

**SUPREME COURT OF CANADA**

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| **Citation:** R. *v.* Knott, 2012 SCC 42, [2012] 2 S.C.R. 470 | **Date:** 20120731  **Docket:** 33911 |

**Between:**

**Damon William Knott**

Appellant

and

**Her Majesty The Queen**

Respondent

**And Between:**

**D.A.P.**

Appellant

and

**Her Majesty The Queen**

Respondent

**Coram:** McLachlin C.J. and Deschamps, Fish, Abella, Rothstein, Moldaver and Karakatsanis JJ.

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| **Reasons for Judgment:**  (paras. 1 to 72) | Fish J. (McLachlin C.J. and Deschamps, Abella, Rothstein, Moldaver and Karakatsanis JJ. concurring) |

R. *v.* Knott, 2012 SCC 42, [2012] 2 S.C.R. 470

Damon William Knott *Appellant*

v.

Her Majesty The Queen *Respondent*

‑ and ‑

D.A.P. *Appellant*

v.

Her Majesty The Queen *Respondent*

**Indexed as: R. *v.* Knott**

2012 SCC 42

File No.: 33911.

2011:  December 14; 2012:  July 31.

Present: McLachlin C.J. and Deschamps, Fish, Abella, Rothstein, Moldaver and Karakatsanis JJ.

on appeal from the court of appeal for british columbia

*Criminal law — Sentencing — Probation — Courts empowered to issue probation orders in addition to imprisonment for a term not exceeding two years* *— Whether “imprisonment for a term not exceeding two years” relates only to imprisonment imposed by a sentencing court at a single sitting or aggregate of all sentences imposed on offender — Whether probation can be ordered where offender is subject to multiple sentences that, if aggregated, exceed two years — Criminal Code, R.S.C. 1985, c. C‑46, s. 731(1)(b).*

In August 2005, the appellant K received a sentence of 24 months’ imprisonment with three years’ probation and a concurrent sentence of 12 months’ imprisonment with three years’ probation. Less than one month later, on a different matter, he received a concurrent sentence of 16 months’ imprisonment with three years’ probation. One week before the expiry of the 24-month sentence, he received a consecutive sentence of six months’ imprisonment. He later received a consecutive sentence of eight months’ imprisonment with one year’s probation. In June 2008, the appellant D.A.P. received a conditional sentence of two years less a day with two years’ probation. He breached that sentence and committed other offences. In February 2009, his conditional sentence was converted into a custodial term and he received concurrent sentences of three years’ imprisonment and six months’ imprisonment for the additional offences. On appeal, the appellants contested the probation orders claiming that s. 731(1)(*b*) of the *Criminal Code* only permits such orders where there is “imprisonment for a term not exceeding two years”, and that this consists of the aggregate of all custodial terms. The Court of Appeal confirmed the probation orders.

*Held*: The appeals should be dismissed.

The probation orders imposed on the appellants were valid when made and no prior or subsequent sentences invalidated them, either prospectively or retrospectively. The phrase “imprisonment for a term not exceeding two years” relates only to the actual term of imprisonment imposed by a sentencing court at a single sitting. It does not refer to the aggregate of the custodial term imposed by the sentencing court and all other sentences then being served or later imposed on the offender. Nor must a probation order come into force within two years of being made. Probation orders, however, may not be attached to a sentence that does not exceed two years’ imprisonment if that sentence results in continuous custody for more than two years when combined with other sentences imposed at the same sentencing session. Probation orders of this sort contravene s. 731(1)(*b*) of the *Criminal Code*.

Trial judges must retain as much flexibility as the *Criminal Code* permits in crafting individualized sentences that respect the principles and purposes of sentencing set out by Parliament in the *Code*. The result sought by the appellants would limit the availability of probation orders in an unwarranted manner and prevent sentencing judges from imposing, in appropriate cases, shorter custodial terms followed by community supervision for up to three years. Probation orders are intended to facilitate rehabilitation. An interpretation of the phrase “imprisonment for a term not exceeding two years” that includes all outstanding sentences would have the undesirable consequence of making probation orders unavailable to offenders who might well benefit from them. The sentencing objectives in the *Criminal Code* are best achieved by preserving non‑custodial sentencing options. Not infrequently, the offender and society will both benefit from a probation order that comes into force following imprisonment for an aggregate period of more than two years.

