S.C.C. FILE NO. 37596

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE SASKATCHEWAN COURT OF APPEAL)

SPENCER DEAN BIRD

Appellant
(Respondent)

And

HER MAJESTY THE QUEEN

Respondent
(Appellant)

FACTUM OF THE APPELLANT

SPENCER DEAN BIRD

(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

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Opening Statement

1. This case is about the rights of individuals charged with a serious criminal offence to have an opportunity to make a full answer and defence. It is about ensuring that individuals who are told to abide by an unconstitutional order do not suffer serious penal consequences if they fail to abide by it. This case is also about ensuring that sentences of imprisonment end when the sentencing court determines that the imprisonment should end, and ensuring that such sentences are not lengthened by administrative bodies without legislative authority under the guise of "community supervision".

2. There are two main issues in this appeal. The first is about the proper application of the doctrine of collateral attack where imprisonment is likely to result from a conviction for breach of an administrative order. The second issue deals with the Parole Board of Canada's ability to make an order that requires an individual to reside in a penitentiary as a condition of that offender's long-term supervision order ("LTSO"), effectively continuing to imprison that individual after that individual's warrant expiry date has passed.

3. The facts of this case have never been in dispute. The Appellant, Mr. Bird, was found to be a Long Term Offender ("LTO") on May 27, 2005, and was sentenced to 54 months imprisonment, and five (5) years of Long Term Supervision.[1] Mr. Bird was subject to a Long Term Supervision Order ("LTSO") at all times relevant to this appeal, meaning that at all times relevant to this appeal, Mr. Bird's 54 month period of imprisonment had been completed. He was subject to a condition, imposed under section 134.1(2) of the *Corrections and Conditional Release Act* ("*CCRA*"), which required that Mr. Bird:

> Reside at a community correctional centre or a community residential facility or other residential facility (such as private home placement) approved by the Correctional Service of Canada, for a period of 180 days.[2]

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[1] *R. v. Bird*, 2016 SKPC 28 [Trial Judgment], Appellant's Record, Tab 1 at para. 2.
[2] Agreed Statement of Facts at para. 4, Appellant's Record, Tab 5.

4. Mr. Bird was required to live at the Oskana Centre, a Community Correctional Centre ("CCC").[3] This is a federal penal institution, and is a penitentiary as defined by the *CCRA*. The Oskana Centre had standard policies designed for individuals on day parole, temporary absence, and statutory release. As a resident of the Oskana Centre, Mr. Bird was required to follow these policies.

5. On January 28, 2015, Mr. Bird did not follow the curfew that the Oskana Centre required. This resulted in his arrest and the charges of breaching section 753.3(1) of the *Criminal Code,* R.S.C. 1985, c. C-46 (*"Criminal Code*") which are now before this Court.

6. Mr. Bird has consistently argued that the Parole Board of Canada does not have the jurisdiction to extend the imprisonment of an individual who is subject to an LTSO once the sentence of imprisonment has expired.

PART II ISSUES ON APPEAL

7. It is respectfully submitted that there are two broad issues in this appeal:

a. What is the proper application of the doctrine of collateral attack in these circumstances?
b. Was the Parole Board of Canada entitled to order that Mr. Bird reside at a penitentiary?

PART III ARGUMENT

A. Jurisdiction

8. Mr. Bird was acquitted by the Saskatchewan Provincial Court of an indictable offence, and this acquittal was set aside by the Saskatchewan Court of Appeal. The Saskatchewan Court of Appeal entered a conviction. It is respectfully submitted that, pursuant to section 691(2)(b) of the *Criminal Code*, this Court has jurisdiction to hear this appeal and consider questions of law arising out of this matter. As these are questions of law, the standard of review is correctness.

[3] Agreed Statement of Facts at para. 5, Appellant's Record, Tab 5.

B. The Doctrine of Collateral Attack

9. A collateral attack is an "attack [on an order] made in proceedings other than those whose specified object is the reversal, variation or nullification of the order or judgment": *R. v. Wilson,* [1983] 2 S.C.R. 594 at 559. While a collateral attack is presumptively prohibited, courts have long recognized that, in some situations, it may be necessary to allow an order to be attacked in a venue other than one whose specific object is the reversal, variation, or nullification of a particular order. The doctrine of collateral attack recognizes that in some cases, an order of a court or tribunal may need to be reviewed outside of the forum where the order was made.

10. The doctrine of collateral attack applies to orders made by both judicial bodies and administrative bodies. The analysis that this Court has established with respect to each type of order is different. While there is a high bar for a collateral attack of a judicial order, this Court established in *R. v. Consolidated Maybrun Mines Ltd.,* [1998] 1 S.C.R. 706 ("*Maybrun*") that the bar is lower for permitting a collateral attack of an order made by an administrative body.

11. In *Maybrun*, the Supreme Court dealt with the question of whether a penal court can determine the validity of an administrative order as a defence to a criminal charge. In the companion decision in *R. v. Al Klippert,* [1998] 1 S.C.R. 737 ("*Al Klippert*"), this Court added that the list of factors enumerated in *Maybrun* was not intended to be exhaustive. Rather, these enumerated factors constitute "various indicia which might be of assistance in determining the legislature's intention" (at para. 14). In other words, *Al Klippert* established that the *Maybrun* analysis is the appropriate test for determining when a collateral attack on an administrative order is permissible, but that the list of relevant factors to consider in applying the *Maybrun* analysis is not closed.

12. In *Maybrun,* this Court discussed the purpose of the doctrine of collateral attack in some detail (paras. 28-52). L'Heureux-Dubé J., writing for the Court, began by reviewing the existing jurisprudence, noting that the case law in Canada on this issue was "surprisingly sparse" (para 29). Given this scarcity of case law, L'Heureux-Dubé J. reviewed American and United Kingdom approaches to this issue. The United States has taken a restrictive approach to collateral attack by fully embracing the exhaustion doctrine. This doctrine requires that a complaining party exhaust all their options in the administrative process before an attack on an administrative order is permissible in a criminal proceeding, so that "the courts may never have to intervene" (*Maybrun*

at para. 36, quoting from *McKart v. United States*, 395 U.S. 185 at 195 (1969)). The rationale behind this doctrine is based on a number of considerations, including the preservation of judicial resources, the benefits of providing an administrative agency with an opportunity to correct its own errors, and concern that the "frequent and deliberate flouting of administrative processes could weaken the effectiveness of an agency" (*Maybrun* at para 36).

13. The exhaustion doctrine creates a strong presumption against a collateral attack on administrative orders. It has been endorsed in Canada in the judicial review context, "relating to the discretion enjoyed by the superior courts in exercising their superintending and reforming power" (*Maybrun* at para. 23). However, as L'Heureux-Dubé J. emphasized in *Maybrun*, a penal court considering the validity of an administrative order is not engaged in judicial review. As a result, she concluded that the exhaustion doctrine as it exists in Canadian law is not dispositive of the issue of when, if ever, a collateral attack should be permitted on an administrative order.

14. Instead, L'Heureux-Dubé J. endorsed the United Kingdom's "legislative intent" approach to collateral attack on administrative orders. This requires a court to determine, as a matter of statutory interpretation, the "appropriate forum to decide whether an administrative order is valid" (at para. 38). Allowing legislative intent to govern the collateral attack analysis ensures that the integrity of the administrative state is respected as much as possible. It precludes individuals from circumventing the administrative process by challenging administrative orders outside of the specialized, expert structure in which they were created. But this rationale can only go so far, as courts must always have the power to ensure "that the government exercises its powers within the limits prescribed by law [and] that appropriate remedies are available for citizens to assert their rights" (at para. 44). These two principles — respect for the administrative process and respect for individual rights — serve to counterbalance each other in the collateral attack analysis. Each tempers the other, and neither can be elevated at the expense of the other.

15. In setting out a framework that could adequately balance these two fundamental principles, Justice L'Heureux-Dubé endorsed an approach in which five factors, or "clues" should be considered in determining whether a penal court may rule on the validity of an administrative order as a defence to a criminal charge (para. 46). These factors are: (1) the wording of the statute under the authority of which the order was issued; (2) the purpose of the legislation; (3) the existence of

a right of appeal; (4) the kind of collateral attack in light of the expertise or *raison d'etre* of the administrative appeal tribunal; and (5) the penalty on a conviction for failing to comply with the order.

C. Application to this Case

16. In this case, Mr. Bird sought to challenge the constitutionality of the order at trial as a defence to a criminal charge. This was allowed by the trial judge, largely on the fifth *Maybrun* factor (penalty upon conviction). The trial judge's decision was overturned by the Court of Appeal (which did not consider the constitutionality of the order in question). The Appellant respectfully submits that, in allowing the Crown's appeal and entering a conviction, the Saskatchewan Court of Appeal failed to properly weight the factors set out by this Court in *Maybrun*. In particular, the Court of Appeal based its assessment of the first two *Maybrun* factors on erroneous assumptions and erred in its application of the "penalty upon conviction" factor. It further erred in failing to consider the constitutional nature of the collateral attack in question. The Court of Appeal unjustly denied the Appellant the right to make full answer and defence by denying him the right to challenge the lawfulness of the order he was accused of breaching. The effect of this decision is that Mr. Bird must face a potentially lengthy period of imprisonment for violating an order that was found to be unconstitutional by the trial judge.

i. The Wording of the Statute and the Purpose of the Legislation

17. The first two factors in the *Maybrun* analysis require the court to look at the statutory context of the decision: the wording of the statute under which the order was issued and the purpose of the legislation in question.

18. The wording of the specific statute is broad: s. 134.1(2) of the *CCRA* allows the Parole Board to establish conditions that are "reasonable and necessary". In addition, as the Court of Appeal noted, s. 18(1) of the *Federal Courts Act*, R.S.C. 1985, c. P-20 is relevant, as it provides the Federal Court with the exclusive authority to hear applications or proceedings for relief against a federal board, commission, or tribunal, including the Parole Board. It is not disputed that the ordinary route to challenge the lawfulness of a condition imposed on an LTSO by the Parole Board is by seeking judicial review of that condition in the Federal Court.

19. However, an offender who is subject to an LTSO does not find himself solely within the jurisdiction of the Federal Court for all matters relating to that LTSO. This is because the *Criminal Code* creates the indictable offence of failing to comply with an LTSO. The Federal Court does not have jurisdiction to consider the effect of a breach of a condition of an LTSO: instead, the breach of an LTSO is a criminal offence within the exclusive jurisdiction of the provincial and superior courts. The exclusive jurisdiction of the criminal courts to deal with breaches of LTSOs combined with the right to make full answer and defence before those courts attenuates the jurisdiction of the Federal Court in the context of LTSOs.

