



SUPREME COURT OF CANADA

CITATION: R. v. Bird, 2019 SCC 7

APPEAL HEARD: March 16, 2018

JUDGMENT RENDERED February 8, 2019

DOCKET: 37596

BETWEEN:

Spencer Dean Bird
Appellant

and

Her Majesty The Queen
Respondent

- and -

Attorney General of Canada, Attorney General of Ontario, Aboriginal Legal Services Inc., David Asper Centre for Constitutional Rights and Canadian Civil Liberties Association
Interveners

CORAM: Wagner C.J. and Abella, Moldaver, Karakatsanis, Gascon, Côté, Brown, Rowe and Martin JJ.

REASONS FOR JUDGMENT: Moldaver J. (Wagner C.J. and Abella, Côté, Brown and Rowe JJ. concurring)
(paras. 1 to 87)

CONCURRING REASONS: Martin J. (Karakatsanis and Gascon JJ. concurring)
(paras. 88 to 174)

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R. v. BIRD

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Her Majesty The Queen

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Present: Wagner C.J. and Abella, Moldaver, Karakatsanis, Gascon, Côté, Brown, Rowe and Martin JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Criminal law — Administrative orders — Collateral attack — Accused charged criminally with breaching Parole Board long-term supervision order requiring that he reside at community correctional centre — Accused defending charge at trial on basis that residency condition was not within Board's statutory authority and violated his constitutional right to liberty — Whether accused could collaterally attack residency condition — If so, whether residency condition arbitrary in respect of purpose of long-term offender regime — Canadian Charter of Rights and Freedoms, s. 7 — Corrections and Conditional Release Act, S.C. 1992, c. 20, s. 134.1(2).

B was found to be a long-term offender and received a sentence comprised of a prison term and a period of long-term supervision in the community. Pursuant to s. 134.1(2) of the *Corrections and Conditional Release Act* (“CCRA”), the Parole Board imposed a residency condition as part of B’s long-term supervision order (“LTSO”). This condition required that he reside at a community correctional centre, community residential facility or other residential facility approved by the Correctional Service of Canada. B was placed in Oskana Centre, a community correctional centre. Less than a month after his long-term supervision commenced, B left Oskana Centre and did not return. He was eventually apprehended and charged with having breached the residency condition of his LTSO.

B defended the charge at trial on the basis that the residency condition of his LTSO was not within the Board’s statutory authority and violated his right to

liberty under s. 7 of the *Charter*. The trial judge agreed and acquitted B, finding that the residency condition was invalid. The Court of Appeal rejected this finding, set aside B's acquittal, entered a conviction on the charge and remitted the matter for sentencing. B appeals, renewing his s. 7 *Charter* attack on the residency condition and raising for the first time that the condition violates his *Charter* rights under ss. 9 and 11(h).

Held: The appeal should be dismissed.

Per Wagner C.J. and Abella, **Moldaver**, Côté, Brown and Rowe JJ.: B was not permitted to collaterally attack the residency condition of his LTSO. Thus, it is unnecessary to consider whether the residency condition violates his *Charter* rights.

In *R. v. Consolidated Maybrun Mines Ltd.*, [1998] 1 S.C.R. 706, and in the companion case, *R. v. Al Klippert Ltd.*, [1998] 1 S.C.R. 737, the Court developed a distinct approach for determining whether a person who is charged criminally with breaching an administrative order can collaterally attack that order. This determination is made by focussing on the legislature's intention: the court must inquire into whether the legislature intended to permit collateral attacks on the order, or intended instead that a person should challenge the order by way of other review mechanisms. In focussing on the legislature's intention, the *Maybrun* framework balances two principles: (1) ensuring that the legislature's decision to assign decision-making powers to administrative bodies is not undermined and (2) ensuring that individuals have an effective means available to them to challenge administrative

orders, particularly when these orders are challenged on the basis that they are not *Charter* compliant. In the *Charter* context, this means that the person challenging an order must be able to receive an effective remedy that will vindicate his or her *Charter* rights. Where no such remedies are available, it must be inferred that the intention of the legislature is to permit a collateral attack. To determine the legislator's intention as to the appropriate forum for challenging the validity of an administrative order, *Maybrun* identifies five non-exhaustive factors that may be considered by a court: (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. The factors are not independent and absolute criteria, but important clues, among others, for determining the legislature's intention.

On balance, with the exception of the final *Maybrun* factor, the other factors strongly indicate that Parliament did not intend to permit collateral attacks in circumstances like those existing in this case. With respect to the first two factors, it would undermine the purposes of long-term supervision if offenders were allowed to take a "breach first, challenge later" approach to the conditions of their LTSOs. The conditions of an LTSO are imposed to reduce to an acceptable level the elevated risk posed by long-term offenders and dangerous offenders in the community. When offenders breach these conditions, they expose the public to this risk. Permitting a "breach first, challenge later" approach in this context undermines not only the

community's interests, but also those of the offenders, by compromising the offender's rehabilitative prospects. This outcome is inconsistent with the objectives of the long-term supervision regime.

The third factor permits a court to consider not only the existence of a right of appeal to an administrative appeal tribunal, but also the existence of other effective mechanisms or forums for challenging the order at issue. Although there is no right of appeal under the *CCRA* from a decision of the Board concerning the conditions of an LTSO, the record indicates that there were mechanisms available to B that would have provided him with an effective means to challenge the residency condition. He could have written to the Board to ask it to vary or remove the condition; he could have applied for judicial review in the Federal Court; and he could have applied to the provincial superior court for *habeas corpus*, a remedy that offers simplified procedures that promote greater accessibility by self-represented litigants and persons with limited means. Accordingly, B was not denied the ability to fully defend against the charge of breaching the residency condition, because he had the opportunity to challenge the Board's order through these mechanisms.

The fourth factor permits a court to consider the nature of a collateral attack in light of the expertise or *raison d'être* of other mechanisms or forums for challenging the order. Where the nature of the collateral attack involves considerations that fall squarely within the expertise or *raison d'être* of a particular administrative body or other forum, this may be taken as an indication that Parliament

wanted that body to decide the question, as opposed to permitting a collateral attack. In the instant case, s. 134.1(2) of the *CCRA* gives the Board broad discretionary power to impose whichever conditions on long-term supervision it deems “reasonable and necessary to protect society and ensure the successful integration of the offender into society”. This provision demonstrates Parliament’s intention to rely on the expertise and experience of the Board in determining which conditions are needed in an LTSO to achieve the balance between public safety and the successful reintegration of the offender. Therefore, if B asked the Board to reconsider its decision to impose the residency condition, the Board would consider matters that fall squarely within its expertise. The fact that B’s challenge to the residency condition raises constitutional issues does not mean that it raises considerations foreign to the Board’s experience and expertise. These issues would also not be unfamiliar to the Federal Court or to provincial superior courts hearing *habeas corpus* applications. Consequently, this factor indicates a legislative intention to have B resort to these mechanisms.

Lastly, the penalty for breaching a condition of an LTSO is significant. However, this final factor is not determinative. When it is viewed not in isolation, but in conjunction with the other factors, it is clear that it is not decisive of Parliament’s intention that B be permitted to collaterally attack the Board’s order. Given that permitting a “breach first, challenge later” approach in this context would pose a real risk to public safety and that effective review mechanisms were available to B, Parliament did not intend that B should be able to circumvent these mechanisms and

instead, challenge the residency condition only after breaching it. Rather, Parliament intended that these offenders would ask the Board to vary or remove the condition and/or, if judicial review in the Federal Court would not provide an effective remedy, apply for *habeas corpus*.

Per Karakatsanis, Gascon and **Martin** JJ.: B's constitutional challenge to his LTSO residency condition should have been permitted at his trial for breach of that condition. Nevertheless, once permitted, B's claim under s. 7 of the *Charter* should fail. B's appeal should therefore be dismissed and his conviction upheld.

There is agreement with the majority that the factors set out in *Mayburn* should be applied; however, there is disagreement on their application. Unlike the collateral attacks in *Mayburn* and *Klippert*, B's collateral attack puts his *Charter* rights in issue in light of the very real possibility of significant imprisonment. When these constitutional and carceral dimensions of B's cases are examined, it is revealed that Parliament did not intend to prohibit B from challenging at trial the constitutional validity of a condition whose breach carries a maximum penalty of ten years' imprisonment.

With respect to the first and second *Mayburn* factors, although the broad authority conferred on the Board by s. 134.1(2) of the *CCRA* does militate against collateral attacks on the Board's LTSO decisions, allowing B's collateral attack is not at odds with the purpose of the long-term offender regime. Permitting B to advance his constitutional challenge to his LTSO condition will not inspire or perpetuate a

“breach first, challenge later” attitude amongst long-term offenders. Framing B’s conduct as “breaching first, challenging later” shifts the focus from whether Parliament intended to allow long-term offenders to challenge LTSO conditions when charged with their breach, which is the correct question, to whether Parliament intended to permit LTSO breaches committed for the purpose of challenging the conditions breached. Of course Parliament would not intend to make collateral attacks available to those who flout their conditions in order to challenge them. Further, and crucially, it is breaches of residency conditions, and not collateral attacks on those conditions, that pose a risk to society.

When examining the third factor, the three options available to B for challenging the residency condition identified by the majority do not, either individually or in concert, provide effective recourse for adjudicating B’s *Charter* claim to the point of illustrating a legislative intent to bar B from arguing that the condition for which he faces a criminal charge is unconstitutional. It cannot be said that Parliament prescribed any one of the three options as the particular forum for raising a constitutional challenge to an LTSO condition. Given their shortcomings, neither internal review by the Parole Board nor judicial review can constitute the only prescribed forum for adjudicating constitutional challenges to LTSO conditions. Assuming its availability and Parliament’s awareness of it in this context, *habeas corpus* cannot serve as evidence that Parliament intended to bar collateral attacks on LTSO conditions; like a collateral attack, an application for *habeas corpus* represents

an external attack on an LTSO residency condition which disregards the “administrative appeal process” contemplated by the *CCRA*.

With respect to the fifth factor, the penalty upon a conviction under s. 753.3 of the *Criminal Code* is up to ten years’ imprisonment. To bar B’s attack on the constitutionality of the condition is to deny his defence at trial where he is facing a lengthy period of imprisonment. The general rule against collateral attacks flows from rule of law and administration of justice considerations, namely, that it is improper to bypass adjudicative processes established by the legislature. However, when criminal defences are barred in the face of severe sanctions, separate aspects of the rule of law and the administration of justice are clearly invoked. The trial judge’s task in cases such as this is to ask whether full answer and defence considerations and fair trial rights outweigh rigid adherence to administrative structures, particularly where those structures are limited. B’s challenge to his residency requirement is the only defence he advanced. He could go to jail for a significant period of time without ever having the basis for that sentence — the residency condition — reviewed by a court for constitutional validity. The prospect of someone in a situation like B’s mounting a meritorious *Charter* claim, yet being ineligible for a corresponding remedy because of the forum in which the claim was advanced, is an affront to both the administration of justice and the accused’s *Charter*-protected right to make full answer and defence. Accordingly, this factor weighs heavily in favour of finding that Parliament could not have intended a claim like B’s to be barred in these

circumstances. B should be allowed to raise his constitutional defence at this time and in this forum.

