S.C.C. File No. 37596

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

BETWEEN:

SPENCER DEAN BIRD

APPELLANT
(Respondent)

-and-

HER MAJESTY THE QUEEN

RESPONDENT
(Appellant)

-and-

THE ATTORNEY GENERAL FOR CANADA,
THE ATTORNEY GENERAL FOR ONTARIO,
ABORIGINAL LEGAL SERVICES,
DAVID ASPER CENTRE FOR CONSTITUTIONAL RIGHTS,
and CANADIAN CIVIL LIBERTIES ASSOCIATION

INTERVENERS

FACTUM OF THE RESPONDENT
HER MAJESTY THE QUEEN

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

Theodore J. C. Litowski
Ministry of Justice and Attorney General
820 – 1874 Scarth Street
Regina, SK S4P 4B3

Tel: (306) 787-6642
Fax: (306) 787-9111
Email: theodore.litowski@gov.sk.ca

Counsel for the Respondent
Attorney General of Saskatchewan

D. Lynne Watt
Gowling WLG (Canada) LLP
160 Elgin Street
Suite 2600
Ottawa, ON K1P 1C3

Tel: (613) 786-8695
Fax: (613) 788-3509
Email: lynne.watt@gowlingwlg.com

Ottawa Agent for Counsel for the
Respondent Attorney General of
Saskatchewan

Leif Jensen
Community Legal Assistance for Saskatoon Inner City Inc. (CLASSIC)
123 20th Street West
Saskatoon, SK S7M 0W7

Tel: (306) 657-6106
Fax: (306) 384-0520
Email: leif_j@classiclaw.ca

Michele Biddulph
Greenspan Humphrey Weinstein
15 Bedford Road
Toronto, ON M5R 2J7

Tel: (416) 868-1755
Fax: (416) 868-1990
Email: mmb@15bedford.com

Counsel for the Appellant Spencer Dean Bird

Aileen Furey
Matthew Day
Shore Davis Johnston
200 Elgin Street, Suite 800
Ottawa, ON K2P 1L5

Tel: (613) 204-9222
Fax: (613) 223-2374
Email: aileen@shoredavis.com
Email: day@shoredavis.com

Ottawa Agents for Counsel for the Appellant Spencer Dean Bird

Sharlene Telles-Langdon
Attorney General of Canada
Prairie Regional Office
301 – 310 Broadway Avenue
Winnipeg, MB R3C 0S6

Tel: (204) 983-0862
Fax: (204) 984-8495
Email: sharlene.telles-langdon@justice.gc.ca

Counsel for the Intervener, Attorney General of Canada

Robert Frater, Q.C.
Attorney General of Canada
50 O'Connor Street
Ottawa, ON K1A 0H8

Tel: (613) 670-6270
Fax: (613) 954-1920
Email: robert.frater@justice.gc.ca

Ottawa Agent for Counsel for the Intervener, Attorney General of Canada

Deborah Krick
Attorney General of Ontario
10th floor, 720 Bay Street
Toronto, ON M7A 2S9

Tel: (416) 326-2002
Fax: (416) 326-4656
Email: howard.leibovich@ontario.ca

Counsel for the Intervener, Attorney General of Ontario

Robert E. Houston, Q.C.
Gowling WLG (Canada) LLP
160 Elgin Street
Suite 2600
Ottawa, ON K1P 1C3

Tel: (613) 783-8817
Fax: (613) 788-3500
Email: robert.houston@gowlingwlg.com

Ottawa Agent for Counsel for the Intervener, Attorney General of Ontario

Jonathan Rudin
Emilie N. Lahaie
Aboriginal Legal Services
211 Yonge Street, Suite 500
Toronto, ON M5B 1M4

Tel: (416) 408-4041
Fax: (416) 408-4268
Email: rudinj@lao.on.ca

Counsel for the Intervener, Aboriginal Legal Services

Michael Bossin
Community Legal Services-Ottawa Carleton
1 Nicholas Street, Suite 422
Ottawa, ON K1N 7B7

Tel: (613) 241-7008 Ext: 224
Fax: (613) 241-8680
Email: bossinm@lao.on.ca

Ottawa Agent for Counsel for the Intervener, Aboriginal Legal Services

Breese Davies
Breese Davies Law
171 John Street
Suite 101
Toronto, ON M5T 1X3

Tel: (416) 649-5061
Fax: (416) 352-7733
Email: bdavies@bdlaw.ca

Counsel for the Intervener, David Asper Centre for Constitutional Rights

Matthew J. Halpin
Norton Rose Fulbright Canada LLP
45 O'Connor Street
Suite 1500
Ottawa, ON K1P 1A4

Tel: (613) 780-8654
Fax: (613) 230-5459
Email: matthew.halpin@nortonrosefulbright.com

Ottawa Agent for Counsel for the Intervener, David Asper Centre for Constitutional Rights

Audrey Boctor
Irving Mitchell Kalichman LLP
Alexis Nihon Plaza, Tower 2
3500 De Maisonneuve Blvd. West
Montreal, QC H3Z 3C1
Tel: (514) 934-7737
Fax: (514) 935-2999
Email: aboctor@imk.ca

Counsel for the Intervener, Canadian Civil Liberties Association

Marie-France Major
Supreme Advocacy LLP
100- 340 Gilmour Street
Ottawa, ON K2P 0R3
Tel: (613) 695-8855 Ext: 102
Fax: (613) 695-8580
Email: mfmajor@supremeadvocacy.ca

Ottawa Agent for Counsel for the Intervener, Canadian Civil Liberties Association

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PART I: OVERVIEW OF FACTS AND LAW

A. Overview of position

1. Trial courts, particularly statutory courts, lack the jurisdiction to modify, amend, or otherwise detract from decisions of the Parole Board of Canada or to issue prerogative relief from Parole Board or Correctional Service of Canada decisions. The *Charter* does not give trial courts the jurisdiction to oversee a federal tribunal as that tribunal exercises its statutory authority.

2. The relationship between the Correctional Service of Canada, the Parole Board of Canada, the police, the Crown, trial courts, and the offenders relies on the integrity and coherence of the *Corrections and Conditional Release Act* and *Criminal Code*. If trial courts can obliquely review decisions of the Parole Board of Canada, considerable uncertainty would be introduced into the long-term supervision system. The doctrine of collateral attack prevents this, and protects society at large from being subject to the risk precipitated by allowing dangerous and long-term offenders to "breach first, challenge later."

3. The Parole Board of Canada's power to impose residence at community-based residential facilities, whether public or privately-owned, is an important component of the long-term offender regime. Residence at supervised facilities is a backstop against the threat of indefinite detention for offenders who, despite meeting the statutory criteria for dangerousness, are nonetheless manageable in the community. Residence at such facilities is not itself a form of incarceration. The Parole Board's decision to place the Appellant in such a facility was reasonable, necessary, and consistent with sections 7, 9 and 11 of the *Canadian Charter of Rights and Freedoms*.

B. Facts

4. In 2005, the Appellant was convicted of a serious personal injury offence and found to be a long-term offender ("LTO") by Judge Ferris of the Saskatchewan Provincial Court. The Appellant was sentenced to 54 months of incarceration to be followed by five years of supervision under a long-term supervision order ("LTSO").[1]

5. Intervening charges and convictions interrupted the Appellant's sentence, such that prior to August 2014, the Appellant was resident at the Oskana Community Correctional Centre (Oskana CCC) as a condition of statutory release. In anticipation of his warrant expiry and transition to his LTSO, the Correctional Service of Canada ("CSC") and the Parole Board of Canada ("PBC") assessed the Appellant to determine how he could best be managed in the community during the remainder of his LTSO.[2] The PBC noted, after reviewing the CSC recommendation and making its own assessment of the Appellant's file information[3]:

> Given your lengthy history of violence causing physical harm to your victims, your numerous failed releases, your use of weapons during the commission of many of your offences, your inability to abide by the conditions that are imposed on you, your ongoing serious addiction issues and your lack of insight into your violence and substance abuse, the Board is satisfied that you will require the structure and supervision that only can be provided by a community correctional centre/community residential centre. Therefore, residency is imposed for 180 days. You will be required to return to the facility nightly until you can garner positive sources of support in the community who are prepared to assist in your reintegration and you are able to demonstrate credibility and stability in the community.

6. Accordingly, among the conditions of the Appellant's long-term supervision was a residence condition, imposed pursuant to section 134.1(2) of the *Corrections and Conditional Release Act*, SC 1992, c 20 [*CCRA*]. The Appellant was required to:

> 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.

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[1] Respondent's Record, Tab 4 (Long-Term Supervision Order, Exhibit P-1), page 20.

[2] Appellant's Record, Volume II, Tab 6 (Agreed Statement of Facts), pages 66 and 71.

[3] *Ibid.*, at page 69.

7. When he reached warrant expiry and long-term supervision recommenced, the Appellant was assigned to continue residing at Oskana CCC.

8. The Appellant failed to maintain his residence at Oskana CCC as of January 28, 2015. He was located and arrested 67 days later, on April 16, 2015.

9. Subject only to the outcome of the constitutional question, all parties agreed that the Appellant was guilty of the offence as charged,[4] namely, that during his period at large he did:

> Being bound by a long term supervision order commencing April 22, 2010, without reasonable excuse fail to comply with a condition therof, to wit; 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, contrary to section 753.3(1) of the *Criminal Code*.[5]

10. The Appellant did not call evidence of the specific conditions, rules, or supervision provided at Oskana CCC, nor of the deleterious effects of the facilities' rules or his subjective perception of them. Only a lunch and nighttime curfew was specifically identified by the Appellant as a matter of concern.[6]

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[4] Respondent's Record, Tab 3 (Supplemental Transcript), pages 8-9.

[5] Appellant's Record, Volume I, Tab 4 (Information #90010344), at page 45.

[6] Appellant's Record, Volume II, Tab 6 (Agreed Statement of Facts), at page 64.

PART II: QUESTIONS IN ISSUE

11. The Respondent submits the following in response to the Appellant's proposed issues:

Issue #1: What is the proper application of the doctrine of collateral attack in these circumstances?

12. Trial courts have no jurisdiction to quash or vary Parole Board of Canada decisions, which stand until set aside in proceedings undertaken for that purpose. The rule against collateral attack applies with full force to criminal proceedings. An LTSO is a sentence of a court of criminal jurisdiction and collateral attacks should be strongly discouraged. Parliament's intent is clear: trial courts are not a parallel forum to the PBC and the Federal Court for the review of PBC decisions.

Issue #2 Was the Parole Board of Canada entitled to order that the Appellant reside at a penitentiary?

13. There is no magic imparted when a halfway house is designated or described as a penitentiary. That some community-based residential facilities are "penitentiaries" in accordance with the *CCRA* does not make them inaccessible to long-term and dangerous offenders who require intensive community supervision. Community-based residential facilities, including community correctional centres, provide structure and support to offenders at various stages of their reintegration into society as law-abiding citizens. This practice is long-standing and has been previously sanctioned by the Federal Court of Appeal in *Normandin v Canada (Attorney General)*, 2005 FCA 345, [2006] 2 FCR 112, leave to appeal to SCC ref'd, 358 NR 392 (note) [*Normandin II*]. It is consistent with the *CCRA* and the *Charter*.