20. The *Criminal Code*, as well as s. 7 of the *Charter*, provide the accused with a right to make a full answer and defence where the accused is charged with a criminal offence, including the breach of an LTSO: see *Criminal Code*, s. 650(3); *R. v. Stinchcombe*, [1991] 3 S.C.R. 326 at 336. The statutory regime that Parliament created for long-term offenders serving LTSOs recognizes that the Federal Court possesses exclusive jurisdiction to judicially review the conditions imposed (subject to very limited exceptions), but that an individual facing a criminal charge for breaching that order still has the right to make full answer and defence to that charge.

21. In considering the purpose of the legislation, the Court of Appeal focused only on the Federal Court's role in interpreting the *CCRA*, as it was concerned that allowing a collateral attack in this case could result in courts in different provinces interpreting the *CCRA* in different ways. The Court of Appeal held that this would leave the Parole Board in "a very difficult position legally and operationally", as different orders may or may not be allowed in different jurisdictions.

22. The Court of Appeal's reasoning was based on two assumptions: (1) that only the National Parole Board is entrusted with the authority to interpret the release provisions of the *CCRA*; and (2) that only the Federal Court exercises judicial review jurisdiction over those interpretations. The Appellant submits that both of these assumptions are incorrect.

23. First, the Parole Board's jurisdiction under the *CCRA* is delegated to provincial parole boards in each province where the offender is serving his or her sentence in a provincial institution: see *CCRA*, s. 112; *R. v. Proulx,* 2000 SCC 5, [2000] 1 S.C.R. 61 at para 42. Not only did Parliament delegate the authority to administer certain aspects of the *CCRA* to provincial parole boards, it granted to each province's lieutenant governor in council the power to allow a provincial parole

board to administer all of the statutory release provisions of the *CCRA* to offenders under its jurisdiction, including s. 134.1: *CCRA*, s. 113(1).[4] However, individuals may not "shop" for their preferred provincial parole board by moving provinces upon release, as s. 114 of the *CCRA* makes it clear that an offender released on parole is always subject to the jurisdiction of the provincial parole board that grants the parole.

24. Parliament has therefore given each province the power to decide whether its provincial parole board should administer all of the statutory release provisions of the *CCRA* for offenders under its control, including the LTSO provisions. The Court of Appeal's concern about provincial encroachment on the federal *CCRA* regime is therefore belied by the very structure of the Parole Board system in Canada. Contrary to the Court of Appeal's assumption, the statutory regime does not evidence a very strong legislative intent for national uniformity in administration of the *CCRA*.

25. Second, because the provincial parole boards in Quebec and Ontario are created pursuant to provincial legislation, their decisions are not reviewable by the Federal Court: see *Federal Courts Act*, s. 18 (this exclusive judicial review jurisdiction exists only for federal administrative bodies). While provincial parole boards only exercise jurisdiction over offenders in provincial institutions, they administer federal law (i.e. the *CCRA* and the *Prisons and Reformatories Act*, R.S.C. 1985, c. P-20) in doing so. Their administration of federal law is reviewable by provincial courts, not the Federal Court. Again, this does not evidence strong legislative intent for absolute national uniformity in the interpretation of the *CCRA*.

26. Further, the Parole Board, not having unlimited resources, already has to accommodate the differences which concerned the Court of Appeal. For example, not every town, or even province, has a CCC available. As such, the Parole Board has to consider what resources are actually available to them and in some provinces may not be able to order the impugned residence condition. The Parole Board does not operate from some central location, but, instead, has representatives in each region in Canada. It already takes local considerations into account in administering the *CCRA* in each province, leading to the possibility of differences among

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[4] Provincial Parole Boards have been established in Quebec and Ontario: see *An Act Respecting the Québec Correctional System*, CQLR c. S-40.1, s. 116; *Ministry of Correctional Services Act*, R.S.O. 1990, c. M.22. Saskatchewan is one of the provinces that does not have a provincial parole board, and, pursuant to s. 108 of the *CCRA*, it is the National Parole Board that exercises all correctional and release jurisdiction in Saskatchewan (see: *Correctional Services Act, 2012*, S.S. 2012, c. C-39, s. 97). This may explain the Court of Appeal's factual error.

provinces in the manner in which it is administered and in the types of conditions that may be imposed in each province. The Court of Appeal's concern about the possibility of such differences is, therefore, misplaced.

27. Since provincial parole boards are already routinely engaged in administering federal law in the correctional context, and since the Parole Board already takes local differences into account in its decisions, the Appellant submits that the Court of Appeal's concern for inconsistent interpretations of federal law in this context should lose much of its force. Put simply, administration of federal corrections law is already fractured across provinces. Concern about prompting such a fracture is hardly a compelling reason for applying the rule against collateral attack in this context. But more importantly, the Court of Appeal's reasoning loses sight of the constitutional context of this proceeding: it assumes that the Parole Board may lawfully impose a condition in one province that it cannot in another, implicitly assuming that what may be constitutional in one province is not constitutional in another. This case is about the *Charter*. It should go without saying that the *Charter* must mean the same thing in every province — that is one of the reasons why this Court routinely settles disputes among provincial courts on constitutional issues. The Appellant respectfully submits that if the specter of inconsistent interpretations that the Court of Appeal identifies were to actually occur, this Court would settle the dispute and the *CCRA* would continue to have a national meaning. The possibility of differing constitutional decisions with respect to a federal statute should not lead courts to abdicate their responsibility to consider constitutional challenges altogether, especially when an individual's liberty is at stake.

28. Although it is certainly more convenient for the Parole Board to operate with a uniform system, it is respectfully submitted that, first, such a uniform system does not exist, and second, there is little injustice in expecting the Parole Board to accommodate differences that may arise between jurisdictions, particularly where the alternative is to deny a right to a full answer and defence.

29. The decision of the Court of Appeal also evidences a reluctance to endorse a "breach first challenge later" approach for individuals on LTSOs (paras. 46, 57). The Appellant respectfully submits that this concern is also exaggerated.

30. The Court of Appeal seemed concerned that permitting a collateral attack in this context would encourage individuals to breach their LTSO in the hopes that they could demonstrate in the penal proceeding that the condition was invalid. This concern was expressed in *Maybrun* as well, though not in the context of a situation with serious penal consequences, or a situation with a constitutional issue. This concern may be generally well-founded, but the Appellant submits that, in this particular circumstance, it is misplaced. Here, the Appellant has challenged the constitutionality of the residence condition. As will be explained below, it is a fundamental principle of Canadian constitutional law that nobody may be convicted under an unconstitutional statute. The same principle ought to apply to unconstitutional conditions.

31. This principle was not considered in *Maybrun*, as it was not relevant to the facts of that case. In the circumstances of this case, allowing a collateral attack would lead to one of two outcomes: if the impugned condition is found to be constitutional, the individual will be convicted for the breach and will likely serve a lengthy sentence, as his or her ignorance of the law is not an excuse for failing to follow the law. The alternative is that the condition is found to be unconstitutional and the accused is not convicted for breaching an unconstitutional condition. This avoids a miscarriage of justice.

32. Finally, the Court of Appeal's reasoning appears to assume that it is in the offender's rational self-interest to breach the LTSO and gamble on a collateral attack in the penal proceedings in the hope that the LTSO will be found unconstitutional. The potential penalty for a conviction for breach of an LTSO is serious, as a breach is punishable by up to ten years in prison: *Criminal Code*, s. 753.3. It strains credulity to assume that an offender would be willing to gamble up to ten years of his or her life by breaching a condition instead of taking the easier step of applying to vary it. Put simply, there is no rational basis to assume that permitting a collateral attack in this narrow circumstance would encourage offenders to adopt a "breach first and challenge later" approach to their LTSOs (Court of Appeal Decision, para. 57). The stakes are too high.

ii. The Existence of a Right of Appeal

33. Turning to the third factor, as noted by the trial judge (para 36) and Court of Appeal (para. 52) there is no statutory right of appeal from a decision of the Parole Board prescribing conditions of an LTSO to the Appeal Division of the Parole Board. As described above, this was an "important, if not decisive, factor" in the pre-*Maybrun* case law (*Maybrun* at para. 34).

34. In the circumstances of this case, Mr. Bird had no right to apply to the Federal Court for judicial review of the condition as of the time that the offence was committed, as the 30 day timeline had expired. Mr. Bird could have applied for an extension to this timeline (as per s. 18.1(2)), but there was no "right" to such judicial review. In any event, the Federal Court is not an "administrative appeal tribunal" as contemplated by *Maybrun* (at paras. 49-50). The possibility of judicial review of the impugned condition in the Federal Court is not relevant to the third *Maybrun* factor. It is therefore respectfully submitted that the third factor has little, if any, application in this case.

iii. The Expertise of the Administrative Tribunal

35. As the Court of Appeal stated at para. 54 of its reasons, the fourth factor, the type of collateral attack in light of the expertise of the administrative tribunal, is not relevant in this case as there is no right of appeal.

iv. The Penalty upon Conviction

36. As submitted above, the penalty upon imprisonment is the most important factor in this case. In most cases, like *Maybrun* itself, administrative bodies are not dealing with substantial and potentially criminal consequences. As a result, as in *Maybrun,* the maximum penalties that may be imposed for breach of the administrative order are typically monetary. Of course, monetary penalties may be important to the individuals involved, but *Charter*-protected interests such as liberty are usually not engaged. As this Court has held, even significant monetary penalties do not have the same effect on individuals as sanctions like imprisonment do: see, e.g., *Guindon v. Canada*, 2015 SCC 41, [2015] 3 S.C.R. 3 (holding that the imposition of a $546,747 fine on an individual was not a true penal consequence).

37. This is not a case where the potential penalty is a fine. This is a criminal conviction, likely to result in a significant period of imprisonment. This case therefore engages what this Court has described as "the most severe deprivation of liberty known to our law": *R. v. Wigglesworth*, [1987] 2 S.C.R. 541 at para. 24. And the potential period of imprisonment is significant, as a breach of an LTSO is punishable by up to ten years in prison: *Criminal Code*, s. 753.3. Further, if the accused has been designated as a dangerous offender, the breach of an LTSO may result in a remand for assessment and the imposition of an indeterminate sentence: *Criminal Code*, s. 753.01. The consequences of a breach of an LTSO are extremely serious.