In assessing the appropriateness of a fresh probation order, however, unexpired prior sentences remain an important consideration. Sentencing courts cannot disregard existing probation orders. A sentence must take into account the particular circumstances of the offence, the character and needs of the offender, and the purpose and relevant principles of sentencing. A probation order that is manifestly inappropriate in itself or that renders a sentence unfit will be set aside on appeal. As well, a probation order that was appropriate when made may be rendered inappropriate by a lengthy intervening term of imprisonment.

**Cases Cited**

**Referred to:** *R. v. Mathieu*, 2008 SCC 21, [2008] 1 S.C.R. 723; *R. v. Middleton*, 2009 SCC 21, [2009] 1 S.C.R. 674; *R. v. Proulx*, 2000 SCC 5, [2000] 1 S.C.R. 61; *R. v. Shoker*, 2006 SCC 44, [2006] 2 S.C.R. 399; *R. v. Pickell*, 2007 CanLII 25672; *R. v. Amyotte*, 2005 BCCA 12, 192 C.C.C. (3d) 412; *R. v. Pawlak*, 2005 BCCA 500, 217 B.C.A.C. 146; *R. v. McKinnon*, 2008 BCCA 416, 237 C.C.C. (3d) 345; *R. v. Miller* (1987), 36 C.C.C. (3d) 100; *R. v. Lucas*, 2009 NLCA 56, 293 Nfld. & P.E.I.R. 90; *R. v. Pauls*, 2008 BCCA 322 (CanLII); *R. v. K. (K.)*, 2009 ONCA 254, 244 C.C.C. (3d) 124; *R. v. Hendrix* (1999), 137 C.C.C. (3d) 445; *R. v. Renouf*, 2001 NFCA 56, 160 C.C.C. (3d) 173; *R. v. Weir*, 2004 BCCA 529 (CanLII); *R. v. Currie* (1982), 65 C.C.C. (2d) 415; *R. v. Young* (1980), 27 C.R. (3d) 85; *R. v. Hennigar* (1983), 58 N.S.R. (2d) 110; *R. v. McPhee* (1993), 128 N.S.R. (2d) 79; *R. v. Amaralik* (1984), 16 C.C.C. (3d) 22; *R. v. Hackett* (1986), 30 C.C.C. (3d) 159; *R. v. Gill* (1994), 162 A.R. 163; *R. v. H.J.P.*(1995), 133 Nfld. & P.E.I.R. 20; *R. v. Shropshire*, [1995] 4 S.C.R. 227; *R. v. Nasogaluak*, 2010 SCC 6, [2010] 1 S.C.R. 206.

**Statutes and Regulations Cited**

*Corrections and Conditional Release Act*, S.C. 1992, c. 20, s. 139.

*Criminal Code*, R.S.C. 1985, c. C‑46, ss. 718 to 718.2, 731, 732.1(5), 732.2, 743.1.

APPEALS from a judgment of the British Columbia Court of Appeal (Finch C.J.B.C. and Rowles, Hall, Groberman and Bennett JJ.A.), 2010 BCCA 386, 291 B.C.A.C. 236, 492 W.A.C. 236, 258 C.C.C. (3d) 470, [2010] B.C.J. No. 1664 (QL), 2010 CarswellBC 2238, affirming the sentencing decisions of Judge Raven, Surrey Registry Nos. 145481‑3‑C and 146247‑1, August 18, 2005; Judge Moss, North Vancouver Registry Nos. 45179‑1 and 45295‑1, September 8, 2005; Judge Chaperon, Victoria Registry No. 140302‑1, December 3, 2007; and *sub nom. R. v. D.A.P.*, Judge Webb, Cranbrook Registry Nos. 26225‑2‑C and 27264‑1‑K, June 3, 2008*.* Appeals dismissed.

*Anna King*, for the appellant Damon William Knott.

*Eric Purtzki*, for the appellant D.A.P.

*Michael J. Brundrett*, for the respondent.