With respect to B's *Charter* claim, an infringement of liberty will be arbitrary in a manner that infringes s. 7 of the *Charter* where it bears no rational connection to the purpose of the governing law. Long-term supervision is a form of exceptional sentence reserved for individuals who pose an ongoing threat to the public and merit enhanced sentences on preventive grounds. The specific objective of long-term supervision is to ensure that the offender does not reoffend and to protect the public during a period of supervised reintegration into society. The Parole Board's broad discretion to set LTSO conditions under s. 134.1(2) of the *CCRA* is limited only by the requirement that the conditions must aim at protecting society or facilitating the long-term offender's reintegration into society. The text of the provision strongly supports the conclusion that the Board is authorized to impose residency requirements, and the purposes of the long-term offender regime are best achieved by interpreting s. 134.1(2) as authorizing the Board to order residency where it deems fit, including in a community-based residential facility such as Oskana Centre. Oskana Centre's technical status as a "penitentiary" under the *CCRA* does not detract from this conclusion, nor do the adjacent *CCRA* provisions which specifically address residency requirements in other contexts. Accordingly, the text, context, and purpose of s. 134.1(2) confirm that the Board is empowered to set residency conditions like the one imposed on B where they are reasonable and necessary to achieve the objects of the long-term offender regime. The residency condition in this case was informed

by B's specific circumstances. Given those circumstances — which include a significant history of failures to comply, substance abuse, and a long criminal record — and the purpose of s. 134.1(2) in the context of the long-term offender regime, B's residency condition is not arbitrary under s. 7 of the *Charter*.

B should not be permitted to raise claims under ss. 9 and 11(*h*) of the *Charter*. While the Court has the discretion to hear new constitutional arguments on appeal, this discretion should only be exercised exceptionally, taking into account all of the circumstances, including the state of the record, fairness to all parties, the importance of having the issue resolved by the Court, its suitability for decision and the broader interests of the administration of justice. B has not demonstrated that this is one of those rare cases that warrants this Court's consideration of his new constitutional arguments on appeal.

Cases Cited

By Moldaver J.

Applied: *R. v. Consolidated Maybrun Mines Ltd.*, [1998] 1 S.C.R. 706; *R. v. Al Klippert Ltd.*, [1998] 1 S.C.R. 737; *May v. Ferndale Institution*, 2005 SCC 82, [2005] 3 S.C.R. 809; *Mission Institution v. Khela*, 2014 SCC 24, [2014] 1 S.C.R. 502; **distinguished:** *Mooring v. Canada (National Parole Board)*, [1996] 1 S.C.R. 75; **considered:** *R. v. Ipeelee*, 2012 SCC 13, [2012] 1 S.C.R. 433; *R. v. Conway*, 2010 SCC 22, [2010] 1 S.C.R. 765; **referred to:** *Wilson v. The Queen*, [1983] 2

S.C.R. 594; *Canada (Attorney General) v. TeleZone Inc.*, 2010 SCC 62, [2010] 3 S.C.R. 585; *R. v. Litchfield*, [1993] 4 S.C.R. 333; *Garland v. Consumers' Gas Co.*, 2004 SCC 25, [2004] 1 S.C.R. 629; *R. v. Domm* (1996), 31 O.R. (3d) 540; *Canada (Human Rights Commission) v. Canadian Liberty Net*, [1998] 1 S.C.R. 626; *Canada (Human Rights Commission) v. Taylor*, [1990] 3 S.C.R. 892; *R. v. 974649 Ontario Inc.*, 2001 SCC 81, [2001] 3 S.C.R. 575; *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 S.C.R. 3; *Henry v. British Columbia (Attorney General)*, 2015 SCC 24, [2015] 2 S.C.R. 214; *R. v. Steele*, 2014 SCC 61, [2014] 3 S.C.R. 138; *R. v. Boutilier*, 2017 SCC 64, [2017] 2 S.C.R. 936; *R. v. Johnson*, 2003 SCC 46, [2003] 2 S.C.R. 357; *Nova Scotia (Workers' Compensation Board) v. Martin*, 2003 SCC 54, [2003] 2 S.C.R. 504; *Quebec (Attorney General) v. Quebec (Human Rights Tribunal)*, 2004 SCC 40, [2004] 2 S.C.R. 223; *D.G. v. Bowden Institution (Warden)*, 2016 ABCA 52, 612 A.R. 213; *Brown v. Canada (Public Safety)*, 2018 ONCA 14, 420 D.L.R. (4th) 124; *Ogiamien v. Ontario (Community Safety and Correctional Services)*, 2017 ONCA 839, 55 Imm. L.R. (4th) 220; *R. v. Miller*, [1985] 2 S.C.R. 613; *Normandin v. Canada*, 2005 FCA 345, [2006] 2 F.C.R. 112.

By Martin J.

Applied: *R. v. Consolidated Maybrun Mines Ltd.*, [1998] 1 S.C.R. 706; *R. v. Al Klippert Ltd.*, [1998] 1 S.C.R. 737; **referred to:** *May v. Ferndale Institution*, 2005 SCC 82, [2005] 3 S.C.R. 809; *Normandin v. Canada (Attorney General)*, 2005

FCA 345, [2006] 2 F.C.R. 112; *R. v. Litchfield*, [1993] 4 S.C.R. 333; *McKart v. United States*, 395 U.S. 185 (1969); *Guindon v. Canada*, 2015 SCC 41, [2015] 3 S.C.R. 3; *Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101; *Carter v. Canada (Attorney General)*, 2015 SCC 5, [2015] 1 S.C.R. 331; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27; *R. v. Steele*, 2014 SCC 61, [2014] 3 S.C.R. 138; *R. v. L.M.*, 2008 SCC 31, [2008] 2 S.C.R. 163; *R. v. Ipeelee*, 2012 SCC 13, [2012] 1 S.C.R. 433; *Thibodeau v. Air Canada*, 2014 SCC 67, [2014] 3 S.C.R. 340.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, ss. 7, 9, 10(c), 11(h), 24(1), (2).

Corrections and Conditional Release Act, S.C. 1992, c. 20, ss. 2, 98, 99.1, 100, 133, 134.1, 134.2(1), 135.1, 147(1).

Corrections and Conditional Release Regulations, SOR/92-602, s. 161(1).

Criminal Code, R.S.C. 1985, c. C-46, ss. 753(1)(a), (b), (4), (4.1), 753.1(1), (3), 753.2(1), 753.3

Federal Courts Act, R.S.C. 1985, c. F-7, ss. 18, 18.1.

Federal Courts Rules, SOR/98-106, r. 8(1).

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Canada. Correctional Service. *Commissioner's Directive 706*, "Classification of Institutions", 2018.

Clewley, Gary R., Paul G. McDermott and Rachel E. Young. *Sentencing: The Practitioner's Guide*. Aurora, Ont.: Canada Law Book, 1995 (loose-leaf updated May 2018, release 61).

APPEAL from a judgment of the Saskatchewan Court of Appeal (Richards C.J. and Ottenbreit and Whitmore JJ.A.), 2017 SKCA 32, 348 C.C.C. (3d) 43, [2017] 8 W.W.R. 684, [2017] S.J. No. 181 (QL), 2017 CarswellSask 216 (WL Can.), setting aside the acquittal entered by Henning Prov. Ct. J., 2016 SKPC 28, 352 C.R.R. (2d) 248, [2016] S.J. No. 68 (QL), 2016 CarswellSask 94 (WL Can.) and entering a conviction. Appeal dismissed.

Leif Jensen and Michelle Biddulph, for the appellant.

Theodore Litowski, for the respondent.

Sharlene Telles-Langdon, for the intervener the Attorney General of Canada.

Deborah Krick, for the intervener the Attorney General of Ontario.

Jonathan Rudin and Emilie N. Lahaie, for the intervener Aboriginal Legal Services Inc.

Breese Davies and Cheryl Milne, for the intervener the David Asper Centre for Constitutional Rights.

Audrey Boctor and *Olga Redko*, for the intervener the Canadian Civil Liberties Association.

The judgment of Wagner C.J. and Abella, Moldaver, Côté, Brown and Rowe JJ. was delivered by

MOLDAVER J. —

I. Overview

[1] The general rule against collateral attacks on court orders is well-established: with limited exceptions, an order issued by a court must be obeyed unless it is set aside in a proceeding taken for that purpose. The rule has been consistently applied to prevent a person from attacking the validity of a court order when defending against a criminal charge stemming from its breach. In *R. v. Consolidated Maybrun Mines Ltd.*, [1998] 1 S.C.R. 706, and in the companion case, *R. v. Al Klippert Ltd.*, [1998] 1 S.C.R. 737, this Court developed a distinct approach for determining whether a person who is charged criminally with breaching an administrative order can collaterally attack that order. In those decisions, the persons seeking to challenge the administrative orders did not allege that the orders infringed their rights under the *Canadian Charter of Rights and Freedoms*.

[2] This appeal requires us to revisit the *Maybrun* framework in the context of a long-term offender, who has been charged criminally for having breached the residency condition imposed on him by the Parole Board of Canada (“Parole Board”) under a long-term supervision order (“LTSO”). In particular, we are required to decide whether, in defending that charge, it was open to the appellant, Spencer Dean Bird, to collaterally attack the validity of the residency condition on the basis that it contravened his *Charter* rights.

[3] Mr. Bird was found to be a long-term offender and received a sentence comprised of a prison term and a period of long-term supervision in the community. Based in part on Mr. Bird’s lengthy history of violence and numerous failed conditional releases, the Parole Board imposed a residency condition as part of Mr. Bird’s LTSO. This condition required that he reside at a community correctional centre, community residential facility or other residential facility approved by the Correctional Service of Canada (“CSC”). CSC placed Mr. Bird in Oskana Centre, a community correctional centre. Less than a month after his long-term supervision commenced, Mr. Bird left Oskana Centre and did not return. He was eventually apprehended and charged under s. 753.3(1) of the *Criminal Code*, R.S.C. 1985, c. C-46, with having breached the residency condition of his LTSO.

[4] Mr. Bird defended the charge at trial on the basis that the residency condition of his LTSO was not within the Parole Board’s statutory authority and violated his s. 7 *Charter* rights. The trial judge accepted this argument and acquitted

Mr. Bird, finding that the residency condition was invalid. On appeal, the Court of Appeal for Saskatchewan rejected this finding. In its view, the trial judge impermissibly permitted Mr. Bird to collaterally attack the residency condition. The Court of Appeal set aside Mr. Bird's acquittal, entered a conviction on the charge under s. 753.3(1) and remitted the matter to the Provincial Court of Saskatchewan for sentencing. Mr. Bird now appeals to this Court. He renews his s. 7 *Charter* attack on the residency condition. Additionally, he raises for the first time that the condition violates his *Charter* rights under ss. 9 and 11(h).