38. Although the risk of a criminal conviction, in and of itself, may justify allowing a collateral attack, allowing a collateral attack becomes even more necessary in criminal proceedings which carry a significant risk of incarceration. On the facts of this case, Mr. Bird was charged with violating a condition of an LTSO. The Crown initially sought a four year sentence for this breach,[5] but later indicated that it would be seeking a two year sentence.[6] Case law suggests that the Crown's position was not out of the range for other similar breaches of a residence condition in an LTSO: for example, *R. v. Archer,* 2014 ONCA 562 (four years), *R. v. Browne*, 2007 ONCJ 453 (three years); *R. v. Sam*, 2006 YKTC 21 (two years); *R. v. Murdock*, 2009 MBPC 7 (two years); *R. v. L.I.*, 2008 ONCJ 156 (21 months); and *R. v. Larocque*, 2012 BCCA 216 (effectively two years). A breach of a residence condition in an LTSO is rightly taken seriously by sentencing judges, and significant sentences of imprisonment are regularly imposed.

39. It is respectfully submitted that, on the facts of this case, the case law, and the position of the Crown prior to trial, this Court may assume that a penalty of significant imprisonment is likely upon conviction.

40. The substantial penalty likely upon conviction may itself be indicative of legislative intent with respect to the possibility of allowing a collateral attack. The Court of Appeal recognized this, stating that the penalty upon conviction "is a substantial penalty and hence, in and of itself, suggests Parliament would not have intended that an offender could or should be convicted of breaching a long-term supervision condition without having an opportunity, in the trial court, to challenge the legality of this condition" (para 56). The Court of Appeal went on to state that "Parliament should not lightly be taken to have denied a person facing such a charge the ability to make anything but the fullest of defences" (para 58).

41. Similar reasoning can be found in *R. v. Hawkins Bros. Fisheries Ltd.,* 2006 NBCA 114, 214 CCC (3d) 459 ("*Hawkins*"). In this decision, the New Brunswick Court of Appeal held that the framework provided in *Maybrun* "rests on the fundamental and overarching presumption that legislatures do not intend to deprive accused persons of their right to make full answer and defence". The Court went on to state at para. 4 (emphasis added):

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[5] Transcript, July 8, 2015, Volume 1, p. T5, line 29, see also page T13, line 33 (Appellant's Record, Tab 5).
[6] Transcript, October 8, 2015, Volume 1, p. T41, lines 37-38 (Appellant's Record, Tab 5).

> Moreover, if I were to accept the Crown's principal submission, I would have to recast the issue in broad terms: whether the failure to pursue judicial review for purposes of challenging the validity of an administrative order is a sufficient basis for holding that invalidity may not be raised as a defense in penal proceedings. In other words, this Court would have to promulgate a rule of law that would effectively prohibit collateral attacks of administrative orders in penal proceedings, once it was established that judicial review was an adequate alternative that the accused failed to pursue. This we cannot do.

42. In *Hawkins*, the Court of Appeal expressed the same concern as the Saskatchewan Court of Appeal did in this case about the possibility of a "breach first and challenge later" approach to administrative orders. But the Court went on to hold that the accused's right to a full answer and defence was not displaced by this concern. The Court cited two reasons in support of this conclusion (at para 30):

> First, it is easy to forget that not everyone has the disposable income necessary to initiate and pursue judicial review proceedings. Second, it is difficult to displace the fundamental principle that an accused is entitled to make full answer and defence to regulatory offences.

43. The "disposable income" consideration mentioned by the New Brunswick Court of Appeal is one that is particularly apposite here. The Appellant was designated as an LTO in May of 2005. An individual designated as an LTO must spend at least two years in a penitentiary: *Criminal Code,* s. 753.1(1)(a). In 2005, the Appellant was sentenced to 4.5 years in the Saskatchewan Penitentiary. Shortly before his release, he was charged with murder and denied bail. He spent three years in jail awaiting trial, only to be released in 2013 after his acquittal for the murder charge.[7] He breached the impugned condition on January 28, 2015, and was arrested on April 16, 2015 for this breach. He was detained on this charge until he was acquitted by the trial judge in February, 2016. The Appellant has spent close to the last decade in prison. It is not difficult to conclude that the Appellant, and others like him, are not likely to have the disposable income necessary to pursue potentially lengthy judicial review proceedings of the conditions of their LTSOs.

44. The New Brunswick Court of Appeal's comment about disposable income is an important reminder that, while abstract principles may be solid in theory, they can lead to significant injustice in practice. Courts must be wary of applying abstract principles like the principles underpinning

[7] Agreed Statement of Facts, Appendix B, p. 2, Appellant's Record, Tab 5.

the collateral attack doctrine in a manner that effectively denies a segment of society the ability to make full answer and defence. The practical realities of members of the most vulnerable segments of society cannot be ignored.

45. *Hawkins* was cited by the Supreme Court of British Columbia in *British Columbia (Workers' Compensation Board) v. Skylite Building Maintenance Ltd.,* 2013 BCSC 1666, 243 A.C.W.S. (3d) 587. In that case, a conviction under the administrative order was accompanied by the possibility of a fine and maximum of six months' imprisonment (para. 27), and there was a full right of appeal available. The Court held that a collateral attack was permissible due to the fact that "the fifth factor, penal consequences, has special significance where jail may be the penalty. This fifth factor together with other "clues" leads to my conclusion that a collateral attack is permissible" (emphasis added, para 30).

46. As outlined above, Mr. Bird would likely be imprisoned for a significant period of time if convicted of this offence, despite the fact that the trial judge ruled that the condition in question was unconstitutional. Even if Mr. Bird were to later challenge the constitutionality of this condition before the Parole Board, success on that point would be hollow: he would still have spent a significant amount of time in prison for the breach. Later success in challenging the constitutionality of the condition would not restore this time to Mr. Bird's life. It is respectfully submitted that the effect of the Court of Appeal's decision on the doctrine of collateral attack in these circumstances would significantly increase the possibility of individuals being sentenced to lengthy prison terms, regardless of whether the order they are accused of violating is within the jurisdiction of the ordering body, and regardless of whether the order is constitutional. This raises a significant prospect of miscarriages of justice, as it leads to the possibility of wrongful convictions that cannot realistically be remedied.

v. The Constitutional Context

47. As noted in *Al Klippert,* the five factors raised by the Court in *Maybrun* are "not necessarily exhaustive but rather constitute various indicia which might be of assistance in determining the legislature's intention" (at para 14).

48. It is respectfully suggested that this case raises an additional factor that should be considered in the *Maybrun* analysis: the constitutional nature of Mr. Bird's argument. As Abella

J. has stated, "[o]ver two decades of jurisprudence has confirmed the practical advantages and constitutional basis for allowing Canadians to assert their *Charter* rights in the most accessible forum available, without the need for bifurcated proceedings between superior courts and administrative tribunals": *R. v. Conway*, 2010 SCC 22, [2010] 1 S.C.R. 765 at para. 79. While this statement was made in the context of affirming that administrative tribunals may apply the *Charter*, its logic is equally applicable here.

49. The Appellant submits that there are three reasons why this factor must be considered in the *Maybrun* analysis: the engagement of fundamental justice, the inability to convict under an unconstitutional law, and the need to look beyond the intent of Parliament or the Legislature where constitutional matters are involved.

1) Engagement of Principles of Fundamental Justice

50. Serious criminal proceedings, by their nature, engage principles of fundamental justice and rights which simply do not exist in in the context of an administrative procedure. For example, an individual without the means to hire private counsel, who is facing a lengthy prison sentence, has a right to state-funded counsel: *R. v. Rowbotham* (1988), 25 O.A.C. 321 (C.A.).For those before the Parole Board, there is no right to state-funded counsel. Similarly, there is no right to state-funded counsel for an individual seeking to review a decision of the Parole Board. As such, even where one asserts that an order made by the Parole Board may unconstitutionally deprive them of their liberty, there will often be no representation by counsel. In this circumstance, the only chance to determine the constitutionality of an order, with counsel, would be at a criminal trial.

51. Further, this limitation on the accused's *Charter*-protected rights occurs in a venue which is explicitly not designed to protect the accused. As noted in *Mooring v. Canada,* [1996] 1 S.C.R. 75 (*"Mooring*"), the "protection of the accused to ensure a fair trial and maintain the reputation of the administration of justice which weighs so heavily in the application of [the *Charter* provisions relevant to that case] is overborne by the overriding societal interest" (para 27) in the context of hearings before the National Parole Board.

52. In effect, this means that if the trial judge is not permitted to consider the constitutionality of the order in question, the argument at trial is narrowed to one question: "did Mr. Bird follow the order, regardless of whether it was constitutional or not?" This would be the only question

despite the fact that Mr. Bird had no right to access or consult with a state-funded lawyer prior to the imposition of the condition. That access to legal counsel could have been crucial in preventing the potentially unconstitutional condition from being imposed in the first place, and it would be crucial in a criminal trial to ensure that the accused is not convicted pursuant to an unconstitutional order.

2) Conviction under an Unconstitutional Statute

53. The mere fact that a criminal conviction is at play in the penal proceeding suggests that the trial judge was correct in allowing the collateral attack to be heard. As Dickson C.J. stated in *R. v. Big M Drug Mart Ltd,* [1985] 1 S.C.R. 295 ("*Big M*"), "the Constitution is supreme. The undoubted corollary to be drawn from this principle is that no one can be convicted of an offence under an unconstitutional law" (at p. 313). The Appellant, like the respondent in *Big M*, is before this Court because he is accused of a crime. Chief Justice Dickson's words in *Big M* are especially relevant here:

> The respondent Big M was commanded by Her Majesty the Queen to face prosecution for a violation of an Act of Parliament. It came to court, not for the purpose of having the Act declared unconstitutional, but in order to secure a dismissal of the charges against it. The Provincial Court Judge was not called upon to make either a prerogative declaration or a s. 24(1) order. He simply was asked to prevent a violation of the fundamental principle of constitutional law embodied in s. 52(1) by dismissing the charges. (at p. 316)

54. The trial judge was asked to prevent a violation of this fundamental principle of constitutional law by refusing to apply the doctrine of collateral attack and considering the constitutionality of the condition the Appellant was alleged to have breached. He did so. By overturning the trial judge's decision and applying the doctrine of collateral attack, the Appellant submits that the Court of Appeal undermined this fundamental principle of constitutional law.

55. This sentiment does not only apply in the context of an unconstitutional statute. In *R. v. Lloyd,* 2016 SCC 13, [2016] 1 S.C.R. 130, this Court confirmed that the principle extends to sentencing proceedings. In *Lloyd*, the majority stated that "just as no one may be convicted of an offence under an invalid statute, so too may no one be sentenced under an invalid statute" (at para. 15). The Appellant submits that this reasoning applies equally to unconstitutional conditions in LTSOs or any administrative order.