The judgment of the Court was delivered by

Fish J. —

I

1. Trial judges must retain as much flexibility as the *Criminal Code* permits in crafting individualized sentences that respect the principles and purposes of sentencing set out by Parliament in the *Code*.
2. The result sought by the appellants would have the opposite effect. It would limit the availability of probation orders in a manner unwarranted by the *Criminal* *Code*,R.S.C. 1985, c. C-46. More particularly, it would prevent sentencing judges from imposing, in appropriate cases, shorter custodial terms followed by community supervision for up to three years.
3. That is what happened here. And it is not suggested that the sentences imposed on either appellant were excessive or incompatible with the relevant principles of sentencing.
4. The sole issue is whether the probation orders attacked by the appellants contravene s. 731(1)(*b*) of the *Criminal Code*. In virtue of that provision, a court that sentences an offender to imprisonment for “a term not exceeding two years [may] direct that the offender comply with the conditions prescribed in a probation order”.
5. None of the courts that made the probation orders in issue here sentenced either appellant to a term of imprisonment exceeding two years. And they were not “merged” by law, for the purposes of s. 731(1)(*b*), with other sentences the appellants were then serving or subsequently received.
6. Earlier case law to the contrary has been overtaken by this Court’s decisions in *R. v. Mathieu*, 2008 SCC 21, [2008] 1 S.C.R. 723, and *R. v. Middleton*, 2009 SCC 21, [2009] 1 S.C.R. 674. I refer here to prior decisions in some provinces (including British Columbia) that struck down a probation order because the accompanying prison sentence — *in combination with* *other sentences imposed against the same offender on other occasions* — exceeded two years. This was known as the “two-year rule”.
7. In the present matter, a five-member panel of the British Columbia Court of Appeal recognized that *Mathieu* and *Middleton* hadexposed latent — and irreparable — cracks in the foundation of the “two-year rule”. The Court of Appeal therefore felt bound to undertake a “new analysis” (2010 BCCA 386, 291 B.C.A.C. 236, at para. 68). In this fresh light, the Court of Appeal upheld all of the probation orders made against both appellants.
8. We are now urged by the appellants to set aside the judgment of the Court of Appeal and quash the probation orders of which they were the beneficiaries when the orders were made: They would both have otherwise received longer terms of imprisonment.
9. Their joined appeals should both be dismissed, not because the appellants are “sore winners”, but because any other result would be unwarranted by the relevant provisions of the *Criminal Code*. And it would be contrary to society’s interest in ensuring its own protection by preserving a sentencing option that favours the rehabilitation of offenders.
10. In appropriate cases, probation orders serve that purpose as an effective and efficient alternative to unnecessary institutional confinement (*Mathieu*, at para. 20; *R. v. Proulx*, 2000 SCC 5, [2000] 1 S.C.R. 61, at para. 32; *R. v. Shoker*, 2006 SCC 44, [2006] 2 S.C.R. 399, at para. 10).

II

1. On August 18, 2005, Mr. Knott received concurrent sentences of 24 months’ imprisonment on one information and 12 months’ on another, with three years’ probation added to each sentence. On September 8, 2005, less than one month later, he was sentenced on a different matter to 16 months’ imprisonment and three years’ probation. *At the Crown’s suggestion*, the trial judge ordered the term of imprisonment to be served concurrently with Mr. Knott’s existing sentences.
2. Mr. Knott was back in court on August 10, 2007, approximately one week before the expiry of his previously imposed 24-month sentence. Mr. Knott again pleaded guilty and was sentenced to six months’ imprisonment, *consecutive* to the term he was already serving. Finally, on December 3, 2007, he was sentenced to eight months’ imprisonment, consecutive to his existing sentences, to be followed by probation for one year.
3. By the end of 2007, Mr. Knott had thus accumulated four separate probation orders, each to come into force in accordance with s. 732.2(1)(*b*) of the *Criminal Code*:

**732.2** (1) A probation order comes into force

. . .

(*b*) where the offender is sentenced to imprisonment under paragraph 731(1)(*b*) or was previously sentenced to imprisonment for another offence, as soon as the offender is released from prison or, if released from prison on conditional release, at the expiration of the sentence of imprisonment; . . .

