clear language and sets out standards and safeguards for collecting these samples. Parliament has not provided a scheme under s. 732.1(3) for collecting bodily samples and such a scheme cannot be judicially enacted. [paras. 20-25]

Per Bastarache and LeBel JJ.: Under well-established rules of statutory interpretation, s. 732.1(3)(*h*) of the *Criminal Code* grants authority to include monitoring procedures in probation orders, including the condition imposed on the accused that he provide bodily samples. Section 732.1(3)(*h*) must be read in the context of probation and sentencing. A probation order addresses the imperatives of the protection of society and the rehabilitation of the accused. Sentencing judges are required to devise terms that are reasonable in the sense that they complement these objectives and the terms set out in s. 732.1(3). The residual clause allows judges to frame conditions to fit the distinct situation of each accused. So long as a reasonable condition can be connected with the categories of terms contemplated by the *Code*, it is grounded in an implied, but solid, statutory authority. Although the *Code* provides for conditions concerning alcohol and drug use, it is silent about monitoring these conditions. This Court has acknowledged implied statutory powers when the need for them flows from the substantive provisions of a law, and the need for a monitoring mechanism may arise from the [page402] nature of the obligations imposed on an accused in a probation order. To hold otherwise would cast doubt on a number of useful monitoring methods used to ensure that the goals of probation are met. However, any condition of a probation order requiring monitoring of an accused is open to review under s. 8 of the *Charter*. In this case, the monitoring condition does not meet the requirements of s. 8. Compelling blood tests absent a statutory framework governing such tests is not consistent with the *Charter* and random drug testing at a probation officer's discretion could become highly arbitrary. [paras. 30-37] [paras. 42-43]

The part of the order stating that a positive test will be a breach of probation is contrary to criminal law principles that require guilt to be proved in the usual manner. [para. 41]

Cases Cited

By Charron J.

Referred to: *R. v. Proulx*, [2000] 1 S.C.R. 61, 2000 SCC 5; *R. v. Kootenay* (2000), 150 C.C.C. (3d) 311; *R. v. Traverse* (2006), 205 C.C.C. (3d) 33; *R. v. Ziatas* (1973), 13 C.C.C. (2d) 287; *R. v. Caja* (1977), 36 C.C.C. (2d) 401; *R. v. Lavender* (1981), 59 C.C.C. (2d) 551; *R. v. L.* (1986), 50 C.R. (3d) 398; *R. v. McLeod* (1993), 81 C.C.C. (3d) 83; *R. v. Borden*, [1994] 3 S.C.R. 145; *R. v. Stillman*, [1997] 1 S.C.R. 607; *R. v. Golden*, [2001] 3 S.C.R. 679, 2001 SCC 83; *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145.

By LeBel J.

Referred to:*R. v. M. (M.R.)*, [1998] 3 S.C.R. 393; *R. v. Carlson* (1996), 141 Sask. R. 168; *R. v. Curtis* (1996), 144 Sask. R. 156; *R. v. McLeod* (1992), 109 Sask. R. 8; *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [2000] 2 S.C.R. 1120, 2000 SCC 69.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, ss. 1, 8.

Correctional Institution Regulation, Alta. Reg. 205/2001, ss. 48.1, 48.2.

Correctional Institutions Regulation, Man. Reg. 227/92, ss. 28, 29, 29.1, 31(1).

[page403]

Correctional Services Act, R.S.P.E.I. 1988, c. C-26.1, s. 17(g).

Correctional Services Act, S.M. 1998, c. 47, C.C.S.M. c. C230, s. 16.

Correctional Services Act, S.S. 1993, c. C-39.1, s. 56(1).

Correctional Services Administration, Discipline and Security Regulations, 2003, R.R.S., c. C-39.1, Reg. 3, s. 40(1).

Correctional Services Regulation, Man. Reg. 128/99, ss. 41 to 45.

Corrections Accountability Act, 2000, S.O. 2000, c. 40, s. 57.9(1) to (3).

Corrections Act, R.S.A. 2000, c. C-29, ss. 14.1, 14.2.

Corrections and Conditional Release Act, S.C. 1992, c. 20, ss. 54 to 57.

Corrections and Conditional Release Regulations, SOR/92-620, ss. 60 to 72.

Criminal Code, R.S.C. 1985, c. C-46, ss. 253 to 261, 487.04 to 487.091, 718 to 718.2, 731, 732.1(2), (3) , 733.1, 742.3(2)(*f*).

P.E.I. Reg. EC616/92, ss. 10, 11.

Authors Cited

Beaulac, Stéphane, and Pierre-André Côté. "Driedger's 'Modern Principle' at the Supreme Court of Canada: Interpretation, Justification, Legitimization" (2006), 40 *R.J.T.* 131.

Ferris, Thomas Wayne. *Sentencing: Practical Approaches*. Markham, Ont.: Butterworths, 2005.

Manson, Allan, Patrick Healy and Gary Trotter. *Sentencing and Penal Policy in Canada: Cases,*

Materials, and Commentary. Toronto: Emond Montgomery, 2000.

Ruby, Clayton C. *Sentencing*, 6th ed. Markham, Ont.: Butterworths, 2004.