56. It is respectfully submitted that in *Big M* and *Lloyd*, this Court was seeking to ensure that trial judges have the tools they need to prevent individuals from being convicted under unconstitutional statutes. It is further respectfully submitted that this concern is equally applicable to orders. If the trial judge is prevented from considering the constitutionality of the order of the Parole Board, then the Appellant will be convicted and sentenced for breaching a potentially unconstitutional order.

3) The Need to Look beyond Parliament's Intention where *Charter* Rights are at Stake

57. A strict application of the *Maybrun* analysis in this context leads to the concern that Parliament's intent may be used to override enforcement of *Charter* rights. Where constitutionally protected rights are in issue, Parliament's intention may not be sufficiently determinative of the issue of whether a collateral attack should be permitted. Parliament may indeed intend that a challenge to a particular order be heard in a particular forum. That intention may be clear. But where the accused risks being convicted of a criminal offence pursuant to an unconstitutional order, Parliament's intent cannot be determinative. To conclude otherwise would elevate Parliament's intent above the fundamental principle of constitutional law enunciated in *Big M*. Legislative intent would trump *Charter* rights. This method of reasoning inverts the relationship between the Constitution and Parliament, as it allows Parliament's intent to supersede an accused person's ability to enforce his or her *Charter* rights in a criminal proceeding. While the need to enforce *Charter* rights may not always outweigh legislative intent in every circumstance,[8] it also cannot be wholly discarded in favour of legislative intent in the collateral attack analysis. Where a defence to a criminal charge is based on enforcement of *Charter* rights, the *Charter* must loom large in the collateral attack analysis.

vi. Conclusion on Collateral Attack

58. In these circumstances, the Appellant concedes that the wording of the statute and the purpose of the legislation weigh against allowing a collateral attack. However the Appellant

[8] This Court has held that limitation periods apply to preclude constitutional claims: *Kingstreet Investments Ltd. v. New Brunswick (Finance)*, 2007 SCC 1, [2007] 1 S.C.R. 3. *Kingstreet* was a constitutional challenge pursuant to the *Constitution Act, 1867*. This Court has not definitively ruled on whether the reasoning in *Kingstreet* is equally applicable to *Charter* challenges.

submits that the wording and purpose are not particularly significant in these circumstances. The third and fourth *Mayburn* factors have little impact in this case.

59. It is respectfully submitted that, given the serious penalties upon conviction for failure to comply with an LTSO, the penalty upon conviction is the most significant factor and should indeed be determinative in this case. Mr. Bird faces up to ten years in a penitentiary if he is convicted. This prospect of imprisonment is not theoretical – case law supports lengthy terms of imprisonment for similar breaches of such orders.

60. Despite the Court of Appeal's recognition that "there is obviously some merit in the notion that Parliament should not lightly be taken to have denied a person facing such a charge the ability to make anything but the fullest of defences" (para 58), the Court of Appeal effectively paid mere lip service to this principle. The Court of Appeal's decision completely denied Mr. Bird the ability to make a full defence to the charges laid against him, leaving him to face a lengthy period of imprisonment without any ability to challenge the constitutionality of the provision giving rise to that imprisonment. This bears repeating: if a collateral attack is not permitted here, Mr. Bird has no way to challenge the constitutionality of the condition he is alleged to have breached. It is respectfully submitted that this is an injustice that must be remedied by this Court. Mr. Bird must be allowed to respond, in full, to the charges made against him. As such, a collateral attack should be permitted and the constitutionality of the condition should be considered.

D. The Impugned Condition Infringes the *Charter*

61. Assuming that the Appellant is permitted to collaterally attack the impugned order, the question is whether the trial judge was correct in ruling that the residence condition infringed the *Charter*. The Appellant submits that the trial judge was correct and the acquittal should be restored.

62. The question raised by Mr. Bird at trial was whether the Parole Board of Canada has the authority to require an individual to live in a penitentiary. Mr. Bird submits that it cannot be correct that an individual who has completed his or her penitentiary sentence must be required to live in a penitentiary as a condition of his or her LTSO. He submits that the imposition of such a condition is not authorized by the *CCRA* or, if it is so authorized, it infringes the *Charter*.

63. It should be noted that although the Order itself created three options for Mr. Bird, it has been agreed throughout these proceedings that the Parole Board and the Correctional Service Canada required Mr. Bird to live in the Oskana Centre, a Community Correctional Centre.[9]

64. The Appellant's argument with respect to the constitutional validity of the impugned condition will proceed as follows. First, the Appellant will outline the applicable statutory regime. A proper interpretation of this regime shows that the Parole Board never had the power to order the impugned condition and, as a result, the condition infringes s. 9 of the *Charter*. However, if this Court concludes that the statutory regime does *prima facie* grant the Parole Board the power to order the impugned condition, the Appellant submits that this condition infringes ss. 7 and/or 11(h) of the *Charter*. Either way, the Appellant submits that there is a *Charter* infringement and a remedy must be granted. In this case, the proper remedy is a stay of proceedings or an acquittal.

i. Parliament did not Grant to the Parole Board the Power to Order the Impugned Condition

65. The Appellant submits that a proper construction of the statutory scheme leads to the conclusion that Parliament did not grant the Parole Board the power to order an offender to reside in a CCC as a condition of an LTSO. While the Parole Board may order other residence conditions, the essence of the Appellant's submission is that, as a matter of statutory interpretation, a residence condition cannot require an offender to reside in a penitentiary. Because the statute does not authorize the Parole Board to impose the impugned condition, the Appellant submits that he was subject to an arbitrary detention, contrary to s. 9 of the *Charter*.

66. Sections 134.1 and 134.2 of the *Corrections and Conditional Release Act* govern the supervision of long-term offenders in the community. The relevant portions state:

> 134.1 (1) Subject to subsection (4), every offender who is required to be supervised by a long-term supervision order is subject to the conditions prescribed by subsection 161(1) of the *Corrections and Conditional Release Regulations*, with such modifications as the circumstances require.
> (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.

[9] Court of Appeal Judgment, Appellant's Record, Tab 2, para. 28.

67. In determining the conditions to impose on an LTSO, the Board must also consider the purpose of conditional release, which is codified in s. 100 of the *CCRA*:

> The purpose of conditional release 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.

68. This definition was expanded by this Court in *R. v. Ipeelee,* 2012 SCC 13, [2012] 1 S.C.R. 433. LeBel J. stated that, although protection of the public is the "ultimate purpose" of the long-term offender regime, rehabilitation is "a key feature of the long-term offender regime that distinguishes it from the dangerous offender regime" (para 50). He went on to state:

> Reading the *Criminal Code*, the *CCRA* and the applicable jurisprudence together, we can therefore identify two specific objectives of long-term supervision as a form of conditional release: (1) protecting the public from the risk of reoffence, and (2) rehabilitating the offender and reintegrating him or her into the community. The latter objective may properly be described as the ultimate purpose of an LTSO, as indicated by s. 100 of the *CCRA*, though it is inextricably entwined with the former. Unfortunately, provincial and appellate courts have tended to emphasize the protection of the public at the expense of the rehabilitation of offenders. This, in turn, has affected their determinations of what is a fit sentence for breaching a condition of an LTSO. (at para. 48)

69. Here, the Appellant was sent to the Oskana Centre — a facility designed to house recent parolees, persons on statutory release, and those on temporary absences. The Oskana Centre is designated as a Community Correctional Centre by the CSC and, as such, is wholly owned and operated by the CSC. The Oskana Centre qualifies as a "penitentiary" for the purpose of the *CCRA*. Section 2 of the *CCRA* defines a "penitentiary" as follows:

> *Penitentiary* means
> (a) a facility of any description, including all lands connected therewith, that is operated, permanently or temporarily, by the Service for the care and custody of inmates, and
> (b) any place declared to be a penitentiary pursuant to section 7.

70. A penitentiary, as defined in s. 2 of the *CCRA*, is intended for the care and custody of inmates. An inmate, in turn, is defined in s. 2 as follows:

> *Inmate* means
> (a) a person who is in a penitentiary pursuant to
> (i) a sentence, committal or transfer to penitentiary, or

> (ii) a condition imposed by the Parole Board of Canada in connection with day parole or statutory release, or
>
> (b) a person who, having been sentenced, committed or transferred to penitentiary,
>
> (i) is temporarily outside penitentiary by reason of a temporary absence or work release authorized under this Act, or
>
> (ii) is temporarily outside penitentiary for reasons other than a temporary absence, work release, parole or statutory release, but is under the direction or supervision of a staff member or of a person authorized by the Service[.]

71. An inmate therefore is a person that is either: (a) serving a sentence; (b) on day parole or statutory release; or (c) is temporarily outside of a penitentiary. None of these capture an offender that is supervised in the community pursuant to a long-term supervision order after that offender has completed serving his or her sentence. A penitentiary is a facility for the care and custody of inmates. It is not, by definition, a facility for individuals who are no longer inmates and who are being supervised in the community.

72. This interpretation is confirmed by the context and legislative history of the *CCRA*. Turning first to context, the *CCRA* also contains provisions governing the suspension and revocation of release for an offender serving an LTSO. These are contained in s. 135.1. The relevant portions of this provision state:

> 135.1 (1) A member of the Board or a person designated, by name or by position, by the Chairperson of the Board or by the Commissioner, when an offender breaches a condition of a long-term supervision order or a condition referred to in section 134.1 or when the member or person is satisfied that it is necessary and reasonable to suspend the long-term supervision in order to prevent a breach of any condition of it or to protect society, may, by warrant,
>
> (a) suspend the long-term supervision;
>
> (b) authorize the apprehension of the offender; and
>
> (c) authorize the commitment of the offender to a community-based residential facility or a mental health facility or, where the member or person is satisfied that commitment to custody is necessary, to custody until the suspension is cancelled, new conditions for the long-term supervision have been established or the offender is charged with an offence under section 753.3 of the Criminal Code.
>
> (2) The period of the commitment of the offender mentioned in paragraph (1)(c) must not exceed ninety days.

73. Section 135.1(1)(c) expressly permits a member of the Parole Board or designated person to require an offender to reside in a community correctional facility, as a "community-based residential facility" is defined in ss. 99 and 66(3) of the *CCRA* as "a place that provides accommodation to offenders who are on parole, statutory release or temporary absence".

74. This power to order an offender to reside in a CCC may only be exercised in two circumstances: (1) where the offender has breached his or her LTSO; or (2) where the Board "is satisfied that it is necessary and reasonable to suspend the long-term supervision in order to prevent a breach of any condition of it or to protect society".