1. On August 2, 2008, Mr. Knott was due for release in respect of all the offences mentioned, having served a total of 2 years, 11 months, and 16 days. But he remained in custody on another matter until December 17, 2008.
2. The other appellant, D.A.P., received a conditional sentence of two years less a day on June 3, 2008, to be followed by two years’ probation. On February 19, 2009, D.A.P. pleaded guilty to having breached his conditional sentence order, along with other offences. His conditional sentence was converted into a custodial term and he was sentenced on the same day to three years’ imprisonment for one offence and six months’ concurrent for another. Both fresh sentences were made concurrent to any other sentences that D.A.P. was then serving.
3. In this context, a brief word concerning the imposition of multiple probation orders in this case.
4. Sentencing courts may impose separate but concurrent probation orders, attached to different counts. This may be done to add supplementary conditions appropriate in the circumstances of different offences, or to ensure that the offender will remain subject to probation if one of the probation orders is later set aside or rendered inoperative.
5. While multiple probation orders may be made in this manner, no probation order may continue for more than three years from the date on which it came into force (*Criminal Code*, s. 732.2(2)(*b*)), subject to the exception involving subsequent convictions once a probation order has already come into force (s. 732.2(5)).

III

1. Mr. Knott appealed his August 18, 2005, September 8, 2005 and December 3, 2007 sentences, seeking to have the probation orders quashed. D.A.P. appealed his June 3, 2008 sentence, seeking the same outcome.
2. As mentioned earlier, the Court of Appeal took these sentence appeals as an opportunity to revisit the law. Sitting as a five-judge panel, the Court of Appeal reached three principal conclusions.
3. First, the court concluded that, where a sentencing court imposes terms of imprisonment at a single sentencing hearing that would — either individually or cumulatively — exceed two years, probation cannot be ordered as well.
4. Second, the court held that, if an offender is subject to a term of imprisonment imposed on a prior occasion, and a court orders a subsequent sentence that would exceed two years when combined with the unexpired portion (or “remanet”) of the existing sentence, it “would, except in the rarest of cases, be an error in principle” for the sentencing court to also make a probation order under s. 731(1)(*b*) (para. 73).
5. Third, the court held that the remanet analysis applies only where the subsequent sentencing court makes a *fresh* probation order. Subsequent sentences of whatever length (other than imprisonment for life) were held not to invalidate any *existing* probation order.
6. Applying these findings of law to the facts in each instance, the Court of Appeal, as I have already mentioned, confirmed all of the probation orders imposed against Mr. Knott and D.A.P., and dismissed their appeals.

IV

1. The British Columbia Court of Appeal was not the first court to question or reject the two-year rule previously applied (see *R. v. Pickell*, 2007 CanLII 25672 (Ont. S.C.J.)). It did nonetheless chart new territory in this case. The court had previously decided that an intervening sentence *could* invalidate a once lawful probation order (*R. v. Amyotte*, 2005 BCCA 12, 192 C.C.C. (3d) 412; *R. v. Pawlak*, 2005 BCCA 500, 217 B.C.A.C. 146; *R. v. McKinnon*, 2008 BCCA 416, 237 C.C.C. (3d) 345). So, too, had other provincial courts of appeal (*R. v. Miller* (1987), 36 C.C.C. (3d) 100 (Ont.); *R. v. Lucas*, 2009 NLCA 56, 293 Nfld. & P.E.I.R. 90).
2. It had also been previously held, both in British Columbia and in Ontario, that probation cannot be ordered where the offender is subject to multiple sentences that, if aggregated, would exceed two years (*R. v. Pauls*, 2008 BCCA 322 (CanLII); *R. v. K. (K.)*, 2009 ONCA 254, 244 C.C.C. (3d) 124).
3. While the case law on this latter point was divided, the disagreement generally related to *how*, not *whether*, sentences were to be aggregated for the purposes of s. 731(1)(*b*). Some decisions calculated the “aggregate sentence” from the date the first sentence was imposed to the date the final sentence would expire (*R. v. Hendrix* (1999), 137 C.C.C. (3d) 445 (Nfld. C.A.); *R. v. Renouf*, 2001 NFCA 56, 160 C.C.C. (3d) 173; *R. v. Weir*, 2004 BCCA 529 (CanLII)). Others added the subsequent sentence to the remanet of previously imposed sentences (*R. v. Currie* (1982), 65 C.C.C. (2d) 415 (Ont. C.A.)).
4. For the most part, these decisions relied implicitly, if not explicitly, on the sentence merger provisions in s. 139 of the *Corrections and Conditional Release Act*,S.C. 1992, c. 20 (“*CCRA*”), and its predecessors. This is no longer possible in light of *Middleton*, where the majority held that s. 139 was enacted for administrative purposes relating to parole and remission, and had no substantive impact on an offender’s eligibility for an otherwise lawful sentence.
5. In my respectful view, s. 139 of the *CCRA* is therefore of no assistance in determining the legality of a probation order.
6. The remaining question, to which I now turn, is whether s. 731(1)(*b*) — in itself — prohibits the making of the probation orders that concern us here.

