Date: 20060726

Docket: A-580-05

Citation: 2006 FCA 265

CORAM: **DÉCARY J.A.**
LINDEN J.A.
SHARLOW J.A.

BETWEEN:

SHAUN JOSHUA DEACON

Appellant

and

ATTORNEY GENERAL OF CANADA

Respondent

Heard at Vancouver, British Columbia, on June 26, 2006.

Judgment delivered at Ottawa, Ontario, on July 26, 2006.

REASONS FOR JUDGMENT BY: LINDEN J.A.

CONCURRED IN BY: DÉCARY J.A.
SHARLOW J.A.

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REASONS FOR JUDGMENT

LINDEN J.A.

I. INTRODUCTION

[1] This appeal raises the issue of the jurisdiction of the National Parole Board, in the case of long-term offenders, to require the taking of medication as a condition for release, without the consent of the offender. If such jurisdiction exists, this Court must then determine whether such a condition complies with the rights guaranteed under the *Canadian Charter of Rights and Freedoms*.

[2] This is an appeal by Shaun Joshua Deacon (the appellant) from a decision of the Federal Court dated November 4, 2005 (reported at (2005), 67 W.C.B. (2d) 738, 2005 FC 1489), dismissing

the appellant's application for judicial review in respect of a decision of the National Parole Board (NPB or Board), dated February 8, 2005, which had confirmed all the conditions of the appellant's long-term supervision order.

[3] The appellant challenges the condition of his long-term supervision order requiring him to "take medication as prescribed by a physician". The medication prescribed by the appellant's physicians consists of psychopharmacological therapy designed to address his sexual fantasies, urges and behaviours, his post-traumatic stress disorder and his anxiety. In particular, the appellant has been prescribed anti-androgen medication, sometimes dramatically described as "chemical castration".

[4] For the following reasons, we conclude that the condition challenged by the appellant in this case falls within the jurisdiction of the Board. In addition, we find that although the condition at issue engages the appellant's constitutional rights to liberty and security of the person, the limitation of these rights is in accordance with the principles of fundamental justice, and therefore does not infringe section 7 of the *Charter*. Accordingly, we would dismiss the appeal.

II. THE FACTS

[5] The appellant has been diagnosed as a homosexual pedophile, and has a lengthy history of sexual offences against children. The appellant's criminal history is set out in some detail by the British Columbia Court of Appeal in *R. v. Deacon* (2004), 182 C.C.C. (3d) 257 at paras. 4-14. For the purposes of this appeal, it is sufficient to note that the appellant's offences follow a predictable

pattern in which the appellant wins the affection and confidence of children and then sexually abuses them.

[6] The appellant was declared a long-term offender, pursuant to s.753.1(1) of the *Criminal Code*, on August 4, 1998. The predicate offences for the long-term offender application, which involved an 11-year-old boy, occurred while the appellant was on probation after serving a two-year sentence for a previous offence of sexual interference with a child. The appellant was sentenced to three years' imprisonment for these offences, and was made subject to a long-term supervision order for the ten year maximum period available.

[7] The appellant was released on long-term supervision for the first time on August 2, 2001. At that time, the conditions of the appellant's long-term supervision order included a prohibition from having any contact with children under 16 years, and a requirement that he live at a specified community residential facility. The long-term supervision order did not include the condition challenged on this appeal.

[8] Three weeks after being released on long-term supervision, the appellant initiated a relationship with a 10 year-old boy. This conduct, which involved contact with a child consistent with the appellant's modus operandi, resulted in the appellant's conviction for breach of his long-term supervision order, for which he was sentenced to two years imprisonment (*R. v. S.J.D.*, [2002] B.C.J. No. 2745 (QL) (B.C. Prov. Ct. (Crim. Div.)), sentence aff'd (2004), 182 C.C.C. (3d) 257 (B.C.C.A.)).

[9] The appellant resumed serving under his long-term supervision order on November 12, 2004. Prior to his release from custody, the Board conducted a review of the appellant's circumstances to determine what special conditions might be appropriate. This time, in its pre-release decision of October 22, 2004, the Board established the following new conditions for the appellant's long-term supervision:

> 1. To reside at a CRF/CCC [Community Residential Facility / Community Correctional Centre].
> 2. Participate in community based sex offender program and psychological counselling.
> 3. Take medication as prescribed by a physician.
> 4. Report all relationships to your Parole Supervisor.
> 5. Not to attend places where children under the age 16 are likely to be. . .
> 6. No indirect or direct contact with your victims unless pre-approved by your Parole Supervisor in writing. . .
> 7. No direct or indirect contact with any child under the age of 16 and women or guardians of children under the age of 16 unless pre-approved by your Parole Supervisor.

[10] Pursuant to condition 3 of the Board's long-term supervision order, the appellant's physicians have prescribed five different prescription medications: Lupron, received monthly by intramuscular injection, to lower libido and control sexual fantasies; Topiramate, taken daily by mouth, to treat post-traumatic stress disorder; Zoloft, taken daily by mouth, to treat anxiety and lower libido; Lipitor, taken daily by mouth, to lower the appellant's high cholesterol, a side effect of the other medication; and, Prometrium, taken daily by mouth, to treat the side effects of Lupron, which can cause the development of female characteristics. The appellant is also required to take

Tums calcium tablets and multi-vitamins, due to the calcium and vitamin deficiencies caused by the other medications.

[11] The appellant complains of numerous side effects caused by the prescribed medications, including mood swings, drowsiness, vomiting, nausea and changes to bone density which over many years can bring on osteoporosis. The medications also cause large discolourations to appear on the appellant's body.

[12] On January 27, 2005, the appellant applied to the Board for a variation of certain conditions of his long-term supervision order and, in particular, sought the deletion of the condition that required him to take medication as prescribed by a physician.

III. THE ISSUES

[13] The following issues are raised by this appeal:

(A) Does the National Parole Board have statutory jurisdiction to impose, on a long-term offender subject to a long-term supervision order after the expiry of his warrant of committal, a special condition to take medication as prescribed by a physician?

(B) Does the special condition to take medication as prescribed by a physician constitute an infringement of the appellant's rights under section 7 of the *Canadian Charter of Rights and Freedoms*?

(C) If yes, is the limitation one which is reasonable, prescribed by law and demonstrably justified pursuant to section 1 of the *Charter*?