History and Disposition:

APPEAL from a judgment of the British Columbia Court of Appeal (Finch C.J.B.C. and Hall and Levine JJ.A.) (2004), 206 B.C.A.C. 266, 338 W.A.C. 266, 192 C.C.C. (3d) 176, 26 C.R. (6th) 97, 126 C. R.R. (2d) 149, [2004] B.C.J. No. 2626 (QL), 2004 BCCA 643, deleting part of a probation order. Appeal dismissed.

Counsel:

Wendy L. Rubin and *Susan J. Brown*, for the appellant.

Garth Barriere and *Dana Kripp*, for the respondent.

[page404]

Kenneth J. Yule, Q.C., and *David Schermbrucker*, for the intervener the Attorney General of Canada.

James Stribopoulos and *Sarah Loosemore*, for the intervener the Criminal Lawyers' Association (Ontario).

The judgment of McLachlin C.J. and Binnie, Fish, Abella and Charron JJ. was delivered by

CHARRON J.:—

1. Overview

¶ 1 This appeal raises the question whether a sentencing judge may require a probationer to provide, on demand by the probation officer, samples of breath, urine or blood for analysis to determine compliance with an abstention term of the probation order. In allowing the appeal against sentence, the British Columbia Court of Appeal held that the enforcement term violates s. 8 of the *Canadian Charter of Rights and Freedoms* due to the absence of legislative or regulatory standards or safeguards that would adequately protect the probationer's privacy interest. Levine J.A., in writing for the majority, deleted the enforcement term, holding that it was up to Parliament and not the courts to fill this "gap in ... legislation" ((2004), 206 B.C.A.C. 266, 2004 BCCA 643, at para. 60). Hall J.A., in partial dissent, would have deleted the requirement to provide blood samples but would have read in adequate

safeguards to ensure the constitutionality of the rest of the condition.

¶ 2 The Crown appeals to this Court and seeks to reinstate the enforcement condition. At issue is whether ss. 732.1(3)(*c*) and 732.1(3)(*h*) of the *Criminal Code*, R.S.C. 1985, c. C-46, authorize the enforcement condition and, if permissible, whether the condition must be predicated by reasonable and probable grounds to suspect a violation of an abstention condition.

[page405]

¶ 3 For the reasons that follow, I would dismiss the appeal. A sentencing judge has a broad jurisdiction in determining appropriate conditions of probation. However, there is no authority under the *Criminal Code* to authorize a search and seizure of bodily substances as part of a probation order. In light of the fact that the impugned condition must be quashed for lack of jurisdiction, it is neither necessary nor advisable for this Court to answer the constitutional question. It is Parliament's role to determine appropriate standards and safeguards governing the collection of bodily samples for enforcement purposes.

2. The Facts and Proceedings Below

¶ 4 Shortly after midnight on September 7, 2003, the complainant was awakened when a naked stranger was getting in her bed. The intruder, Harjit Singh Shoker, followed her when she fled to the kitchen to phone the police but he did not attempt to leave. On arrest, he told the police that he had been using a narcotic the previous day. Mr. Shoker did not testify at trial. He was convicted of breaking and entering a dwelling-house with intent to commit sexual assault.

¶ 5 A psychological assessment report prepared by Dr. Whittemore for sentencing revealed that Mr. Shoker blamed his drug use for his behaviour, stating that he had been on speed at the time of the offence. The report described a history of substance abuse, starting with alcohol as a teenager and later drugs including heroin, speed, cocaine and marijuana. The report also referred to a similar incident that had occurred a few months earlier in respect of which Mr. Shoker had been charged and awaiting trial at the time of this offence. Mr. Shoker told Dr. Whittemore that he was under the influence of alcohol at the time of this previous incident and thought he was at a friend's apartment. He was acquitted on that charge. Mr. Shoker did not feel that he needed treatment as he had not used drugs for the three months he had been in custody since his arrest. Describing Mr. Shoker's behaviour [page406] as disturbing, Dr. Whittemore suggested that the court might consider imposing a condition requiring him to submit to random urinalysis to assist in managing his risk in the community.

¶ 6 The trial judge sentenced Mr. Shoker to 20 months' incarceration to be followed by a two-year period of probation subject to a number of conditions. The Crown did not ask that the order of probation include any condition for treatment or testing of bodily substances and the offender did not consent to those conditions. The following two conditions were later challenged by Mr. Shoker on his appeal before the British Columbia Court of Appeal:

> CONDITION 7: You shall attend for such treatment and counselling as directed by the Probation Officer and successfully complete any such programs to which you are referred.
>
> ...
>
> CONDITION 9: Abstain absolutely from the consumption and possession of alcohol and non prescription narcotics and to submit to a urinalysis, blood test or breathalyzer test upon the demand/request of a Peace Officer or Probation Officer to determine compliance with this condition. Any positive reading will be a breach of this condition.

¶ 7 The Court of Appeal deleted the reference to "treatment" in Condition 7 because a treatment condition can only be imposed under s. 732.1(3)(*g*) of the *Criminal Code* with the consent of the offender. In addition, as the majority of the court noted, there is no program in British Columbia for curative treatment in relation to the consumption of alcohol or drugs as described in para. (*g*.1). Condition 7 was amended accordingly and it is no longer in issue before this Court. The court also [page407] deleted the last sentence of Condition 9 for lack of jurisdiction -- the sentencing judge could not predetermine that any positive reading would constitute a breach of probation as he had purported to do. The question of any breach would have to form the basis of a new charge against Mr. Shoker and be determined by a court in the usual way.