PART III: ARGUMENT

A. Jurisdiction and standard of review

14. The Respondent acknowledges that the standard of review of questions of law is correctness.

B. The statutory frameworks

1. Part XXIV of the Criminal Code

15. Dangerous offenders ("DO") are unique in the criminal law. The risk they present to the community is so great, and their prospects for rehabilitation so daunting, that a special sentencing regime is required: *R v Lyons*, [1987] 2 SCR 309 at paras 13-16 [*Lyons*]. Indefinite detention was the lynchpin of dangerous offender sentencing for decades.

16. In 1997, Parliament more carefully tailored the range of outcomes available to offenders in this exceptional group. With section 753.1 of the *Criminal Code*, RSC 1985, c C-46, a new category of offender was identified: the long-term offender. Since 1997, long-term offenders ("LTO") comprise those who pose a "substantial risk" to the community but whose prospects for rehabilitation are clear enough that indefinite detention is no longer appropriate. A new remedy, the long-term supervision order ("LTSO"), was created to address the needs of these offenders.

17. Just as with dangerous offenders, LTO designation is exceptional and procedurally rigorous: *R v L.M.*, 2008 SCC 31 at para 39, [2008] 2 SCR 163 [*L.M.*].

18. Between 1997 and 2008, offenders convicted of a serious personal injury offence and subject to a Part XXIV hearing could be subject to three possible orders.

1) If the criteria in s. 753(1) were satisfied beyond a reasonable doubt, the sentencing Court could find the accused to be a dangerous offender ("DO") and sentence him or her to indefinite detention;

2) Whether or not the criteria in s. 753(1) were satisfied, if the criteria in s. 753.1(1) were <u>also</u> satisfied, an offender could be designated a long-term offender ("LTO"). These criteria were often applied together in the "one stage" approach, epitomized by *R v Johnson*, 2003 SCC 46, [2003] 2 SCR 357 [*Johnson*].

3) If neither s. 753(1) nor 753.1(1) were satisfied, the offender would receive a conventional sentence.

19. Beginning in 1997 (and affirmed by this Court's decision in *Johnson*) the LTO regime has applied to offenders who were "dangerous" within the meaning of 753(1) but also met the criteria in 753.1(1)(c), namely, that they exhibited a reasonable possibility of eventual control in the community.

20. The Appellant was designated a long-term offender under the pre-2008 regime, as it stood post-*Johnson*.

21. Under the *Johnson*-era Part XXIV regime, indefinite detention was mandatory for all dangerous offenders. By contrast, long-term offenders would be sentenced to a definite period of incarceration, usually followed by a long-term supervision order ("LTSO"). This system of determinate detention and long-term supervision remains the case for LTOs to the present day.

22. After *Johnson*, offenders who met the DO criteria in s. 753(1) of the *Criminal Code* could nonetheless be designated LTOs if they also met the criteria in s. 753.1(c). Parliament responded to this by passing the *Tackling Violent Crime Act*, SC 2008, c 6 in 2008, entrenching the *Johnson* test in section 753(4.1) but requiring mandatory "dangerous" designations for all offenders who meet the criteria in section 753(1). After 2008, dangerous offenders may receive determinate sentences, with or without LTSOs, if a "lesser measure" than indefinite detention will "adequately protect the public against the commission […] of murder or a serious personal injury offence".

23. Despite the *Tackling Violent Crime Act* and intervening amendments to Part XXIV, the nature of long-term supervision remains unchanged since 1997. Pursuant to section 753.2(1) of the *Criminal Code*, LTSOs are a form of supervision "in the community"[7] to be managed "in accordance with the *Corrections and Conditional Release Act*."

24. After sentencing, LTO (or DOs who receive determinate sentences and LTSOs pursuant to section 753(4)(b)) must receive a sentence of at least two years, followed by long-term supervision of up to ten years (pursuant to sections 7531(4)(b), 753.1(3)(b), and 755(2)). A LTSO begins after warrant expiry and runs for a fixed length.

[7] This phrase moved from section 753.1(3)(b) to 753.2(1) with the *Tackling Violent Crime Act*.

25. Sentencing judges fix the length of an LTSO after Part XXIV proceedings, but as noted by Southin J.A. in her concurring decision in *R v Wormell*, 2005 BCCA 328 at para 27, 198 CCC (3d) 252, leave to appeal to SCC ref'd, [2006] 1 SCR xvi, sentencing judges have no jurisdiction to set the conditions of an offender's long-term supervision. Setting conditions are the responsibility of the PBC, pursuant to Part II of the *CCRA*. This division of labour remains the case, post-2008.

26. Since the Applicant's predicate offence was committed prior to 2008, his sentence and designation as a long-term offender were determined under the previous version of Part XXIV, as it stood before the *Tackling Violent Crime Act* and subsequent amendments. Accordingly, the impact of the *Tackling Violent Crime Act* to this appeal is limited, but raises an important question of scope: under the *Criminal Code* and *CCRA* as currently structured, both DOs and LTOs can be serving LTSOs.

3. The Corrections and Conditional Release Act (Part II)

27. After being sentenced to imprisonment for a predicate offence, DO and LTOs pass from the jurisdiction of the trial court into the purview of the PBC and the Correctional Service of Canada ("CSC"). Unless the offender is held in custody until his or her warrant expiry, they will be under the supervision of the CSC in the community as a component of their parole or statutory release prior to the beginning of the LTSO.

28. The LTSO scheme fits creatively into the *CCRA*. In some respects, offenders subject to long-term supervision are treated identically to offenders serving more conventional forms of community release, like parole or statutory release. To this end, deeming provisions applying portions of the *CCRA* to LTSOs *mutatis mutandis* are found in sections 2.1, 99.1, and 157.1 of the *CCRA*.

29. As *per* s. 134.1(1) of the *CCRA*, all offenders under long-term supervision are subject to the release conditions set out in the *Corrections and Conditional Release Regulations*, SOR/92-620, s. 161(1) [*Regulations*]. These release conditions require, *inter alia*, that offenders remain in Canada, keep the peace, and report to their parole supervisors. These conditions would, in the absence of s. 134.1(1) of the *CCRA*, apply only to offenders on parole or statutory release.

30. Conversely, offenders under long-term supervision require careful, very serious supervisory conditions to be manageable in the community to ensure that the community is protected and to encourage the offender's reintegration into society. LTOs and DOs are offenders who have been sentenced to LTSOs in lieu of conventional sentences because of their potential for violent recidivism, as expressed by the strict procedural rules found in section 753.1 of the *Criminal Code* and described by this Court in *L.M.*, at para 40.

31. LTSOs are freestanding "supervision" orders of up to ten years' length and are not tied to a period of incarceration. They are, to this extent, unique within the *CCRA*. Accordingly, section 134.1 gives the PBC broad authority to impose a range of conditions:

> **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.

32. The PBC[8] has a broad jurisdiction to establish conditions on LTSOs. The absolute discretion and exclusive jurisdiction the PBC exercises in this regard is a factor that this Court has regarded as indicative of the rehabilitative and remedial nature of the LTSO regime: *Johnson*, at para 32; *R v Ipeelee*, 2012 SCC 13 at paras 46-47, [2012] 1 SCR 433 [*Ipeelee*]. The PBC relies on this broad, remedial authority to craft a variety of conditions for LTSOs where those conditions are "reasonable and necessary," including provisions addressing internet access, drugs and alcohol, travel, romantic partners, or libido-reducing medications.

4. Community-Based Residential Facilities and the CCRA

33. Community Correctional Centres ("CCC"), such as Oskana CCC, are not specifically defined in the *CCRA*. Understanding the nature of these facilities requires an understanding of the *CCRA*, the *Regulations*, and related Commissioner's Directives. But the nature of CCCs is

[8] The name of the National Parole Board was changed to the "Parole Board of Canada" in 2012 with the *Safe Streets and Communities Act*, SC 2012, c 1, s 73.

not a matter in dispute: they are federally owned and operated community-based residential facilities ("CBRF"), part of a group of facilities colloquially known as "halfway houses."

34. Understanding CCCs begins with section 66 of the *CCRA.* This section is otherwise *non sequitur* to this appeal, but sets out a special search regime which allows employees of community-based residential facilities to undertake certain physical searches. The term "community-based residential facility" is defined in s. 66(3):

> **66.** […] (3) In this section, "community-based residential facility" means a place that provides accommodation to offenders who are on parole, statutory release or temporary absence.

This definition of "community based residential facility" ("CBRF") is applied elsewhere in the *CCRA*, most importantly to all of Part II as per the *CCRA*, section 99 definition of "community-based residential facility".

35. Section 66 is needed because employees of private CBRFs are not necessarily employees of the CSC. Staff members of the CSC may search inmates in accordance with sections 47 to 49 of the *CCRA*, and do not need to rely on section 66. But CBRFs are not exclusively private institutions. The phrase is descriptive – any place that provides accommodation to certain offenders is considered a CBRF. This includes CCCs.

36. The PBC finds its jurisdiction to impose residence at CBRFs on paroled or statutorily released offenders in section 133 of the *CCRA.* Such conditions would be within the universe of options considered "reasonable or necessary," pursuant to section 133(3). However, this residence-assigning power is curtailed by subsections 133(4) and (4.1) of the *CCRA*. Those sections read:

> **133** […] (4) Where, in the opinion of the releasing authority, the circumstances of the case so justify, the releasing authority may require an offender, as a condition of parole or unescorted temporary absence, to reside in a community-based residential facility.
>
> (4.1) In order to facilitate the successful reintegration into society of an offender, the releasing authority may, as a condition of statutory release, require that the offender reside in a community-based residential facility or a psychiatric facility if the releasing authority is satisfied that, in the absence of such a condition, the offender will present an undue risk to society by committing, before the expiration of their sentence according to

law, an offence set out in Schedule I or an offence under section 467.11, 467.12 or 467.13 of the Criminal Code.

(4.2) In subsection (4.1), *community-based residential facility* includes a community correctional centre but does not include any other penitentiary.

37. No specific provisions relating to CBRFs or CCCs are found in section 134.1 of the *CCRA*, which is the parallel section to s. 133 for long-term supervision. Pursuant to section 134.1(2) of the *CCRA*, the PBC relies on the general power to set conditions it considers "reasonable and necessary in order to protect society and to facilitate the successful reintegration into society of the [long term] offender". These include residence conditions in appropriate cases.

38. CCC are "penitentiaries" for the purposes of the *CCRA*, as *per* s. 2:

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 […]

39. The reference to "inmates" in section 2 of the *CCRA* distinguishes penitentiaries from other facilities within the CSC's control, for example, head offices or storage facilities. Importantly, the definition of penitentiaries does not purport to limit such facilities to inmates. In fact, the definition of "inmate" in section 2 is not exhaustive of those who may be resident in a community correctional center; for example, it fails to mention parolees or persons on long-term supervision. Offenders subject to long-term supervision at CBRFs are not inmates: *Dufresne v Canada (Attorney General)*, 2013 FC 1071 at para 19.