[5] For reasons that follow, I agree with the Court of Appeal that Mr. Bird was not permitted to collaterally attack the residency condition of his LTSO. In view of that, I find it unnecessary to address the various *Charter* arguments he has raised in support of his position that the residency condition is invalid. Accordingly, I would dismiss the appeal.

II. Facts

[6] Mr. Bird has a lengthy criminal history dating back to 1983. His criminal record consists of approximately 63 convictions, including 12 convictions for violent offences.

[7] On May 27, 2005, following Mr. Bird's convictions for assault with a weapon and theft under \$5,000, Judge Ferris of the Provincial Court of Saskatchewan found him to be a long-term offender under s. 753.1(3) of the *Criminal Code*. He

sentenced Mr. Bird to 54 months of imprisonment to be followed by a five-year period of long-term supervision. Over the course of this sentence, Mr. Bird was placed on statutory release three times. On each occasion, his release was suspended for violating conditions, re-offending or allegedly re-offending. Mr. Bird was eventually released on his long-term supervision order on June 21, 2013. Three days later, he was arrested and charged with possession of a weapon for a dangerous purpose, for which he eventually received a 12-month sentence.

[8] CSC prepared an “Assessment for Decision” dated April 28, 2014, which assessed Mr. Bird’s statutory release plans in respect of the 12-month sentence he received on the weapon conviction. Mr. Bird’s plan was to return to Ahtahkakoop First Nation and live with his brother. CSC found that this plan was not sufficient to manage the risk Mr. Bird posed to the community, noting that Mr. Bird had a “well established pattern of violence” and was “unable to abide by imposed conditions for any length of time” (A.R., vol. II, at p. 77). CSC determined that if a residency condition was not imposed, Mr. Bird would “present an undue risk to society” (*ibid.*). Accordingly, CSC recommended that Mr. Bird reside at a community correctional centre or a community residential facility for the duration of his statutory release and for the first 180 days of his long-term supervision.

[9] In its Pre-Release Decision dated July 15, 2014, the Parole Board took up CSC’s recommendation and imposed a condition that Mr. Bird reside at a community correctional centre, community residential facility or other residential facility (such as

a private home placement) approved by CSC for the first 180 days of his long-term supervision. This condition was imposed pursuant to s. 134.1(2) of the *Corrections and Conditional Release Act*, S.C. 1992, c. 20 (“CCRA”), which permits the Parole Board to “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”. Echoing CSC’s concerns, the Parole Board reasoned that the residency condition was reasonable and necessary based on Mr. Bird’s “lengthy history of violence causing physical harm” and his “inability to abide by the conditions that [were] imposed” on his conditional releases (A.R., vol. II, at p. 69). The Parole Board concluded that it was “satisfied that [Mr. Bird would] 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” (*ibid.*).

[10] The Parole Board conveyed its reasons for decision to Mr. Bird under a cover letter dated July 24, 2014. The letter expressly advised Mr. Bird that he could apply to the Board to be relieved of any of the conditions of his LTSO:

You may apply to the Parole Board of Canada to be relieved of any of your conditions or request that the Board vary the terms of any of your conditions of Long Term Supervision Order. Upon receipt of your application and an updated report from your Parole Officer, with whom you should discuss your request, your file will be referred to the Board for voting and subsequently you will be advised of the outcome. To ensure that your request receives complete consideration, please fully document the reasons for your request. [Emphasis added].

(A.R., vol. II, at p. 67)

[11] On Mr. Bird's statutory release date of August 14, 2014, he was transported to Oskana Centre where he lived until his warrant expiry date of January 7, 2015, at which time his LTSO commenced. That same day, Mr. Bird signed a Long-term Supervision Certificate prepared by CSC, which spelled out the special conditions of his long-term supervision, including a direction that he report to Oskana Centre. The Certificate also included an acknowledgement, signed by Mr. Bird, that violating a condition of his long-term supervision without lawful excuse was an offence under s. 753.3(1) of the *Criminal Code*.

[12] Oskana Centre is a community correctional centre, also known as a halfway house. It has established various conditions for persons who reside there, two of which include a nighttime curfew and a requirement that residents return to Oskana Centre from 11:00 a.m. to 1:00 p.m. Mr. Bird was expected to comply with those conditions.

[13] On January 28, 2015, Mr. Bird left Oskana Centre and did not return. The following day he was charged with breaching the residency condition of his LTSO under s. 753.3(1) of the *Criminal Code*. He remained at large for more than two months until April 16, 2015, when the police located him and placed him under arrest.

III. Judgments Below

A. *Provincial Court of Saskatchewan, 2016 SKPC 28, 352 C.R.R. (2d) 248 (Henning Prov. Ct. J.)*

[14] At his trial for breaching the residency condition of his LTSO, Mr. Bird argued that the residency condition exceeded the Parole Board's statutory authority and violated his s. 7 *Charter* rights.

[15] The trial judge initially considered whether, in defending against the charge of breaching the residency condition, Mr. Bird could mount a collateral attack on the Parole Board's decision to impose it. Applying the framework set out in *Maybrun* and *Klippert*, the trial judge determined that Mr. Bird could collaterally attack the order of the Parole Board.

[16] The trial judge then considered whether the residency condition was valid. He found that the decision of the Parole Board to impose the residency condition had the effect of placing Mr. Bird in Oskana Centre, a penal institution. In his view, such a condition was not authorized under the *CCRA* for LTSOs and it amounted to a significant breach of Mr. Bird's rights under s. 7 of the *Charter*. Given his conclusion that the residency condition was unconstitutional, he concluded that Mr. Bird could not be convicted of breaching it. Accordingly, he dismissed the charge against Mr. Bird.

B. *Court of Appeal for Saskatchewan, 2017 SKCA 32, 348 C.C.C. (3d) 43 (Richards C.J. and Ottenbreit and Whitmore J.J.A.)*

[17] On appeal, the Crown argued that the trial judge erred in permitting a collateral attack on the Parole Board's decision to impose a residency condition, and he further erred in determining that the residency condition violated s. 7 of the *Charter*.

[18] Chief Justice Richards, writing for a unanimous court, allowed the appeal. In his view, the trial judge erred in permitting a collateral attack on the residency condition imposed by the Parole Board. Considering the framework set out in *Maybrun* and *Klippert* and its focus on legislative intent, the Court of Appeal concluded that it was not the intention of Parliament to permit collateral attacks on conditions imposed on LTSOs by the Parole Board.

[19] Chief Justice Richards noted that allowing offenders to "breach first, challenge later" would tend to frustrate the purposes of the long-term supervision regime (para. 57). He further observed that the Federal Court has exclusive supervisory jurisdiction over Parole Board decisions and that an offender may ask the Parole Board to vary or remove any condition. Although a substantial penalty could be imposed for breaching an LTSO, Richards C.J. concluded that Parliament did not intend for offenders to take issue with conditions of their LTSOs by breaching them. It followed that the trial judge erred in permitting Mr. Bird to collaterally attack the Parole Board's order. In light of this conclusion, he found it unnecessary to address whether the residency condition violated Mr. Bird's s. 7 *Charter* rights. In the result,

he set aside Mr. Bird's acquittal, entered a conviction on the charge under s. 753.3(1) of the *Criminal Code* and remitted the matter to the Provincial Court for sentencing.

IV. Issue

[20] In my view, this appeal raises a single issue: Can Mr. Bird collaterally attack the residency condition imposed by the Parole Board on his LTSO in defending against a criminal charge of having breached that condition? Because I would answer this question in the negative, I find it unnecessary to address Mr. Bird's argument that the residency condition violates his *Charter* rights.

V. Analysis

A. *General Principles Regarding Collateral Attacks*

[21] A collateral attack is an attack on an order "made in proceedings other than those whose specific object is the reversal, variation or nullification of the order" (*Wilson v. The Queen*, [1983] 2 S.C.R. 594, at p. 559; *Canada (Attorney General) v. TeleZone Inc.*, 2010 SCC 62, [2010] 3 S.C.R. 585, at para. 60). This Court has recognized a general rule against collateral attacks on court orders: with limited exceptions, an order issued by a court must be obeyed unless it is set aside in a proceeding taken for that purpose (*Maybrun*, at paras. 2-3; *R. v. Litchfield*, [1993] 4 S.C.R. 333, at p. 349; *Garland v. Consumers' Gas Co.*, 2004 SCC 25, [2004] 1 S.C.R. 629, at para. 71). In *Maybrun*, the Court held that a different analysis was

warranted for collateral attacks on administrative orders. As I will explain, however, similar principles underlie both approaches.

(1) Collateral Attacks on Court Orders

[22] There is a powerful rationale for the general rule precluding collateral attacks on court orders:

. . . 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

(*Maybrun*, at para. 2, quoting *Litchfield*, at p. 349)

As this Court noted in *Maybrun*, the rule against collateral attacks on court orders has been consistently applied in criminal proceedings where the charge involves an alleged breach of a court order (*Maybrun*, at para. 3, citing *R. v. Domm* (1996), 31 O.R. (3d) 540 (C.A.), at p. 547, leave to appeal refused, [1997] 2 S.C.R. viii). The rule has also been applied where the accused alleges that the court order is unconstitutional. In *Domm*, Doherty J.A., writing for the Ontario Court of Appeal, held that “[e]ven orders that are constitutionally unsound must be complied with unless set aside in a proceeding taken for that purpose” (p. 549). As this Court explained in *Canada (Human Rights Commission) v. Canadian Liberty Net*, [1998] 1 S.C.R. 626, “[i]f 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" (para. 51, citing McLachlin J. (as she then was), in *Canada (Human Rights Commission) v. Taylor*, [1990] 3 S.C.R. 892, at p. 974).

[23] The doctrine of collateral attack, however, recognizes that people must have an effective means to challenge court orders, particularly when those orders are alleged to violate constitutional rights. In *Domm*, Doherty J.A. clarified 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" to allow a collateral attack (p. 552). Where a collateral attack is the only way to effectively challenge a court order, a collateral attack will be permitted (see *Domm*, at pp. 553-54).

[24] In sum, two principles underlie the approach to collateral attacks on court orders: (1) the importance of maintaining the rule of law and preserving the reputation of the administration of justice; and (2) ensuring that individuals have an effective means to challenge court orders, particularly when these orders are challenged on the basis that they are not *Charter* compliant. As I will explain, the *Maybrun* framework accounts for these principles in the administrative context.

(2) Collateral Attacks on Administrative Orders

[25] In *Maybrun*, the Court held that a different framework was warranted for collateral attacks on administrative orders, given the major differences that exist between court orders and administrative orders in relation to their legal nature and the institutions that issue them (para. 4). *Maybrun* clarified that the question of whether a person charged with breaching an administrative order can collaterally attack the validity of the order is determined by focussing on the legislature's intention. The court must inquire into whether the legislature intended to permit collateral attacks on the order, or intended instead that a person should challenge the order by way of other review mechanisms.