¶ 8 Fresh evidence admitted before the Court of Appeal revealed that funding for urinalysis testing had been discontinued as of March 31, 2003, and the service was no longer available in British Columbia. Hence the question of urinalysis testing for this offender was effectively moot. However, the court considered whether at law an offender can be required under the terms of a probation order to submit to a demand for a sample of bodily substances, including breath, urine and blood. Levine J.A., Finch C.J.B.C. concurring, was of the view that the authority for imposing such a condition could be found in s. 732.1(3)(*c*) of the *Criminal Code* with s. 732.1(3)(*h*) supporting this interpretation. Despite this finding, Levine J.A., in writing for the majority, held that the requirement to provide bodily samples, in the absence of a regulatory or statutory framework governing how the samples will be taken and tested, violates s. 8 of the *Charter* and that the defect cannot be cured by judicial fiat. Hence, that part of Condition 9 following the words "non prescription narcotics" was deleted. I read the majority's reasons as effectively holding that there is no statutory authority to require a probationer to provide bodily samples on demand.

¶ 9 Hall J.A., in partial dissent, was of the view that the authority to impose the condition could not be found under s. 732.1(3)(*h*) because "Parliament has spoken in a specific manner about alcohol and drugs in s. 732.1(3)(c)" (para. 70). In his view, the power flowed rather from s. 732.1(3)(*c*) itself as "a reasonable methodology to ensure that such an [page408] order is effective" (para. 70). Hall J.A. departed from the majority on the question whether the condition could be amended to conform with the *Charter*. He would have deleted the requirement to provide blood samples and would have amended Condition 9 to require that urine or breath samples be provided upon demand based on reasonable and

probable grounds to suspect a violation of the abstention condition.

3. Analysis

3.1 *Relevant Statutory Provisions*

¶ 10 Probation is a form of sentence that can be imposed only in circumstances described in s. 731 of the *Criminal Code*:

> **731.** (1) Where a person is convicted of an offence, a court may, having regard to the age and character of the offender, the nature of the offence and the circumstances surrounding its commission,
>
> > (*a*) if no minimum punishment is prescribed by law, suspend the passing of sentence and direct that the offender be released on the conditions prescribed in a probation order; or
> > (*b*) in addition to fining or sentencing the offender to imprisonment for a term not exceeding two years, direct that the offender comply with the conditions prescribed in a probation order.
>
> (2) A court may also make a probation order where it discharges an accused under subsection 730(1).

Probation has traditionally been viewed as a rehabilitative sentencing tool: *R. v. Proulx*, [2000] 1 S.C.R. 61, 2000 SCC 5, at paras. 31-33. The probationer remains free to live in the community but certain restraints on his freedom are imposed for the purpose of facilitating his rehabilitation and protecting society. An offender who is bound by a probation order and who, without reasonable excuse, fails or refuses to comply with that order is guilty of an offence under s. 733.1 punishable by up to two years' imprisonment.

[page409]

¶ 11 All probation orders must contain at a minimum three conditions as prescribed under s. 732.1 (2):

> (*a*) keep the peace and be of good behaviour;
> (*b*) appear before the court when required to do so by the court; and
> (*c*) notify the court or the probation officer in advance of any change of name or address, and promptly notify the court or the probation officer of any change of employment or occupation.

¶ 12 Additional optional conditions may be imposed pursuant to s. 732.1(3). Only ss. 732.1(3)(*c*) and

732.1(3)(*h*) are at issue on this appeal. However, it is important that they be read in the context of the entire provision. Section 732.1(3) reads as follows:

> **732.1** ...
> (3) The court may prescribe, as additional conditions of a probation order, that the offender do one or more of the following:
> (*a*) report to a probation officer
>
> (i) within two working days, or such longer period as the court directs, after the making of the probation order, and
> (ii) thereafter, when required by the probation officer and in the manner directed by the probation officer;
>
> (*b*) remain within the jurisdiction of the court unless written permission to go outside that jurisdiction is obtained from the court or the probation officer;
> (*c*) abstain from
>
> (i) the consumption of alcohol or other intoxicating substances, or
> (ii) the consumption of drugs except in accordance with a medical prescription;
>
> (*d*) abstain from owning, possessing or carrying a weapon;
> (*e*) provide for the support or care of dependants;
> (*f*) perform up to 240 hours of community service over a period not exceeding eighteen months;
>
> [page410]
>
> (*g*) if the offender agrees, and subject to the program director's acceptance of the offender, participate actively in a treatment program approved by the province;
> (*g*.1) where the lieutenant governor in council of the province in which the probation order is made has established a program for curative treatment in relation to the consumption of alcohol or drugs, attend at a treatment facility, designated by the lieutenant governor in council of the province, for assessment and curative treatment in relation to the consumption by the offender of alcohol or drugs that is recommended pursuant to the program;
> (*g*.2) where the lieutenant governor in council of the province in which the probation order is made has established a program governing the use of an alcohol ignition interlock device by an offender and if the offender agrees to participate in the program, comply with the program; and
> (*h*) comply with such other reasonable conditions as the court considers desirable, subject to any regulations made under subsection 738(2) [s. 738(2) relates to restitution orders], for protecting society and for facilitating the offender's successful reintegration into the community.