40. Following on the *CCRA* and *Regulations*, Commissioner's Directives specify how and in what manner CCCs are to be operated and conducted. [9] For instance, despite being "penitentiaries," CCCs are not required to comply with the minimum security standards required

[9] Pursuant to section 97 and 98 of the *CCRA*, the Commissioner has the power to set rules for the management of the CSC and the carrying out of the purposes and provisions of Part II of the *CCRA*, in addition to the *Regulations*. Some of these rules become Commissioners Directives, and are published and made accessible to the public and offenders.

of other minimum security facilities, "due to [their] role in accommodating offenders on conditional release or on a long term supervision order": *Classification of Institutions*, CD 706 (March 29, 2016), ¶31. Rules specific to curfews, privileges, and community access at a CCC are to be set by the District Director: *Community Correctional Centre Standards*, CD 714 (June 2, 2016), ¶2(a).

41. Residency conditions during long-term supervision are limited to a maximum of 365 days by Directive: *Long-Term Supervision Orders*, CD 719 (June 1, 2016), ¶16. The Appellant's was limited to 180 days (see para 6, above). In addition to CD 719, a more general directive related to community supervision also applies to LTSOs: *Community Supervision Framework*, CD 715-1 (June 23, 2014) pursuant to CD 719, ¶17. This Directive sets out the levels of supervision an offender may be subject to (¶20) and how specific supervision decisions should be made, *e.g.* travel permits (¶44-¶54) and selecting the location of supervision (¶55-¶57).

42. Consistent with sections 66 and 133(4.1) of the *CCRA*, the Directives confirm that CCCs are a form of "community-based residential facility" owned and operated by the CSC: CD 714, Definitions and CD 706, Definitions:

> **Community Correctional Centre (CCC)**: a federally operated community-based residential facility that provides a structured living environment with 24-hour supervision, programs and interventions for the purpose of safely reintegrating offenders into the community. These facilities, which may also have an enhanced programming component, accommodate offenders under federal jurisdiction who have been released to the community on unescorted temporary absences, day parole, full parole, work releases, statutory release, as well as those subject to long-term supervision orders.

C. The trial court lacked jurisdiction to nullify the PBC decision

43. The trial judge exceeded his jurisdiction by purporting to "acquit" the Appellant despite the existence of a facially valid order. Trial courts do not have jurisdiction to modify, strike, or vary PBC decisions. This was acknowledged by the trial judge: *R v Bird*, 2016 SKPC 28 at para 12, 352 CRR (2d) 248 [Appellant's Record, Volume I, Tab 1]. Acquitting the accused amounted to an explicit or implicit quashing or nullifying of a PBC decision.

44. Part II of the *CCRA* grants the PBC the jurisdiction to impose, vary, remove or otherwise relieve the offender from compliance with the conditions of long-term supervision. As *per*

Wormell, even sentencing courts are not empowered to set LTSO conditions, but are limited to making recommendations for the PBC's consideration.[10] The PBC operates with "exclusive jurisdiction and absolute discretion," pursuant to the *CCRA*, s. 107.

45. The *Federal Courts Act*, RSC 1985, c F-7 is clear that the jurisdiction to review decisions from federal boards and agencies is exclusive to that Court:

> **18.** Subject to section 28, the Federal Court has exclusive original jurisdiction
>
> (a) to issue an injunction, writ of *certiorari*, writ of prohibition, writ of *mandamus* or writ of *quo warranto*, or grant declaratory relief, against any federal board, commission or other tribunal; and
>
> (b) to hear and determine any application or other proceeding for relief in the nature of relief contemplated by paragraph (a), including any proceeding brought against the Attorney General of Canada, to obtain relief against a federal board, commission or other tribunal. [emphasis added]

The PBC is a "federal board, commission or other tribunal."[11] Moreover, as a statutory court the trial judge could not issue declaratory judgments (*R v Lloyd*, 2016 SCC 13 at para 15, [2016] 1 SCR 130) and certainly could not issue a declaration binding on a federal board or commission, in light of the *Federal Courts Act*.

46. Framing the "validity" of the PBC decision as a *Charter* matter does not avoid the issue. The *Charter* does not give bodies, particularly statutory ones, jurisdiction to do what they could not do in the absence of the *Charter*: *Mills v The Queen*, [1986] 1 SCR 863 at 172 [*Mills*]; *R v Daniels* (1991), 65 CCC (3d) 366 at para 15, [1991] 5 WWR 340 (Sask CA), leave to appeal to SCC ref'd, 69 CCC (3d) vi; *R v 974649 Ontario Inc.*, 2001 SCC 81 at para 15, [2001] 3 SCR 575. The trial judge lacked jurisdiction to quash the order and acquit the Appellant.

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[10] See para 159 below for examples of trial judges recommending LTSO conditions during sentencing.

[11] The phrase is defined at section 2(1) of the *Federal Courts Act*. The PBC is one such entity, see *e.g. McCabe v Canada (Attorney General)*, [2001] 3 FCR 430 at 20, 2001 FCT 309; *Francis v Canada (Attorney General)*, 2017 ONSC 3354**.**

47. When confronted with the fact that declarations of invalidity could not be granted, the trial judge turned to a justification reminiscent of *R v Big M Drug Mart Ltd.*, [1985] 1 SCR 295 [*Big M*].[12] The *Charter* application was taken to be "withdrawn."[13]

48. The Crown attempted to clarify the Court's approach to its remedial jurisdiction.[14] The question was specifically put to the Court: is this an application for *Charter* section 24 relief or a request to acquit on the basis of an alleged defect in the order?[15] The Court remained under the impression that an acquittal or a stay of proceedings could alternately flow from the *Charter* application.[16]

49. It is not clear what *Charter* violation was eventually found (see para 128, below). In any event, the trial judge did not grant any *Charter*, s 24(1) relief, nor did he rely on section 52 of the *Constitution Act, 1982* to affect either the *Criminal Code* or the *CCRA*. The *Charter* "validity" of the PBC decision was treated as a necessary condition for the prosecution to succeed (*Bird* (PC), at paras 6 and 42). To the trial judge, the PBC decision did not exist "at law" (*Bird* (PC), at para 42).

50. This confusion persists. The Appellant claims that he cannot be convicted under an unconstitutional law, yet also claims that this appeal is a challenge to a particular administrative decision and not a request for *Constitution Act, 1982*, s 52 relief from compliance with unconstitutional legislation. This conflates remedies pursuant to section 52 of the *Constitution Act, 1982* with remedies available pursuant to section 24(1) of the *Charter*.

51. This mixed approach to the "validity" of orders and the validity of statutes pursuant to *Big M* reveals both an error in analysis and a more fundamental problem with trial courts interceding in PBC decisions. As discussed below, there is no doubt that a person can be convicted of violating an unlawful, even unconstitutional, order or decision. The *Big M* doctrine

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[12] Respondent's Record, Tab 3 (Supplemental Transcripts), at pages 10-11.

[13] *Ibid.*, at page 11 (lines 15-24); *Bird* (PC), at para 6.

[14] Respondent's Record, Tab 3 (Supplemental Transcripts), at pages 11 (lines 29-37) and 16 (lines 11-33).

[15] *Ibid.*, at page 18 (lines 11-33).

[16] *Ibid.*, at page 18.

pertains to remedies available under section 52 of the *Constitution Act, 1982* where the validity of a statute is in question. A court or administrative order or decision must be complied with until set aside.

52. Moreover, no *Constitution Act, 1982*, section 52 remedy is being sought in this Court.

53. The remedial jurisdiction of the trial court is limited. It cannot modify or strike the conditions on the Appellant's long-term supervision. A trial court which is also a provincial statutory court is doubly incapable of affecting a PBC decision, there being nothing in its constituting statute[17] permitting such interference. Neither can trial judges issue injunctions, *mandamus,* or any other remedy that would compel the CSC to place the Appellant in any particular place or facility.

54. As such, a dangerous or long-term offender's success in obtaining a stay of proceedings in Provincial Court is of extraordinarily limited usefulness. The PBC decision is undisturbed by the stay of proceedings, and once the offender is released from remand the CSC is faced with a PBC decision compelling it to once again place the Appellant in a CCC, CRF, or other residence. If a CCC is the only available or appropriate residence for the Appellant, the CSC will be compelled to return him to it. If an offender chooses to disregard the LTSO residence condition on the strength of his earlier acquittal, he risks suspension of his LTSO and apprehension and subsequent conviction in front of a second trial court, since there is only horizontal *stare decisis* to compel the second court to follow the first: *R v Sharkey*, 2015 ONSC 1657 at paras 6-8, 331 CRR (2d) 86; *Lloyd*, at para 19. This will be the case for the remainder of that offenders' LTSO. This is precisely the species of chaos that the rule against collateral attack prevents.

55. This is more than a hypothetical concern. Indeed, the Appellant was subsequently convicted of breaching his LTSO by failing to maintain residence at Oskana CCC: *R v Bird* (April 10, 2017), Information #90016719 *et al*, Regina (SKPC) [Respondent's Book of Authorities, Tab 3]. The potential for infinite regress should weigh heavily on trial courts purporting to relieve offenders from compliance with PBC decisions.

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[17] In this case, *The Provincial Court Act, 1998*, SS 1998, c P-30.11.

D. The Parole Board decision should not be collaterally attacked

56. The Appellant, rightly, does not contest that the *Charter* motion is a collateral attack on the PBC's decision. Unlike *Garland v. Consumers' Gas Co.*, 2004 SCC 25, [2004] 1 SCR 629 or *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 SCR 77, this is not a case where consequences flowing from an order or the facts underling it can be litigated separately from the validity of the order itself, such that the rule against collateral attack can be avoided altogether. The trial court was asked to deny the PBC decision the force of law. This is a collateral attack of a fundamental sort.

57. Nor is this a case where the order is alleged to be invalid on its face. To be so invalid, the impugned order must be outside of the originating tribunal's capacity, *i.e.* the order must be of a type that cannot be issued by the tribunal in question: *Okell v Saskatchewan (Minister of Justice)*, 2006 SKCA 34 at para 28, 206 CCC (3d) 513; *R v Litchfield*, [1993] 4 SCR 333 at 348 [*Litchfield*]. A disagreement over the interpretation of the PBC's home statute does not provide this level of invalidity.