IV. CONSTITUTIONAL AND STATUTORY PROVISIONS

[14] The Board's statutory jurisdiction to impose conditions upon long-term offenders, to govern the supervision period following the expiry of the offender's sentence, is set out in subsection 753.2(1) of the *Criminal Code* and subsection 134.1(2) of the *Corrections and Conditional Release Act*, S.C. 1992, c. 20 (*CCRA*):

753.2 (1) Subject to subsection (2), an offender who is required to be supervised by an order made under paragraph 753.1(3)(*b*) [long term offender supervision order] shall be supervised in accordance with the *Corrections and Conditional Release Act* when the offender has finished serving	**753.2** (1) Sous réserve du paragraphe (2), le délinquant soumis à une ordonnance de surveillance aux termes du paragraphe 753.1(3) [ordonnance de surveillance de longue durée] est surveillé au sein de la collectivité en conformité avec la *Loi sur le système correctionnel et la mise en liberté sous condition* lorsqu'il a terminé de purger :
(*a*) the sentence for the offence for which the offender has been convicted; and	*a*) d'une part, la peine imposée pour l'infraction dont il a été déclaré coupable;
(*b*) all other sentences for offences for which the offender is convicted and for which sentence of a term of imprisonment is imposed on the offender, either before or after the conviction for the offence referred to in paragraph (*a*).	*b*) d'autre part, toutes autres peines d'emprisonnement imposées pour des infractions dont il est déclaré coupable avant ou après la déclaration de culpabilité pour l'infraction visée à l'alinéa *a*).
134.1 (2) The Board may establish conditions for the long-term supervision of the offender that it considers reasonable and necessary in order to protect society and to facilitate the successful reintegration into society of the offender.	**134.1** (2) La Commission peut imposer au délinquant les conditions de surveillance qu'elle juge raisonnables et nécessaires pour protéger la société et favoriser la réinsertion sociale du délinquant.

[15] Pursuant to subsection 134.1(1) of the *CCRA*, long-term offenders subject to long-term supervision orders are also deemed to be subject to the conditions prescribed in subsection 161(1) of the *Corrections and Conditional Release Regulations*, SOR/92-620, "with such modifications as the circumstances require". Subsection 161(1) of the Regulations sets out the following conditions:

> **161.** (1) For the purposes of subsection 133(2) of the Act, every offender who is released on parole or statutory release is subject to the following conditions, namely, that the offender
>
> (*a*) on release, travel directly to the offender's place of residence, as set out in the release certificate respecting the offender, and report to the offender's parole supervisor immediately and thereafter as instructed by the parole supervisor;
>
> (*b*) remain at all times in Canada within the territorial boundaries fixed by the parole supervisor;
>
> (*c*) obey the law and keep the peace;
>
> (*d*) inform the parole supervisor immediately on arrest or on being questioned by the police;
>
> (*e*) at all times carry the release certificate and the identity card provided by the releasing authority and produce them on request for identification to any peace officer or parole supervisor;
>
> (*f*) report to the police if and as instructed by the parole supervisor;
>
> (*g*) advise the parole supervisor of the offender's address of residence on release and
>
> **161.** (1) Pour l'application du paragraphe 133(2) de la Loi, les conditions de mise en liberté qui sont réputées avoir été imposées au délinquant dans tous les cas de libération conditionnelle ou d'office sont les suivantes :
>
> *a*) dès sa mise en liberté, le délinquant doit se rendre directement à sa résidence, dont l'adresse est indiquée sur son certificat de mise en liberté, se présenter immédiatement à son surveillant de liberté conditionnelle et se présenter ensuite à lui selon les directives de celui-ci;
>
> *b*) il doit rester à tout moment au Canada, dans les limites territoriales spécifiées par son surveillant;
>
> *c*) il doit respecter la loi et ne pas troubler l'ordre public;
>
> *d*) il doit informer immédiatement son surveillant en cas d'arrestation ou d'interrogatoire par la police;
>
> *e*) il doit porter sur lui à tout moment le certificat de mise en liberté et la carte d'identité que lui a remis l'autorité compétente et les présenter à tout agent de la paix ou surveillant de liberté conditionnelle qui lui en fait la demande à des fins d'identification;
>
> *f*) le cas échéant, il doit se

thereafter report immediately

(i) any change in the offender's address of residence,

(ii) any change in the offender's normal occupation, including employment, vocational or educational training and volunteer work,

(iii) any change in the domestic or financial situation of the offender and, on request of the parole supervisor, any change that the offender has knowledge of in the family situation of the offender, and

(iv) any change that may reasonably be expected to affect the offender's ability to comply with the conditions of parole or statutory release;

(*h*) not own, possess or have the control of any weapon, as defined in section 2 of the *Criminal Code*, except as authorized by the parole supervisor; and

(*i*) in respect of an offender released on day parole, on completion of the day parole, return to the penitentiary from which the offender was released on the date and at the time provided for in the release certificate.

présenter à la police, à la demande de son surveillant et selon ses directives;

g) dès sa mise en liberté, il doit communiquer à son surveillant l'adresse de sa résidence, de même que l'informer sans délai de :

(i) tout changement de résidence,

(ii) tout changement d'occupation habituelle, notamment un changement d'emploi rémunéré ou bénévole ou un changement de cours de formation,

(iii) tout changement dans sa situation domestique ou financière et, sur demande de son surveillant, tout changement dont il est au courant concernant sa famille,

(iv) tout changement qui, selon ce qui peut être raisonnablement prévu, pourrait affecter sa capacité de respecter les conditions de sa libération conditionnelle ou d'office;

h) il ne doit pas être en possession d'arme, au sens de l'article 2 du *Code criminel*, ni en avoir le contrôle ou la propriété, sauf avec l'autorisation de son surveillant;

i) s'il est en semi-liberté, il doit, dès la fin de sa période de semi-liberté, réintégrer le pénitencier d'où il a été mis en liberté à l'heure et à la date inscrites à son certificat de mise en liberté.

[16] The following *Charter* provisions are also relevant to the issues raised in this appeal:

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.	**1.** La *Charte canadienne des droits et libertés* garantit les droits et libertés qui y sont énoncés. Ils ne peuvent être restreints que par une règle de droit, dans des limites qui soient raisonnables et dont la justification puisse se démontrer dans le cadre d'une société libre et démocratique.
7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.	**7.** Chacun a droit à la vie, à la liberté et à la sécurité de sa personne; il ne peut être porté atteinte à ce droit qu'en conformité avec les principes de justice fondamentale.

V. JUDICIAL HISTORY

(a) The Board's pre-release and post-release decisions

[17] The special conditions governing the appellant's long-term supervision were set by the Board in its pre-release decision of October 22, 2004. Following the appellant's application for a variation to his long-term supervision order, these conditions were confirmed by the Board in its post-release decision of February 8, 2005. The judicial review of this latter decision forms the basis for the current appeal.

[18] In its pre-release decision, the Board concluded that the prescribed special conditions "are each reasonable and necessary to manage your risk and to assist in your reintegration, and in the absence of these special conditions you pose a substantial risk to the community" (Appeal Book Vol. 1, p. 56). In determining that the conditions were necessary to manage the appellant's risk, the Board took into account the individual circumstances and history of the appellant, noting in particular that in the past the appellant had "shown no willingness to abide by the release conditions

imposed upon [him]", that the appellant had not participated in any programming to address his risk factors since he last reoffended, and that actuarial measures and psychological assessments indicated that the appellant posed a moderate to high risk to reoffend violently and a high risk to reoffend sexually (Appeal Book Vol. 1, p. 55-56).