V

1. Section 731(1) of the *Criminal Code* provides:

**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.

1. The Crown submits that the phrase “imprisonment for a term not exceeding two years” in s. 731(1)(*b*) relates only to the actual term of imprisonment imposed by a sentencing court at a single sitting. The appellants argue that “term” of imprisonment referred to in that provision is the aggregate of the custodial term imposed by the sentencing court and all other sentences then being served or later imposed on the offender. In my view, the Crown’s submission is correct and the appellants’ submission fails.
2. The ordinary meaning of s. 731(1)(*b*) is perfectly clear: A probation order may not be made where the *sentencing court* imposes a term of imprisonment exceeding two years. In determining whether two years has been exceeded, one looks at the term of imprisonment ordered by *the* *sentencing court* *on that occasion —* not at *other* sentences imposed by *other* courts on *other* occasions for *other* matters.
3. Section 731(1)(*b*) admits of no ambiguity in this regard. The opening words of s. 731(1) read: “Where a person is convicted of an offence, a court may”. The provision authorizes *that court* to make a probation order, “in addition to fining or sentencing the offender to imprisonment for a term not exceeding two years”. On a plain reading of this provision, the phrase “imprisonment for a term not exceeding two years” refers to the sentence imposed by the court empoweredby s. 731(1)to make the probation order.
4. Had Parliament intended unexpired sentences from other occasions to be included in the phrase “imprisonment for a term . . . exceeding two years”, it would have said so. The language was close at hand. Section 743.1 of the *Criminal Code*, for example, expressly provides for the aggregation of sentences in determining whether an offender is to be sent to the penitentiary.
5. The appellants submit that the two-year limitation in s. 731(1)(*b*) reflects Parliament’s intention that probation orders not be imposed on offenders subject, even for reasons unrelated to the sentence accompanied by the probation order, to more than two years’ imprisonment. There is some support for this view in *Miller*, where the Ontario Court of Appeal held that

the principle governing s. 663(1)(*b*) [now s. 731(1)(*b*)] of the *Code* is that Parliament intended that a probation order would not come into effect more than two years from the time of sentencing and that an accused would not be made subject to a probation order, if required to serve a sentence of more than two years. [p. 104]