1. Foundational principles of collateral attack

58. The animating principles of the rule against collateral attack can be aptly summarized by a decision of the Court of Appeal for Saskatchewan. In *R v Pastro* (1988), 39 CRR 108 at paras 15-16 (Sask CA) [*Pastro*], speaking for a unanimous panel, Bayda C.J.S. wrote:

> If a person affected by a judicial order were entitled to assess for himself the validity of a judicial order or to surmise the result of a possible judicial adjudication of that validity and with impunity, govern his affairs accordingly, there would be an area of serious uncertainty in the law, and at times chaos. The need for a standard uniform rule, that, generally speaking, a judicial order (fraud, deliberate deceptive conduct and lack of jurisdiction aside) is valid until set aside, on appeal or otherwise, by another judicial order, is by and large self-evident. [emphasis added]

59. *Pastro* was cited and approved of in this Court's decision in *Litchfield*, which followed *Wilson v The Queen*, [1983] 2 SCR 594 [*Wilson*] and reiterated the importance of the

"fundamental" (*Wilson*, at 599) doctrine of collateral attack in criminal proceedings. In *Litchfield*, Iaccobucci J. for the Court[18] noted at 348:

> This rule [against collateral attack] holds that "a court order, made by a court having jurisdiction to make it," may not be attacked "in proceedings other than those whose specific object is the reversal, variation, or nullification of the order or judgment" (*Wilson v. The Queen*, [1983] 2 S.C.R. 594, *per* McIntyre J., at p. 599). The lack of jurisdiction which would oust the rule against collateral attack would be a lack of capacity in the court to make the type of order in question, such as a provincial court without the power to issue injunctions. However, where a judge, sitting as a member of a court having the capacity to make the relevant type of order, erroneously exercises that jurisdiction, the rule against collateral attack applies. See, e.g., *B.C. (A.G.) v. Mount Currie Indian Band* (1991), 54 B.C.L.R. (2d) 129 (S.C.), at p. 141, and *R. v. Pastro* (1988), 42 C.C.C. (3d) 485 (Sask. C.A.), at pp. 498-99, *per* Bayda C.J.S. Such an order is binding and conclusive until set aside on appeal. [emphasis added]

60. Further drawing from *Pastro*, Iaccobucci J. elaborated on the rationale for the rule against collateral attack at 349:

> The rationale behind the rule is powerful: the rule seeks to maintain the rule of law and to preserve the repute of the administration of justice. To allow parties to govern their affairs according to their perception of matters such as the jurisdiction of the court issuing the order would result in uncertainty. Further, "the orderly and functional administration of justice" requires that court orders be considered final and binding unless they are reversed on appeal (*R. v. Pastro*, supra, at p. 497).

61. The case of *Canada (Human Rights Commission) v Taylor*, [1990] 3 SCR 892 [*Taylor*] should also be noted. The accused was charged with contempt after violating a cease and desist order issued by the Canadian Human Rights Commission. In defence, he challenged the constitutional authority of the Commission to make the orders in question. The majority upheld the legislation authorizing the orders. In dissent, McLachlin J. (as she then was) would have struck down the legislation and, thus, had to address the effect of her ruling on the cease and desist orders issued by the Commission and registered with the Federal Court. She refused to vacate the contempt convictions, noting at 974 that:

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[18] McLachlin J. (as she then was) wrote a separate decision but agreed with the majority's approach to the doctrine of collateral attack: *Litchfield* at 369.

> If people are free to ignore court orders because they believe that their foundation is unconstitutional, anarchy cannot be far behind. The citizens' safeguard is in seeking to have illegal orders set aside through the legal process, not in disobeying them.

The ultimate invalidity of the order could therefore not be a defence to a contempt conviction arising from its breach: *Taylor*, at 974-975.

62. A final important touchstone on collateral attack in criminal matters is the Ontario Court of Appeal decision in *R v Domm* (1996), 31 OR (3d) 540 (Ont CA) [*Domm*]. The accused had violated a publication ban and was charged with criminal contempt under s. 127 of the *Criminal Code*. In the course of his defence, he attempted to challenge the *Charter* validity of the original publication ban. After an extensive summary of the doctrine of collateral attack (see *Domm*, paras 13ff), Doherty J.A. for the Court of Appeal concluded that *Charter* violations are not *per se* jurisdictional errors and court orders that violate the *Charter* must nonetheless be obeyed:

> [29] In my opinion, an allegation that an individual's constitutional rights have been violated by a court order cannot justify the abandonment of the rule against collateral attack. In such cases (and this is a good example), there are usually fundamental and conflicting values to be balanced. It is very much in the community's best interests that those whose values clash settle their competing claims by resort to established judicial procedures and not by pre-emptive acts by those convinced of the righteousness of their cause. I would, however, add that where constitutional rights are implicated, the court must be particularly concerned about the availability of an effective remedy apart from collateral attack when considering whether an exception should be made to the rule against collateral attack.

63. The doctrine of collateral attack should be relaxed in cases where the order being impugned does not necessarily govern the parties, but is rather part of the judicial process: *R v Canadian Broadcasting Corporation*, 2004 SKQB 320 at para 26, [2005] 3 WWR 77 [*CBC*], leave to appeal to CA ref'd, 2007 WL 1821427 (WL), leave to appeal to SCC refused, 374 NR 391 (note); *Domm*, at para 32; *Litchfield*, at 349-350. This exception does not apply to the PBC decision under attack in this case. Indeed, the PBC decision in this case existed precisely to govern the Appellant's conduct.

64. The doctrine of collateral attack has its *loci classici* in criminal proceedings at this Court and applies with force and vigor to criminal orders of every variety. Extensive examples of courts protecting sentences and other criminal orders from collateral attack can be identified, as

the Court of Appeal did at para 34 of the decision below. The Court of Appeal's survey was extensive but certainly not exhaustive.[19]

65. The primary legislative goal of Part XXIV and the related provisions of the *CCRA* is the protection of the public. This purpose is followed closely by the need to rehabilitate the offender, which is the primary purpose of LTSOs in particular. These two goals are common to other conditional release or supervision regimes, such as probation, conditional sentences, and interim release. If it is a prohibited "affirmation of defiance" (*R v Avery* (1985), 30 CCC (3d) 16 (NWT CA)) for an ordinary offender to flaunt the terms of his or her sentence by asking the court to sanction a breach, the same principles are brought to bear when that defiance is exhibited by the most dangerous and publically harmful offenders known to the criminal law.

66. Long-term supervision exists "to reduce the threat to the life, safety or physical or mental well-being of other persons to an acceptable level": *L.M.*, at para 41. If "controlling a serious risk" (*L.M.*, *ibid.*) is the goal of the *CCRA* and Part XXIV of the *Criminal Code*, the adverse effects of the breach accrued as soon as the Appellant evaded supervision. To borrow from *Domm*, at para 33, the "genie" was out of the bottle for the duration of the Appellant's time at large.[20] The harm of the breach—that is, a substantially increased risk of relapse and offending—crystallizes as soon as the breach occurs. This will be the case for all conditions imposed pursuant to section 134.1(2) of the *CCRA*, which are tailored to protect and rehabilitate alike. By breaching long-term supervision, a LTO or DO is unilaterally subjecting the community to a level of risk that was implicitly or explicitly adjudged by the PBC to be unacceptable.

67. PBC decisions are not *per se* court orders. Nonetheless, the PBC's jurisdiction to impose conditions on the Appellant's LTSO flows from a court order. LTSOs share a number of important features with probation orders, community supervision orders, judicial interim release,

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[19] To the Court of Appeal's list could be added *R v Conkin* (1998), 176 WAC 167 (BC CA); *R v Coppola*, 2007 ONCJ 184; *R v Desjarlais*, 2005 NWTTC 13, 67 WCB (2d) 687 [Respondent's Book of Authorities, Tab 4]; and *R v D.A.H.*, 2005 ABQB 404, [2005] AWLD 2707.

[20] Residence breaches, which tend to remove offenders from supervision altogether, can be especially serious: *R v Archer*, 2012 ONCJ 760 at 37, rev'd 2014 ONCA 562. The six-year sentence in *Archer* was reduced to four years on appeal, due to the intervening decision of this Court in *Ipeelee*.

police recognizances[21] and other forms of court-ordered supervision. The same principles that compel respect for court orders in criminal proceedings compel respect for PBC decisions. By forbidding collateral attacks of sentencing decisions, Courts maintain respect for the rule of law and protect the public at large. These concerns apply to LTSOs with equal vigor.

68. It would be pointless, if not outright counterproductive, for sentencing courts to prognosticate and set conditions of LTSOs at LTO or DO sentencing. The length of the custodial sentence necessitates a more close-in-time scrutiny of the offender's prospects. Parliament's delegation of LTSO conditions to the PBC renders those conditions more credible and effective than otherwise. Permitting collateral attacks against PBC decisions, since they do not originate from a "court," impairs the PBC's ability to manage offenders and transforms a strength of long-term supervision into a weakness.

2. Application of the administrative standard for collateral attack

69. It is inconsistent with the dangerous and long-term offender statutory scheme and its animating purposes to allow offenders to flaunt long-term supervision and claim retroactively that the conditions were improper. The Appellant's supervision conditions were established expressly and specifically to protect the community at large and to assist with the Appellant's reintegration into society.

70. The test, from *R v Al Klippert Ltd.*, [1998] 1 SCR 737 [*Al Klippert*] and *R v Consolidated Maybrun Mines Ltd.*, [1998] 1 SCR 706 [*Maybrun*], is well known. In *Al Klippert*, L'Heureux-Dubé J. for the Court described a five-part test for when a collateral attack on an administrative order may be permitted:

> [13] […] In summary, whether a collateral attack is possible must be determined by reviewing the legislature's intention as to the appropriate forum. For that purpose, I stated that it might be helpful to consider, in particular, the following factors: (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'être* of the administrative appeal tribunal; and (5) the penalty on a conviction for failing to comply with the order.

[21] See *R v J.S.* (2007), 2007 CanLII 44356 at para 18 (Ont SC).

These five factors are not mechanical tests or freestanding legal principles that permit or forbid collateral attacks on their own strength. They are analytic tools, intended to answer an interpretive question: where did Parliament intend the underlying order to be reviewed?

71. The Court of Appeal correctly identified and applied the *Maybrun* and *Al Klippert* tests and refused to permit the collateral attack: *R v Bird*, 2017 SKCA 32 at paras 36-60, 348 CCC (3d) 43 [Appellant's Record, Volume I, Tab 2]. Parliament's intent with regard to LTSOs is unambiguous. PBC and CSC decisions are reviewable in the framework provided by the *CCRA* and *Federal Courts Act*. Parliament did not intend trial courts, such as the Provincial Court of Saskatchewan, as an alternative forum for reviewing the validity of PBC decisions.

3. Factor 1: wording of the statutes

72. Taking a birds-eye view of the *CCRA*, *Criminal Code*, and *Federal Courts Act*, the first *Al Klippert*/*Maybrun* factor—the wording of the statutes in question—weighs against allowing a collateral attack on PBC decisions. The *CCRA*, *Criminal Code*, and *Federal Courts Act* all demand that the merits of PBC decisions be reviewed outside of the trial setting.

73. The PBC operates with "exclusive jurisdiction and absolute discretion," as *per* the *CCRA*, section 107. The *Federal Courts Act* is clear that the jurisdiction to review decisions from federal boards and agencies is "exclusive" to that Court.

74. In some cases, the statute which enables the underlying order or its review expressly or impliedly contemplated multiple *fora*. For example, when an action for damages is brought against a federal entity provincial superior courts have concurrent original jurisdiction to assess the claim, pursuant to section 17 of the *Federal Courts Act* and section 21 of the *Crown Liability and Proceedings Act*, RSC 1985, c C-50, see *e.g. Canada (Attorney General) v Telezone*, 2010 SCC 62 at para 22, [2010] 3 SCR 585; *Canada (Attorney General) v. McArthur*, 2010 SCC 63 at 16, [2010] 3 SCR 626. This stands in obvious contrast to section 18 of the *Federal Courts Act*, which gives the Federal Courts exclusive jurisdiction to review decisions from federal boards and agencies.