¶ 13 Before discussing the issue that arises in this case, I wish to make a few general comments about the power to impose optional conditions under s. 732.1(3). The residual power under s. 732.1(3)(*h*) speaks of "other reasonable conditions" imposed "for protecting society and for facilitating the offender's successful reintegration into the community". Such language is instructive, not only in respect of conditions crafted under this residual power, but in respect of the optional conditions listed under s. 732.1(3): before a condition can be imposed, it must be "reasonable" in the circumstances and must be ordered for the purpose of protecting society and facilitating the particular offender's successful reintegration into the community. Reasonable conditions will generally be linked to the particular offence but need not be. What is required is a nexus between the offender, the protection of the community and his reintegration into the community. See, for example, *R. v. Kootenay* (2000), 150 C.C. C. (3d) 311 (Alta. C.A.), and *R. v. Traverse* (2006), 205 C.C.C. (3d) 33 (Man. C.A.), where appellate courts have upheld conditions [page411] requiring abstinence from alcohol or drugs even though these played no part in the commission of the offence for which the offender was sentenced. On the other hand, conditions of probation imposed to punish rather than rehabilitate the offender have been struck out: *R. v. Ziatas* (1973), 13 C.C.C. (2d) 287 (Ont. C.A.); *R. v. Caja* (1977), 36 C.C.C. (2d) 401 (Ont. C. A.); *R. v. Lavender* (1981), 59 C.C.C. (2d) 551 (B.C.C.A.); *R. v. L.* (1986), 50 C.R. (3d) 398 (Alta. C. A.). In contrast, punitive conditions may be imposed pursuant to s. 742.3(2)(*f*) as part of a conditional sentence: *Proulx*, at para. 34.

¶ 14 The residual power to craft individualized conditions of probation is very broad. It constitutes an important sentencing tool. The purpose and principles of sentencing set out in ss. 718 to 718.2 of the *Criminal Code* make it clear that sentencing is an individualized process that must take into account both the circumstances of the offence and of the offender. It would be impossible for Parliament to spell out every possible condition of probation that can meet these sentence objectives. The sentencing judge is well placed to craft conditions that are tailored to the particular offender to assist in his rehabilitation and protect society. However, the residual power to impose individualized conditions is not unlimited. The sentencing judge cannot impose conditions that would contravene federal or provincial legislation or the *Charter*. Further, inasmuch as the wording of the residual provision can inform the sentencing judge's exercise of discretion in imposing one of the listed optional conditions as I have described, the listed conditions in turn can assist in interpreting the scope of "other reasonable conditions" that can be crafted under s. 732.1(3)(*h*). As we shall see, none of the listed conditions is aimed at facilitating the investigation of suspected breaches of probation. I will come back to this point later.

[page412]

¶ 15 The underlying purpose for imposing conditions of probation also serves to define the role of the probation officer. The intervener the Attorney General of Canada aptly describes the probation officer's functions in its factum (at para. 21):

> It is in the nature of a probation officer's duties to act as an officer of the court, to assist the probationer in his rehabilitation, and to monitor compliance with the conditions of probation imposed by the sentencing court. The supervising probation officer simultaneously performs two distinct functions, rehabilitation and enforcement. The twin goals of probation -- rehabilitation of the offender and protection of society -- require and justify supervision in order to ensure that the probationer in fact observes his conditions. This supervised control is a restraint on the probationer's freedom.

The supervisory function of the probation officer in ensuring compliance with the conditions and the manner in which this function must be performed becomes of central importance in this case when we consider the full implications of enforcing an abstention order by requiring bodily samples. The determinative question is whether the supervisory power to demand samples of bodily substances for enforcement purposes may be conferred upon the probation officer by the court as a discretionary exercise of discretion or whether it must be authorized by statute.

3.2 *The Impugned Condition*

¶ 16 For ease of reference, I repeat the terms of Condition 9:

> CONDITION 9: Abstain absolutely from the consumption and possession of alcohol and non prescription narcotics and to submit to a urinalysis, blood test or breathalyzer test upon the demand/request of a Peace Officer or Probation Officer to determine compliance with this condition. Any positive reading will be a breach of this condition. [Emphasis added.]

¶ 17 As indicated earlier, the sentencing judge did not have the jurisdiction to predetermine that any positive reading would constitute a breach of [page413] probation. Therefore, the last sentence of Condition 9 was properly deleted by the Court of Appeal. The first part of the condition is also not in issue. The abstention condition is expressly authorized under s. 732.1(3)(*c*) and, given Mr. Shoker's particular circumstances, it is entirely reasonable to impose this condition to facilitate his rehabilitation and to protect society. The prohibition against the possession of alcohol and non-prescription drugs, imposed pursuant to the s. 732.1(3)(*h*) residual power, is also not in dispute. What remains at issue is the requirement that bodily samples be provided on demand.

¶ 18 The impugned condition is challenged essentially on *Charter* grounds. In reviewing a sentencing judge's exercise of discretion on *Charter* grounds, an appellate court should first consider whether the sentencing judge acted within his statutory jurisdiction. If a sentence is illegal on the basis that it is unauthorized under the governing legislation, it must be struck down and the constitutional issue does not arise. I will therefore consider whether the requirement to provide bodily samples as a condition of probation falls within the scope of s. 732.1.