75. In considering s. 135.1(1)(c), it is important to note that there is no similar language set out in s. 134.1. The *CCRA* contemplates that committing an offender to a CCC is exercisable on *suspension* of the LTSO, not as a *condition* of the LTSO. Concluding otherwise would render s. 135.1(1)(c) substantially redundant, as it would permit the Parole Board to suspend an offender's release by committing him to the precise place where he was ordered to reside.

76. Further, s. 135.1 contains a time limit on the length of permissible detention in a CCC where an LTSO has been suspended: this detention cannot exceed 90 days (s. 135.1(2)). Parliament expressly turned its mind to the question of when and how a long-term offender may be required to reside in a CCC. It concluded that such a requirement is only permissible where the LTSO is suspended and, further, that such a requirement has a 90-day time limit. This further confirms that Parliament did not intend for the Parole Board to have the power to require an offender to reside in a CCC as a condition of the LTSO.

77. The grammatical and ordinary meaning of the words used also supports the proposition that Parliament did not intend for the Parole Board to have the power to "release" an individual serving an LTSO into a penitentiary. The word "release" in the context of prisons has a consistent meaning, which simply put, means "release from a penitentiary."[10]

78. The *CCRA* does not provide its own definition of release, but does provide some partial definitions. In s. 99, "statutory release" means "release from imprisonment subject to supervision

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[10] See for example the Shorter Oxford English Dictionary, 6 ed. Vol 2 (New York: Oxford University Press, 2007): "the act of freeing or fact of being freed from restraint or imprisonment; permission to go free" and "a document giving formal discharge from custody."

See also the Shorter Oxford English Dictionary "remit or discharge (a debt, tax, etcetera) formerly also, discharge (a vow or task)" or "set or make free; liberate; deliver from pain, an obligation, etcetera; free from physical restraint, confinement, or imprisonment; allow to move, drop, or operate, by removing a restraining part; let go (one's hold, etcetera)"

See also Black's Law Dictionary, 9th ed. (St. Paul: West, a Thompson Business, 2009): "the action of freeing or the fact of being freed from restraint or confinement <he became a model citizen after his release from prison>."

before the expiration of an offender's sentence, to which an offender is entitled under s. 127." Section 92, under the heading "Release of Inmates" states: "an inmate may be released from a penitentiary or from any other place designated by the Commissioner."

79. The Appellant submits that, in the context of the *CCRA*, release means release from a penitentiary or from imprisonment. Parliament has made several exceptions to this meaning, none of which are applicable to an individual designated as an LTO. For example, s. 133(4.1) of the *CCRA* specifies that an inmate may be ordered to reside in a community-based residential facility as a condition of statutory release, and that a CCC qualifies as a community-based residential facility for the purpose of statutory release only. But Parliament chose not to apply this exception to individuals that have completed the penitentiary portion of their sentence. The Appellant submits that, for these individuals, the word "release" has its ordinary and grammatical meaning. The individual must be released from a penitentiary.

80. This interpretation is also supported by the legislative history of the long-term offender regime. Section 134.1 was added to the *CCRA* in 1997 as part of Bill C-55, which became *An Act to Amend the Criminal Code (High Risk Offenders), the Corrections and Conditional Release Act, The Criminal Records Act, The Prisons and Reformatories Act and the Department of the Solicitor General Act*, S.C. 1997, c. 17, s. 30.

81. In second reading on October 3, 1996, the Parliamentary Secretary to the Minister of Justice stated that the long-term offender category was initially intended to apply to "the sentencing of repeat sex offenders"[11] by allowing a judge to impose a penitentiary sentence for the offender's crime, followed by up to ten years of intensive community supervision:

> The judge will then impose a penitentiary sentence-in effect the normal sentence for the sex crime in question-but also make an order which can add up to 10 years of intensive community supervision. This long term supervision period begins only when the long term offender has finished the full prison sentence, including parole and any other period of conditional release.[12]

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[11] House of Commons, *House of Commons Debates*, Vol. 134, No. 80, 2nd Sess., 35th Parl., October 3, 1996, p. 5038.
[12] *Ibid*.

82. He stated that the long-term offender regime was not intended to extend the sentence that the offender will serve, but, rather, to manage the reintegration of high risk offenders into the community following the expiry of their prison sentences:

> Our goal is not simply to lock up every sex offender indefinitely although, as noted, an indeterminate dangerous offender sentence remains an option in some cases. Our goal is to reduce the risk posed by this special group of offenders. The reality is most offenders will eventually return to the community having served their time. Community safety is not assured by the sudden release of offenders from a prison environment.
>
> We need to control sex offenders through a combination of jail time and managed reintegration. A long term supervision order can result in an effective doubling of the period that a sex offender remains under the control of the state, the control of Correctional Service Canada.[13]

83. In his statement to the Standing Committee on Justice and Legal Affairs, the Minister of Justice confirmed that a long-term supervision order is not intended to form part of the sentence, as "the long-term supervision period would start only once the offender completes the entire sentence".[14] He also stated that the amendments were not intended to give the state the power to continue to imprison individuals after the expiration of their sentence:

> For a long-term offender, it empowers the court to impose, for as long as ten years after they're released from prison, a whole range of controls and supervision - reporting regularly to the police your whereabouts, maintaining a course of treatment, staying away from certain persons or places - whatever works, and it can be there for ten years.
>
> You ask why we can't pick up the people who are now in prison, why we can't go into the ranges at Kingston Penitentiary, look at the files of the people there and say you and you and you are all likely to reoffend so we're going to impose something on you now that's going to limit your freedom when you get out, or perhaps keep you in longer than your sentence provided. Well, we can't do that.[15]

84. The representative of the National Parole Board testifying before the Standing Committee on Justice and Legal Affairs confirmed that the Parole Board would not have jurisdiction to

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[13] *Ibid* at pp. 5038-39. It should be noted that, while the long-term offender regime was initially reserved for sexual offenders, it has since been expanded to apply to anyone convicted of a serious personal injury offence as defined by s. 752 of the *Criminal Code*.
[14] House of Commons, Standing Committee on Justice and Legal Affairs, *Evidence*, No. 88, 2nd Sess., 35th Parl., December 3, 1996 at 1110.
[15] *Ibid* at 1155-1200.

continue to imprison an offender following the expiry of that offender's sentence, regardless of the level of risk that offender poses:

> I'm not a lawyer, but I would like to point out that there's an issue of double jeopardy here. With a person who has already been convicted and sentenced, it would be extremely difficult to turn around and give him another ten years of incarceration because we think he's dangerous. I don't think the provisions of our Charter of Rights would allow that.[16]

85. The Minister of Justice and representatives of the National Parole Board recognized in 1996 that the *Charter* would not permit a condition like the one imposed on the Appellant to be imposed on any long-term offender. While their concerns were primarily addressed at s. 11(h) of the *Charter* — concerns which will be elaborated on below — these comments clearly show that Parliament did not intend for the Parole Board to have the power to order the continued detention of a long-term offender following the warrant expiry date of that offender's sentence. In other words, Parliament did not intend for the Parole Board to have the power to order that an offender continue to serve as an inmate following the expiry of his or her sentence.

86. The Appellant submits that, by requiring him to abide by a residence condition that the Parole Board did not have the power to impose, he was subject to an arbitrary detention. Section 9 of the *Charter* guarantees that "everyone has the right not to be arbitrarily detained or imprisoned". In *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353, this Court stated that the guarantee in s. 9 "is a manifestation of the general principle, enunciated in s. 7, that a person's liberty is not to be curtailed except in accordance with the principles of fundamental justice" (para. 54).

87. There should be no question that a requirement to reside in a specific place with the threat of significant penal sanctions for non-compliance meets the definition of "detention" set out in *Grant*. This Court defined a detention in *Grant* as a "suspension of the individual's liberty interest by a significant physical or psychological restraint", and that a psychological detention is established "where the individual has a legal obligation to comply with the restrictive request or demand" (at para. 44). It cannot seriously be disputed that a residence condition in an LTSO with a threat of up to ten years' imprisonment for non-compliance amounts to a detention.

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[16] House of Commons, Standing Committee on Justice and Legal Affairs, *Evidence*, No. 92, 2nd Sess., 35th Parl., December 11, 1996 at 1640.

88. If a detention must be authorized by a non-arbitrary law in order to be a non-arbitrary detention, the logical corollary is that a detention that is not authorized by any law at all is *automatically* an arbitrary detention.

89. It should be clarified that the s. 9 analysis turns on the scope of s. 134.1 of the *CCRA* rather than the terms of the condition itself. This is because the Parole Board is a creature of statute: it can only exercise the powers expressly delegated to it. Section 134.1 codifies the powers delegated to the Parole Board when crafting conditions for an LTSO. The Parole Board cannot exceed the boundaries of the delegated authority in s. 134.1 of the *CCRA* without offending the rule of law. As a result, the fact that the condition is a legal order authorizing the detention is immaterial. It loses its legal force if it is not authorized by the enabling statute, just as any other exercise of legal authority becomes arbitrary where it is not authorized by law.

90. As the above review of the history of this provision indicates, Parliament did not intend for the Parole Board to have the power to continue to detain a long-term offender after that offender has finished serving the sentence for his or her offence. Instead, the Parole Board only has the power to impose conditions on the LTSO that enable proper supervision of that offender in the community. The Appellant submits that "supervise in the community" does not and cannot mean "require the offender to reside in a penitentiary". The offender has already served the penitentiary aspect of his sentence.

91. That being said, courts have favoured a broad interpretation of the Parole Board's power to impose conditions on long-term offenders: see, e.g., *Deacon v. Canada (Attorney General)*, 2006 FCA 265, [2007] 2 F.C.R. 607. In *Deacon,* the offender challenged the statutory and constitutional jurisdiction of the Parole Board to impose a medical treatment condition as a condition of his LTSO. The Federal Court of Appeal affirmed that s. 134.1 of the *CCRA* should be interpreted broadly in light of the statutory objectives codified in s. 100 of the *CCRA*: "to fulfill 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" (at para. 41). As a result, the Court concluded in *Deacon* that the medical treatment condition was within the Parole Board's jurisdiction and that this condition did not infringe s. 7 of the *Charter*.

92. The Appellant does not dispute that the Parole Board has broad jurisdiction to impose all reasonable conditions that might be reasonably capable of rendering the risk posed by a long-term offender manageable in the community. But "broad" does not mean "unlimited". There must be a limit to the scope of conditions that the Parole Board may impose on an LTSO. In the Appellant's submission, this limit is found in two sources: the statutory scheme (as discussed above), and ss. 7 and 11(h) of the *Charter*.