75. Certainly, there is no language in the *Criminal Code* or *CCRA* which, expressly or impliedly, evinces Parliamentary intent to give trial courts the power to vary PBC decisions that have come before them for enforcement under section 753.3(1) of the *Criminal Code*. Indeed,

section 752.1(1) of the *Criminal Code* requires that long-term supervision be undertaken in "accordance with the *Corrections and Conditional Release Act*." The only authority the *Criminal Code* grants to courts of criminal jurisdiction is a specific power to reduce the length of LTSOs, not conditions. This variation requires a special application to a superior court of criminal jurisdiction pursuant to section 753.2(3) of the *Criminal Code*. Part XXIV of the *Criminal Code* and Part II of the *CCRA* establish a careful and specific division of labour between trial and sentencing courts, the PBC, and the CSC. The machinery of the *CCRA* governs the management and review of long-term supervision, not trial courts.

76. The first factor—the wording of the statutes—discourages collateral attacks.

4. Factor 2: the purpose of the statutes

77. In the DO/LTO context, the second *Al Klippert*/*Maybrun* factor—the purpose of the legislation—must take a broad view. The DO/LTO scheme is not a single statute, but an amalgam of the *CCRA*, the *Criminal Code*, and the *Federal Courts Act*.

78. The purpose of the DO/LTO scheme is well known, from *Lyons*, at paras 26-27: the protection of the public. This too weighs against allowing collateral attack on PBC decisions.

79. LTSOs in particular serve an additional purpose, namely, the rehabilitation of the offender over the period of supervision: *Ipeelee*, at para 50. The *Criminal Code* serves as the screening or intake portion of the DO/LTO scheme. The *CCRA* provides the institutional mechanisms for incarceration and long-term supervision in the community.

80. The Appellant was at large and unsupervised for over two months. His defiance placed the community at risk and jeopardized any progress he had made during his statutory release and subsequent supervision. It serves neither public safety nor the Appellant's rehabilitation for trial courts to allow high-risk, violent offenders to instigate a review of their supervision conditions by defying them. The critical "social purposes" (*CBC*, at para 32) of DO and LTO sentencing are undermined by permitting a breach first, challenge later approach. The dangers of this approach are discussed above, at paras 65 to 68. The purpose of Part XXIV sentencing is wholly undermined by allowing collateral attacks to PBC decisions during trials for 753.3(1) breaches.

81. A third purpose should also be noted. The unitary nature of the Federal Court system, flowing from Parliament's power to establish Courts for the "better Administration of the Laws

of Canada," (*Constitution Act, 1867*, s. 101) ensures that the PBC is not forced to apply its home legislation differently on the basis of offenders' residence. It also prevents the PBC (and other federal agencies) from being subject to conflicting determinations on the validity of its decisions, as *per Telezone*, at paras 49-50. This weighs strongly against collateral attack under the second *Al Klippert*/*Maybrun* factor.

82. That the *CCRA* can be interpreted by provincial parole boards in rare instances where a federal offender is serving in a provincial institution does not undermine this purpose. In the case of long-term offenders in particular, this movement between the provincial and federal systems is not permitted: section 743.1(3.1) of the *Criminal Code* demands that new prison time, of any length, accrued while under long-term supervision be served in a federal institution. Furthermore, prison sentences associated with LTSOs must always be longer than two years pursuant to 753.1(3). Parliament intended dangerous and long-term offenders to be federally supervised.

83. More importantly, if and when a provincial parole board applies the *CCRA* to offenders within provincial custody, the provincial parole board is not reviewing decisions of the PBC, nor is it determining the conditions of supervision that the CSC must administer. The provincial parole board is applying the federal statute to inmates within the provincial correctional system. While different interpretations of the *CCRA* may develop between the PBC and the provincial parole boards over time, at no point is either the PBC or CSC subject to competing judicial review. Attacks on PBC decisions in the manner proposed by the Appellant forces individual agencies—the PBC and CSC in particular—to comply with competing court rulings on the validity or merits of their actions.

84. Moreover, the incorporation by reference permitted by section 113 of the *CCRA* has not occurred for any provincial parole board. No such Orders-in-Council exist.

85. The practical effect of opening this avenue of collateral attack remains to be seen. In prosecutions pursuant to section 753.3 where the long-term offender alleges the PBC condition was unnecessary, unreasonable, or otherwise unlawful, the prosecuting Crown could be forced to collect, produce, and disclose the record that was before the PBC. This is a significant undertaking and likely to increase overall trial complexity and delay. The two documents

tendered before the trial judge[22] were the result of the CSC recommendation and the PBC's deliberation and decision. Both bodies had access to significant extrinsic information about the Appellant and his conduct which would have been available to the Federal Court had the PBC decision been judicially reviewed in due course.

5. Factor 3: alternate mechanisms

86. There is no statutory right of appeal from the PBC to the Appeal Division of the PBC. Offenders subject to long-term supervision proceed directly to judicial review in the Federal Court: *McMurray v Canada (National Parole Board)*, 2004 FC 462, 249 FTR 118.

87. The Federal Court, pursuant section 18 of the *Federal Courts Act*, exercises a fulsome review jurisdiction over federal tribunals. The Federal Court may order a federal agency to do anything it has failed to do or quash any decision or proceeding originating from a federal agency: *Federal Courts Act*, section 18.1(3). This review must usually be taken up within 30 days, but can be extended with leave of the court: *Federal Courts Act*, section 18.1(2). Relief is available in any case where the federal agency has acted without jurisdiction or in any other way contrary to law: *Federal Courts Act*, s. 18.1(4)(a), (c), and (f). Appeals from the Federal Court proceed to the Federal Court of Appeal and thereafter to the Supreme Court of Canada.

88. The Federal Court's jurisdiction over review of PBC decisions is exclusive. In the normal course, PBC decisions should be taken to the Federal Court for review, as the Appellant concedes.[23]

89. One of the animating purposes of the doctrine of collateral attack is certainty: *Pastro*, at 497. The fact that the Appellant was out of time to initiate judicial review except with leave of the Court does not augur towards permitting a collateral attack. Malfeasance and misbehavior should not permit a challenge to a PBC decision in a case where a compliant but tardy offender required leave to initiate that review. Limitation periods and discretionary bars to relief should not be subverted by encouraging breaches of administrative orders: *Western Stevedoring Co. v*

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[22] Appendices A and B to the Appellant's Record, Volume II, Tab 6 (Agreed Statement of Facts), pages 67 and 71.

[23] Appellant's Factum, at para 18.

British Columbia (Workers' Compensation Board), 2005 BCSC 1650 at 30, 45 Admin LR (4th) 305 [*Western Stevedoring*].

90. Moreover, the Appellant had other remedies. If the Appellant's concern was the PBC's condition *simpliciter*, the PBC always retains the jurisdiction to vary or remove long-term supervision conditions "at any time," in accordance with the *CCRA*, section 134.1(4)(b). Offenders may apply to vary their release conditions in accordance with the *Regulations*. Being out of time for judicial review would not have prevented him from applying for reconsideration and judicial review of the reconsideration, if the impugned condition was maintained. There was no need for the Appellant to breach his conditions in order to have them reviewed or judicially scrutinized.

91. If the Appellant was concerned with his placement at Oskana CCC or the rules or procedures at the facility, including the strictness of his curfew, an entirely separate review mechanism existed. Offenders subject to long-term supervision have access to the typical *CCRA* grievance mechanism to address granular concerns about their supervision[24] arising out of any "action or concern by a [CSC] staff member": *Regulations*, 74(1). The *Regulations* prescribe that these grievances escalate through the CSC hierarchy in a formalized but accessible and expeditious process, eventually being reviewed by the Commissioner or his or her delegates: *Regulations*, ss 74-80. This grievance procedure applies to LTSOs by virtue of section 2.1 of the *CCRA*: *Hurdle v Canada (Attorney General)*, 2012 FC 894. Judicial review of offenders' grievances, including from DOs and LTOs, occurs at the Federal Court, pursuant to section 18.1 of the *Federal Courts Act*.

92. In all cases, the Federal Court is required to treat judicial review applications in a summary way and without delay: *Federal Courts Act*, section 18.4.

The constitutional context

93. Framing the collateral attack as a *Charter* claim does not assist with the analytical exercise. Tellingly, both the section 9 and section 7 *Charter* claims in this appeal are based wholly or large part on interpretations of the *CCRA* itself. The Appellant claims that deviations

[24] The grievance procedures in ss 90 and 91 of the *CCRA* apply to LTSOs with necessary modifications, pursuant to s 2.1 of the *CCRA*.

from the *CCRA* are *per se Charter* breaches. For trial courts, this leads inexorably into querying the merits of PBC decisions. For instance, are "unreasonable" conditions a violation of the *Charter* at trial? Are "unnecessary" conditions violations of the *Charter* at trial? If the answer to either question is "yes," then every section 753.3(1) prosecution will inevitably devolve into an inquiry into the merits of a PBC decision. This is judicial review by another name.

94. Furthermore, treating the constitutionality of the PBC decision as a *Charter* issue at trial is likely to distort the onus of proof and standard of review applied to such decisions. At the Federal Court, a standard of review would be applied to PBC decisions commensurate with the type of decision at stake and consistent with the principles of judicial review. For determinations of law related to the interpretation of the *CCRA*, this standard is probably reasonableness: *Ye v Canada (Attorney General)*, 2017 FC 660 at paras 13-16. The trial judge implicitly adopted a correctness standard. In principle, breaching conditions of long-term supervision should not precipitate a more favourable standard of review than judicially reviewing them: *Western Stevedoring*, at para 30.

95. Concerns about the accessibility of *Charter* remedies for offenders in the correctional system are not alien to this Court. Encouraging accessibility in detention cases is one of the reasons that courts of inherent jurisdiction—provincial superior courts—may exercise the writ of *habeas corpus* even in the face of Federal Court jurisdiction: *May v Ferndale Institution*, 2005 SCC 82 at paras 69-71, [2005] 3 SCR 809; *Mission Institution v Khela*, 2014 SCC 24 at paras 46-47, [2014] 1 SCR 502. This limited concurrent jurisdiction between provincial superior courts and the Federal Court addresses the important reminder that there must always be a body, particularly a superior court, capable of providing *Charter* relief when it is demanded: *Domm*, at para 29; *Mills*, at 892-93.

96. If the Appellant believed his supervision was illegal or unconstitutional in whole or part but the federal courts were nonetheless inappropriate or inaccessible, *habeas corpus* remained. On a *habeas corpus* application, the superior court would be asked whether the procedures provided in the *CCRA* and *Federal Courts Act* are complete, comprehensive and expert. Depending on the nature of the review requested, *habeas corpus* might be available in this or analogous situations. The prevailing trend of appellate courts has been to deny *habeas corpus* when used against PBC decisions: *Perron v Warden of Donnaconna Institution* (September 6,

2017), 200-36-002498-178, Quebec (QCCA) (unreported) at para 11 [Respondent's Book of Authorities, Tab 1]; *Ewanchuck v Canada (Parole Board)*, 2017 ABCA 145. Though, *contra Gallant v Canada (Attorney General)*, 2016 NBQB 165; *DG v Bowden Institution*, 2016 ABCA 52, 36 Alta LR (6th) 294 (decisions of Bielby and Wakeling JJ.A).