3.3 *Requiring Bodily Samples and Section 732.1 of the Criminal Code*

¶ 19 The Crown submits that s. 732.1(3)(*c*) abstention conditions are highly desirable for the rehabilitation of the offender and the protection of the public and that the sentencing objectives of such abstention terms can only be achieved if there is also an effective mechanism to enforce them. Therefore, the Crown argues that ss. 732.1(3)(*c*) and 732.1(3)(*h*), read together, authorize the imposition of random sampling of an offender's bodily substances to ensure compliance with the [page414] abstention condition. Mr. Shoker argues that the power to impose enforcement terms to the abstention condition neither flows implicitly from s. 732.1(3)(*c*) nor does it fall within the scope of s. 732.1(3)(*h*) "reasonable conditions". If Parliament had intended to authorize the seizure of bodily samples, he argues, it would have expressly so stated as it has done in other existing legislative schemes.

¶ 20 I will deal firstly with s. 732.1(3)(*c*). With respect to Hall J.A.'s opinion to the contrary, the jurisdiction to impose enforcement terms cannot simply flow from the power to impose an abstention condition. The effect of including a s. 732.1(3)(*c*) abstention condition in a probation order is to define a criminal offence, the commission of which is punishable under s. 733.1. Enforcement powers are not implicit from the simple creation of an offence. For example, it cannot reasonably be contended that the prohibition against impaired driving under s. 253 implicitly includes the enforcement scheme for demanding bodily samples contained in ss. 254 to 258. Yet, in essence, that is the argument here. The Crown submits that the enforcement scheme should be implied as necessary to give effect to a s. 732.1(3)(*c*) abstention condition. I do not accept this argument. Breach of probation is a criminal offence under the *Criminal Code* and, as such, it is subject to the usual investigatory techniques and manner of proof as any other offence. Hence, the probationer who is found consuming alcohol with his friends in a drinking establishment can be prosecuted based on the evidence of witnesses to the event. Likewise, the probationer who exhibits signs of alcohol or drug impairment can be prosecuted and the offence can be proven by testimonial evidence much in the same way as an offence for impaired driving. The power to demand bodily samples and the resulting analyses would undoubtedly assist in the enforcement [page415] of a s. 732.1(3)(*c*) condition, but it cannot on that basis simply be implied.

¶ 21 The authority to impose enforcement terms, if any, must be found rather in the residual clause. As indicated earlier, s. 732.1(3)(*h*) gives the sentencing judge a broad power to craft other reasonable conditions designed to protect society and facilitate the offender's successful reintegration into the community. Hall J.A. was of the view that the authority could not be found under s. 732.1(3)(*h*) because Parliament has specifically addressed alcohol and drugs in s. 732.1(3)(*c*). The fact that Parliament has specifically addressed alcohol and drugs under s. 732.1(3)(*c*) -- and also in ss. 732.1(3)(*g*.1) and 732.1(3)(*g*.2) -- is certainly a relevant factor but, in my respectful view, it does not preclude the imposition of "other" alcohol and drug-related "reasonable conditions" under the residual clause. Any number of additional conditions aimed at ensuring that the probationer comply with the abstention condition can be imposed. Indeed, the prescription against the possession of alcohol and drug found in Condition 9 is one example. Similarly, a sentencing judge could prescribe that the offender not enter any premises where alcohol is sold or served; that he not associate with his favourite drinking buddies; or that he obey a curfew. All these conditions could be imposed to ensure better compliance with the abstention condition and thereby facilitate the offender's rehabilitation and protect society. Absent peculiar circumstances, it could not seriously be contended that any such condition would be unreasonable. LeBel J., in his

concurring reasons, expressed concerns that a narrow interpretation of the residual clause would cast doubt on a number of useful monitoring methods, [page416] more particularly the use of electronic monitoring. The legality of electronic monitoring under s. 732.1(3)(*h*) is not before us and, hence, this Court is not deciding this issue. We are concerned here only with the compelled seizure of bodily samples as an enforcement mechanism. It is also noteworthy that in each case referred to by LeBel J., the probationer's consent was required for participation in the Saskatchewan electronic monitoring program. Further, the Saskatchewan Court of Appeal in *R. v. McLeod* (1993), 81 C.C.C. (3d) 83, at p. 99, also made it clear that "the constitutionality of this form of sanction was not argued or considered during argument".

¶ 22 On the face of it, s. 732.1(3)(*h*) therefore appears wide enough to permit enforcement terms such as the one imposed in this case since, it is argued, submitting to testing would also ensure better compliance with the abstention condition. However, the residual provision must be read in context. Since it provides for "other" reasonable conditions, the listed conditions under ss. 732.1(3)(*a*) to 732.1(3)(*g*.2) can assist in delineating the scope of the residual provision. It is noteworthy that the fulfilment of any of the listed conditions can have no incriminating consequence for the probationer. In addition, when the condition may pose a risk, such as participating in a treatment program, the consent of the offender is required before the condition can be imposed. Section 732.1(3)(*h*) speaks of "other reasonable conditions". It is reasonable to infer that additional conditions imposed under the residual power would be of the same kind as the listed conditions. However, conditions intended to facilitate the gathering of evidence for enforcement purposes do not simply monitor the probationer's behaviour and, as such, are of a different kind and, because of their potential effect, absent the probationer's consent to such conditions, raise [page417] constitutional concerns. For example, could Mr. Shoker be compelled, as a condition of his probation, to make his home available for inspection on demand to better monitor the prescription against the possession of alcohol or drugs? Such a condition in effect would subject him to a different standard than that provided by Parliament for the issuance of a search warrant. In my view, it could not reasonably be argued that the sentencing judge would have the jurisdiction to override this scheme under the authority of the open-ended language of s. 732.1(3)(*h*). It would be up to Parliament, if it saw fit, to enact any such scheme.