[19] With respect to the special condition concerning medication, the Board explained its reasons as follows (Appeal Book Vol.1, p. 57):

> You have indicated a dissatisfaction with the level and type of medications prescribed to reduce your deviant arousals. You have threatened to stop taking these medications when you become frustrated. Your risk of reoffend [sic] will greatly escalate in the absence of taking these medications.

[20] In its post-release decision, the Board repeated many of the factors noted in the pre-release decision. In addition, the Board observed that "nothing has changed in the area of program participation to this date", and that the appellant "continue[s] to refuse to sign the consent form that will allow [him] to begin National Sex Offender Maintenance Program in the community" (Appeal Book Vol. 1, p. 75). With regard to medication, the Board commented as follows (Appeal Book Vol. 1, p. 75):

> You show a dangerous and erratic attitude towards abiding by a medication regime to manage deviant sexual arousals. In a memo to file dated October 8, 2004, the psychiatrist noted that when you were confronted with situations where you perceived that you had little control or in which you felt things were going badly, you resorted to threats to stop your medication. This attitude indicates you have not internalized any commitment to managing your deviant arousals towards children, and use your potential for violence as a way to manipulate outcomes for your own benefit.

[21] The Board concluded by confirming the condition concerning medication, “for the reasons described in the [pre-release] decision” (Appeal Book Vol. 1, p. 76).

(b) The Federal Court decision

[22] The Federal Court determined that the question of the Board’s jurisdiction to impose the medication condition was to be reviewed on the standard of correctness. Relying in large part on the analysis provided in *Normandin v. Canada*, [2005] 2 F.C.R. 373 (F.C.), aff’d [2006] 2 F.C.R. 112 (F.C.A.) and in *R. v. V.M.*, [2003] O.T.C. 97 (Ont. Sup. Ct.), the Applications Judge concluded that the Board’s jurisdiction under subsection 134.1(2) of the *CCRA* includes the power to impose a medical treatment condition in a long-term supervision order when the Board considers such a condition to be reasonable. In the appellant’s case, the Applications Judge noted, the Board found that the medical treatment would reduce the appellant’s risk to reoffend.

[23] The Applications Judge then considered whether the medical treatment condition violated the appellant’s rights under section 7 of the *Charter*. The Applications Judge concluded that the condition at issue “may violate the principle of fundamental justice that individuals should be free from unwanted medical treatment” (Reasons, para. 88). By virtue of the condition, the Applications Judge reasoned, the appellant is forced to choose between his right to security of the person and his liberty interest. The Applications Judge therefore concluded that the condition constitutes a *prima facie* violation of the appellant’s section 7 *Charter* rights, as “[t]he choice between the losses of section 7 *Charter* rights is not a choice that the State should normally be imposing on an individual” (Reasons, para. 88).

[24] However, the Applications Judge was satisfied that the section 7 violation was justified under section 1, as in his view the protection of the public provides the required pressing and substantial objective, the condition in question is rationally connected to this objective, and the condition also minimally impairs the appellant's section 7 rights. The Applications Judge noted in particular that "it is highly unlikely that the Applicant would have gained supervised release without the condition that he takes medication as prescribed by a physician" (Reasons, para. 89).

[25] The Applications Judge thus declined to interfere with the condition set by the Board. I agree with this decision, but for slightly different reasons on one aspect of the decision.

VI. ANALYSIS

(A) Does the National Parole Board have statutory jurisdiction to impose, on a long-term offender subject to a long-term supervision order after the expiry of his warrant of committal, a special condition to take medication as prescribed by a physician?

[26] This Court must first consider whether, at the administrative law level, the Board possesses the statutory jurisdiction to impose the condition at issue. In other words, apart from the question of *Charter* rights, does the condition fall within the jurisdiction of the Board? If the Board is found to have acted within its administrative law jurisdiction, this Court must then consider whether the condition is nevertheless inconsistent with the *Charter* (*Ross v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825 at paras. 31-33).

[27] As the Applications Judge rightly noted, the applicable standard of review is correctness. The question of the Board's administrative law jurisdiction to impose the condition at issue calls for an interpretation of the applicable statutory provisions. This is a question of pure law, which the Court is in a better position to decide than the Board. While the Board is entitled to deference in its determination of the conditions necessary to fulfil the purposes of the *CCRA* in relation to a particular offender, its jurisdiction to impose any given condition must be correctly established.

[28] The scope of the Board's jurisdiction to impose conditions on long-term offenders is set out in subsection 134.1(2) of the *CCRA*, which for convenience's sake I reproduce again:

134.1 (2) The Board may establish conditions for the long-term supervision of the offender that it considers reasonable and necessary in order to protect society and to facilitate the successful reintegration into society of the offender.	**134.1** (2) La Commission peut imposer au délinquant les conditions de surveillance qu'elle juge raisonnables et nécessaires pour protéger la société et favoriser la réinsertion sociale du délinquant.

[Emphasis added.]

[29] It is clear that Parliament intended to grant the Board a broad discretion to set conditions for the long-term supervision of offenders such as the appellant. It is also clear that the statute does not expressly confer upon the Board the jurisdiction to impose medical treatment conditions. The appellant argues that there exists a common law right to refuse medical treatment, and therefore, in the absence of an express conferral of jurisdiction on the Board, the power to impose medical treatment conditions was not properly conferred on the Board.

[30] The proper approach to statutory interpretation is well-established, as Sharlow J.A. observed in *Rooke v. Minister of National Revenue* (2002), 295 N.R. 125 (F.C.A.) at para. 10:

> 10 The principles to be applied in interpreting a statute have been stated many times, most recently by the Supreme Court of Canada in *Bell ExpressVu Limited Partnership v. Rex*, [2002] S.C.J. No. 43, 2002 SCC 42, at paragraph 26:
>
> > In Elmer Driedger's definitive formulation, found at p. 87 of his Construction of Statutes (2nd ed. 1983):
> >
> > > Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.
> >
> > Driedger's modern approach has been repeatedly cited by this Court as the preferred approach to statutory interpretation across a wide range of interpretive settings: see, for example, *Stubart Investments Ltd. v. The Queen*, [1984] 1 S.C.R. 536, at p. 578, per Estey J.; *Québec (Communauté urbaine) v. Corp. Notre-Dame de Bon-Secours*, [1994] 3 S.C.R. 3, at p. 17; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21; *R. v. Gladue*, [1999] 1 S.C.R. 688, at para. 25; *R. v. Araujo*, [2000] 2 S.C.R. 992, 2000 SCC 65, at para. 26; *R. v. Sharpe*, [2001] 1 S.C.R. 45, 2001 SCC 2, at para. 33, per McLachlin C.J.; *Chieu v. Canada (Minister of Citizenship and Immigration)*, [2002] S.C.J. No. 1, 2002 SCC 3, at para. 27. I note as well that, in the federal legislative context, this Court's preferred approach is buttressed by s. 12 of the Interpretation Act, R.S.C. 1985, c. I-21, which provides that every enactment "is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects".