97. The availability of *habeas corpus* to these matters is not a live issue in this appeal. However, the very existence of a competing test for superior court review points away from permitting a collateral attack. If *habeas corpus* was available, then the Appellant had yet another option for reviewing his long-term supervision conditions. If *habeas corpus* was not available, then the federal review mechanisms are complete, comprehensive, and expert and the Appellant should not be able to breach his long-term supervision to access a writ that a superior court would have declined to grant.

98. But the Appellant did not request *habeas corpus*. Nor could a statutory court like the trial court have granted it. He appealed the PBC decision with his feet, forcing the community to bear the risk of his non-compliance and asking the trial court to sanction his conduct.

6. Factor 4: expertise and raison d'être

99. As noted by the Court of Appeal at para 54, to the extent that the Appellant's argument relates to the PBC decision to impose a residence condition this factor does not weigh in either direction. Though it should be noted that the PBC is a tribunal with considerable special experience in its own right: *Normandin II*, at para 46.

100. The PBC was not uniquely responsible for the Appellant's residence at Oskana CCC, and it was certainly not responsible for the specific conditions of his supervision there. Grieving a condition of his supervision, including his curfew, would have brought his case before the escalating review mechanisms in the *Regulations*. The *raison d'être* of the CCRA grievance mechanisms is squarely related reviews of staff conduct, including security classifications, conditions and instructions, placements, and other concerns.

7. Factor 5: penal consequences

101. Attempting to apply the fifth *Al Klippert*/*Maybrun* factor highlights the incongruity between the administrative law-centric test and the substance of the current appeal, which is fundamentally a criminal court being asked to enforce a criminal sentence. LTSOs are not

"regulatory" orders in the modern, economic sense. They do not serve commercial or industrial purposes like land use, environmental regulation, or other familiar administrative goals.

102. Breaches of long-term supervision are serious matters. They are indictable offences by law, and carry a punishment of up to ten years of incarceration. While *Ipeelee* is clear that sentencing for LTSO breaches must be sensitive to the rehabilitative goals of the LTSO regime and be suitably accommodating of sentencing goals found in section 718 of the *Criminal Code*, a custodial sentence is nonetheless probable for most LTSO breaches.

103. LTSOs are sentences, handed down by court order after conviction of a serious personal injury offence. The conditions of supervision are subsequently imposed by the PBC but the order originates from a sentencing court. As the cases briefly surveyed above at paras 58 to 64 demonstrate, criminal consequences have never foreclosed the doctrine of collateral attack when criminal orders are at stake. Violations of probation, undertakings, bail, and or other criminal orders are often hybrid or indictable offences (see *e.g. Criminal Code*, ss 733.1(1) and 811) and carry serious criminal consequences, including incarceration.[25]

104. Even if the doctrine of collateral attack forecloses an indirect challenge to an order, a sentencing court can be sensitive to the offenders' perception of the validity of the order or other concerns about the merits of the order: *Al Klippert*, at paras 24 and 26. While the PBC decision must be respected by the offender, lingering questions about the PBC decision's *vires* or virtue may weigh on a sentencing Court in due course.

E. The *CCRA* and Parole Board decision are *Charter*-compliant

105. Section 134.1(2) of the *CCRA* contains a crucial limiting provision: any conditions imposed by the PBC must be "reasonable and necessary" to protect society and facilitate the Appellant's successful reintegration into society. The trial judge specifically refused to address whether residence at Oskana CCC met either of those goals (*Bird* (PC), at para 12), and the PBCs determination of this point is not assailed.

106. The Attorney General submits that s. 134.1(2) of the *CCRA* does not violate section 7 of the *Charter*. While section 134.1(2) of the *CCRA* clearly authorizes the PBC to deprive the

[25] The Appellant was sentenced before 2008 and therefore was not at risk of being sentenced indeterminately for the LTSO breach.

Appellant of liberty, it does not do so in an arbitrary manner. Any conditions established by the PBC must be "reasonable and necessary" to protect society and rehabilitate the offender.

107. Significantly, the Appellant's *Charter* section 9 and section 11(h) claims are new in this Court. They were not before either the trial judge or the Court of Appeal.[26] This Court should be reluctant to entertain a new argument on appeal: *R v Brown*, [1993] 2 SCR 918 at 923-24 (decision of L'Heureux-Dubé J., dissenting).

108. Nonetheless, the Attorney General submits that section 134.1(2) of the *CCRA* authorizes residence conditions for offenders subject to long-term supervision orders. The PBC's decision did not exceed its statutory jurisdiction, which is dispositive of the *Charter*, section 9 claim.

109. Finally, it does not constitute "double punishment" for offenders to be subject to long-term supervision orders that include residence at CBRFs, including CCCs. The PBC has substantial discretion to manage long-term offenders during the LTSO period. The term of an LTSO and scope of supervision are known in advance, but the PBC's individual determinations are not. The PBC's leeway to establish conditions of supervision for offenders in the community does not render conditions of supervision a second "punishment" for the same offence.

1. A stay of proceedings is not appropriate

110. Concerns about the trial judge's remedial jurisdiction are addressed above, at paras 43 to 55. With specific regard to section 24(1), stays of proceedings are not available in all cases where a *Charter* breach is alleged. Stays of proceedings are usually reserved for abuses of process pursuant to section 7, and reserved for the "clearest of cases": *R v Babos*, 2014 SCC 16 at 31-32, [2014] 1 SCR 309; *R v Regan*, 2002 SCC 12 at paras 53-55, [2002] 1 SCR 297. Treating the *Charter* compliance of the PBC decision as a precondition to conviction short-circuits this analysis.

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[26] See the Notice of Constitutional Question and amendments filed pursuant to *The Constitutional Questions Act, 2012*, SS 2012, c C-29.01, found at the Respondent's Record, Tab 1 (Notice of Constitutional Question) and Tab 2 (Amended Notice of Constitutional Question).

2. The residence condition is authorized by the CCRA

111. The Appellant does not argue that his *Charter* rights would be violated by this prosecution or the possibility of his conviction. He argues, instead, that the underlying PBC decision violates the *Charter* and that his defiance of the conditions can be sanctioned on that basis. The PBC decision is otherwise facially valid. Taking the Appellant's case at its very highest, the PBC decision was voidable if properly brought before the Federal Court, but not void. This would not normally provide a defense to partially analogous charges, *e.g.* escapes from custody: *R v Adams* (1978), 45 CCC (2d) 459 (BCCA) [Respondent's Book of Authorities, Tab 2].

112. Nonetheless, if the interpretive argument fails the section 9 *Charter* argument also fails.

113. Saskatchewan submits that the Federal Court of Appeal decision in *Normandin II* is correct. Parliament did not intend to limit residence conditions for long-term supervision in the same fashion as those residence conditions are limited for ordinary offenders.

114. The ratio of *Normandin II* was not limited to residence conditions in a general sense. The applicant, Mr. Normandin, was resident at Hochelaga Community Correctional Centre.[27] Létorneau JA specifically commented on the necessity of transitional housing at CBRFs for offenders on long-term supervision (at para 38). Most of the Court's reasoning would be nonsensical if the issue were residence conditions *ab initio*. For instance, the Court would not have undertaken an exegesis of section 134.1(2) in light of sections 133(4.1) and 135.1 if the issue had not been the offender's residence at a supervised facility, which those sections are specific to. The argument that *Normandin II* did not address the issue squarely should be rejected.

Expressio unius *by any other name*

115. The Appellant relies on, without specifically invoking, the doctrine of *expressio unius est exclusio alterius* or "implied exclusion." Put simply, the Appellant argues that Parliament granted specific authority to the PBC to impose residence conditions at CBRFs in other contexts, but did not do so with regard to long-term supervision.

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[27] *Normandin v Canada (Attorney General)*, 2005 FC 1605 at paras 10, 12, 16, and 19.

116. *Expressio unius* does not assist the Appellant here. As this Court noted in *Alimport (Empresa Cubana Importadora de Alimentos) v Victoria Transport Ltd.*, [1977] 2 SCR 858, *per* Pigeon J.: "On the contrary, an affirmative provision of limited scope does not ordinarily exclude the application of a general rule otherwise established." As a principle of construction, the specific affirmative provisions in sections 133 and 135.1 would not ordinarily detract from the general power found in 134.1(2).

117. Moreover, the differences between sections 133 and 135.1 and 134.1(2) are substantial.

118. First, ordinary offenders on parole or statutory release from a federal institution do not necessarily present a significant risk of harm to the community. The rules in section 133(4) and (4.1) reflect that, and limit the PBC's authority to put ordinary offenders into CBRFs by requiring, respectively, that the "circumstances of the case so justify" or that the offender presents an "undue risk to society" that they will commit a listed offence. This ensures that residential supervision is reserved for offenders who require it.

119. However, these limiting factors are not germane to dangerous and long-term offenders. Offenders subject to long-term supervision present a level of risk far beyond the litmus tests prescribed for ordinary offenders in section 133. Section 753(1) and 753.1 of the *Criminal Code* are the gateways to long-term community supervision for LTO and DOs, and Parliament chose not to duplicate similar limitations in the *CCRA* when the PBC sets the conditions of supervision for these classes of offender.

120. In 2005, Judge Ferris found the Appellant to be a LTO on the basis that there was a "substantial risk" that the he would re-offend (*Criminal Code*, s. 753.1(1)(b)), presumably because he had demonstrated the requisite "pattern of repetitive behavior" that showed a "likelihood of causing death or injury to other persons or inflicting severe psychological damage" (*Criminal Code*, s. 753.1(2)(b)(i)). This, by definition, is the case for all long-term offenders. Sentencing courts determine the length of the LTSO for long-term and dangerous offenders with the express understanding that a term of supervision of that length will be required to sufficiently reduce the risk that the offender poised to the community: *L.M.*, at para 44.

121. Second, section 135.1 of the *CCRA* is a special power to apprehend offenders in response to a breach or incipient breach, or out of an overriding need to protect society. There is no reason

to read into section 134.1(2) carve-outs in the type of conditions available for dangerous and long-term offenders on the basis of the special power in section 135.1.

122. The power in section 135.1 is not limited to CBRFs. It allows a general increase in the level of supervision applied to an offender, up to and including "custody," in response to a personal crisis, relapse, or other incident. An offender subject to a warrant of apprehension may be resident in a CBRF, including a CCC, prior to apprehension and thereafter moved to a penitentiary or psychiatric facility.