¶ 23 The sentencing judge's jurisdiction can be no greater in respect of the seizure of bodily samples. The seizure of bodily samples is highly intrusive and, as this Court has often reaffirmed, it is subject to stringent standards and safeguards to meet constitutional requirements. Significantly, in *R. v. Borden*, [1994] 3 S.C.R. 145, this Court held that where there is no statutory authorization for the seizure of bodily samples, consent must be obtained if the seizure is to be lawful. In *R. v. Stillman*, [1997] 1 S.C.R. 607, Cory J., speaking for the majority, held that the seizure of bodily samples such as hair, buccal swabs and dental impressions, was not authorized by the common law power to search incident to arrest. The principle was again reaffirmed in *R. v. Golden*, [2001] 3 S.C.R. 679, 2001 SCC 83. Again here, it is my view that such statutory authorization cannot be read in the general language of s. 732.1(3)(*h*). In the various circumstances where Parliament has chosen to authorize the collection of bodily samples, it has not only used clear language; it has also included in the legislation, or through regulations, a number of standards and safeguards: see for example, the collection of DNA samples for investigative purposes or,

on conviction, for inclusion in the DNA databank (ss. 487.04 to 487.091 of the *Criminal Code*); the collection of breath and blood samples during the [page418] investigation of impaired driving offences (ss. 253 to 261 of the *Criminal Code*); and the collection of urine samples from federal inmates and parolees (ss. 54 to 57 of the *Corrections and Conditional Release Act*, S.C. 1992, c. 20, and ss. 60 to 72 of the *Corrections and Conditional Release Regulations*, SOR/92-620).

¶ 24 A number of provincial legislatures have also enacted legislation and regulations governing the seizure of bodily samples from inmates of provincial institutions: see, for example, Alberta, *Corrections Act*, R.S.A. 2000, c. C-29, ss. 14.1 and 14.2, and *Correctional Institution Regulation*, Alta. Reg. 205/2001, ss. 48.1 and 48.2; Saskatchewan, *The Correctional Services Act*, S.S. 1993, c. C-39.1, s. 56 (1), and *The Correctional Services Administration, Discipline and Security Regulations, 2003*, R.R.S., c. C-39.1, Reg. 3, s. 40(1); Manitoba, *Correctional Services Act*, S.M. 1998, c. 47, C.C.S.M. c. C230, s. 16, *Correctional Institutions Regulation*, Man. Reg. 227/92, ss. 28, 29, 29.1 and 31(1), and *Correctional Services Regulation*, Man. Reg. 128/99, ss. 41 to 45; Prince Edward Island, *Correctional Services Act*, R. S.P.E.I. 1988, c. C-26.1, s. 17(g), and P.E.I. Reg. EC616/92, ss. 10 and 11; Ontario, *Corrections Accountability Act, 2000*, S.O. 2000, c. 40, s. 57.9(1) to (3). The Ontario legislation, unlike other provinces, applies to probationers as well as to provincial inmates.

[page419]

¶ 25 The establishment of these standards and safeguards cannot be left to the discretion of the sentencing judge in individual cases. There is no question that a probationer has a lowered expectation of privacy. However, it is up to Parliament, not the courts, to balance the probationers' *Charter* rights as against society's interest in effectively monitoring their conduct. Since the purpose of s. 8 is preventative, the following principle in *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, at p. 169, is particularly apposite here:

> While the courts are guardians of the Constitution and of individuals' rights under it, it is the legislature's responsibility to enact legislation that embodies appropriate safeguards to comply with the Constitution's requirements. It should not fall to the courts to fill in the details that will render legislative lacunae constitutional.

In this case, the Crown argues that reasonable and probable grounds are not required for the search and seizure of bodily substances from probationers and that the seizure of blood samples is also reasonable. Hall J.A. disagreed. He would have deleted the requirement to provide blood samples as too intrusive and conditioned the requirement to provide urine and breath samples upon the establishment of reasonable and probable grounds. Those are precisely the kinds of policy decisions for Parliament to make having regard to the limitations contained in the *Charter*. Parliament has specifically addressed the issue of alcohol and intoxicating substances in ss. 732.1(3)(*c*), 732.1(3)(*g*.1) and 732.1(3)(*g*.2) but it has not provided for a scheme for the collection of bodily samples as it has done in respect of parolees. Such a scheme cannot be judicially enacted on the ground that the court may find it desirable in an individual case. In addition to the constitutional concerns raised by the collection of bodily samples, the

establishment of such a scheme requires the expenditure of resources and usually the cooperation of the provinces. This reality is exemplified in this case where the funding for urinalysis has been discontinued in British Columbia rendering the [page420] probation condition moot. This is yet another reason why the matter is one for Parliament.

¶ 26 For these reasons, I would conclude that there is no statutory authority for requiring Mr. Shoker to submit bodily samples. In the absence of a legislative scheme authorizing the seizure of bodily samples, the enforcement of abstention conditions must be done in accordance with existing investigatory tools. The majority of the Court of Appeal was therefore correct in deleting that part of Condition 9 following the words "non prescription narcotics". I would dismiss the appeal.