[26] In focussing on the legislature's intention, the *Maybrun* framework balances two principles: (1) ensuring that the legislature's decision to assign decision-making powers to administrative bodies is not undermined and (2) ensuring that individuals have an effective means available to them to challenge administrative orders (*Maybrun* at para. 44; see also B. Bilson, "Lying in Wait for Justice: Collateral Attacks on Administrative and Regulatory Orders" (1998), 12 *C.J.A.L.P.* 289, at pp. 291-94).

[27] Focussed as it is on the legislature's intention as to the appropriate forum for challenging an administrative order, the *Maybrun* framework respects the legislature's choice to assign decision-making powers to administrative bodies. The Court in *Maybrun* emphasized that administrative structures play an important role in the organization of a wide range of activities in modern society (paras. 26 and 43). To

maintain the authority of these administrative bodies, the legislature may establish internal mechanisms with the intention that people will challenge administrative orders by way of these mechanisms or other appropriate forums, rather than by mounting a collateral attack on them (*Maybrun*, at para. 27). *Maybrun* recognized that if a person were entirely free to ignore these established procedures for challenging the order and could breach the order and wait for criminal charges to be laid before challenging it, this would risk discrediting the authority of administrative bodies that issue such orders and undermine the effectiveness of administrative regimes (para. 42).

[28] In addition, permitting collateral attacks would result in increased recourse to criminal sanctions by the state (para 42). If individuals object to administrative orders only after having breached them, the state will need to resort to criminal charges and sanctions to secure compliance. As the Court in *Maybrun* warned, “[r]ather than promoting co-operation and conciliation, which are among the basic objectives of such administrative mechanisms, this would result in a hardening of relations between governments and citizens” (*ibid.*). Furthermore, allowing collateral attacks on administrative orders could undermine the legislature’s intention to draw on the expertise and experience of certain decision-makers. As the Court noted in *Maybrun*, permitting individuals to circumvent administrative tribunals or other appropriate forums and transfer the debate to the judicial arena could lead the courts to rule on matters they are not best suited to decide (para. 43).

[29] That said, in focussing on the legislature's intention as to the appropriate forum, the *Maybrun* framework also stresses that individuals must have an effective means to challenge administrative orders. The Court in *Maybrun* noted that the rule of law requires "that the government exercises its powers within the limits prescribed by law or that appropriate remedies are available for citizens to assert their rights", especially where penal sanctions are involved (paras. 25 and 44). Accordingly, "it must . . . be presumed that the legislature did not intend to deprive citizens affected by government actions of an adequate opportunity to raise the validity of the order" (para. 46). Where there is no mechanism or forum for challenging the validity of the administrative order effectively, it must be inferred that the intention of the legislature is to permit a collateral attack (paras. 44 and 46).

[30] In view of this, I respectfully disagree with Mr. Bird's argument that "[l]egislative intent would trump *Charter* rights" under the *Maybrun* framework (A.F., at para. 57). Mr. Bird asserts that *Maybrun*'s focus on the legislature's intent "may be used to override . . . *Charter* rights. Where constitutionally protected rights are in issue, Parliament's intention may not be sufficiently determinative of the issue of whether a collateral attack should be permitted" (para. 57). *Maybrun* specifically recognizes that the legislature intends for individuals to have an opportunity to effectively assert their rights. In the *Charter* context, this means that the person challenging the order must be able to receive an effective remedy that will vindicate his or her *Charter* rights (see *R. v. 974649 Ontario Inc.*, 2001 SCC 81, [2001] 3 S.C.R. 575, at para. 19; *Doucet-Boudreau v. Nova Scotia (Minister of Education)*,

2003 SCC 62, [2003] 3 S.C.R. 3, at paras. 25 and 55; *Henry v. British Columbia (Attorney General)*, 2015 SCC 24, [2015] 2 S.C.R. 214, at para. 64). Where no such remedies are available, it must be inferred that the intention of the legislature is to permit a collateral attack.

[31] I would further observe that where an effective forum or mechanism is available for challenging an order, and a person takes issue with the order only after breaching it, he or she has not been denied the ability to fully defend against the charge if a collateral attack is refused. This is because the person *had* the opportunity to challenge the validity of the order through other means but failed to do so (see *Maybrun*, at paras. 60-61).

[32] To determine the legislator's intention as to the appropriate forum for challenging the validity of an administrative order, *Maybrun* identifies five non-exhaustive factors that may be considered by a court: (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 (*Maybrun*, at paras. 45-49; *Klippert*, at para. 13). The factors are "not independent and absolute criteria, but important clues, among others, for determining the legislature's intention" (*Maybrun*, at para. 46).

B. *Applying the Maybrun Framework to the Case at Hand: The Five Factors*

- (1) Factor One: The Wording of the Statute Under the Authority of Which the Order Was Issued; and (2) Factor Two: The Purpose of the Legislation

[33] I begin with the first two factors, “the wording of the statute under the authority of which the order was issued” and “the purpose of the legislation”.

[34] The Parole Board imposed the residency condition on Mr. Bird’s LTSO pursuant to s. 134.1(2) of the *CCRA*, which permits the Parole Board to “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”. An LTSO is a form of conditional release governed by the *CCRA*: *R. v. Ipeelee*, 2012 SCC 13, [2012] 1 S.C.R. 433, at para. 47. The sentencing court establishes only the length of an LTSO (*ibid.*, at para. 44). The specific conditions of long-term supervision are a combination of what the *CCRA* prescribes and what the Parole Board orders pursuant to its authority under s. 134.1(2) of the *CCRA* (C.A. reasons, at para. 22).

[35] Long-term supervision applies to two exceptional groups of offenders: long-term offenders and dangerous offenders. Both groups pose an elevated risk to the community (*R. v. Steele*, 2014 SCC 61, [2014] 3 S.C.R. 138, at para. 28). A court can designate an offender as a long-term offender where the offender has been convicted of an offence for which a sentence of two years or more is appropriate, there is a substantial risk that the offender will reoffend and there is a reasonable possibility of eventual control of that risk in the community (s. 753.1(1) of the

Criminal Code; Ipeelee, at para. 44). If a court finds an offender to be a long-term offender, the court must impose a term of imprisonment and order that the offender be subject to a period of long-term supervision: s. 753.1(3) of the *Criminal Code*.

[36] Dangerous offenders are offenders who have been convicted of a serious personal injury offence and whose “past conduct and patterns of behaviour show that they constitute a threat to the life, safety or physical or mental well-being of other persons (s. 753(1)(a)), or that their failure to control sexual impulses means that they are likely to cause injury, pain or other evil to other persons (s. 753(1)(b))” (*Steele*, at para. 28; see also *R. v. Boutilier*, 2017 SCC 64, [2017] 2 S.C.R. 936, at paras. 16-18). A sentencing court may, on finding an offender to be a dangerous offender, decide to impose a term of imprisonment and a period of long-term supervision instead of an indeterminate sentence of imprisonment if the court determines that long-term supervision will adequately protect the public against the risk the dangerous offender poses (s. 753(4) and (4.1); *Steele*, at para. 31).

[37] In *Ipeelee*, this Court recognized two specific objectives of long-term supervision: (1) to protect the public from the risk of re-offence by long-term and dangerous offenders; and (2) to rehabilitate these offenders and reintegrate them into the community (para. 48). An LTSO controls the risk to public safety posed by long-term and dangerous offenders in the community, which is why the breach of an LTSO is deemed to be a more serious offence than the breach of a probation order (*Ipeelee*, at paras. 53-54). As G.R. Clewley, P.G. McDermott and R.E. Young note in

Sentencing: The Practitioner's Guide (loose-leaf): “[t]he breach of a long-term supervision order is taken very seriously, because by definition the offenders on these orders have committed violent and/or sexual offences and pose some risk to the community” (p. 13-57). Under s. 753.3(1) of the *Criminal Code*, the breach of a condition of an LTSO is an indictable offence punishable by a term of imprisonment of up to ten years.

[38] In my view, it would undermine the purposes of long-term supervision if offenders were allowed to take a “breach first, challenge later” approach to the conditions of their LTSOs. The conditions of an LTSO are imposed to reduce to an acceptable level the elevated risk posed by long-term offenders and dangerous offenders in the community. When offenders breach these conditions, they expose the public to this risk. Bearing this in mind, I find it hard to conceive that Parliament could have intended to permit long-term and dangerous offenders to take a “breach first, challenge later” approach to their LTSO conditions, thereby exposing the community to the very dangers those conditions were intended to address. Moreover, breaches are likely to be antithetical to the offender’s rehabilitation, given that conditions are imposed, at least in part, to facilitate the offender’s successful reintegration into the community. In sum, permitting a “breach first, challenge later” approach in this context undermines not only the community’s interests, but also those of the offender. This outcome is inconsistent with the objectives of the long-term supervision regime and, to that extent, strongly indicates that Parliament did not intend to permit collateral attacks.

[39] Mr. Bird rebuffs the concern that permitting collateral attacks in this context will place the community at risk. In his view, it “strains credulity to assume that an offender would be willing to gamble up to ten years of his or her life by breaching a condition instead of taking the easier step of applying to vary it” (A.F., at para. 32). But that is effectively what Mr. Bird did in this case: instead of “taking the easier step” of applying to vary his residency condition, he challenged that condition only *after* having breached it. To be clear, I do not suggest that in taking a “breach first, challenge later” approach, Mr. Bird surveyed his options and made a deliberate and tactical choice to challenge his residency condition by breaching it, viewing that course of action as the most advantageous. Rather, I am simply focusing on Mr. Bird’s actions, which speak for themselves: he challenged his residency condition only *after* having breached it. The question before this Court is not *why* he took this course of action, but rather whether Parliament intended that he be permitted to do so.

[40] After leaving Oskana Centre, Mr. Bird was at large and unsupervised in the community for over two months. It should be recalled that the Parole Board was satisfied that, based on Mr. Bird’s “lengthy history of violence causing physical harm to [his] victims”, his “use of weapons during the commission of many of [his] offences” and his “numerous failed releases” (A.R., vol. II, at p. 69), Mr. Bird required the structure and supervision of a community correctional centre or community residential centre. In breaching the residency condition of his LTSO, Mr. Bird exposed the public to a risk of violent re-offence that the Parole Board deemed unacceptable.

[41] I would also point out that Mr. Bird breached his residency condition a second time. After the trial judge acquitted Mr. Bird of breaching the residency condition of his LTSO on February 19, 2016, the trial judge did not quash or vary the residency condition (trial reasons, at para. 41). The residency condition remained unchanged and accordingly, Mr. Bird was returned to Oskana Centre to finish the remainder of his residency condition. On or about March 18, 2016, Mr. Bird left Oskana Centre again, in breach of his residency condition. He was arrested on April 11, 2016, when the police were dispatched to a residence regarding a report of a disturbance. The police observed a woman in the residence who appeared to be crying and entered the residence to check on her welfare, where they found and arrested Mr. Bird.