The suitability of this approach to statutory interpretation was also recently reaffirmed by the Supreme Court of Canada in *Mazzei v. British Columbia (Director of Adult Forensic Psychiatric Services)*, 2006 SCC 7, a case involving the interpretation of the jurisdiction of the British Columbia Review Board to set conditions under Part XX.1 of the *Criminal Code*, concerning persons found not criminally responsible on account of mental disorder.

[31] The interpretation of subsection 134.1(2) must therefore start with an analysis of the purpose and object of the long-term supervision order, as established by the *CCRA* and Part XXIV of the *Criminal Code*.

[32] The object of the statutory regime for long-term offenders established by Part XXIV of the *Criminal Code* was considered by the Supreme Court of Canada in *R. v. Johnson*, [2003] 2 S.C.R. 357. The Court concluded that "Parliament did not intend the dangerous offender provisions and the long-term offender provisions to be considered in isolation of one another" (para. 39). Interpreting these provisions together, the Court noted (at para. 30-31) their potential overlapping application. Almost all dangerous offenders will satisfy the first two criteria for long-term offender designation set out in subsection 753.1(1), that is, facing a sentence of two years or more of imprisonment, and posing a substantial risk of re-offending, but only a smaller group of offenders will satisfy the third condition, namely offering a reasonable possibility of eventual control of risk. According to the Court, this reasonable possibility of eventual control of the risk in the community is a defining feature of the long-term supervision provisions:

> The very purpose of a long-term supervision order, then, is to protect society from the threat that the offender currently poses – and to do

> so without resort to the blunt instrument of indeterminate detention. If the public threat can be reduced to an acceptable level through either a determinate period of detention or a determinate period of detention followed by a long-term supervision order, a sentencing judge cannot properly declare an offender dangerous and sentence him or her to an indeterminate period of detention. (para. 32)

[33] More recently, in *Normandin v. Canada*, [2006] 2 F.C.R. 112, this Court articulated a similar view of the purpose of the long-term supervision provisions (at para. 40):

> Before this scheme [for long-term offenders] was established, a sexual offender could be sentenced as a dangerous offender for an indefinite period or a longer prison sentence. The scheme established by Parliament for long-term offenders within the community is a more flexible scheme that is more beneficial for them. Its purpose is to enhance the offender's social integration but without compromising the protection of society and the victims.

[34] The stated purpose and guiding principles enunciated in sections 100 and 101 of the *CCRA*, which are expressly made applicable to long-term supervision orders by virtue of section 99.1, support this interpretation. Section 100 states that the purpose of long-term supervision is "to contribute to the maintenance of a just, peaceful and safe society by means of decisions on the timing and conditions of release that will best facilitate the rehabilitation of offenders and their reintegration into the community as law-abiding citizens".

[35] Among the mandatory principles provided in section 101 to guide the Board in its decisions concerning release, paragraph 101(a) states that "the protection of society [shall] be the paramount consideration in the determination of any case", and paragraph 101(d) states that "parole boards [shall] make the least restrictive determination consistent with the protection of society". .

[36] In my view, the purpose of the long-term offender provisions is therefore clear. An offender whose conduct or behaviour is not "pathologically intractable", in that there is a reasonable possibility that the offender can eventually reach a stage where, although not curable, his or her risk can be controlled in the community, will now qualify for long-term offender status. Under the former provisions, such an offender – for example, a repeat sexual offender – might have been found to be a dangerous offender. Long-term supervision orders thus pursue two main objects: first, protecting society, and second, enhancing the social reintegration of long-term offenders, whenever possible, by granting release under the least restrictive conditions consistent with the protection of society.

[37] The jurisdiction conferred on the Board by virtue of the specific wording of subsection 134.1(2) must be read against this backdrop of general statutory purpose. As this Court held in *Normandin*, *supra*, the plain wording of subsection 134.1(2) "grants the Board a general power to set conditions for long-term offenders without restrictions as to their content and nature other than the requirement that they be necessary, reasonable and limited in duration" (para. 39). The jurisdiction granted to the Board by subsection 134.1(2) is necessarily "a broad and flexible discretionary authority" (*Normandin*, para. 44), designed to enable the Board to achieve the objectives of the long-term offender provisions.

[38] The interpretation suggested by the appellant would disregard the clearly-stated objectives of this statutory scheme. If the statutory purposes of protecting society and enabling social reintegration of long-term offenders through supervised release with the least restrictive conditions

possible are to be achieved, the Board must possess the power to impose a medical treatment condition in appropriate circumstances. Such conditions, when necessary to control the offender's risk of re-offending, fall within the Board's jurisdiction under subsection 134.1(2) of the *CCRA* to impose "reasonable and necessary" conditions.

[39] This broad interpretation of the Board's jurisdiction under subsection 134.1(2) also represents the interpretation most favourable to accuseds in a global sense. As Décary J.A. observed in *Cartier v. Canada (Attorney General)*, [2003] 2 F.C. 317 at para. 19, this principle of statutory interpretation is somewhat modified in the penal context of conditional release:

> 19 The proposition that in the event of ambiguity the Act should be interpreted in the offender's favour is correct in so far is it means that once society's protection is guaranteed the Board should, in a given case, choose the solution which is less injurious to the offender's freedom. However, it is incorrect in so far as the Act has to ensure at the outset that society is protected: if there is any ambiguity in that regard, it will operate in favour of the public interest rather than in the interest of the offender. . .

An interpretation of subsection 134.1(2) that enables the Board to impose a medical treatment condition in appropriate circumstances ensures that an accused will be given the benefit of available treatment options, both when a Court is considering whether the long-term offender designation is appropriate in a particular case, and later when the Board is considering what conditions are necessary to manage the offender's risk. The Board's ability to consider such treatment options ensures at each stage of the sentencing process that an offender will have access to the least restrictive sanction possible, consistent with the protection of the public. Thus, contrary to the appellant's assertion, the absence of an express conferral of jurisdiction with respect to medical

treatment conditions in subsection 134.1(2) does not preclude the Board from imposing such conditions.