123. Unlike the power to set the conditions of supervision in section 134.1(2), which must be exercised by the PBC as a tribunal, a section 135.1 warrant of apprehension may be issued by an individual, namely, a designate of the Board or the Commissioner. This comports with the purpose of this section, which is to allow rapid responses to developing situations. This grant of power to certain individuals does not lead to an inference that the PBC, acting as a body, lacks the general power to assign offenders to CBRFs, including CCCs, where residential supervision is "reasonable and necessary."

124. Third and finally, it is inconsistent with the purpose of Part XXIV and the *CCRA* to infer that that "supervision" of dangerous or long-term offenders cannot encompass residential supervision. As the Federal Court of Appeal noted in *Normandin II* and Wilson J. noted in *R v M. (L.)*, [2003] OTC 97, *(sub nom R v McGarroch)* 2003 CarswellOnt 370 (WL) (Ont SCJ) [*McGarroch*], it is absurd that the PBC should be limited in its power to assess DO/LTOs such that an ordinary offender on full parole or statutory release could be subject to a wider range of conditions than a dangerous or long-term offender serving an LTSO. This is explored in the next section.

3. The residence condition complies with the principles of fundamental justice

125. Section 7 of the *Charter* reads:

> **7.** Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

126. This Court in *Carter v Canada (Attorney General)*, 2015 SCC 5, [2015] 1 SCR 331 [*Carter*] and *Canada (Attorney General) v Bedford*, 2013 SCC 72, [2013] 3 SCR 1101 [*Bedford*] has considered the meaning of "the principles of fundamental justice" and the framework of

section 7. Broadly speaking, the test for determining whether a section 7 violation has occurred is (*Carter*, at para 55):

> [55] In order to demonstrate a violation of s. 7, the claimants must first show that the law interferes with, or deprives them of, their life, liberty or security of the person. Once they have established that s. 7 is engaged, they must then show that the deprivation in question is not in accordance with the principles of fundamental justice.

127. As with all *Charter* violations, the Appellant bears the onus of satisfying the court that a breach has occurred: *Bedford*, at para. 127. The Appellant must prove the breach on a "balance of probabilities."

128. The trial judge did not specify which principle of fundamental justice was abrogated, and referred only generally to violations of a "section 7 *Charter* right." (*Bird* (PC), pars 40 and 42) The Crown appealed this finding to the Court of Appeal, *inter alia*, on the basis of an absence of reasons pursuant to *R v Sheppard*, 2002 SCC 26, [2002] 1 SCR 869. The Appellant now limits his section 7 argument to an abrogation of the section 7 principle against arbitrariness.

129. Arbitrariness is, put shortly, where "there is no connection between the effect and the object of the law," as *per Bedford*, para 78. There must be a "rational connection" (*Bedford*, para 111) between the object of the measure and the limits it imposes on a person's liberties. The standard for an applicant to satisfy is "not easily met": *Bedford*, at para 119.

130. The identification of the law's "object" is critical to a section 7 analysis, often determinative: *Carter*, at paras 77-78. Too broad an object can short-circuit the analysis and immunize a measure from analysis. Likewise, however, choosing an object which does not reflect the true purpose of the statute will compromise this analysis irreparably.

"Release" is a means, not an end

131. Clearly, "release" within the meaning of the *CCRA* can include release to CBRFs, including CCCs. Both full parole and statutory release are forms of "release," and such persons are resident at CBRFs, including CCCs, if their individual circumstances demand it: see e.g. sections 131(3)(a)(ii) and 131(4). Statutory release is self-evidently a form of release,[28] as is

[28] *E.g. CCRA*, s 127(1).

parole.[29] Section 133 gives "releasing authorities" the ability to set terms of release for ordinary offenders, which can include residence at CBRF. The section itself is clear:

> **133** […] (2) Subject to subsection (6), every offender released on parole, statutory release or unescorted temporary absence is subject to the conditions prescribed by the regulations.

A lengthy number of provisions throughout the *CCRA* and the *Regulations*, including section 133(2), unambiguously refer to parole and statutory release as forms of "release."[30]

132. Any and all offenders on statutory release or parole residing at CBRFs, including CCCs, have been released to those residences. The same is no less true of offenders subject to long-term supervision who have been assigned to reside at these facilities. The Appellant superimposes a definition of "release" onto the *CCRA* which is inconsistent with the Act itself.

133. Moreover, it is within the purview of releasing authorities under Part II of the *CCRA* to deny release where appropriate, pursuant to sections 102, 116, 129 and others.

134. The purpose of Part II of the *CCRA* cannot be distilled to a singular, abstract demand for a *non sequitur* definition of "release." To the contrary: the *CCRA*, in concert with the *Criminal Code*, expressly demands that the Appellant be "supervised in the community." The *Charter* argument must be resolved by asking whether the PBC decision was consonant with the purposes of supervision.

The purpose of supervision is rehabilitation and reintegration

135. The purpose of the *CCRA* is not obscure. Parliament went to considerable length to establish the purposes and principles governing the interpretation of the *CCRA* and the actions of the entities governed by it.[31]

136. Most pertinent here are the purpose provisions found in Part II of the *CCRA*, which governs the PBC while making decisions related to conditional release. The *CCRA* states:

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[29] *E.g. CCRA*, s 123(5)(a).

[30] *E.g. CCRA*, ss 25(2), 26(c)(i), d(iii), d(iv), 94(1), and 115(1) – (5); *Regulations*, s 122(a)(i); 161(a).

[31] For example, the purpose of the CSC is set out at ss. 3 – 5 of the *CCRA*.

> **100.** 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.
>
> **100.1** The protection of society is the paramount consideration for the Board and the provincial parole boards in the determination of all cases.

137. In accordance with section 99.1 of the CCRA, section 100 applies, with such modifications as the circumstances require, to long-term supervision. This synthesis is not difficult. The timing of long-term supervision is out of the PBCs hands and, *mutatis mutandis,* is not a factor here.[32] Otherwise, the synthesis required by section 99.1 requires as follows:

> The purpose of long-term supervision is to contribute to the maintenance of a just, peaceful and safe society by means of decisions on the conditions of long-term supervision that will best facilitate the rehabilitation of offenders and their reintegration into the community as law-abiding citizens.

138. This was also the conclusion of this Court in *Ipeelee*, at para 47 "The legislative purpose of an LTSO, a form of conditional release governed by the *CCRA*, is therefore to contribute to the maintenance of a just, peaceful and safe society by facilitating the rehabilitation and reintegration of long-term offenders."

139. Section 100.1 applies to "all cases," and therefore to long-term supervision *ex proprio vigore* and does not require deeming.[33]

140. It is plainly consistent with these express purposes for the Appellant and other long-term offenders to be supervised at CBRFs, including CCCs, where this is "reasonable and necessary."

141. Part XXIV of the *Criminal Code*, the long-term supervision provisions of the *CCRA*, and the corrections system as a whole serve a variety of goals. It goes without saying that paramount among those purposes—both in Part XXIV and the *CCRA*—is the protection of the public. The

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[32] The PBC is not blind to timing when managing long-term offenders during their LTSOs, particularly when seized with a case following a suspension of supervision. However, long-term supervision begins after warrant expiry and the start date must be taken for granted.

[33] *Robertson v. Canada (Attorney General)*, 2016 FC 663 at 35; *Pargelen v. Canada (Attorney General)*, 2012 FC 921 at 13; *Ipeelee* at para 46.

importance of public protection to dangerous and long-term sentencing in particular is well beyond dispute.

142. Judicial treatment of section 134.1(2) confirms this: residence at CCCs during long-term supervision accords with the purpose of long-term supervision.

143. In *Normandin II* and *McGarroch*, the Federal Court of Appeal and Ontario Superior Court of Justice had occasion to consider whether section 134.1(2) should be interpreted to permit residence conditions on long-term supervision orders. In doing so, those Courts made important pronouncements on the scope of section 134.1(2) and its relationship with Part XXIV of the *Criminal Code*.

144. In *McGarroch*, the Crown claimed that residence conditions were not available for long-term supervision orders in an attempt to convince the sentencing judge that only an indefinite sentence would adequately protect the community. Wilson J. disagreed with the Crown's interpretation:

> [143] In my view, such an interpretation flies in the face of the purpose of long-term supervision orders to protect the public. It would make little sense for the NPB to have the authority to order that ordinary offenders on parole be subject to residency conditions, and not have the authority to make similar orders for identified high risk, high need offenders. […]
>
> [158] Second, courts should interpret legislation so as to avoid absurd results. In my view it would be an absurd result to interpret legislation that is primarily intended to protect the public from high risk offenders as precluding the jurisdiction to impose a residency requirement, when jurisdiction exists to make such orders for lower risk individuals who are on parole.

145. Wilson J. went so far as to state that residency at community correction facilities "should, at least initially, in all probability, be the norm, not the exception" (at para 151, emphasis added). While clearly the accused was to be supervised "in the community," the use of the word "supervision" implied conditions, including residence ones (at para 159). The public protective purpose of section 134.1(2) is such that it would be "absurd" if the PBC could not impose residence conditions on long-term offenders.

146. The Federal Court of Appeal also considered the relationship between section 134.1(2) of the *CCRA* and the purpose of dangerous and long-term offender sentencing in *Normandin II*:

> [42] Furthermore, the proposed application of the [*expressio unius*] rule tends to discredit court orders of long-term supervision of a long-term offender. It reduces their value and usefulness and risks jeopardizing the security that they are intended to bring to the community. Similarly, its consequence would be to unduly impede the work of the social workers and reduce its effectiveness while unjustly and unnecessarily increasing the risks of harm to society. [emphasis added]

147. The purpose of Part XXIV and the *CCRA*, according to the Federal Court of Appeal, is consonant with the PBC's ability to impose residence conditions on offenders subject to long-term supervision orders. Many offenders subject to long-term supervision orders require intensive, careful supervision in order to manage the risk they present to the community.

148. The *Normandin* cases have been followed in the Federal Courts in related cases. In *Deacon v Canada (Attorney General)*, 2006 FCA 265, [2007] 2 FCR 607 [*Deacon*], the Federal Court of Appeal agreed with the PBC that a condition requiring a long-term offender to take ongoing medications to control sexual desire was consistent with section 7 of the *Charter*. In *Lalo v Canada (Attorney General)*, 2013 FC 1113, 110 WCB (2d) 561 the Federal Court ruled that conditions relating to residence and internet access for a long-term offender were (a) within the jurisdiction of the PBC; and (b) not a violation of the accused's section 7 rights: see paras 46-48.

149. Notably, the decision in *Normandin II* has been preferred to the trial decision in *Bird* in the one reported *habeas corpus* application to confront this issue: *Gallant*, at para 21:

150. Section 134.1(2) comports exactly with the goal of long-term supervision orders, as *per* the Supreme Court's important decision in *Ipeelee*:

> [45] LTSOs are administered in accordance with the *Corrections and Conditional Release Act*, S.C. 1992, c. 20 ("*CCRA*"). LTSOs must include the conditions set out in s. 161(1) of the *Corrections and Conditional Release Regulations*, SOR/92-620. In addition, the National Parole Board ("NPB") may include any other condition "that it considers reasonable and necessary in order to protect society and to facilitate the successful reintegration into society of the offender" (*CCRA*, s. 134.1(2)). […]
>
> [48] 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 re offence, 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.