1. With respect, this articulation of Parliament’s intent is consistent with neither the language of s. 731(1)(*b*), nor its statutory context.
2. Section 731(1)(*b*) *does not address the coming into force of a probation order*. The provision empowers the sentencing court to *make* a probation order as part of the sentence. The availability of this non-custodial sentencing option is restricted where the required custodial portion of the sentence exceeds two years. But the *coming into force* of the order is not dealt with at all in s. 731(1)(*b*).
3. For that, one must look to s. 732.2 of the *Criminal Code*.
4. Nowhere does s. 732.2 — or any other provision of the *Criminal Code* — provide that a probation order must come into force within two years of it being made.
5. My interpretation of s. 731(1)(*b*) is supported as well by the purposive approach outlined in *Mathieu*. As I stated at the outset, the policy considerations underpinning probation orders are best promoted by an interpretation that preserves their availability to trial judges.
6. It is well established that probation orders are intended to facilitate an offender’s rehabilitation (*Mathieu*, at para. 20; *Proulx*, at para. 32). An interpretation of the phrase “imprisonment for a term not exceeding two years” that includes all outstanding sentences would have the undesirable consequence of making probation orders unavailable to offenders who might well benefit from them (*Mathieu*, at para. 22).
7. The sentencing objectives set out by Parliament in ss. 718 to 718.2 of the *Criminal Code* are best achieved by preserving — not curtailing — a sentencing court’s arsenal of non-custodial sentencing options. Probation orders, where available and appropriate, serve that purpose well: They afford sentencing judges the flexibility to opt for shorter prison terms followed by community supervision, rather than the longer prison terms that they would have otherwise unnecessarily imposed to achieve the same ends.
8. The appellants’ interpretation of s. 731(1)(*b*), rejected in *Mathieu* (at para. 22), would have the undesirable consequence of increasing the custodial portion of an offender’s sentences without any countervailing correctional advantage or benefit to society.
9. Not infrequently, the offender and society will both benefit from a probation order that comes into force following imprisonment for an aggregate period of more than two years (*Mathieu*, at para. 20). The offender has the benefit of a shorter sentence of imprisonment, and society benefits from constraints aimed at facilitating rehabilitation and protecting society (*Shoker*, at para. 10).
10. There will, of course, be situations in which a probation order may not serve a useful purpose when it follows a lengthy term of imprisonment. Parliament has anticipated this possibility by including both preventive and curative antidotes in the sentencing provisions of the *Code*.
11. I take care not to be understood to have expressed here a decided view on sentencing issues that are not now but may one day confront the Court. Subject to that reservation, I think it fair to say that the purpose and principles of sentencing set out in the *Criminal Code* are meant to take into account the correctional imperative of sentence individualization. Consistent with this approach and subject to the conditions set out in s. 731(1)(*b*) of the *Code*, questions related to the fitness of probation orders in particular cases — as opposed to their availability in principle — are best left to be dealt with by the courts on a case-by-case basis as a matter of fitness.
12. Before returning to the *Code*’s remedies against probation orders that render a sentence unfit when it is imposed, I acknowledge that neither Cartesian logic nor textual exegesis can satisfactorily resolve every perceived anomaly.
13. For example, it may appear anomalous to cause the validity of a probation order to depend on whether the relevant sentences were imposed at a single session or on different occasions. I have already explained why the availability of a probation order depends on the “term of imprisonment” imposed when the order is made.
14. How, then, do we deal with probation orders attached to sentences that, likewise, do not exceed two years’ imprisonment — but do result in continuous custody for more than two years in combination with other sentences imposed on the same offender by the same sentencing court *at the same session*?
15. It has consistently been held by courts across the country that probation orders of this sort contravene s. 731(1)(*b*) (see, for example, *R. v. Young* (1980), 27 C.R. (3d) 85 (B.C.C.A.); *R. v. Hennigar* (1983), 58 N.S.R. (2d) 110 (S.C. (App. Div.)); *R. v. McPhee* (1993), 128 N.S.R. (2d) 79 (C.A.); *R. v. Amaralik* (1984), 16 C.C.C. (3d) 22 (N.W.T.C.A.); *R. v. Hackett* (1986), 30 C.C.C. (3d) 159 (B.C.C.A.); *R. v. Gill* (1994), 162 A.R. 163 (C.A.); and *R. v. H.J.P.* (1995), 133 Nfld. & P.E.I.R. 20 (Nfld. C.A.)).
16. While some of these cases invoked s. 139 of the *CCRA* and its predecessors, I believe they were nonetheless correctly decided pursuant to s. 731(1) alone, bearing in mind the “totality” principle that remains unchallenged on this appeal.
17. The appellants argue in this regard that the interpretation of s. 731(1)(*b*)adopted by the Court of Appeal is problematic in that it treats similarly situated offenders differently depending on the *timing* of a sentence. For example, an offender who is sentenced on different days to two years’ imprisonment for one offence and one year consecutive for another may be subject to probation, while an offender who receives identical terms of imprisonment at the same hearing would not.
18. This apparent anomaly, or inconsistency, must yield to Parliament’s intent, and the best indication of Parliament’s intent is the provisions it has enacted.
19. I need hardly add that it would be a reviewable error for a sentencing court to exploit this difference for the sole purpose of circumventing the two-year rule in s. 731(1)(*b*). For example, in a proceeding involving multiple counts, indictments, or informations, the sentencing court must not adjourn the sentencing on some of the offences in order to make a probation order that would otherwise contravene s. 731(1)(*b*).
20. Moreover, sentencing and appellate courts are empowered to ensure that probation orders are made and applied in an even-handed and appropriate manner. Judicial discretion — and the checks placed upon it — are sufficient to ensure that this scheme is fairly applied.