1) Distinguishing *Normandin*

93. Before turning to the Appellant's arguments on ss. 7 and 11(h) of the *Charter*, there is one decision that must be dealt with as it could be argued to undermine the Appellant's submissions on s. 9 of the *Charter*. This is *Normandin v. Canada (Attorney General),* 2005 FCA 345, [2006] 2 F.C.R. 112. In that case, the Federal Court of Appeal concluded that the *CCRA* did allow the Parole Board to impose a condition of residence, though it did not distinguish between a CCC and a CRF in reaching this conclusion.

94. The Appellant submits that this decision is not persuasive, for three reasons. First, the decision is simply inconsistent with the purpose of the LTSO regime, as discussed above. It was decided prior to this Court's decision in *R. v. L.M.*, 2008 SCC 31, [2008] 2. S.C.R. 163 and is, in many respects, inconsistent with the reasoning in *L.M.* In *L.M.*, LeBel J. held that the length of an LTSO cannot factor into the proportionality analysis when crafting a fit sentence for the predicate offence. This was for a number of reasons, including the fact that "the effect of a sentence is to deprive the offender of his or her liberty, whereas community supervision is aimed at reintegrating the offender into the community under the supervision of the Correctional Service of Canada" and that "the period of community supervision does not begin until after the sentence (imprisonment) has been served" (at para. 48). The two aspects of the LTO regime also serve different purposes: while the "principal object of a prison sentence is punishment", the "objectives and rationale for the supervision of an offender in the community are to ensure that the offender does not reoffend and to protect the public during a period of supervised reintegration into society" (at para. 46).

95. In *Normandin*, the Federal Court of Appeal rejected the argument that the conditions applicable to paroled offenders and those on statutory release ought not to apply *mutadis mutandis* to offenders serving an LTSO. In its view, an interpretation that would permit the Board to "impose a residence requirement on paroled offenders but [it] could not do so in regard to long-term

offenders" is a "fatal" flaw (at para. 33). It could not accept that a long-term offender could be subject to a residency condition when on parole or statutory release from his or her penitentiary sentence, but could not be subject to an identical residency condition when serving his or her LTSO (at para. 37). The undercurrent of the Federal Court of Appeal's reasoning on this point is that offenders on parole and offenders on an LTSO should be treated the same, and an interpretation of the *CCRA* that results in them being treated differently should be discarded. But this reasoning is, with respect, expressly contrary to what was recognized in *L.M.*: offenders on parole are serving penitentiary sentences, while offenders on LTSOs are not. The two are apples and oranges — they cannot be compared, let alone equated.

96. It is respectfully submitted that the *CCRA* grants the Parole Board a greater power to require residence in a penitentiary when an individual is still serving a sentence of imprisonment than when that sentence is at an end. This is apparent from s. 133 of the *CCRA*, which states that a statutory release order may only include a requirement that an individual reside in a Community Based Residential Facility if the Board is satisfied that, in the absence of such a condition, the offender will: 1) present an undue risk to society 2) by committing an offence listed in Schedule 1. Schedule 1 involves indictable offences: if the Board were concerned that the individual may present an undue risk to society by committing a summary offence, they would be barred from imposing this sort of residency requirement. Similarly, as stated above, ss. 133(4.1)-(4.4) permit the Board to require an inmate to reside in a CCC as a condition of statutory release, but only where the conditions set out in s. 133(4.1) are met and only with the written consent of the Commissioner. Yet, if the Federal Court of Appeal's reasoning is correct in *Normandin*, the Board could impose this residency requirement in an LTSO if it felt it was "reasonable and necessary in order to protect society", despite the fact that the conditions for imposing this requirement upon statutory release were not met, and despite the fact that, unlike statutory release, Parliament chose not to specifically prescribe that this power is available to the Parole Board. It is respectfully submitted that Parliament has already granted the Parole Board the power to order an LTO to reside in a penitentiary where it determines that society is in need of protection: the power in s. 135.1(2)(c). As a result, there is no basis to read an identical power into s. 134.1(2).

97. Second, the *Normandin* decision is, with respect, internally inconsistent. For example, the Federal Court of Appeal held that the purpose of s. 135.1 was to address an anticipated breach,

and so serves a different purpose from s. 134.1(2). Both provisions require that the condition in question be "necessary and reasonable" "to protect society". The difference is that s. 134.1(2) requires the Board to consider how to "facilitate the successful reintegration into society of the offender". Section 135.1 is designed to remove an LTO from the community to protect the public; s. 134.1 is designed to reintegrate that offender into the community. Given these differing purposes, it does not make sense that Parliament would prescribe a 90 day limit when dealing with an anticipated breach to protect society, but no ceiling whatsoever when the limit is intended to reintegrate the offender into society. Further it is inconsistent to point to these differing purposes to justify an interpretation that would treat the Parole Board's powers pursuant to each condition identically.

98. Similarly, the Federal Court of Appeal stated in *Normandin* that s. 135.1 confers a "power of commitment to a residence and not a power to assign a residence". Section 134.1(2) confers a power to assign to a residence. This distinction is entirely artificial: there is no difference between committing an individual to a penitentiary and assigning an individual to live in a penitentiary, particularly when further penal consequences may follow from failing to live in the penitentiary. The "assigning" of a residence bears no factual difference from the "commitment" to a residence, as an offender is not at liberty to dispute either order: failing to live in his or her "assigned" residence results in the same penal consequences as refusing to be "committed" to a residence. In any event, it is illogical to point to the difference in language between "assign" and "commit" to justify the conclusion that because of this difference in language, the two provisions should be interpreted to contain identical powers. If anything, this difference in language shows that there is a difference in the types of places that a long-term offender can be ordered to reside in: it is only under s. 135.1 that that residence can be a penitentiary. That is precisely the Appellant's submission in this case.

99. Third, and perhaps most importantly, the Federal Court of Appeal was not asked to consider any constitutional issues in *Normandin*. It was asked to determine whether any residence condition could be imposed at all, as a matter of pure statutory interpretation: the fact that the offender in *Normandin* was ordered to reside in a CCC rather than a CRF did not factor into the Federal Court of Appeal's decision. The offender's argument in *Normandin* was that he could not be ordered to reside in any particular place at all. The Federal Court of Appeal's holding was that

a residence condition could be imposed — something that the Appellant does not dispute here. What the Appellant disputes is that this condition can require an offender to reside in a penitentiary. Even accepting *Normandin* to be good law, it does not stand for the proposition that an offender may be ordered to reside in a CCC as a condition of his or her LTSO. The *ratio* of *Normandin* is narrower than that.

100. The Appellant submits that *Normandin* does not stand for the proposition that the *CCRA* authorizes a residence condition in a penitentiary, as it did not consider the issue of whether the statutory scheme specifically authorizes the Parole Board to impose a condition of residence requiring an offender to reside in a CCC rather than a CRF. However, assuming that *Normandin* could be interpreted as standing for the proposition that the *CCRA* authorizes the impugned condition, the Appellant submits that its reasoning is not persuasive and the trial judge was correct not to follow it. As a result, a s. 9 breach should be declared.

101. In the alternative, if this Court concludes that the Federal Court of Appeal was correct in *Normandin* and that the *CCRA* authorizes the Parole Board to impose the impugned condition, then the Appellant submits that the impugned condition infringes ss. 7 and 11(h) of the *Charter*.

ii. The Appellant's Right to Liberty was violated in a Manner Inconsistent with the Principles of Fundamental Justice

102. The Appellant submits that the impugned residence condition infringes his right to liberty in a manner that is inconsistent with the principles of fundamental justice. His argument on this point is not that s. 134.1 of the *CCRA* is inconsistent with s. 7, but, rather, that this specific condition infringes his s. 7 right. This was what the trial judge ultimately concluded in this case, and the Appellant submits that he was correct in doing so.

103. The Appellant recognizes that there are two laws that could ground the s. 7 analysis here: s. 753.3 of the *Criminal Code* — the charge that the Appellant is facing — or s. 134.1 of the *CCRA*. The purpose of s. 753.3(1) is to "lessen the risk to the public posed by the offender, but not at the expense of endorsing or encouraging the infringement of the person's constitutional rights": *R. v. Nash,* 2004 ONCJ 58, 186 C.C.C. (3d) 198 at para 44. It is respectfully submitted that in this case, the s. 7 analysis turns on the purpose of the *CCRA* rather than the purpose of the impugned provision of the *Criminal Code*. This is because the Appellant's submission is that the impugned

condition of the LTSO is arbitrary in relation to the enabling provisions of the *CCRA*, not that it is arbitrary in relation to the criminal offence he is charged with.

104. There should be no dispute that the Parole Board's decision to require the Appellant to live in a CCC as a condition of his LTSO engages his liberty interest. This Court has established that imprisonment, and even probation, deprives a person of their liberty (see for example *Reference re Motor Vehicle Act (British Columbia) s94(2),* [1985] 2 S.C.R. 486, at para 74):

> Obviously, imprisonment (including probation orders) deprives people of their liberty. An offence that has the potential as of the moment it is open to the judge to impose imprisonment. There is no need that imprisonment…be made mandatory.

105. As described above, this is not a situation where the possibility of imprisonment is remote. The very order in question, residency in a penitentiary, creates a state of imprisonment, with more imprisonment to follow if the order is not followed. Of course, even if the residence in a penitentiary is not "imprisonment", this LTSO condition still infringes on the offender's liberty, as most sentence conditions engage the offender's liberty interest in s. 7 of the *Charter*: *Proulx,* at para 21. In *Godbout v. Longueuil (City)*, [1997] 3 S.C.R. 844, La Forest J. recognized in the context of a s. 7 challenge to a municipal bylaw that "choosing where to establish one's home is, likewise, a quintessentially private decision going to the very heart of personal or individual autonomy" (para. 66), and the bylaw thus engaged s. 7 of the *Charter*.

1) Arbitrariness

106. The Appellant respectfully submits that the impugned condition interferes with his liberty in a manner that does not accord with the principles of fundamental justice because it is arbitrary. The Appellant submits that the impugned condition is arbitrary because it bears no rational connection to the purpose of Part II of the *CCRA*, *i.e.*, to release offenders.

107. The principle of fundamental justice that forbids arbitrariness targets situations in which there is no rational connection between the object of the law and the limit it imposes on life, liberty, or security of the person – the law is simply incapable of fulfilling its own objectives: *Carter v. Canada (Attorney General)*, 2015 SCC 5, [2015] 1 S.C.R. 331 at para. 83. If the infringement of liberty "bears no relation to, or is inconsistent with, the objective that lies behind the legislation", that infringement of liberty is arbitrary: *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519 at 619-620, per McLachlin J. (as she then was).