151. In *Ipeelee*, this Court did not craft the objectives of long-term supervision out of whole cloth. The *Ipeelee* "twin principles" of rehabilitation and protection are derived from the *CCRA* sections which enabled the PBC's decision at issue in this case.

4. The residence condition is not a second punishment

152. The Appellant was sentenced in 2005 to a determinate sentence followed by a period of long-term supervision. The residence condition was a facially valid condition imposed pursuant to an existing LTSO. No change—retroactive or otherwise—to section 134.1(2) or related provisions of the *CCRA* has occurred since 1997, and the Appellant's "settled expectation of liberty" has not been thwarted. The Appellant, at all material times, has been subject to an order of supervision imposed by Judge Ferris in 2005. He merely objects to how he is being supervised.

153. Residence at CCC or CRF has been a legal consequence of LTSO supervision since the mechanism's inception. The law is unchanged, and the *Canada (Attorney General) v Whaling*, 2014 SCC 20, [2014] 1 SCR 392 test does not apply.

154. Residence at a CBRF, including a CCC, is not incarceration. As discussed above, CBRF and CCC are expressly designated as placements for offenders on conditional release. The fact that some residents of those facilities are "inmates" does not *per se* elevate the facility to a carceral one. Indeed, access to halfway houses was one of the benefits of parole that the offender in *Whaling* sought, which had been denied by the retroactive amendments to the *CCRA*: *Whaling v. Canada (Attorney General)*, 2012 BCSC 944 at para 2. A curfew and house rules does not incarceration make, and the Appellant chose to call no evidence on his living conditions or treatment in the facility to argue that his supervision at Oskana CCC was "punishment." It should be recalled that the section 11(h) argument is new in this Court.

155. The LTSO regime contemplates that specific rules and instructions will be imposed by parole supervisors and CSC officials in addition to those conditions supplied by the PBC itself: *CCRA*, s. 134.2(1). Whether associated with a supervised facility or otherwise, curfews, travel restrictions, and other day-to-day directions designed to prevent breaches or protect society can

and should be expected for LTSOs. There is certainly no "settled expectation of liberty" to the contrary.

156. Notably, the offender's subjective expectation of liberty is irrelevant: *Liang v. Canada (Attorney General)*, 2014 BCCA 190 at paras 19-21, 311 CCC (3d) 159. The question is not whether the Appellant believed he could reside on his own, nor whether such a belief, if held, was reasonable or settled. The question is whether an expectation "settled" in law has been thwarted.

157. Moreover, individual conditions on a LTSO do not necessarily constitute "punishment," certainly not if they meet the twin tests in 134.1(2). The objective of LTSOs is to prevent future reoffending and to protect the public during the period of the order: *L.M.*, at para 46. The PBC chooses conditions on LTSOs not in service of the sentencing objectives in the *Criminal Code*, but on the basis of future-oriented risk reduction, the protection of society, and the reintegration of the offender back into society.

158. When sentencing an offender during Part XXIV proceedings, the possibility and nature of supervision at CCCs is frequently considered by Courts, experts and counsel when weighing definite detention and long-term supervision against indefinite detention,[34] *e.g. R v Spilman*, 2014 ONCJ 373 at para 82; *R v Sipos*, 2012 ONCA 751 at para 33, 297 CCC (3d) 22, appeal to SCC dismissed, 2014 SCC 47, [2014] 2 SCR 423; *R v Farouk,* 2015 ONSC 4257 at paras 424 and 428; *R v Munro*, 2014 ONCJ 226 at para 40; *R v Simpson-Fry*, 2016 ONCJ 532 at para 55; *R v R. K.*, 2016 ONSC 3654 at paras 120-121; *R v C.B.*, 2016 ONCJ 209 at para 179; *R v Pelletier*, 2014 SKQB 90, 441 Sask R 136 at para 17; *R v Francis*, 2017 ONCJ 313 at para 51; and *The Queen v Andre Taillefer*, 2015 ONSC 2357 at para 35.

159. In some instances, the sentencing court hears evidence about nearby CBRFs, particularly CCCs, and recommends that residency at a CCC should be imposed during long-term supervision. In such cases, the availability of CCCs during long-term supervision is explicitly, if not implicitly, a factor in the Court's decision to permit the offender to serve a determinate

[34] The calculus is roughly the same whether choosing between dangerous and long-term offender status under the pre-2008 regime and *Johnson*, or choosing between levels of supervision for dangerous offenders under the post-2008 regime and 753(4.1) of the *Criminal Code*.

sentence, *e.g. R v McDonald*, 2013 ONSC 1143 at para 101; *R v Powell*, 2012 ONSC 4106 at para 120; *R v Wice*, 2012 CanLII 34317 (Ont SC) at para 177; *R v J.A.P.*, 2011 BCPC 333 at para 31; *R v Middleton*, 2014 ONSC 1071 at para 43; and *R v C.B.*, 2016 ONCJ 209 at paras 179 and 242.

160. Conversely, in cases where even a CCC cannot provide the level of support and supervision required by an offender, he or she is probably unmanageable in the community and indefinite detention is imposed, *e.g. R v Robinson*, 2009 CanLII 70138 at para 133 (Ont SC); *R v J.P.*, 2009 NUCJ 13 at paras 50-52; and *R v Byers*, 2011 ONSC 4159 at paras 437-440.

161. At the point in time that dangerous and long-term offenders are sentenced, the settled expectation in sentencing courts is that residence at CBRFs, including CCCs, is possible. As discussed in the next section, CBRFs and CCCs are important to protect offenders from indefinite detention.

5. Avoiding "blunt instruments"

162. The availability of the PBC's discretion to impose conditions for long-term supervision is a factor which allows some dangerous offenders to be sentenced to long-term supervision orders instead of indefinite detention, especially those sentenced prior to 2008 following the Supreme Court's decision in *Johnson*. Until 2008, dangerous offenders who met the criteria in section 753(1) of the *Criminal Code* could nonetheless be found to be long-term offenders if they also met the tests in section 753.1, particularly subsection 753.1(c). The scope of the PBC's supervisory powers was one of the factors that allowed the *Johnson* overlap to occur, *per* Iaccobucci and Arbour JJ in *Johnson*:

> [32] […] Supervision conditions under s. 134.1(2) of the Act may include those that are "reasonable and necessary in order to protect society". The very purpose of a long-term supervision order, then, is to protect society from the threat that the offender currently poses — and to do so without resort to the blunt instrument of indeterminate detention. If the public threat can be reduced to an acceptable level through either a determinate period of detention or a determinate period of detention followed by a long-term supervision order, a sentencing judge cannot properly declare an offender dangerous and sentence him or her to an indeterminate period of detention.

163. The *Johnson* discretion remains in Part XXIV, though the machinery has changed: see the *Criminal Code*, ss. 753(4) - (4.1). Residence conditions imposed through section 134.1(2) of

the *CCRA* are an important benefit to accused persons and a way to avoid the "blunt instrument" of indefinite detention: *Normandin II*, at para 40. Without section 134.1(2) of the *CCRA* and the commensurate ability of the PBC to impose residence at CBRFs, including CCCs, indefinite detention might be the only feasible option for offenders whose risk to the community is too great to be managed otherwise.

164. This point was also made by this Court in *L.M.* Only if the serious risk that a dangerous offender poses can be controlled in the community will an offender be found to be a long-term offender instead of a dangerous offender: *L.M.*, at 41. Long-term supervision is less restrictive than indeterminate detention and must be accessible to offenders who are amenable to it. This comports with the principles of proportionality and moderation: *L.M.* at para 42.

165. Reading down the PBC's broad authority in section 134.1(2) could have the unintentional consequence of precluding many dangerous or long-term offenders from being assessed as manageable in the community under subsections 753(4.1) or 753.1(c) of the *Criminal Code*, increasing the number of offenders who receive indeterminate sentences As Wilson J. of the Ontario Superior Court of Justice noted in *McGarroch*, at para 162: "To protect the public yet avoid over-incarceration, the [Parole Board] must have the jurisdiction to impose residency requirements during a long-term supervision order." [emphasis added]

PART IV: COSTS

166. Saskatchewan does not seek costs and submits it should not be liable for costs.

PART V: REQUEST FOR ORDER

167. Saskatchewan requests that the appeal be dismissed and that the matter to be returned to the Provincial Court of Saskatchewan for sentencing.

ALL OF WHICH is respectfully submitted.

DATED at Regina, Saskatchewan, this 6 day of October, 2017.

Theodore J. C. Litowski
Crown Counsel

PART VI: AUTHORITIES

Cases

Citation	Paragraph(s)
Alimport (Empresa Cubana Importadora de Alimentos) v Victoria Transport Ltd., [1977] 2 SCR 858	116
Canada (Attorney General) v Bedford, 2013 SCC 72, [2013] 3 SCR 1101	126, 127, 129
Canada (Attorney General) v McArthur, 2010 SCC 63, [2010] 3 SCR 626	74
Canada (Attorney General) v Telezone, 2010 SCC 62, [2010] 3 SCR 585	74, 81
Canada (Attorney General) v Whaling, 2014 SCC 20, [2014] 1 SCR 392	153
Canada (Human Rights Commission) v Taylor, [1990] 3 SCR 892	61
Carter v Canada (Attorney General), 2015 SCC 5, [2015] 1 SCR 331	126, 129
Deacon v Canada (Attorney General), 2006 FCA 265, [2007] 2 FCR 607	148
DG v Bowden Institution, 2016 ABCA 52, 36 Alta LR (6th) 294	96
Dufresne v Canada (Attorney General), 2013 FC 1071	39
Ewanchuck v Canada (Parole Board), 2017 ABCA 145	96
Francis v Canada (Attorney General), 2017 ONSC 3354	45
Gallant v Canada (Attorney General), 2016 NBQB 165	96, 149
Garland v Consumers' Gas Co., 2004 SCC 25, [2004] 1 SCR 629	56
Hurdle v Canada (Attorney General), 2012 FC 894	91
Lalo v Canada (Attorney General), 2013 FC 1113	148
Liang v Canada (Attorney General), 2014 BCCA 190, 311 CCC (3d) 159	156
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McCabe v Canada (Attorney General), [2001] 3 FCR 430, 2001 FCT 309	45
McMurray v Canada (National Parole Board), 2004 FC 462, 249 FTR 118	86
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Citation	Paragraph(s)
Mission Institution v Khela, 2014 SCC 24, [2014] 1 SCR 502	95
Normandin v Canada (Attorney General), 2005 FC 1605	114
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Okell v Saskatchewan (Minister of Justice), 2006 SKCA 34, 206 CCC (3d) 513	57
Pargelen v Canada (Attorney General), 2012 FC 921	139
Perron v Warden of Donnaconna Institution (September 6, 2017), 200-36-002498-178, Quebec (QCCA) (unreported) [Respondent's Book of Authorities, Tab 1]	96
R v 974649 Ontario Inc., [2001] 3 SCR 575, 2001 SCC 81	46
R v Adams (1978), 45 CCC (2d) 459 (BCCA) [Respondent's Book of Authorities, Tab 2]	111
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