[40] The Board is not in this case ordering the forcible administration of medication to the appellant. The common law right concerning non-consensual medical treatment (*Fleming v. Reid* (1991), 4 O.R. (3d) 74 at 84; *Starson v. Swayze*, [2003] 1 S.C.R. 722 at para. 75) is therefore not being violated in this case. The appellant is at liberty to refuse to take the prescribed medication. However, if he does, there will be consequences for such a refusal: the appellant will be in breach of his long-term supervision order and therefore liable to commitment under section 135.1 of the *CCRA* or imprisonment pursuant to section 753.3 of the *Criminal Code*. The basis and authority for these consequences is the appellant's status as a long-term offender, which status in turn was predicated on the Court's finding that the appellant satisfied the criteria prescribed by subsection 753.1(1).

[41] As a long-term offender, the appellant "retain[s] the rights and privileges of all members of society, except those rights and privileges that are necessarily removed or restricted as a consequence of the sentence" (*CCRA*, s.4(*e*)). In my view, the appellant's complaint in respect of the medical treatment condition imposed by the Board relates to a restriction necessarily consequent upon his sentence as a long-term offender. As a long-term offender, the appellant has been found to pose a substantial risk of re-offending, but one that has been judged reasonably capable of eventual control in the community. To fulfil the dual purposes with which it is charged under the long-term offender provisions, the Board must be able to consider all reasonable conditions that might be

reasonably capable of rendering the risk posed by him eventually manageable in the community. In the appellant's case, the Board has concluded – significantly, only after the appellant breached a previous long-term supervision order that did not include a medication condition – that medication is necessary to control the risk he poses. If the appellant does not want to take this medication, he may choose to refuse, but he thereby chooses also to face the consequences flowing from that decision, given his status as a long-term offender.

[42] Like the British Columbia Court of Appeal in *R. v. Goodwin* (2002),168 C.C.C. (3d) 14 at para. 32, I would therefore endorse the following analysis of Mr. Justice Hill in *R. v. Payne,* [2001] O.T.C. 15 (Ont. Sup. Ct.) at para. 138:

> 138 In my view, an offender on conditional release by way of a long-term supervision order may be compelled by a term of the order to undertake treatment and related pharmaceutical intervention where essential to management of the accused's risk of re-offending. In other words, the offender's consent to such a condition is not required. Should the offender breach terms of the order respecting treatment or medication, he or she is subject to apprehension with suspension of the order pursuant to s. 135.1 of the Act or to arrest and prosecution pursuant to s. 753.3(1) of the Code. The entire object of the long-term offender regime would be undermined by providing the offender the ability to defeat risk management. Accordingly, mandatory treatment and medication conditions in an order are a proportionate response to protecting the public from a person who, by definition, is a substantial risk to reoffend.

[43] The appellant argues that this Court should follow the approach adopted in *R. v. Kieling* (1991), 64 C.C.C. (3d) 124, in which the Saskatchewan Court of Appeal concluded that the Court had no jurisdiction to impose medical treatment as a condition of probation under then paragraph 737(2)(*h*) of the *Criminal Code* (now substantially re-worded as paragraph 732.1(3)(*h*)). In my

view, however, *Kieling* is easily distinguishable from the current appeal. First, the principles of sentencing applicable to an offender on probation are different from those applicable to long-term offenders, for whom protection of the public is the paramount consideration. Second, the wording of the jurisdiction-granting provision at issue in *Kieling* is materially different from subsection 134.1(2) of the *CCRA*.

[44] At the time of *Kieling*, the Court was empowered under then subsection 737(2) to specify in a probation order any of the conditions listed in paragraphs 737(2)(*a*) through (*h*). Paragraph 737(2)(*h*) further empowered the Court to set in probation orders "such other reasonable conditions as the court considers desirable for securing the good conduct of the accused and for preventing a repetition by him of the same offence or the commission of other offences". The Saskatchewan Court of Appeal interpreted the words "such other reasonable conditions" as restricted by the common meaning of the conditions listed in the previous paragraphs, which all referred to either affirmative conduct or abstention from conduct, and of which none presented any risk to the accused. Therefore, compelling the accused to take medication as a condition of probation was found not to be within the jurisdiction of the judge. However, subsection 134.1(2), the jurisdiction-granting provision in the current appeal, does not employ the "such other" wording, nor any other restrictive wording of this kind. In my opinion, therefore, the *Kieling* precedent does not assist the appellant.

[45] I note that the appellant is not in this appeal challenging the specific medication prescribed by his physicians, or arguing that another form of medical or other treatment would be more

effective or less injurious. He is also not contesting the Board's determination concerning the reasonableness or necessity of a medical treatment condition in his particular case. If these issues had been raised in this case, the analysis might have proceeded differently, and according to a more deferential standard of review. However, the appellant's sole assertion in this appeal is that a medical treatment condition is, in all cases of long-term supervision, outside the statutory jurisdiction of the Board. The particularities of the appellant's circumstances – his history and risk profile, the medical regimen prescribed to him, its effectiveness and side effects – have not been raised here and are therefore largely irrelevant to this appeal as it has been argued.

[46] I conclude that the Applications Judge correctly decided that the condition at issue falls within the jurisdiction of the Board under subsection 134.1(2) of the *CCRA*. Accordingly, this ground of appeal fails.

(B) Does the special condition to take medication as prescribed by a physician constitute an infringement of the appellant's rights under section 7 of the *Canadian Charter of Rights and Freedoms*?

[47] Having concluded that the Board acted within its jurisdiction in imposing the medical treatment condition at issue, this Court must now consider whether the imposition of that condition is nevertheless a breach of the appellant's *Charter* rights.

[48] The three-stage approach for determining whether there has been a breach of section 7 was set out as follows by the Supreme Court of Canada in *R. v. White*, [1999] 2 S.C.R. 417 at para. 38:

> Where a court is called upon to determine whether s. 7 has been infringed, the analysis consists of three main stages, in accordance with the structure of the provision. The first question to be resolved is whether there exists a real or imminent deprivation of life, liberty, security of the person, or a combination of these interests. The second stage involves identifying and defining the relevant principle or principles of fundamental justice. Finally, it must be determined whether the deprivation has occurred in accordance with the relevant principle or principles: see R. v. S. (R.J.), [1995] 1 S.C.R. 451, at p. 479, per Iacobucci J. Where a deprivation of life, liberty, or security of the person has occurred or will imminently occur in a manner which does not accord with the principles of fundamental justice, a s. 7 infringement is made out.

[49] In the current appeal, the respondent has conceded that requiring the appellant, a competent adult, to take medication on pain of re-incarceration or prosecution constitutes a violation of the "liberty" and "security of the person" elements of section 7. The first stage of the section 7 analysis is therefore satisfied.

