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MAR - 9 2011

Senator Joan Fraser
Chair, Senate Standing Committee on
Legal and Constitutional Affairs
The Senate
Ottawa, Ontario K1A 0A6

Dear Senator Fraser:

I am writing in regard to *Bill C-30: Response to the Supreme Court of Canada Decision in R. v. Shoker Act.*

Unfortunately, both myself, and the Assistant Commissioner are outside Ottawa and unable to appear before the Committee this week. I would therefore ask that you accept these written submissions in the circumstances. I would also be pleased to appear at a later date should the Committee have any questions about these submissions or wish to discuss other aspects of the Bill further.

Summary of the Bill and background context

Bill C-30 creates a scheme to govern the mandatory provision of bodily samples in order to confirm individuals' compliance with court imposed conditions requiring abstention from alcohol, drugs or other intoxicating substances. The scheme is a response to the Supreme Court of Canada's decision in *R. v. Shoker*, [2006] 2 S.C.R. 399, which held that absent specific legislative authority, judges cannot require bodily samples to be furnished by an individual on probation in order to enforce an abstention condition.

The Bill contemplates two mechanisms for the taking of bodily samples. The first (a "reasonable grounds" demand) would empower courts to require individuals on probation or subject to a peace bond who must abstain from the consumption or use of intoxicating substances to furnish a bodily sample to peace officers, probation officers or other designated persons who have reasonable grounds to *believe* that the individual has breached the abstention condition. In the case of an individual subject to a conditional sentence, the Bill sets the threshold to the lower standard of "reasonable grounds to *suspect*".

The second mechanism for the taking of bodily samples is a process of "scheduled screenings" whereby a court could order an individual to provide bodily samples for analysis at regular intervals to be specified by officials responsible for supervising abstention orders. The Bill would require written notice of an initial screening to be provided to an offender or defendant at least twenty-four hours in

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advance. Subsequent samples may be taken at regular intervals of at least seven days. The Bill includes a form that must be served on an offender or defendant that would specify the relevant places, times, dates and intervals. Other than a twenty-four hour advance notice, a "scheduled screen" demand is essentially random in that an official does not require any evidentiary basis to suspect a breach of an abstention condition before demanding the provision of a bodily sample.

In many respects, Bill C-30 represents a departure from ordinary standards of law enforcement under which the state independently gathers proof of criminal offences without compelling the individual subject to an investigation to participate in his or her own conviction. Under Bill C-30, individuals who are already subject to a significant amount of state oversight are compelled to provide bodily samples, the analysis of which can be used against them.

In the case of both a "reasonable grounds" demand and "scheduled screen" demand, the results of the analysis of bodily samples would be admissible in evidence against an individual to prove a breach of the abstention condition in issue. In the case of an individual on probation or subject to a peace bond, a breach of an abstention condition in an existing court order constitutes a new criminal offence that could result in imprisonment. For an individual serving a conditional sentence, breach of an abstention condition could result in the loss of the privilege of serving a jail sentence in the community.

Comments on the Bill

Interference with an individual's bodily integrity engages fundamental privacy rights and as such, requires a high standard of justification. As the Supreme Court of Canada recognized in the *Shoker* decision, a requirement to provide the state with bodily samples for law enforcement purposes is "highly intrusive" and must be "subject to stringent standards and safeguards to meet constitutional requirements". With this background in mind, I would offer the following specific comments on the Bill.

There are several privacy protections already in the Bill. For instance, test results are to be used solely for the purpose of determining compliance with the relevant abstention order and, in the event of a positive screen, the prosecution of this offence. Test results cannot be disclosed other than to the subject, or in the course of an investigation or proceeding against the subject for breach of a court imposed abstention condition. Only if anonymized, may test results be otherwise reported for statistical or other research purposes. A violation of these provisions constitutes an offence punishable on summary conviction.

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These privacy protective safeguards are very important and offer significant protection to individuals' privacy rights. They should operate to preclude unauthorized secondary uses of highly sensitive bodily samples and ensure an appropriate degree of confidentiality for the results of bodily sample testing.

This being said, there are a few other privacy safeguards I suggest may further enhance the Bill. While the general authority for both a "reasonable grounds" demand and a "scheduled screen" demand must be imposed by a court initially, the assessment of when "reasonable grounds" to believe or suspect that breach of an abstention condition exist in particular circumstances, is made by a peace officer, a probation officer or other designated person. In other words, the reasonable grounds assessment is made by those individuals responsible for enforcing the abstention condition, as opposed to an independent judicial adjudicator as should ideally be the case when such fundamental rights are at stake.

I am of the view that this situation could be strengthened by requiring the designated official who makes a "reasonable grounds" demand to document in writing the basis for the demand in a notice to be provided to the offender or defendant at the time the demand is made or as soon as practicable thereafter. While this would not prevent unauthorized demands, it would be one means of introducing transparency and accountability for the exercise of this significant and discretionary new power.

A "scheduled screen" demand would permit extremely close monitoring of individuals and frequent demands for bodily samples. While the Bill imposes some general limits on the timing and frequency of "scheduled screen" demands, decisions with respect to when and how often samples may be demanded remain highly discretionary and privacy invasive. Like the "reasonable grounds" demand contemplated by the Bill, the "scheduled screen" demand is administered by those responsible for enforcing abstention conditions imposed on individuals subject to a probation order, conditional sentence or peace bond.

In view of the particularly invasive and discretionary nature of the "scheduled screen" demands contemplated by the Bill, I would encourage the Committee to consider an amendment that would make a "scheduled screen" demand available only in those cases where a judge is satisfied that a "reasonable grounds" demand is unlikely to be effective in ensuring compliance with an abstention order. This would help ensure that the use of a "scheduled screen" demand was reserved for only those offenders and defendants in respect of whom such close, discretionary and privacy-invasive monitoring would be demonstrably necessary on the basis of evidence before a neutral judicial adjudicator.

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Other opportunities to build in privacy protections and help ensure the reasonableness of the scheme as a whole may be addressed by way of regulations not yet available for review. For example, the kinds of bodily samples and the manner in which they will be taken, stored, analyzed and destroyed are to be spelled out in regulations. Because specific information regarding these important operational issues is not yet available, I am unable to offer much in the way of specific comments. In addition, many of the matters that will be the subject of regulations to come will touch on matters that fall within the jurisdiction of my provincial and territorial counterparts. As a result, I would encourage those responsible for drafting the regulations to consult with my office as well as provincial and territorial privacy oversight agencies as appropriate. The Committee may also wish to ensure it is consulted on or has an opportunity to review draft regulations once they are available.

Before closing, there is one important regulatory matter within federal jurisdiction that bears specific mention. Bill C-30 authorizes the Governor in Council to make regulations respecting the length of time bodily samples may be retained. In view of the highly sensitive nature of the bodily samples themselves and the personal information associated with them, I am strongly in favour of regulations that would limit the retention of bodily samples to only as long as is reasonably and demonstrably necessary to monitor and enforce compliance with an abstention condition. In the case of samples giving rise to negative results, this time period should be necessarily brief or non-existent.

I appreciate the opportunity to provide the Committee with my views on Bill C-30 and reiterate my willingness to appear before the Committee to discuss them further should the Committee desire.

Yours sincerely,

for,

Jennifer Stoddart
Privacy Commissioner of Canada

c.c.: Shaila Anwar, Clerk