[42] In my view, it is plain and obvious that allowing offenders like Mr. Bird to object to conditions of their LTSOs by taking a “breach first, challenge later” approach puts the community at risk and may compromise the offender’s rehabilitation. Moreover, it could have the detrimental effect of reducing the availability of long-term supervision for dangerous offenders, thus further undermining the objectives of the long-term supervision regime. As this Court stated in *R. v. Johnson*, 2003 SCC 46, [2003] 2 S.C.R. 357, long-term supervision is designed to protect society from the threat that the offender currently poses without having to resort to “the blunt instrument of indeterminate detention” (para. 32). As noted above, a court may order that a dangerous offender receive a specified term of imprisonment combined with long-term supervision instead of an indeterminate

sentence of imprisonment (*Steele*, at para. 31). This, however, will occur only if the court is satisfied that long-term supervision will adequately protect the public against the risk posed by the dangerous offender (*Steele*, at para. 28). If dangerous offenders are permitted to take a “breach first, challenge later” approach to the conditions of their LTSOs, sentencing courts may become concerned about the manageability of dangerous offenders within the community, which in turn could lead to the imposition of more indeterminate sentences of imprisonment.

[43] In my view, then, the first two factors of the *Maybrun* framework — the wording of the statute under which the order was issued and the purpose of the legislation — strongly indicate that Parliament did not intend for long-term and dangerous offenders to take issue with residency conditions of long-term supervision through collateral attacks.

(3) Factor Three: The Existence of a Right of Appeal

[44] I turn now to the third *Maybrun* factor, “the existence of a right of appeal”. In my view, this factor permits a court to consider not only the existence of a right of appeal to an administrative appeal tribunal, but also the existence of *other* effective mechanisms or forums for challenging the order at issue.

[45] The Court of Appeal noted and the parties conceded that there is no right of appeal under the *CCRA* from a decision of the Parole Board concerning the

conditions of an LTSO (C.A. reasons, at para. 52). I approach this matter on that basis.

[46] Mr. Bird points out that in *Maybrun* and *Klippert*, there was a right of appeal to an administrative appeal tribunal. Given that there is no right of appeal to the Appeal Division of the Parole Board, Mr. Bird argues that the third *Maybrun* factor has “little, if any, application in this case” (A.F., at para. 34). However, it must be remembered that the focus under the *Maybrun* framework is on “the legislature’s intention as to the appropriate forum for raising the validity of an administrative order” (para. 52). As indicated, *Maybrun* was careful to state that the listed factors were not “absolute criteria, but important clues, among others, for determining the legislature’s intention” (para. 46). Likewise, in *Klippert*, the Court emphasized that “[t]he determination of legislative intent is never a mechanical act, and an inflexible formula cannot be applied in carrying it out” (para. 14). In certain administrative contexts, the legislature may intend for people to challenge the validity of an administrative order by means other than an appeal to an administrative tribunal. Therefore, in my view, a court can consider other review mechanisms or forums under this factor.

[47] That being said, these review mechanisms or forums must permit the person to assert his or her rights and challenge the administrative order effectively. As indicated, under the *Maybrun* framework, it must be presumed that the legislature intends citizens affected by government actions to have “an adequate opportunity to

raise the validity of the order” (para. 46). To provide an effective means of challenging an administrative order, the review mechanisms must give the person access to an effective remedy. This is particularly important when a person alleges that the administrative order violates his or her constitutional rights. As noted, a person must always have access to an effective remedy that will vindicate his or her *Charter* rights.

[48] Before this Court, Mr. Bird asserts that the residency condition in his case infringed his rights under ss. 7, 9 and/or 11(*h*) of the *Charter*. He argues that because a community correctional centre meets the definition of a penitentiary under the *CCRA*, the residency condition is not authorized under s. 134.1(2) of the *CCRA* and is inconsistent with the objectives of long-term supervision. He maintains that the purpose of long-term supervision is to release people into the community, not to a penitentiary (see transcript, at p. 23).

[49] To the extent that Mr. Bird seeks to rely on the *Charter* as a basis for challenging the residency condition, the record indicates that he had at least two and possibly three viable options open to him. First, Mr. Bird could have written to the Parole Board to ask it to vary or remove the condition. Second, he could have applied for judicial review in the Federal Court (although, as I will explain, this may not have provided an effective remedy). And third, he could have applied to the provincial superior court for *habeas corpus*. I therefore respectfully disagree with the assertion by the intervener Aboriginal Legal Services Inc. that Mr. Bird “had virtually no means to

challenge the decision to any body anywhere” (I.F., at para. 30). Taken collectively, these mechanisms provided Mr. Bird with an effective means to challenge the residency condition.

(a) *Writing to the Parole Board*

[50] Mr. Bird could have written to the Parole Board and requested that his residency condition be varied or removed. Under s. 134.1(4) of the *CCRA*, the Parole Board can remove or vary any condition of long-term supervision. Mr. Bird was expressly advised of this opportunity in writing before his long-term supervision came into effect. In the cover letter sent to Mr. Bird on July 24, 2014, which attached the Parole Board’s reasons for its decision to impose the residency condition, the Parole Board stated that:

You may apply to the Parole Board of Canada to be relieved of any of your conditions or request that the Board vary the terms of any of your conditions of Long Term Supervision Order. Upon receipt of your application and an updated report from your Parole Officer, with whom you should discuss your request, your file will be referred to the Board for voting and subsequently you will be advised of the outcome. To ensure that your request receives complete consideration, please fully document the reasons for your request. [Emphasis added]

(A.R., vol. II, at p. 67)

[51] This letter gave Mr. Bird ample notice of the residency condition — more than five months — before his LTSO came into effect on January 7, 2015. During those five months, he could have written to the Parole Board and requested that the

Parole Board vary or remove the condition so that he would not be placed in a community correctional centre.

[52] Mr. Bird does not contest that the Parole Board must exercise its statutory authority in conformity with the *Charter* and has jurisdiction to consider *Charter* issues and grant an appropriate remedy. In *R. v. Conway*, 2010 SCC 22, [2010] 1 S.C.R. 765, this Court stated that “administrative tribunals with the power to decide questions of law, and from whom constitutional jurisdiction has not been clearly withdrawn, have the authority to resolve constitutional questions that are linked to matters properly before them” (para. 78). This includes *Charter* issues and *Charter* remedies (*ibid.*, at para. 81).

[53] It is clear that the Parole Board has the power to decide questions of law. For example, s. 147(1) of the *CCRA* provides that an offender may appeal a decision of the Parole Board to the Appeal Division on the ground that the Parole Board, in making its decision, “failed to observe a principle of fundamental justice” or “made an error of law”. This language indicates that the Parole Board has the power to decide legal questions (see *Conway*, at para. 84, citing *Nova Scotia (Workers’ Compensation Board) v. Martin*, 2003 SCC 54, [2003] 2 S.C.R. 504; see also *Quebec (Attorney General) v. Quebec (Human Rights Tribunal)*, 2004 SCC 40, [2004] 2 S.C.R. 223, and *Mooring v. Canada (National Parole Board)*, [1996] 1 S.C.R. 75, at para. 89). In addition, there is nothing in the *CCRA* that indicates that Parliament intended to withdraw *Charter* jurisdiction from the scope of the Parole Board’s

mandate. In the wake of *Conway*, I am satisfied that the Parole Board has the jurisdiction to decide *Charter* issues and grant *Charter* remedies and is therefore a court of competent jurisdiction under s. 24(1) of the *Charter* (para. 22).

[54] I acknowledge that in *Mooring*, this Court decided that the Parole Board was not a court of competent jurisdiction for the purpose of excluding evidence under s. 24(2) of the *Charter* (para. 32). In that decision, the Court found that the Parole Board did not have the authority under its statutory scheme to grant this remedy (paras. 25-29). In my view, *Mooring* did not decide whether the Parole Board could award *Charter* remedies generally. As this Court explained in *Conway*, the threshold question is whether the tribunal has the jurisdiction to award *Charter* remedies generally and is therefore a court of competent jurisdiction (paras. 22 and 81). If the tribunal does have the jurisdiction to award *Charter* remedies generally, the remaining question is whether the tribunal can grant the particular remedy sought, given the relevant statutory scheme (para. 82). As such, this Court's decision in *Mooring* does not prevent a determination that the Parole Board can grant other *Charter* remedies. Whether, in light of *Conway*, *Mooring* remains good law is best left for another day.

[55] In sum, there is nothing to indicate that Mr. Bird could not have written to the Parole Board and requested that it reconsider its original decision on the basis that it did not comply with the *Charter*. It was open to the Parole Board to grant an appropriate remedy to Mr. Bird by varying or removing the residency condition. I

accept that, in doing so, Mr. Bird would be asking the same body that made the decision to reconsider it, which is not the same as a right of appeal to a body which is independent from the original decision-maker, such as an administrative appeal tribunal, as was the case in *Maybrun* and *Klippert*. In those decisions, the Court specifically noted that the relevant statutory schemes provided a right of appeal to an independent specialized tribunal (see *Maybrun*, at para. 56; *Klippert*, at para. 17). But, as I will explain, Mr. Bird could have applied for *habeas corpus* in a provincial superior court. He could also have applied for judicial review in the Federal Court, subject to the concerns discussed below.

(b) *Applying for Judicial Review in the Federal Court*

[56] Under s. 18(1) of the *Federal Courts Act*, R.S.C. 1985, c. F-7, the Federal Court has exclusive jurisdiction to issue, *inter alia*, a writ of *certiorari* or grant declaratory relief against a federal board, commission or tribunal, which includes the Parole Board. Such relief may be granted on *Charter* grounds. That said, two of the interveners assert that judicial review in the Federal Court may not have offered timely relief to Mr. Bird. In addition, counsel for Mr. Bird and the David Asper Centre for Constitutional Rights (“David Asper Centre”) raise concerns about the accessibility of judicial review proceedings to Mr. Bird.

[57] The interveners, the David Asper Centre and the Canadian Civil Liberties Association, argue that by the time Mr. Bird’s challenge would have been heard by

the Federal Court, his residency condition may have expired, thereby rendering the issue moot.

[58] In addition, counsel for Mr. Bird and the David Asper Centre raise concerns about the accessibility of judicial review proceedings in the Federal Court to individuals like Mr. Bird who would need to initiate proceedings while being incarcerated, or at best having been recently released on statutory release. Counsel for Mr. Bird points out that Mr. Bird has spent close to the last decade in prison and was not likely to have the financial resources necessary to hire counsel for potentially lengthy judicial review proceedings. If Mr. Bird had to represent himself, the David Asper Centre submits that Federal Court procedure would pose particular challenges for him. Citing Bielby J.A.'s decision in *D.G. v. Bowden Institution (Warden)*, 2016 ABCA 52, 612 A.R. 213, the David Asper Center asserts that "knowledge of the [*Federal Court*] Rules is likely to be limited . . . given the comparative rarity with which individuals engage with the federal court system" (I.F., at para. 24).

[59] In my view, counsel for Mr. Bird and the interveners raise realistic concerns about the timeliness and accessibility of relief in the Federal Court. When someone's liberty is at stake, efficiency and timeliness take on greater significance. As such, it is important that there be a mechanism available that affords sufficiently swift and accessible relief for those deprived of their liberty. On the record before us, I cannot say with certainty that judicial review would have offered such relief to Mr. Bird.