108. In describing the distinction between arbitrariness and overbreadth, this Court held in *Canada (Attorney General) v Bedford,* 2013 SCC 72, [2013] 3 S.C.R. 1101 ("*Bedford*"), that arbitrariness "asks whether there is a direct connection between the purpose of the law and the impugned effect on the individual, in the sense that the effect on the individual bears some relation to the law's purpose. … A law that imposes limits on these interests in a way that bears *no connection* to its objective arbitrarily impinges on those interests" (para 111). Later, the Court noted that it "may be helpful" to think of overbreadth as a distinct principle of fundamental justice related to arbitrariness, in that the question for both is whether there is *no connection* between the effects of a law and its objective" (para 117).

109. The most succinct description of the arbitrariness test is found in *R. v. Smith,* 2015 SCC 34, [2015] 2 S.C.R. 602 ("*Smith*") , where this Court stated at para 23 that "a law is only arbitrary if it imposes limits on liberty or security of the person that have no connection to its purpose" (para 23).

110. The impugned condition was imposed by the Parole Board. A discretionary decision by a government actor may be arbitrary under s. 7 of the *Charter* if the contents of that decision bear no rational connection to the objectives of the enabling legislation: *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44, [2011] 3 S.C.R. 134 at paras. 129-132 ("*PHS*"). The Appellant submits that *PHS* sets out the appropriate analytical framework for assessing the validity of the impugned condition under s. 7 of the *Charter*.

111. The Appellant submits that the impugned condition is arbitrary because it is inconsistent with the objective that lies behind the *CCRA*. This, obviously, requires a clear understanding of what the relevant legislative objective is. As described above, the term "release" in Part II of the *CCRA* has the same meaning that the word "release" typically means in the context of a penitentiary, *i.e.*, a release from the penitentiary and custodial system, albeit with supervision in the community for LTOs.

112. The Appellant submits that the relevant purpose of the *CCRA* is to facilitate 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 this Court stated in *Ipeelee*, the long-term supervision provisions of the *CCRA* "identify two specific objectives of long-term supervision as a form of conditional release: (1)

protecting the public from the risk of reoffence, and (2) rehabilitating the offender and reintegrating him or her into the community" (at para. 48). In other words, the purpose of long-term supervision is to release the offender into the community while protecting the public from the risk of reoffence.

113. Imposing such a penitentiary residence requirement as a condition of an LTSO means that the so-called "release" is not a release at all: it is a transfer. The Appellant submits that there is no rational connection between the purpose of the long-term supervision provisions of the *CCRA* and a denial of release. Denying release does not bear any rational connection to the objective of releasing offenders — it undermines that objective. The corollary objective of public protection is also not rationally connected to a denial of release under the guise of community supervision. The objective of public protection is already served by the denial of release through s. 135.1 of the *CCRA*: this provision allows for "residency" to be ordered in a penitentiary as a suspension of release. Absent such a specific provision, the term "release" necessarily implies that the offender is to be released from a penitentiary, not simply moved from one penitentiary to another.

114. That being said, there are cases that have considered s. 7 challenges to conditions of LTSOs and have upheld these conditions as constitutional. The Appellant submits that these cases are distinguishable. In *Deacon v. Canada, supra*, an individual serving an LTSO was required to take certain medication, including medication which was "sometimes dramatically described as 'chemical castration'" (para 3). The individual was diagnosed as a homosexual pedophile, which a history of sexual offences against children. The Federal Court of Appeal held that, as the purpose of the LTSO regime is connected to the safety of the public, this condition did not violate the principles of fundamental justice. The Court's reasoning was based on its rejection of a new principle of fundamental justice, *i.e.*, that the state may only impose non-consensual medical treatment with express statutory authorization. It also rejected the argument that the right to refuse medical treatment is a principle of fundamental justice. The Court did not consider the principle of arbitrariness, and its reasoning, while relevant, is not dispositive here.

115. *Lalo v. Canada (Attorney General)* 2013 FC 1113, involved a situation where an individual serving an LTSO was required to abide by several conditions. One of these was a residency requirement, however on the facts of that case the individual lived in a community-based residential facility (para 6). The bulk of this decision involved conditions that the applicant not

access the internet, and that he not purchase or possess any form of pornography. This decision was "reasonable", and the Court rejected the argument that the residence in the CRF was "a form of custody". However, it should be emphasized that a community based residential facility is not a "penitentiary" within the meaning of the *CCRA* (see s. 133(4.2)), and so the reasoning in *Lalo* has little application to this matter.

116. It is not disputed that there will be restrictions on an individual's liberty while they are serving an LTSO. Such restrictions are permissible if they do not conflict with the fundamental purpose of the LTSO regime, which requires a release from a penitentiary and supervision in the community. These cases may also be distinguished by the severity of the interference with the Appellant's liberty interest – this is not a situation where Mr. Bird is prevented from accessing the internet, but one where he has been entirely deprived of his right to live outside of a penal institution. Mr. Bird's argument is simple: his sentence of incarceration is at an end, and yet it was determined (without representation by state-funded counsel or judicial oversight) that he would have to continue to live in a penitentiary.

117. It may be argued that the denial of release furthers the public protection purpose of the *CCRA* and, as a result, is not arbitrary. This argument, while facially attractive, has a serious problem: it ignores the structure of the *CCRA*. The power to deny release on public protection grounds is already codified in s. 135.1; it should not be found in s. 134.1. The *CCRA* allows an individual declared to be a long-term offender to be placed in a CCC in two scenarios: by way of transfer during the penitentiary sentence for the predicate offence; or where the conditions in s. 135.1 are fulfilled and the LTSO is suspended. Residence in a CCC pursuant to a s. 135.1 order is not arbitrary, because this provision permits detention in a CCC when there is a reason to believe that the LTSO has been breached, or the LTSO is about to be breached. This section is intended to act as an enforcement mechanism to ensure the conditions of release are followed, and, as a result, a detention authorized pursuant to s. 135.1 is rationally connected to the "public protection" purpose of the *CCRA*. The purpose of s. 135.1 is to revoke release. Reading an identical power of detention into s. 134.1(2) under the guise of "public protection" is not rationally connected to the purpose of s. 134.1, *i.e.*, to release LTOs in the community.

118. The Appellant submits that the order requiring the Appellant to reside at a penitentiary, while facially presented as a condition of release, is, in reality, a denial of release. For this reason, the order has no rational connection to the purpose of Part II of the *CCRA*. As such, it is arbitrary.

119. In the event that this Court does find that there was a violation of Mr. Bird's right to liberty, and that this violation was inconsistent with the principles of fundamental justice, it is respectfully submitted that this violation should not be justified under s. 1. As this Court held in *PHS*, a s. 1 justification may not be required where a discretionary decision is held to infringe s. 7: *PHS* at para. 137. In the event that a s. 1 justification is required, the Appellant submits that, as outlined in *Bedford* at para. 127, a law violating s. 7 is "unlikely" to be justified under s. 1, due to the significance of the fundamental rights protected by s. 7. Where the objective of the prohibition is the same for the purposes of a s. 7 and s. 1 analysis, this Court has held that "the same disconnect…that renders it arbitrary under s. 7 frustrates the requirement under s. 1 that the limit be rationally connected to a pressing objective" (*Smith* at 29).

iii. Double Punishment

120. The Appellant submits that, even if this Court concludes that there is no s. 7 or s. 9 infringement, requiring the Appellant to reside in a penitentiary as a condition of his LTSO gives rise to a s. 11(h) breach. This s. 11(h) concern was expressed by the Minister of Justice and representatives of the National Parole Board in the debates preceding the enactment of this legislation in 1996. Parliament recognized as early as 1996 that an offender could not continue to be detained in a penitentiary after warrant expiry without offending s. 11(h) of the *Charter*: an offender must know at the time of sentencing of the extent of jeopardy that he or she faces.

121. In *Canada (Attorney General) v. Whaling*, 2014 SCC 20, [2014] 1 S.C.R. 392, this Court recognized that changes to the manner in which an imprisoned individual serves his or her sentence may infringe s. 11(h) of the *Charter*. In *Whaling*, this Court affirmed that s. 11(h) of the *Charter* does not only protect against the duplication of penal proceedings. Instead, Wagner J. affirmed that s. 11(h) "applies where an offender has been sentenced, even if no separate proceeding has taken place" (at para. 36). This is because s. 11(h) is framed in disjunctive terms: if a person is "finally found guilty and punished for the offence", that person has the right "not to be tried or punished for it again" (*Whaling* at para. 37). Justice Wagner concluded that "the protection [of s.

11(h)] applies to both the harassment of multiple trials and the harassment of additional punishment" (*Whaling* at para. 37)

122. Justice Wagner then went on to address the difficult question of what constitutes "punishment" for the purpose of s. 11(h). He recognized that incarceration is 'punishment':

> [51] On the other hand, a retrospective change to parole eligibility may have the effect of extending an offender's term of incarceration. Incarceration is "the most severe deprivation of liberty known to our law" (*Wigglesworth*, at p. 562), and the most obvious example of punishment in the "arsenal of sanctions" available under the *Criminal Code*. Incarceration and heavy fines are the benchmark sanctions against which other, less severe sanctions are assessed under the *Rodgers* test. That incarceration constitutes "punishment" is a core underlying assumption of the *Rodgers* test.

123. He summarized the test for 'punishment' under s. 11(h) of the *Charter* as follows:

> [54] …. In my view, where an offender has been finally acquitted of, or finally found guilty and punished for, an offence, s. 11(h) precludes the following further state actions in relation to the same offence:
>
> > (a) a proceeding that is criminal or quasi-criminal in nature (being "tried . . . again");
> > (b) an additional sanction or consequence that meets the two-part *Rodgers* test for punishment (being "punished . . . again") in that it is similar in nature to the types of sanctions available under the *Criminal Code* and is imposed in furtherance of the purpose and principles of sentencing; and
> > (c) retrospective changes to the conditions of the original sanction which have the effect of adding to the offender's punishment (being "punished . . . again").

124. As Pomerance J. explained in *R. v. Jenkins*, 2014 ONSC 3223, *Whaling* "marks an important chapter in the evolution of punishment" (at para. 58). This is for three reasons:

> [58] … First, *Whaling* recognizes the distinction between a sentence and the conditions under which a sentence is served. The change to the parole system in *Whaling* did not affect or change the offender's original sentence. However, by altering parole status, the legislation did change the manner in which he served his sentence. It affected whether he was to serve his sentence in jail, or under supervision within the community. It affected the conditions of the sentence, even though it did not affect the sentence itself.
>
> [59] The second major breakthrough in *Whaling* is the recognition that a retrospective change to the conditions of a sentence could amount to punishment, even though the sentence itself was not affected, and no new or separate proceedings had been instituted.
>
> [60] The third critical aspect of *Whaling* is the creation of a framework for determining when retrospective changes to the conditions of a sentence will increase punishment. The

> court stressed that many changes to parole policy and/or practice will not offend the *Charter* even though they affect individual liberty. Section 11(h) is only violated when punishment is increased. How does one make that determination? Wagner J. refrained from stating any absolute formula, but identified, as the dominant consideration, the offender's expectation of liberty at the time sentence was imposed. If the change retrospectively thwarts an offender's settled expectations of liberty, it will be seen as increasing punishment[.]