[50] The second stage of the analysis involves the identification of the relevant principles of fundamental justice. The concept of "principle of fundamental justice" was defined as follows by Gonthier and Binnie JJ. in *R. v. Malmo-Levine*, [2003] 3 S.C.R. 571, at paras. 112-113:

> 112 In *Re B.C. Motor Vehicle Act*, *supra*, Lamer J. (as he then was) explained that the principles of fundamental justice lie in "the basic tenets of our legal system. They do not lie in the realm of general public policy but in the inherent domain of the judiciary as guardian of the justice system" (p. 503). This Court provided further guidance as to what constitutes a principle of fundamental justice for the purposes of s. 7, in *Rodriguez*, *supra*, *per* Sopinka J. (at pp. 590-91 and 607):
>
> > A mere common law rule does not suffice to constitute a principle of fundamental justice, rather, as the term implies, principles upon which there is

> some consensus that they are vital or fundamental to our societal notion of justice are required. Principles of fundamental justice must not, however, be so broad as to be no more than vague generalizations about what our society considers to be ethical or moral. They must be capable of being identified with some precision and applied to situations in a manner which yields an understandable result. They must also, in my view, be legal principles.
>
> . . .
>
> While the principles of fundamental justice are concerned with more than process, reference must be made to principles which are "fundamental" in the sense that they would have general acceptance among reasonable people. [Emphasis added.]

> 113 The requirement of "general acceptance among reasonable people" enhances the legitimacy of judicial review of state action, and ensures that the values against which state action is measured are not just fundamental "in the eye of the beholder only": *Rodriguez*, at pp. 607 and 590 (emphasis in original). In short, for a rule or principle to constitute a principle of fundamental justice for the purposes of s. 7, it must be a legal principle about which there is significant societal consensus that it is fundamental to the way in which the legal system ought fairly to operate, and it must be identified with sufficient precision to yield a manageable standard against which to measure deprivations of life, liberty or security of the person.

[51] In *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, [2004] 1 S.C.R. 76, the Court affirmed this three-pronged definition of “principles of fundamental justice” (at para. 8):

> 8 Jurisprudence on s. 7 has established that a "principle of fundamental justice" must fulfill three criteria: *R. v. Malmo-Levine*, [2003] 3 S.C.R. 571, 2003 SCC 74, at para. 113. First, it must be a legal principle. This serves two purposes. First, it "provides meaningful content for the s. 7 guarantee"; second, it avoids the "adjudication of policy matters": *Re B.C. Motor Vehicle Act*, [1985]

> 2 S.C.R. 486, at p. 503. Second, there must be sufficient consensus that the alleged principle is "vital or fundamental to our societal notion of justice": *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519, at p. 590. The principles of fundamental justice are the shared assumptions upon which our system of justice is grounded. They find their meaning in the cases and traditions that have long detailed the basic norms for how the state deals with its citizens. Society views them as essential to the administration of justice. Third, the alleged principle must be capable of being identified with precision and applied to situations in a manner that yields predictable results. Examples of principles of fundamental justice that meet all three requirements include the need for a guilty mind and for reasonably clear laws.

[52] Before considering the specific principles of justice advanced by the appellant against the above standard, I begin with a few general observations concerning the specific context in which the *Charter* issue arises in this case, namely Part XXIV of the *Criminal Code*, which contains both the long-term offender and dangerous offender provisions. The special condition challenged by the appellant is imposed in the context of the long-term offender regime, which itself is part of a larger set of provisions crafted to deal with the small group of offenders who pose an extraordinary, continuing risk to the public, and are therefore subject to preventive conditions and sanctions of various forms. As the Supreme Court of Canada observed in *Johnson, supra*, “Parliament did not intend the dangerous offender provisions and the long-term offender provisions to be considered in isolation of one another” (para. 39).

[53] This specific context must be borne in mind when considering whether the condition at issue breaches the appellant’s section 7 rights. We cannot deal with long-term offenders as if there are no constitutional *Charter* rights; equally, we cannot consider *Charter* rights as if there are no long-term offenders. “[W]here the regime involves a comprehensive administrative and adjudicatory structure.

. . it is appropriate to look at the regime as a whole. One must consider the special problem to which the scheme is directed" (*Winko v. British Columbia (Forensic Psychiatric Institute)*, [1999] 2 S.C.R. 625 at para. 65). The principles of fundamental justice may be affected by this context, for it is recognized that "the requirements of fundamental justice are not immutable; rather, they vary according to the context in which they are invoked" (*R. v. Lyons*, [1987] 2 S.C.R. 309 at para. 85; see also *Winko*, *supra* at para. 66). In particular, context is important to the balancing of individual and societal interests within section 7, a consideration comprising a recognized part of the process of elucidating the content and scope of a particular principle of fundamental justice (*Winko*, *supra* at para. 66; *Malmo-Levine*, *supra* at paras. 98-99; *R. v. Demers*, [2004] 2 S.C.R. 489 at para. 45). As the Supreme Court stated in *Malmo-Levine*, *supra*, "[t]he delineation of the principles of fundamental justice must inevitably take into account the social nature of our collective existence" (para. 99).

[54] The appellant submits that the special condition of his long-term supervision order, requiring him to take medication as prescribed by a physician, violates two principles of fundamental justice: first, the principle that medical treatment must be expressly authorized by legislation; and, second, the principle that all competent adults have the right to refuse medical treatment. I will consider each of these alleged principles in turn.

(i) Express legislative authorization of medical treatment

[55] The appellant asserts that in the context of a delegated, statutory decision-maker such as the Board, it is a principle of fundamental justice that the decision-maker may only deprive a person of

his or her security of the person if the legislature has expressly provided such authority in clear statutory language. In other words, the appellant contends that the principles of fundamental justice require that there be express statutory authorization if non-consensual medical treatment is to be imposed.

[56] I cannot accept the appellant's submission in this regard. In my view, while the state cannot impose non-consensual medical treatment without authorization by law, there exists no principle of fundamental justice requiring that such authorization occur by express statutory language. In the current appeal, the required authorization by law is found in subsection 134.1(2) of the *CCRA*, which confers jurisdiction on the Board to impose a medical condition in a long-term supervision order, when "reasonable and necessary in order to protect society and to facilitate the successful reintegration into society of the offender". The Board exercised this jurisdiction in the case of the appellant, and the appellant has not in this appeal challenged the reasonableness of the Board's decision in this regard. In my view, therefore, the positive law requirement of the principles of fundamental justice has been met in this case.

[57] My conclusion that the principles of fundamental justice do not require express statutory authorization is supported by the *Malmo-Levine* three-part test for principles of fundamental justice, by the case law concerning deprivations of bodily integrity under section 7, and by the case law concerning such searches under section 8 of the *Charter*. I will briefly explain each of these bases for my conclusion.