[60] That said, I would point out that Mr. Bird received notice of the Parole Board's decision to impose the residency condition more than five months before his long-term supervision commenced, which would have given him a considerable amount of time in which to initiate judicial review proceedings. I also note that under r. 8(1) of the *Federal Courts Rules*, SOR/98-106, Mr. Bird could have moved for an expedited proceeding. However, if that motion were to have been denied, which is perhaps unlikely given the pressing liberty interest at stake, the reality remains that a decision by the Federal Court might not have been released before the majority, if not all, of Mr. Bird's residency condition had been completed (see *May v. Ferndale Institution*, 2005 SCC 82, [2005] 3 S.C.R. 809, at para. 69; *Bowden*, at para. 43).

[61] While much of this is speculative, I cannot reject Mr. Bird's concerns out of hand. In view of this, Parliament may wish to consider whether the procedures in place governing judicial review applications could be modified to provide more timely and accessible relief. This would be of benefit to both persons challenging conditions that restrict their liberty, as well as persons challenging conditions that do not restrict their liberty — perhaps more so as regards the latter. Fortunately, the remedy of *habeas corpus* was available to Mr. Bird, and it provided a swift and efficient mechanism for challenging the residency condition at issue here, which restricted his liberty — unconstitutionally, in his view. I turn to that remedy now.

(c) *Applying for Habeas Corpus*

[62] Although Mr. Bird did not have a right of appeal from the Parole Board's decision to an independent administrative tribunal, applying for *habeas corpus* in a provincial superior court would have given him the opportunity to ask for speedy relief from an independent body. *Habeas corpus*, which has been called the "Great Writ of Liberty" (see *May*, at para. 19), is a remedy designed to provide "swift access to justice for those who have been unlawfully deprived of their liberty" (*Mission Institution v. Khela*, 2014 SCC 24, [2014] 1 S.C.R. 502, at para. 3). Once the applicant shows a deprivation of liberty and some basis for concluding that the detention is unlawful, the court will issue a writ of *habeas corpus*, which requires the detaining authorities to demonstrate at a hearing that the detention is justified (*ibid.*, at para. 41). Generally, courts give priority to *habeas corpus* applications as they are deemed urgent (*Brown v. Canada (Public Safety)*, 2018 ONCA 14, 420 D.L.R. (4th) 124, at para. 20), and a hearing of a *habeas corpus* application can be obtained more rapidly than a hearing of a judicial review application in the Federal Court (*May*, at para. 69; *Khela*, at para. 46; *Ogiamien v. Ontario (Community Safety and Correctional Services)*, 2017 ONCA 839, 55 Imm. L.R. (4th) 220, at para. 18). As this Court noted in *May*, *habeas corpus* is a crucial remedy in pursuit of ss. 7 and 9 rights under the *Charter* (para. 22). Given the long history of this remedy, its central role in safeguarding against unlawful deprivations of liberty, and the fact that it is enshrined in s. 10(c) of the *Charter*, Parliament would clearly have been aware of *habeas corpus* and its availability to challenge residency conditions that are not *Charter* compliant and thereby unlawfully deprive long-term offenders of their liberty.

[63] There is nothing in the record to indicate that Mr. Bird would have been unable to apply for *habeas corpus*. The essence of Mr. Bird's constitutional argument is that he had been deprived of liberty unlawfully by the Parole Board's order, which in its effect led to his residence at Oskana Centre. No issue was taken with the fact that Mr. Bird's residency condition amounted to a deprivation of liberty: see *R. v. Miller*, [1985] 2 S.C.R. 613, at p. 637; *May*, at para. 76. Moreover, this Court has recognized that *habeas corpus* is a remedy particularly well-suited for individuals in Mr. Bird's situation, who may be self-represented, "the quick resolution of . . . issues" afforded by *habeas corpus* is important "if counsel is acting *pro bono* or on limited legal aid funding or if the prisoner is representing himself" (*May*, at para. 69). *Habeas corpus* is more accessible to self-represented litigants than judicial review in the Federal Court, as it provides access to local procedures "upon which [self-represented litigants] may more readily obtain some type of legal assistance and advice" (*Bowden*, at para. 40).

[64] Furthermore, there is no evidence that a provincial superior court would have declined its jurisdiction to hear Mr. Bird's application. *May* clarified that as a governing rule, a provincial superior court has the jurisdiction to hear an application for *habeas corpus*, despite the fact that alternative remedies are available in the Federal Court (para. 50; *Khela*, at para. 42). As this Court noted in *May*, "As a matter of principle, a provincial superior court should exercise its jurisdiction when it is requested to do so. *Habeas corpus* jurisdiction should not be declined merely because another alternative remedy exists" (para. 44).

[65] The Court in *May* stated that provincial superior courts should decline jurisdiction to hear *habeas corpus* applications in only two very limited circumstances (para. 50; *Khela*, at para. 42). First, *habeas corpus* cannot be used to challenge the legality of a conviction (*May*, at para. 36). Second, where Parliament has put in place “a complete, comprehensive and expert statutory scheme which provides for a review at least as broad as that available by way of *habeas corpus* and no less advantageous”, provincial superior courts should decline jurisdiction (*May*, at paras. 40 and 63; *Khela*, at para. 42; *Ogiamien*, at para. 13).

[66] In the circumstances of this case, there is nothing in the record to indicate that there was a mechanism which provided a form of review as advantageous as *habeas corpus*. While Mr. Bird accepts that he could have written to the Parole Board to ask it to reconsider its original decision, this would not have enabled him to seek relief from an independent body (see *May*, at para. 62). Furthermore, this Court in *May* and *Khela* set out five factors that militate in favour of a provincial superior court hearing a *habeas corpus* application, despite the availability of judicial review in the Federal Court. Four of these five factors are relevant to this case. First, a hearing of a *habeas corpus* application in a superior court can be obtained more rapidly than a hearing of a judicial review application in the Federal Court (*May*, at para. 69; *Khela*, at para. 46). Second, Mr. Bird would have greater local access to a provincial superior court than to the Federal Court (*May*, at para. 70; *Khela*, at para. 47; *Ogiamien*, at para. 18). Third, superior courts are “eminently familiar with the application of *Charter* principles”, which are directly at issue when a person claims to

have been unlawfully deprived of liberty (*Khela*, at para. 45; see also *May*, at para. 68). Fourth, unlike judicial review, *habeas corpus* is non-discretionary: a court must issue a writ of *habeas corpus* where the applicant has shown a deprivation of liberty and raised a legitimate basis on which to question the legality of the detention (*May*, at para. 71; *Khela*, at para. 48; *Ogiamien*, at para. 18).

[67] For these reasons, it is difficult to conceive of a remedy better suited to Mr. Bird's circumstances than *habeas corpus*, designed as it is to provide swift and easily accessible relief to persons challenging a deprivation of their liberty. Moreover, given the force of the first two *Maybrun* factors, which strongly indicate that Parliament did not intend to permit long-term offenders to launch collateral attacks against their LTSO conditions in criminal proceedings, if effective alternative mechanisms or forums exist, then it is axiomatic that Parliament would have intended that those alternatives be used, rather than permitting a collateral attack in criminal proceedings. To reason otherwise and to adopt the narrower approach advocated by my colleague would be to assume Parliament's ignorance of these effective alternatives — which, in the case of *habeas corpus*, is particularly difficult to imagine since the writ has existed for centuries (see *May*, at para. 19) and is enshrined in s. 10(c) of the *Charter* — or, if aware of them, that Parliament intended for some unknown reason that they not be used. I am not persuaded that either assumption is justified.

[68] My colleague, however, rejects the notion that the availability of *habeas corpus* is relevant to the *Maybrun* analysis in this case. While she takes the position that reconsideration by the Parole Board represents an inadequate mechanism for challenging Mr. Bird’s residency condition, she does not dispute that *habeas corpus* remained available to Mr. Bird. Yet she rejects the relevance of *habeas corpus* as an available alternative because, in her view, Parliament presumably intended that collateral attacks in criminal proceedings would be permitted despite the availability of *habeas corpus*, thereby enabling the accused to take a “breach first, challenge later” approach.

[69] Respectfully, I cannot agree. In my view, where an administrative process is inadequate (which I do not accept is necessarily the case here), but an effective alternative such as *habeas corpus* — which, as indicated, is a remedy Parliament would have undoubtedly been aware of — is readily available, there is no compelling reason to assume that Parliament would have intended that a collateral attack in a criminal proceeding would provide an appropriate forum for challenging the order in question. In fact, the more plausible supposition is the opposite. Moreover, in my view, where the administrative process put in place by Parliament is inadequate (as my colleague contends), a person deprived of their liberty could hardly be faulted for disregarding that inadequate process and seeking *habeas corpus* instead.

[70] As a further basis for concluding that the availability of *habeas corpus* is irrelevant to the *Maybrun* analysis in this case, my colleague relies on the fact that

habeas corpus would not be available as a means of challenging LTSO conditions that do not restrict the long-term offender's liberty (see Martin J.'s reasons, at para. 135).

[71] Again, I cannot agree with my colleague's approach. In my respectful view, the proper framing of the question to be answered at this stage of the analysis is whether there are effective alternative mechanisms or forums, apart from a collateral attack in criminal proceedings, for challenging *the particular LTSO condition in dispute* — here, one that restricts the long-term offender's liberty. This framing is important because it focuses the inquiry on the particular condition in dispute, rather than casting the inquiry so broadly as to encompass other types of conditions that are not being challenged. How the analysis would differ where the condition at issue *does not* involve a restriction of liberty may be a legitimate question, but it is not before us and is best left for another day.

[72] In sum, the record in this case indicates that even if judicial review in the Federal Court would not have provided Mr. Bird with an effective remedy, writing to the Parole Board and/or applying for *habeas corpus* would have offered effective relief to Mr. Bird. In my view, these mechanisms, considered together, constitute an effective means to challenge the order. As a first step, Mr. Bird could have simply written to the Parole Board and asked it to vary or remove the residency condition. He could also have applied for judicial review in the Federal Court. However, if judicial review was not accessible to Mr. Bird and/or if Mr. Bird had wanted quicker relief, he

could have applied for *habeas corpus* in a provincial superior court, a remedy that offers simplified procedures that promote greater accessibility by self-represented litigants and persons with limited means.

[73] As an aside, I note that *Maybrun* held that the legislature must have intended to permit a collateral attack if it is the only effective way to challenge an administrative order. However, in this case, a collateral attack would not appear to be an effective means to challenge the order at issue. In oral submissions, the Crown asserted that when a person breaches a residency condition, a warrant of suspension will be issued and the person will be brought back into custody (transcript, at p. 78). If a charge is laid for breaching the order, the offender will likely be held in custody pending his or her trial (*ibid.*). The Crown asserted that after a bail hearing, a preliminary hearing, the serving of notice of a constitutional question and the eventual trial, the likelihood is that many months will have passed since the breach of the condition (*ibid.*). Indeed, that is exactly what happened to Mr. Bird in this case: Mr. Bird left Oskana Centre in breach of his residency condition and was arrested more than two months later. He was kept in custody until the date of his trial for a period of approximately ten months (trial reasons, at para. 4). As the trial judge noted, that period of time in custody greatly exceeded the residence time that was required in Oskana Centre (*ibid.*). This indicates that Parliament did not intend for Mr. Bird to object to his residency condition by collaterally attacking it.