125. *Whaling* therefore affirms that changes to the conditions of a sentence may still trigger the protection of s. 11(h) of the *Charter*, even without any additional proceedings or changes to the sentence itself. The condition at issue here falls within the second and/or third aspects of the *Whaling* test: it is either an additional sanction or consequence that is similar in nature to the types of sanctions available under the *Criminal Code*, or it forms a retrospective change to the conditions of the original sanction which has the effect of adding to the offender's punishment.

126. Here, the Appellant was ordered to reside in a CCC as a term of his LTSO. As set out above, a CCC is, by definition, a penitentiary. The Appellant was ordered to reside in a penitentiary as a term of his LTSO. This was not part of the original sentence imposed on the Appellant at the time of sentencing, since the conditions of an LTSO are not set until the offender finishes serving the sentence for the predicate offence.

127. The effect of the Parole Board's order is to continue to treat the Appellant as an inmate after he has finished serving his sentence. He has been ordered to reside in a CCC, which is a penitentiary designed, by definition, "for the care and custody of inmates": *CCRA*, s. 2. An inmate is a person who is in a penitentiary pursuant to either "a sentence" or a condition imposed "in connection with day parole or statutory release". The Appellant is none of these things: he has finished serving his sentence, and, as a result, is not eligible for day parole or statutory release. But for the LTSO, the Appellant would have been released into the community. He was not serving a sentence for the predicate offence and, as a result, he was no longer an inmate.

128. The effect of the residence condition is to continue to treat the Appellant as an inmate for the duration of the condition. An inmate is required to abide by the rules of a penitentiary, and may be subject to discipline for breaches of those rules: *CCRA*, ss. 38-45. The Appellant had to abide by the rules of the Oksana Centre, and could be criminally charged for failing to do so (as he indeed

was).[17] The Parole Board intended for the Appellant to be subject to the rules of the Oksana Centre, as it was recommended that the Appellant be subject to the same residence condition on his statutory release as on his LTSO.[18] If the Parole Board intended for the Appellant to follow the rules of the Oskana Centre — a penitentiary designed for the housing of inmates — then the Parole Board intended to continue treating the Appellant as an inmate.

129. The question is whether such a condition thwarts an offender's reasonable expectation of liberty that existed at the time of sentencing. In the Appellant's submission, it would not be reasonable for any offender to expect that he or she would continue to be treated as an inmate and detained in a penitentiary following the expiry of his or her sentence. It would not be reasonable for an offender declared to be a long-term offender to have that expectation either — instead, that offender would expect that he or she would be "supervised in the community": *Criminal Code*, s. 753.2(1). The Appellant submits that a penitentiary is not the "community". Placing the word "community" in the title of the penitentiary does not change its legal nature. It is designed for the care and custody of inmates, not individuals.

130. The Appellant therefore submits that the imposition of this condition thwarts his "settled expectation of liberty" that existed at the time of sentencing: *Whaling* at para. 58. This condition requires the Appellant to reside in a penitentiary. This restriction on his liberty meets the test for a punishment as set out in *Whaling*, both because it is similar to the nature of sanctions available under the *Criminal Code* — *i.e.*, imprisonment or detention in a penitentiary — and because it furthers the purposes and principles of sentencing, namely protection of the public.

131. The problem with this condition goes far beyond the Appellant's obligation to reside in the Oksana Centre. If this Court concludes that this condition is a valid exercise of the Parole Board's power under s. 134.1 of the *CCRA*, then there is no statutory restriction on how the Parole Board may use its power to impose a residency condition, or the extent to which the Parole Board can interfere with an long-term offender's liberty after the offender has completed serving his or her sentence for the predicate offence. If the Parole Board can order that the Appellant reside in this penitentiary, the Parole Board could, in theory, order the offender to reside in any penitentiary,

[17] Agreed Statement of Facts, para. 9, Appellant's Record, Tab 5. The warrant for Mr. Bird's arrest was issued upon breach of the curfew rule established by the Oksana Centre.
[18] Agreed Statement of Facts, Appendix B, p. 6, Appellant's Record, Tab 5.

whether it be a maximum security facility or a CCC. There would be no identifiable basis in the legislation that would permit the Parole Board to order an offender to reside in a CCC, but would not permit the Parole Board to order than an offender reside in a maximum security penitentiary as a condition of the offender's LTSO — unlike the safeguard imposed in s. 133(4.2) for offenders released on statutory release.[19] The result is that upholding the constitutional validity of this condition leads to the inescapable conclusion that the Parole Board has the unfettered power to order that an offender continue to be imprisoned in a penitentiary as a residence condition of an LTSO. This defeats the community supervision purpose of the LTSO.

132. The essence of the Appellant's argument on this point is that the Parole Board's order continues to treat him as an inmate after he has finished serving the sentence for his offence. The sentence for a LTO has two parts: the penitentiary sentence for the predicate offence, and the subsequent LTSO. An offender that is declared to be a LTO has, in the Appellant's submission, a settled expectation that these two parts will be separate. The condition imposed by the Parole Board here bleeds the two together: it imposes a penitentiary residence on the offender as a condition of the LTSO after the penitentiary aspect of the offender's sentence has concluded. The Appellant submits that this amounts to punishment within the meaning of s. 11(h) of the *Charter*.

133. This is what distinguishes the residence condition here from other conditions that restrict an offender's liberty: an offender that is declared to be a long-term offender obviously has a settled expectation that the Parole Board will restrict his or her liberty by setting conditions for the LTSO. The offender knows at the time of sentencing that the LTSO was ordered and that he or she will be required to abide by conditions for the duration of the LTSO. But the offender does not have a settled expectation that he or she will continue to be treated as an inmate after the expiration of the sentence for the predicate offence: like the offender in *Whaling*, the Appellant reasonably expected that he would be released and supervised in the community, as the Appellant reasonably expected that he had completed the penitentiary aspect of his sentence. The residence condition imposed by the Parole Board thwarts this settled expectation of liberty and amounts to double punishment within the meaning of s. 11(h) of the *Charter*.

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[19] Section 133(4.2) specifies that a CBRF in s. 133(4.1) includes a CCC, but that it "does not include any other penitentiary".

134. This concern for double punishment cannot be assuaged by pointing to the different purposes that each element of long-term offender sentencing serves. It is undoubtedly true that the penitentiary sentence is the sentence that is fit for the predicate offence, while the LTSO is based on the offender's entire offending history and the risk he or she poses to the public. And it is undoubtedly true that s. 11(h), by its terms, applies to double punishment for the same offence. But in the Appellant's submission, the protections of s. 11(h) would be hollow for long-term offenders if the Parole Board was entitled to merge the penitentiary aspect of his or her sentence with the LTSO aspect, thereby extending the period of penitentiary detention and lessening the period of true supervision in the community. As Wagner J. stated in *Whaling*, "offenders have constitutionally protected expectations as to the duration, but not the conditions, of their sentences" (at para. 57). Extending the duration of the penitentiary aspect of the offender's sentence after the warrant expiry date for that sentence under the guise of public protection amounts, in effect, to a retrospective increase of the penitentiary sentence for the predicate offence. In the Appellant's submission, this is an infringement of s. 11(h) of the *Charter*.

iv. Remedy

135. The Appellant submits that the remedy will depend on which *Charter* right is infringed. If the *Charter* infringement is s. 7 or s. 11(h), the Appellant respectfully requests that the impugned condition be quashed pursuant to s. 24(1) of the *Charter* and an acquittal be entered.

136. The Appellant submits that the remedy sought is under s. 24(1) of the *Charter* (not s. 52(1) of the *Constitution Act, 1982*). This is because the condition applies only to Mr. Bird: it is not a law of "general application" but is the product of "unconstitutional government action": *R. v. Ferguson*, 2008 SCC 6, [2008] 1 S.C.R. 96 at para. 61. The Appellant is challenging "the validity of government action taken in administering a valid legislative scheme": *Greater Vancouver Transportation Authority v. Canadian Federation of Students – British Columbia Component*, 2009 SCC 31, [2009] 2 S.C.R. 294 at para. 84. As such, the remedial authority is s. 24(1) of the *Charter*, not s. 52(1) of the *Constitution Act, 1982: Ferguson* at para. 35.

137. Similarly, since the Appellant is challenging the validity of government action rather than the validity of a general law, there is no possibility for justification under s. 1 of the *Charter*. Once an infringement is found, a remedy must be granted without any s. 1 analysis: *R. v. Therens*, [1985] 1 S.C.R. 613 at para. 10, *per* Estey J.

138. If this Court recognizes that the *CCRA* does not authorize the impugned condition, the Appellant asks that this Court declare that the Appellant's s. 9 rights were infringed and enter a stay of proceedings pursuant to s. 24(1). This Court could also quash the impugned condition as a nullity pursuant to its inherent jurisdiction and enter an acquittal without considering s. 9 of the *Charter*. However, the Appellant has framed this submission in the language of s. 9 because this trial was heard by a Provincial Court judge: a Provincial Court judge does not have the inherent jurisdiction necessary to quash an administrative order. However, a Provincial Court judge does have the jurisdiction to issue *Charter* remedies. The Appellant therefore submits that in this particular context, where a condition is imposed without statutory authority and where the breach of that condition is prosecuted before a statutory court without inherent jurisdiction, that a stay of proceedings pursuant to s. 24(1) of the *Charter* based on a s. 9 breach is the appropriate remedy.

139. If this Court concludes that the impugned condition does infringe the *Charter*, the Appellant submits that it is open to this Court to remand the matter to the Parole Board to craft a replacement condition, whether by way of this Court's jurisdiction under s. 46.1 of the *Supreme Court Act* or by way of a writ of *mandamus* or *procedendo*.

PART IV Submission on Costs

140. The Appellant does not seek costs, and requests that no costs be ordered against him.

PART V Order Sought

141. The Appellant respectfully requests that:

1. The appeal be allowed;
2. The conviction be quashed and the acquittal entered by the trial judge be restored;
3. In the alternative, that a stay of proceedings be entered pursuant to s. 24(1) of the *Charter*.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

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Leif Jensen and Michelle Biddulph

Solicitors for the Appellant

PART VI

Authorities

Cases

Statute

Other