VI

1. In light of the foregoing, I agree with the Court of Appeal that s. 731(1)(*b*) does not invalidate probation orders imposed on prior occasions.
2. With respect, however, I take a somewhat different view of fresh probation orders. Like the Ontario Court of Appeal in *Currie* (at p. 416), the British Columbia Court of Appeal held in this case that, “[w]hen the sentence is imposed on a remanet, and the total of the new sentence and the remanet exceeds two years, probation should not be ordered” (para. 74).
3. And, again as in *Currie*, the Court of Appeal held here that the sentencing court has the jurisdiction to impose a fresh probation order in such circumstances — but it would generally be an error in principle to do so (para. 73). This conclusion was based on the view that s. 731(1)(*b*) “makes it clear that the intention of Parliament was to limit probation orders to situations where the sentence to be served does not exceed two years” (*ibid.*).
4. If it is an error in principle to make a probation order that follows an aggregate sentence of more than two years, the principle does not arise from s. 731. As I earlier explained, s. 731(1)(*b*) does not reflect any sort of Parliamentary intention that probation orders be limited to situations where the sentence to be served does not exceed two years.
5. But probation orders permitted by s. 731(1)(*b*) are, like other elements of a sentence, subject to review for their fitness. Courts are precluded by the relevant sentencing principles from making a probation order that is clearly unreasonable in the circumstances (*R. v. Shropshire*, [1995] 4 S.C.R. 227). Put differently, a probation order that is manifestly inappropriate in itself or that renders unfit the sentence of which it is a part will be set aside on appeal.
6. In considering whether a fresh probation order is appropriate, the sentencing court must thus take into account the particular circumstances of the offence, the character and needs of the offender, and the purpose and relevant principles of sentencing (*R. v. Nasogaluak*, 2010 SCC 6, [2010] 1 S.C.R. 206, at para. 43).
7. In short, unexpired prior sentences remain an important consideration, though not necessarily decisive, in determining whether a probation order is appropriate.

VII

1. A probation order that was appropriate when made may well be rendered inappropriate by a lengthy intervening term of imprisonment.
2. For example, where a probation order will not come into force for many years after its imposition, or where the total period of incarceration is extended to the point that the offender will be subject to a lengthy period of community supervision while on parole or statutory release, a probation order will generally lack a meaningful rehabilitative purpose.
3. Existing probation orders are not automatically invalidated in these situations, but this does not mean that subsequent sentencing courts may disregard them. Quite the contrary. Sentencing judges must take into consideration a probation order that, pursuant to s. 732.2 of the *Code*, will come into force following any additional terms of imprisonment imposed by that court.
4. Sentencing judges should also ensure that offenders understand that probation orders previously imposed are not automatically invalidated by the imposition of additional terms of imprisonment.
5. Moreover, where a fresh sentence may be thought to strip an existing probation order of its rehabilitative purpose, the sentencing judge should explain the substance of s. 732.2(3) of the *Criminal Code* to the offender*.* Pursuant to that provision, an offender, probation officer or prosecutor may apply at any time to the court that made the probation order to have the probationary period decreased or in effect terminated.
6. The court that made the original probation order would have already caused an explanation of this provision to be given to the offender (s. 732.1(5)). However, as the procedure contemplated by s. 732.2(3) is properly applied where an additional sentence overtakes a probation order, it is appropriate to remind the offender of his or her rights in this regard at the time of the subsequent sentencing.
7. Finally, provided that the statutory and procedural requirements are met, the offender or the Crown may apply to the sentencing court *itself* under s. 732.2(3) to have an outstanding probation order varied or decreased.

VIII

1. For the reasons given, all of the probation orders attacked by the appellants were valid when made and no prior or subsequent sentences imposed on either appellant had, or could have had, the effect of invalidating any of their probation orders, either prospectively or retrospectively.
2. Accordingly, as mentioned at the outset, I would affirm the judgment of the British Columbia Court of Appeal and dismiss the appeals of Mr. Knott and D.A.P. to this Court.

*Appeals dismissed.*

Solicitor for the appellant Damon William Knott:  Anna King, Vancouver.

Solicitor for the appellant D.A.P.:  Eric Purtzki, Vancouver.

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