[74] In my view, then, the third *Maybrun* factor indicates an intention by Parliament not to permit individuals like Mr. Bird to collaterally attack residency conditions, but rather for the offender to write to the Parole Board and/or, if judicial review in the Federal Court would not provide an effective remedy, apply for *habeas corpus*.

(4) Factor Four: The Kind of Collateral Attack in Light of the Expertise or *Raison d'Être* of the Administrative Appeal Tribunal

[75] The fourth *Maybrun* factor is “the kind of collateral attack in light of the expertise or *raison d'Être* of the administrative appeal tribunal”. In my view, this factor also permits a court to consider the nature of the collateral attack in light of the expertise or *raison d'Être* of *other* mechanisms or forums for challenging the order.

[76] In *Maybrun*, the Court explained that the fourth factor examines whether the nature of the collateral attack involves considerations that fall within the expertise of the tribunal or which the tribunal was established by the legislature to address. The Court noted that where the nature of a collateral attack “requires the consideration of factors that fall within the specific expertise of an administrative appeal tribunal, this is a strong indication that the legislature wanted that tribunal to decide the question rather than a court of penal jurisdiction” (para. 50).

[77] Counsel for Mr. Bird maintains that this factor is not relevant in this case, as Mr. Bird has no right of appeal to an administrative tribunal. Respectfully, I

disagree. A court is not limited to considering only the expertise or *raison d'être* of an administrative appeal tribunal. The *Maybrun* framework focuses on the intention of Parliament as to the appropriate forum for challenging the order, which may include a review mechanism *other than* an administrative appeal tribunal. It follows that a court may consider the nature of the collateral attack in relation to the expertise or *raison d'être* of other forums or mechanisms. Where the nature of the collateral attack involves considerations that fall squarely within the expertise or *raison d'être* of a particular administrative body or other forum, this may be taken as an indication that Parliament wanted that body to decide the question, as opposed to permitting a collateral attack.

[78] In the instant case, s. 134.1(2) of the *CCRA* gives the Parole Board broad discretionary power to impose whichever conditions on long-term supervision it deems “reasonable and necessary in order to protect society and to facilitate the successful integration of the offender into society”. As the Federal Court of Appeal noted in *Normandin v. Canada*, 2005 FCA 345, [2006] 2 F.C.R. 112, s. 134.1(2) demonstrates “Parliament’s intention to rely on the expertise and experience of the Board” in determining which conditions are needed in an LTSO to achieve the balance between public safety and the successful reintegration of the offender (para. 46). It follows from this that if Mr. Bird asked the Parole Board to reconsider its decision to impose the residency condition, the Parole Board would consider matters that fall squarely within its expertise.

[79] The fact that Mr. Bird’s challenge to the residency condition raises constitutional issues does not mean that it raises considerations foreign to the Parole Board’s experience and expertise. As this Court observed in *Conway*, “expert tribunals should play a primary role in the determination of *Charter* issues falling within their specialized jurisdiction” (para. 21).

[80] The issues raised by Mr. Bird’s challenge fall squarely within the expertise of the Parole Board. These issues would also not be unfamiliar to the Federal Court or to provincial superior courts hearing *habeas corpus* applications. In my view, this factor indicates a legislative intention to have Mr. Bird resort to these mechanisms — and against permitting a collateral attack in the criminal trial process.

(5) Factor Five: The Penalty on a Conviction for Failing to Comply With the Order

[81] I now turn to the final *Maybrun* factor, the “penalty on a conviction for failing to comply with the order”. The penalty for breaching a condition of an LTSO is significant. As indicated, under s. 753.3(1) of the *Criminal Code*, an offender who, without reasonable excuse, breaches an LTSO is guilty of an indictable offence which is punishable by a term of imprisonment of up to ten years. Mr. Bird argues that the penalty on conviction in this case “is the most significant factor and should indeed be determinative in this case” (A.F., at para. 59).

[82] I acknowledge that the potential penalty for breaching an LTSO is substantial. If I were to consider it in isolation, I would be hard pressed to ascribe to Parliament an intention that an offender could be convicted of breaching an LTSO without having an opportunity, during the criminal trial, to challenge the validity of the condition (C.A. reasons, at para. 56). In *Maybrun*, where the Court determined that a collateral attack was not permitted, the penalty on conviction was a fine, and the Court specifically noted that imprisonment was not an option (para. 63). However, I disagree with Mr. Bird that this factor is determinative. As I will explain, when the penalty provision is viewed not in isolation, but in conjunction with the other *Maybrun* factors, it is clear to me that it is not decisive of Parliament's intention.

(6) Weighing the *Maybrun* Factors

[83] With the exception of the final *Maybrun* factor, the other factors strongly indicate that Parliament did not intend to permit collateral attacks in circumstances like those existing in this case. Allowing dangerous and long-term offenders to take a “breach first, challenge later” approach to their residency conditions would expose the community to an unacceptable level of risk and compromise the offender's rehabilitative prospects.

[84] Furthermore, the record indicates that there were mechanisms available to Mr. Bird that would have provided him with an effective means to challenge the residency condition. Even if judicial review in the Federal Court would not have been

effective, Mr. Bird had two other avenues open to him: he could have written to the Parole Board, which has expertise and experience establishing conditions of long-term supervision, and/or applied for *habeas corpus* in a provincial superior court. In such circumstances, Mr. Bird was not denied the ability to fully defend against the charge of breaching the residency condition, because he had the opportunity to challenge the Parole Board's order through these mechanisms.

[85] Although Mr. Bird faced a substantial penalty on conviction — a term of imprisonment — for breaching the residency condition, this penalty does not, in my view, tip the scale in favour of Mr. Bird's contention that Parliament intended that he be permitted to collaterally attack the Parole Board's order. Given that permitting a "breach first, challenge later" approach in this context would pose a real risk to public safety and that effective review mechanisms were available to Mr. Bird, I am satisfied that Parliament did not intend that Mr. Bird should be able to circumvent these mechanisms and instead, challenge the residency condition only after breaching it. Accordingly, I am of the opinion that the Court of Appeal correctly held that Parliament did not intend to permit long-term and dangerous offenders to collaterally attack residency conditions of their LTSOs. Rather, Parliament intended that these offenders would ask the Parole Board to vary or remove the condition and/or, if judicial review in the Federal Court would not provide an effective remedy, apply for *habeas corpus*.

[86] In light of this conclusion, it is not necessary to consider Mr. Bird's argument that the residency condition in this case infringed his ss. 7, 9 and/or 11(*h*) *Charter* rights.

VI. Disposition

[87] The Court of Appeal did not err in holding that Mr. Bird was not allowed to collaterally attack the residency condition of his LTSO. The Court of Appeal properly set aside Mr. Bird's acquittal, entered a conviction on the charge of breaching the LTSO under s. 753.3(1) of the *Criminal Code* and remitted the matter to the Provincial Court of Saskatchewan for sentencing. Accordingly, I would dismiss the appeal.

The reasons of Karakatsanis, Gascon and Martin JJ. were delivered by

MARTIN J. —

I. Introduction

[88] Significant consequences attach to being declared a long-term offender under s. 753.1(3) of the *Criminal Code*, R.S.C. 1985, c. C-46. One consequence is the operation of s. 753.3, which subjects a long-term offender to up to ten years in prison for breaching *any* of the conditions attached to the applicable long-term supervision

order (“LTSO”). These conditions are set in part by the Parole Board of Canada (“Board”) and in part by s. 161(1) of the *Corrections and Conditional Release Regulations*, SOR/92-602. They apply once an offender’s carceral sentence and parole have expired and can be wide-ranging and touch diverse aspects of the offender’s life. The LTSO at issue in this case prohibits Spencer Dean Bird from associating with certain people, being at specified places, possessing or consuming alcohol or drugs, and living anywhere not approved by the Correctional Service of Canada (“CSC”) for a 180-day period. This last condition is at issue in this matter.

[89] Mr. Bird was charged under s. 753.3 with breaching the residency condition of his LTSO. This appeal asks whether he should be permitted to challenge the constitutionality of that condition as his defence at his criminal trial, even though he took no proactive steps to properly challenge the condition when it was imposed. Should what is known as a “collateral attack” on the residency condition set by the Board be permitted in the criminal proceedings? Having admitted the elements of the offence and raised no other defences, Mr. Bird’s constitutional challenge represents his only prospect of acquittal.

[90] I agree with the majority that our primary task in this matter is to apply the framework for assessing the viability of collateral attacks set out in *R. v. Consolidated Maybrun Mines Ltd.*, [1998] 1 S.C.R. 706 and *R. v. Al Klippert Ltd.*, [1998] 1 S.C.R. 737. This framework is aimed at determining the relevant legislature’s intention as to the appropriate forum for adjudicating the validity of the

challenged order (*Maybrun*, at paras. 19, 38, 44, 46 and 52; *Klippert*, at para. 13). The key question is whether the relevant legislature prescribed a particular forum for challenging the order under attack (*Maybrun*, at para. 46; see also *Klippert*, at para. 20). There are five factors that guide this assessment (*Maybrun*, at paras. 45 and 51-52, and *Klippert*, at paras. 13-14).

[91] I reach a different conclusion, however, on how those factors apply in this case. I conclude that two of the factors — whether an administrative appeal is available and the penalty upon conviction for the breach — overwhelmingly weigh against finding that Parliament intended for an “attack” like Mr. Bird’s to be barred in these circumstances. I agree with the trial judge that Mr. Bird should have been permitted to attack the residency requirement on constitutional grounds as his defence at trial. Indeed, it is difficult to imagine in what circumstances the *Maybrun* factors might permit a collateral attack if not in these. I do not accept that permitting Mr. Bird’s challenge at trial would somehow condone or invite a “breach first, challenge later” approach to LTSO conditions. I conclude that Mr. Bird ought not be barred from raising his constitutional arguments because he failed to challenge his residency condition through one of the three imperfect avenues that the majority finds were open to him.

[92] Mr. Bird alleges the residency condition infringes his rights under ss. 7, 9 and 11(h) of the *Canadian Charter of Rights and Freedoms*. In the courts below, Mr. Bird advanced only his s. 7 claim. The Crown opposes this Court adjudicating

Mr. Bird's ss. 9 and 11(*h*) claims. Mr. Bird has not persuaded me that this Court should exercise its exceptional discretion to entertain new *Charter* claims on appeal. As such, I address only his s. 7 claim. While I conclude that Mr. Bird should have had the opportunity to advance this *Charter* claim, I find that it is not made out.

[93] Therefore, although I would allow Mr. Bird to challenge the constitutionality of his residency condition, I would dismiss the appeal.