[58] As set out in *Malmo-Levine*, *supra*, a principle of fundamental justice must satisfy three criteria: it must be a legal principle, there must be significant social consensus that it is fundamental to the way in which the legal system ought fairly to operate, and it must be capable of being identified with precision and applied to situations in a manner that yields predictable results. The principle suggested by the appellant, that medical treatment must be expressly authorized by legislation, might satisfy the first criterion. The third criterion might also be met. However, the second criterion is not satisfied: there is no "significant social consensus" that the requirement of express statutory authorization for medical treatment is fundamental to the way in which the legal system ought fairly to operate. A general authorization by way of a reasonable law is, in my view, sufficient to conform to the principles of fundamental justice. The principles of fundamental justice may well impose procedural and substantive constitutional limitations on the state's ability to compel medical treatment, but the requirement of express statutory authorization proposed by the appellant is not among these constitutional limitations.

[59] It is significant that the appellant is unable to point to any precedent concerning a deprivation of bodily integrity in which express statutory authorization has been mentioned as a requirement for conformity with the principles of fundamental justice under section 7. Many of the cases concerning medical treatment conditions have been decided on the basis of an interpretation of statutory jurisdiction, and not constitutional analysis: see, for example, *R. v. Kieling* (1991), 64 C.C.C. (3d) 124; *R. v. J.J.L.* (2001), 153 Man. R. (2d) 153; *R. v. Shoker* (2004), 206 B.C.A.C. 266 at para. 6, re medical treatment condition. The two appellate cases concerning medical conditions decided upon section 7 grounds provide little analysis of the precise requirements of fundamental

justice in this context, and make no mention of a requirement of express statutory authorization. In *R. v. Rogers* (1990), 61 C.C.C. (3d) 481, a case concerning a medical treatment condition in a probation order, the British Columbia Court of Appeal concluded that such a condition was "an unreasonable restraint upon the liberty and security of the accused person", and was "contrary to the principles of fundamental justice and, save in exceptional circumstances, cannot be saved by s. 1 of the *Charter*" (p. 488). Such "exceptional circumstances" were held not to exist in *Rogers*, but were invoked by the same Court in *R. v. Goodwin* (2002), 168 C.C.C. (3d) 14, a case concerning a long-term offender. Neither case provided much analysis of the requirements of the principles of fundamental justice in this context, nor mentioned express statutory authorization.

[60] Express statutory authorization also receives no mention in other cases in which deprivations of bodily integrity were challenged under section 7. In *Jackson v. Joyceville Penitentary*, [1990] 3 F.C. 55 (T.D.) and *Re Dion and The Queen* (1986), 30 C.C.C. (3d) 108 (Qc. Sup. Ct.), inmates challenged regulations authorizing mandatory urine sampling for the detection and deterrence of drug and intoxicant use in prisons, and providing for consequences for positive test results. In both cases, the regulations were held to contravene the principles of fundamental justice under section 7. Neither case, however, makes any mention of a requirement of express statutory authorization. Rather, it was the absence of any standards or criteria limiting the arbitrary use of the power that was found to offend the principles of fundamental justice (*Jackson* at paras. 97-98, *Dion* at 119-125).

[61] The appellant also draws this Court's attention to the caselaw concerning section 8 of the *Charter*, and in particular the requirements that a constitutional search must be authorized by law, and such law must itself be reasonable (*R. v. Collins*, [1987] 1 S.C.R. 265 at para. 23). These requirements, the appellant submits, should be imported by analogy into the principles of fundamental justice of section 7. The appellant argues that to have any value as a constitutional requirement, the authorization by law requirement under section 7 must have content. Such content is provided, he submits, by requiring express statutory authorization.

[62] In my view, however, the section 8 jurisprudence cited by the appellant is insufficient to support his argument. Section 8 does indeed require authorization by law for any search or seizure, and this limitation has been further amplified by the requirement that such authorizing law must itself be reasonable. However, I am aware of no section 8 authority prescribing a constitutional requirement of express statutory authorization as a feature of such reasonableness. In fact, searches incident upon lawful arrest conducted pursuant to the common law power – even when intruding into privacy and bodily integrity – have been recognized as constitutional, provided certain conditions are met: *Cloutier v. Langlois*, [1990] 1 S.C.R. 158 (common law power to "frisk" incident upon arrest recognized as constitutionally reasonable); *R. v. Stillman*, [1997] 1 S.C.R. 607 (common law power found not to extend to seizure of bodily samples); *R. v. Golden*, [2001] 3 S.C.R. 679 (common law power to strip search incident upon arrest recognized as constitutionally reasonable; search in that case found to be unreasonable).

[63] In these cases, after defining the scope of the common law power at issue, the Supreme Court has expressly considered whether this common law rule was itself constitutional, according to the standard of reasonableness applicable under section 8: see *Golden*, *supra* at paras. 25 and 104; *Stillman*, *supra* at para. 49. Clearly, therefore, there is no constitutional requirement under section 8 that a deprivation of bodily integrity must be expressly authorized by statute in order to meet the requisite constitutional standard of reasonableness. Rather, section 8 requires that the authorizing law must be reasonable, and this necessary reasonableness can be satisfied by common law or statutory rules.

[64] In my view, the requirement of reasonableness can be imported from section 8 into the section 7 analysis of the principles of fundamental justice. The deprivation, through imposed medication, of a person's liberty or security of the person must, if it is to conform to the principles of fundamental justice, occur pursuant to an authorizing law, and such law must itself be reasonable. Reasonableness does not, however, require that the authorizing law consist of an express statutory authorization.

[65] The specific requirements of reasonableness in the context of the principles of fundamental justice will fall to be determined in future cases in which this question arises. I am satisfied, for the purposes of the current appeal, that the authorizing law in this case – namely subsection 134.1(2) of the *CCRA* and its attendant procedures under subsection 134.1(4) concerning Board review of long-term supervision conditions – meets the constitutional standard of reasonableness. The Board's jurisdiction to set conditions is limited, by the wordings of subsection 134.1(2), to conditions

"reasonable and necessary in order to protect society and to facilitate the successful reintegration into society of the offender". This limitation ensures that, in the context of the long-term offender regime, the proper balance is struck between the societal interest in public protection and the individual interests of the offender in gaining release under the least restrictive conditions consistent with the protection of society.

[66] The wording of subsection 134.1(2) also limits the specific medical treatment condition at issue in this appeal: the medication prescribed to the appellant by his physicians must also be "reasonable and necessary in order to protect society and to facilitate the successful reintegration into society of the offender". An extensive array of procedural protections are afforded to the appellant to ensure compliance with this limitation: the conditions of his long-term supervision order are set by the Board based on a review of his complete file, including written submissions by the appellant's counsel, the appellant has a right to a hearing before the Board (which he chose to waive in this case), and judicial review of the Board's decision is available. In addition, under subsection 134.1(4), the Board is empowered to review and vary the conditions of a long-term supervision order. The appellant availed himself of this procedure to mount the current appeal, and could do so again if necessary, for example if the appellant's circumstances or treatment requirements change, rendering the treatment currently prescribed unreasonable and unnecessary. Given these procedural protections, and given the special context and purpose of the long-term offender regime, the condition at issue is consistent with the constitutional standard of reasonableness under the principles of fundamental justice.