The reasons of Bastarache and LeBel JJ. were delivered by

LeBEL J.:--

I. Introduction

¶ 27 I have read the reasons of my colleague Charron J. Although I agree with her that the appeal should be dismissed, I reach this result on a different basis. In my opinion, there is statutory authority for the kind of order made by the sentencing judge. But the terms of the order were open to review under s. 8 of the *Canadian Charter of Rights and Freedoms.* As they did not meet the requirements of s. 8, the appeal should fail.

¶ 28 I need not return to the facts of this appeal, which were fully reviewed by Charron J. I will focus on the two legal issues raised by the case at bar. I will begin by considering whether statutory authority for the order can be found in the *Criminal Code*, R.S.C. 1985, c. C-46. Then, I will turn to the issue of whether the discretion delegated to the sentencing judge was exercised in conformity with the *Charter*.

[page421]

II. Statutory Basis for the Order

¶ 29 This case is, first and foremost, one raising a problem of statutory interpretation. Once more, the courts are trying to ascertain the intention of Parliament using, I assume, the modern approach of purposive interpretation (see S. Beaulac and P.-A. Côté, "Driedger's 'Modern Principle' at the Supreme Court of Canada: Interpretation, Justification, Legitimization" (2006), 40 *R.J.T.* 131). In this context, I readily concede that a purely textual reading of the relevant provisions of the *Criminal Code* (ss. 732.1(3)(*c*) and 732.1(3)(*h*)) would not resolve the issue. Nowhere do these provisions grant the sentencing judge, in so many words, the discretion to impose on the accused, in a probation order, an obligation to give samples of bodily substances. The *Criminal Code* expressly lists a number of mandatory and optional conditions, which are reviewed by my colleague in her reasons. Section 732.1(3)(*c*) authorizes the prohibition of the consumption of drugs or alcohol, but says nothing about monitoring the

interdiction. Then, s. 732.1(3)(*h*), which plays the role of a basket or residual clause, refers merely to "such other reasonable conditions as the court considers desirable ... for protecting society and for facilitating the offender's successful reintegration into the community". These words do not by themselves clearly grant a discretion. Read in context, however, they do.

¶ 30 To determine whether statutory authority for the order exists, the court must consider the context, namely probation and sentencing. A probation order is framed in a situation in which the court must address, in an individualized manner, the imperatives of the protection of society and rehabilitation of the accused. The sentencing judge is required to address the circumstances of the case and to devise terms that are reasonable in their context. The focus of the analysis remains the reasonableness of the conditions themselves. They are reasonable, and thus authorized by the statute, if they complement terms provided for in the *Code* [page422] and address the objectives of the protection of society and the reintegration of the accused into the community.

¶ 31 In a legal and factual environment such as this, the *Code* cannot provide for everything. Parliament has wisely delegated to sentencing judges a reasonable discretion to frame terms that will allow them to address the particular situation of each accused. A reasonable condition that can be connected with the categories of terms contemplated by the *Code* is grounded in an implied, but solid, statutory authority. The condition may then face a second level of scrutiny under the *Charter*, but it would not lie outside the jurisdiction of the sentencing judge.

¶ 32 The *Criminal Code* provides for conditions concerning alcohol and drug use. Prohibitions or restrictions on their use appear to have become almost standard terms of many probation orders. Nevertheless, the *Code* remains vague, even silent, about the monitoring of these conditions, although, according to well-known textbooks on sentencing, probation orders often incorporate monitoring procedures (C. C. Ruby, *Sentencing* (6th ed. 2004), at para. 10.57; A. Manson, P. Healy and G. Trotter, *Sentencing and Penal Policy in Canada* (2000), at p. 280).

¶ 33 The residual clause in s. 732.1(3)(*h*) appears to have been designed to address the difficulties faced by trial judges in framing orders that fit the distinct situations of individual accused and that must be made effective. It is there to fill in gaps, allowing the sentencing judge to flesh out the terms of the probation order by adding reasonable conditions. Conditions will be reasonable if they address the situation of the accused and meet the standards of s. 8 of the *Charter*.

¶ 34 The residual clause was not adopted for the purpose of collecting evidence for future prosecution. [page423] It exists to make sure that the terms of probation orders are effective and can be implemented in a practical way. The fact that the *Criminal Code* contains no specific monitoring provisions simply reflects the generally individualized nature of the sentencing process and of probation orders.

¶ 35 The need for a monitoring mechanism may result from the nature of the obligations imposed on the accused by the probation order. Absent a monitoring procedure in such circumstances, it might

rightly be said that Parliament spoke for nothing. To deny the existence of implied statutory powers in the present case does not comport with the approach of this Court, which has not hesitated to acknowledge the existence of such powers when the need for them flows from the nature of the substantive provisions of a law. For example, in one *Charter* case, which concerned public schools and their students, the Court found implied authority for conducting reasonable searches of students in the statutory obligations of schools and teachers to maintain order and discipline (*R. v. M. (M.R.)*, [1998] 3 S. C.R. 393, at para. 51, *per* Cory J.):

> If it is to be reasonable the search must be conducted reasonably and must be authorized by a statutory provision which is itself reasonable. There is no specific authorization to search provided in the *Education Act*, R.S.N.S. 1989, [c. 136,] or its regulations. Nonetheless, the responsibility placed upon teachers, and principals to maintain proper order and discipline in the school and to attend to the health and comfort of students by necessary implication authorizes searches of students. See s. 54 (b) and Regulation 3(7) and (9). Teachers must be able to search students if they are to fulfil the statutory duties imposed upon them. It is reasonable, if not essential to provide teachers and principals with this authorization to search. It is now necessary to consider the circumstances in which the search itself may be considered to be reasonable.

¶ 36 With respect for those who hold other views, under very well-established rules of statutory interpretation, the *Criminal Code* grants the sentencing [page424] judge the authority to include monitoring procedures in probation orders. To hold otherwise might well cause unforeseen and undesirable effects, as the inflexibility of such an interpretative approach would likely require Parliament to attempt to foresee a wide range of individual situations and to address them in minute detail. A drafting technique such as this would hardly be consistent with the canons of sound legal drafting, even if it were feasible.

¶ 37 Moreover, a narrow interpretation of the residual clause would cast doubt on a number of useful monitoring methods, which sentencing judges appear to be resorting to with increasing frequency. For example, it might prevent the use of electronic monitoring, which allows probation officers or public authorities to make sure that conditions relating to house arrest or curfews are complied with. I note that a number of judges have found such conditions to be valid:

> The conclusion is that section 732.1(3)(h) allows orders which restrict a defendant's lifestyle, such as curfews, orders that he or she not frequent specified places, or associate with specified persons, or orders that a defendant be confined on electronic monitoring.
>
> ...
>
> The terms of probation can control the defendant's lifestyle. For example, a defendant might be ... ordered to wear an electronic monitoring device ... .

...

> Thus, curfews, house arrest (with or without electronic monitoring), bed checks ... *etc.*, can all be appropriate "other conditions". It does not matter whether one sees them as rehabilitative measures, control measures, or punishment. What counts is not the label but an intent that the condition should further public protection or the acceptance of the defendant in the community, and some reasonable grounds for belief that it will [page425] have a tendency to effect those purposes. [Emphasis added.]
> (T. W. Ferris, *Sentencing: Practical Approaches* (2005), at pp. 79, 116 and 216-17)

Ferris reports that the courts in the following cases held that electronic monitoring is lawful under s. 732.1(3)(*h*) : *R. v. Carlson* (1996), 141 Sask. R. 168 (C.A.); *R. v. Curtis* (1996), 144 Sask. R. 156 (C. A.); *R. v. McLeod* (1992), 109 Sask. R. 8 (C.A.).

¶ 38 The range of possible conditions is broad. The purpose of such conditions is often to control aspects of the lifestyle of an accused to ensure that the goals of probation -- protection of society and reintegration into the community -- are achieved.

¶ 39 We should not assume that such a discretion would be abused by sentencing judges or exercised in an unconstitutional manner in the absence of a detailed statutory framework. In another context -- a case concerning an exercise of discretion by an administrative authority -- this Court asserted that it should not rely on assumptions of prospective breaches of the *Charter*:

> I do not think there is any constitutional rule that requires Parliament to deal with Customs' treatment of constitutionally protected expressive material by legislation (as the appellants contend) rather than by way of regulation (as Parliament contemplated in s. 164(1)(*j*)) or even by ministerial directive or departmental practice. Parliament is entitled to proceed on the basis that its enactments "will be applied constitutionally" by the public service.
>
> ...
>
> [I]t is in the nature of government work that the power of the state is exercised and the *Charter* rights of the citizen may therefore be engaged. While there is evidence of actual abuse here, there is the *potential* for [page426] abuse in many areas, and a rule requiring Parliament to enact in each case special procedures for the protection of *Charter* rights would be unnecessarily rigid. [Underlining added.]
> (*Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [2000] 2 S.C.R. 1120, 2000 SCC 69, at paras. 71 and 137)

¶ 40 Any challenge in the instant case should have related to the reasonableness of the order under s. 8 of the *Charter*. The authority to impose the monitoring conditions exists. It remains to be seen whether

the conditions meet the standards of the *Charter* (see Ruby, at para. 10.63).

¶ 41 Before I move on to some brief comments on the application of s. 8 in the context of the case at bar, I must add that I agree with Charron J. that the part of the order that would, in essence, turn a positive test into a breach of the conditions set out in the order is contrary to the principles of criminal law. Guilt must be proved in the usual manner, that is, beyond a reasonable doubt, and the accused is entitled to the protection of the law of criminal evidence and criminal procedure.

III. Application of Section 8

¶ 42 Section 8 raises difficulties in respect of parts of the order. I agree that the part compelling the accused to undergo blood tests would be far too intrusive and would breach s. 8 absent a statutory framework consistent with the standards of the *Charter*.

¶ 43 Although it may very well be a more efficient way to monitor compliance, random drug testing at the probation officer's discretion could become highly arbitrary. Courts would have difficulty defining a proper framework to supplement the silence of the *Code*. This is a situation where Parliament would be in a better position to address the issue. Its solution would then be open to review by the courts under s. 8 and s. 1 of the *Charter*.

[page427]

¶ 44 For these reasons, I agree with my colleague that the appeal should be dismissed.

Solicitors:

Solicitor for the appellant: Attorney General of British Columbia, Vancouver.

Solicitor for the respondent: Garth Barriere, Vancouver.

Solicitor for the intervener the Attorney General of Canada: Attorney General of Canada, Vancouver.

Solicitors for the intervener the Criminal Lawyers' Association (Ontario): Kapoor & Stribopoulos, Toronto.

QL Update: 20070309
cp/e/qllls