[67] For these reasons, I conclude therefore that express statutory authorization for medical treatment is not a principle of fundamental justice under section 7. The positive law requirement of the principles of fundamental justice is satisfied in this case by the statutory jurisdiction conferred on the Board by subsection 134.1(2) of the *CCRA*.

(ii) The right to refuse medical treatment

[68] The appellant also submits that it is a principle of fundamental justice that all competent adults have the right to refuse medical treatment. Any exceptions to this rule, he argues, must be upheld under section 1, if at all. In the circumstances of this case, the appellant is required, as a result of the medical treatment condition in his long-term supervision order, to choose between his right to liberty and his right to security of the person, in a manner that engages his ability to refuse unwanted medical treatment. Further, it is urged that, if the right to refuse medical treatment constitutes a principle of fundamental justice, then the medical treatment condition imposed upon the appellant might violate section 7.

[69] However, in my view this second rule proposed by the appellant also fails to satisfy the second branch of the *Malmo-Levine* test for a principle of fundamental justice. There exists no significant social consensus in favour of an absolute rule concerning the right to refuse medical treatment in every situation, and such a principle is not considered "vital or fundamental to our societal notion of justice" (*Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519 at 590, cited in *Canadian Foundation*, *supra* at para. 8).

[70] The right of a competent adult to refuse unwanted medical treatment is clearly "fundamental to a person's dignity and autonomy" (*Starson v. Swayze*, [2003] 1 S.C.R. 722 at para. 75). However, respect for human dignity and autonomy is not itself a principle of fundamental justice (*Rodriguez*, *supra* at 592). Moreover, although the right to refuse treatment may well be a right "deeply rooted in our common law" (*Fleming v. Reid* (1991), 4 O.R. (3d) 74 at 85), it is recognized that "a mere common law rule does not suffice to constitute a principle of fundamental justice" (*Rodriguez*, *supra* at 590). The principles of fundamental justice are also not simply "vague generalizations about what our society considers to be ethical or moral" (*Rodriguez*, *supra* at 591): significant social consensus is required.

[71] Contrary to the appellant's assertion, I do not think the requisite broad societal consensus is present concerning an absolute right to refuse unwanted medical treatment in every situation for the latter to be recognized as a principle of fundamental justice. Rather, the right to refuse medical treatment, while perhaps accepted as the general rule, is also recognized as properly subject to limitations in certain contexts.

[72] The authorities cited by the appellant do not support an unqualified constitutional right to refuse medical treatment. In *Starson v. Swayze*, *supra*, which concerned the judicial review of a finding of incapacity under the Ontario *Health Care Consent Act*, the constitutionality of the legislative scheme at issue was neither raised nor addressed (see para. 75). The dispute in that case thus centred around the statutory test for capacity and its application, it being established by the

legislation itself that unless incapacity was found, medical treatment could only be administered with the patient's consent.

[73] The constitutional question was addressed in *Fleming v. Reid*, *supra*. In that case, the Ontario Court of Appeal found the common law right to bodily integrity and personal autonomy – of which the right to refuse medication was held to a part – to be "fundamental and deserving of the highest order of protection", and "co-extensive" with the constitutional right to security of the person (at p. 88). Ultimately, the legislative scheme at issue in *Fleming v. Reid* was found inconsistent with the principles of fundamental justice, not simply because it mandated that the prior competent wishes of psychiatric patients be overridden, but because the statute did not allow such competent wishes to be considered at all by the review board in its determination of the patient's course of treatment (see para. 93). As a result, the treatment orders made by the board were held to be "arbitrary and unfair", and were therefore set aside (at para. 95). The Court expressly noted the relevance of context to its conclusion, observing that "[n]o emergency is claimed here, and it is not suggested that the appellants are a threat to themselves or anyone else" (at para. 94). It is thus apparent that *Fleming v. Reid* was dealing with a particular fact situation and did not suggest that an unqualified or absolute right to refuse medication in all situations is a principle of fundamental justice under section 7.

[74] In the case at bar, in contrast with both *Fleming v. Reid* and *Starson v. Swayze*, the appellant poses a danger to others: he is a long-term offender who by definition is likely to re-offend, and has a lengthy history of offences against children, including while on probation and long-term

supervision. Moreover, the medical condition at issue in the current case has been imposed *for the purpose* of rendering this risk manageable in the community, thereby granting the appellant release under the least restrictive conditions consistent with the protection of the public. In further contrast to *Fleming v. Reid* and *Starson v. Swayze*, the case at bar does not involve the forcible administration of medication: as explained above, the appellant may choose not to take the medication prescribed to him, although he thereby also chooses to face the consequences of his decision. These contextual factors are critical, and are properly considered within the process of determining the content and scope of a particular principle of fundamental justice (*Winko*, *supra* at para. 66; *Malmo-Levine*, *supra* at paras. 98-99; *R. v. Demers*, [2004] 2 S.C.R. 489 at para. 45). Given this context, which includes both the long-term offender statutory regime and the particular history and risk profile of the appellant, I conclude that the condition of the appellant's long-term supervision order requiring him to take medication as prescribed by a physician, imposed by the Board without the appellant's consent, does not violate the principles of fundamental justice under section 7 of the *Charter*.

[75] I conclude that an absolute right to refuse unwanted medical treatment in all situations is not a principle of fundamental justice under section 7. The medical treatment condition at issue is consistent with the principles of fundamental justice, and does not violate section 7 of the *Charter*.

> (C) If yes, is the limitation one which is reasonable, prescribed by law and demonstrably justified pursuant to section 1 of the *Charter*?

[76] As I have concluded that the condition at issue does not infringe the appellant's rights under section 7 of the *Charter*, there is no need to consider justification under section 1.

VI. CONCLUSION

[77] For the above reasons, the appeal will be dismissed. As the respondent has not requested costs in this Court, and has indicated that it will not be seeking costs for the proceedings before the Federal Court, there will be no order with respect to costs.

"A.M. Linden"

J.A.

"I agree
Robert Décary J.A."

"I agree
K. Sharlow J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	**A-580-05**

APPEAL FROM AN ORDER OF THE HONOURABLE MR. JUSTICE TEITELBAUM OF THE FEDERAL COURT DATED NOVEMBER 4, 2005 IN COURT FILE T-410-05

STYLE OF CAUSE:	**SHAUN JOSHUA DEACON v. ATTORNEY GENERAL OF CANADA**
PLACE OF HEARING:	**VANCOUVER, BC**
DATE OF HEARING:	**JUNE 26, 2006**
REASONS FOR JUDGMENT BY:	**LINDEN J.A.**
CONCURRED IN BY:	**DÉCARY J.A.** **SHARLOW J.A.**
DATED:	**JULY 26, 2006**

APPEARANCES:

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