II. Background

[94] On May 27, 2005, Mr. Bird was declared a long-term offender upon being convicted of assault. Consequently, in addition and subsequent to a 54-month carceral component, his sentence included five years of supervision in the community.

[95] Mr. Bird's statutory release from prison did not occur until August 14, 2014, as he had been convicted of other offences in the interim. On the day of his release, he was transferred from a federal institution (prison) in Alberta to Oskana Community Correctional Centre in Regina, where CSC had placed him for his statutory release period.

[96] This period expired on January 7, 2015. Mr. Bird's period of long-term supervision began that same day.

[97] In anticipation of the commencement of Mr. Bird's long-term supervision, the Board developed the conditions that would attach to his LTSO. In doing so, the Board considered Mr. Bird's corrections file as well as an assessment provided by CSC.

[98] The Board included a residency condition in the LTSO. The Board ordered that Mr. Bird must:

[r]eside 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. (A.R., at p. 64)

[99] The Board grounded this condition in Mr. Bird's specific circumstances, including his history of violence, substance abuse, and failure to comply convictions. The Board concluded that "[Mr. Bird] will require the structure and supervision that only can be provided by a community correctional centre/community residential centre". The Board's decision was also informed by CSC's opinion that allowing Mr. Bird to live with his family, which he had proposed, would likely give him access to alcohol and put him at risk of re-offending.

[100] CSC approved Oskana Centre for Mr. Bird's 180-day residency condition under the LTSO. As set out above, Mr. Bird was already at Oskana Centre, serving out his carceral sentence on statutory release. Therefore, his living arrangements did

not change when he became subject to his LTSO. In other words, Mr. Bird was ordered to remain where he was for 180 days, despite his change in status.

[101] Oskana Centre is a community-based residential facility — or, more specifically, a “community correctional centre”, as it is owned and operated by CSC. It houses individuals subject to state supervision, including individuals on parole, out of prison on temporary absences, and on statutory release.

[102] All residents at Oskana Centre are subject to a set of standard rules. The Crown conceded in the Agreed Statement of Facts entered at trial that Mr. Bird’s status as a long-term offender — someone who had already completed his carceral sentence — did not exempt him from the standard rules. The record on appeal does not include descriptions of day-to-day conditions at Oskana Centre. The parties agree, however, that Mr. Bird was subject to a curfew rule. This involved a night curfew as well as a requirement that residents be at Oskana Centre from 11:00 a.m. to 1:00 p.m.

[103] On January 28, 2015, Mr. Bird left Oskana Centre and did not return. Police arrested him on April 16, 2015 in Regina and charged him under s. 753.3(1) for failing to comply with the residency condition of his LTSO. At trial, Mr. Bird was acquitted; the judge permitted Mr. Bird’s collateral attack and accepted his s. 7 *Charter* challenge to the residency condition. On appeal, the court held that the judge had erred in permitting Mr. Bird’s collateral attack, and Mr. Bird was convicted.

III. Analysis

A. *Collateral Attack*

[104] A central tension animates cases of collateral attack — the tension between an accused person’s right to challenge an administrative order alleged to be invalid, and the legislature’s choice to have certain matters assessed by administrative bodies, and not by courts (*Maybrun*, at para. 42). This tension informs the interpretive exercise itself; when considering legislative intent, the trial judge must presume “that the legislature did not intend to deprive a person to whom an order is directed of an opportunity to assert his or her rights” (*Maybrun*, at para. 52).

[105] The five factors that can assist a trial judge’s assessment of a collateral attack are: (1) the wording of the statute from which the power to issue the order derives; (2) the purpose of the legislation; (3) the availability of an appeal; (4) the nature of the attack given the appeal tribunal’s expertise or *raison d’être*; and (5) the penalty on a conviction for failing to comply with the order (*Maybrun*, at paras. 45 and 51-52; *Klippert*, at paras. 13-14). As noted in *Klippert*, at paras. 13-14, these factors are not to be taken as a strict test but instead “might be helpful to consider” and “are not necessarily exhaustive but rather constitute various indicia which might be of assistance in determining the legislature’s intention”. This means that this is not a scorecard assessment. The trial judge may find that one factor dictates the outcome.

[106] For the first time, this appeal provides this Court with the opportunity to apply *Maybrun* to a collateral attack that puts the defendant’s *Charter* rights in issue in light of the very real possibility of imprisonment. In neither *Maybrun* nor *Klippert*

did the defendants attack administrative orders on *Charter* grounds. Nor were the defendants in those cases facing potential jail time for their breaches, let alone the possibility of ten years in prison. In my view, these key facets of Mr. Bird’s case are critical to its assessment. When these constitutional and carceral dimensions are examined, I conclude that factors (3) and (5) in particular — whether an administrative appeal is available and the penalty on a conviction for failing to comply with the order — reveal that Parliament did not intend to bar Mr. Bird’s ability to challenge the constitutional validity of a condition whose breach carries a maximum penalty of ten years’ imprisonment.

(1) Wording and Purpose of the Legislation (Factors (1) and (2))

[107] I agree with the majority that the broad authority conferred on the Parole Board by s. 134.1(2) of the *Corrections and Conditional Release Act*, S.C. 1992, c. 20 (“*CCRA*”), militates against collateral attacks on the Board’s LTSO decisions.

[108] However, I disagree that it is at odds with the purpose of the long-term offender regime to permit Mr. Bird’s collateral attack. In particular, I impute no strategic motivation to Mr. Bird’s breach of his residency condition and I reject the notion that allowing Mr. Bird to advance his constitutional challenge will inspire or perpetuate a “breach first, challenge later” attitude amongst long-term offenders. The implication that Mr. Bird’s decision to leave Oskana Centre was a deliberate choice to “breach first, challenge later” is not supported by the record, and this Court is not in a position to speculate about Mr. Bird’s reasoning and motives at the time he left

Oskana Centre. The facts are simply that Mr. Bird did not challenge his residency condition when it was imposed, left Oskana Centre, was arrested, charged, and held in custody for approximately ten months awaiting trial on the charge of breaching his residency condition. His constitutional challenge to that condition was put forward as his defence to a charge that carried a possible sentence of ten years' imprisonment. In that regard, Mr. Bird is like many accused persons who challenge the constitutionality of state action only after they have been charged.

[109] In my view, the manner in which this Court conceives of Mr. Bird's departure from Oskana Centre has a critical impact on the *Maybrun* analysis. Framing Mr. Bird's conduct as "breaching first, challenging later" shifts the focus from whether Parliament intended to allow long-term offenders to challenge LTSO conditions when charged with their breach, which is the correct question, to whether Parliament intended to permit LTSO breaches committed *for the purpose of* challenging the conditions breached. Of course Parliament would not intend to make collateral attacks available to those who flout their conditions *in order to* challenge them.

[110] It is crucial to recognize that it is breaches of residency conditions, and not collateral attacks on those conditions, that pose a risk to society. This Court ought not equate permitting Mr. Bird's defence with perpetuating the dangers associated with breaches of LTSO residency conditions. Anyone subject to an LTSO residency condition can breach that condition and put the community at risk — whether or not

that person is diligently pursuing the appropriate avenues for challenging that condition, and whether or not that person ultimately attempts to challenge that condition in response to a criminal charge. Just as this Court cannot make assumptions about Mr. Bird's rationale for leaving Oskana Centre, it cannot presume that allowing Mr. Bird to challenge the constitutionality of his residency condition will motivate other long-term offenders to "breach first, challenge later".

[111] Finally, it must not be overlooked that an offender who breaches an LTSO condition risks up to ten years' imprisonment for that breach, as well as a period of pre-trial custody. (As noted above, Mr. Bird's pre-trial custody lasted ten months, a period notably longer than the 180 days he was ordered to reside at Oskana Centre.) It is difficult to imagine that a long-term offender would assume these risks *because of* the prospect of challenging the residency condition at a later stage.

(2) Availability of an Appeal (Factor (3))

[112] The majority concludes that Mr. Bird had three available options for challenging the residency condition. He could have asked the Board to reconsider the order that enabled his placement at a community correctional centre like Oskana Centre; he could have applied for judicial review of the Board's order in Federal Court; and he could have made an application for *habeas corpus*. The majority concludes that, "these mechanisms, considered together, constitute an effective means" to challenge the administrative order, and thus evince legislative intent to bar a collateral attack like Mr. Bird's (Majority Reasons, at para. 72).

[113] I am not convinced that these options, either individually or in concert, provide effective recourse for adjudicating Mr. Bird's *Charter* claims to the point of illustrating a legislative intent to bar Mr. Bird from arguing that the condition for which he faces a criminal charge is unconstitutional. My explanation follows.

(a) *Writing to the Parole Board*

[114] I begin with the possibility of internal review. The residency condition in question was set by the Board pursuant to s. 134.1 of the *CCRA*. Although there is an Appeal Division of the Board, the parties agree that the statute provides no recourse to that body for long-term offenders who wish to challenge their LTSO conditions.

[115] In *Maybrun* and *Klippert*, the defendants had recourse to have the orders they were challenging reviewed by an appeal tribunal established precisely for the purpose. Those tribunals, by virtue of their enabling statutes, could issue a wide range of remedies, were distinct from the original decision-maker, and were governed by carefully crafted procedures and defined routes for further review. It was clear in each of those cases that law-makers intended those subject to qualifying administrative orders to pursue challenges via the specified administrative appeal structure.

[116] In lieu of any comparable appeal process, individuals like Mr. Bird are limited to applying to the Board to have their LTSO conditions removed or varied under s. 134.1(4) of the *CCRA*. In contrast to the appeal tribunals in *Maybrun* and *Klippert*, the Board cannot issue a wide range of remedies, is not distinct from the

original decision-maker, and does not form part of a specified appeal structure. Mr. Bird's option was to ask the Board to reconsider *its own* residency condition.

[117] As the majority notes, the Board notified Mr. Bird of this possibility in a letter just over five months before his LTSO came into effect. He was advised:

You may apply to the Parole Board of Canada to be relieved of any of your conditions or request that the Board vary the terms of any of your conditions of Long Term Supervision Order. Upon receipt of your application and an updated report from your Parole Officer, with whom you should discuss your request, your file will be referred to the Board for voting and subsequently you will be advised of the outcome. To ensure that your request receives complete consideration, please fully document the reasons for your request.
(A.R., Vol. II, at p. 67)

[118] Discretionary conditions can be imposed by the Board under s. 134.1(2) of the *CCRA* where the Board "considers" them to be "reasonable and necessary in order to protect society and to facilitate the successful reintegration into society of the offender". As per the letter Mr. Bird received, and given the wording of s. 134.1, a reconsideration of the impugned residency condition under s. 134.1(4) would entail members of the Board voting on whether they still considered the condition to be reasonable and necessary to protect society and facilitate reintegration. The letter Mr. Bird received also reveals that the members' votes would be informed by Mr. Bird's application and an updated report from his parole officer.

[119] The question before us is whether the possibility for reconsideration under s. 134.1(4) of the *CCRA* indicates Parliament's intention that Mr. Bird's

Charter defence at trial be barred. It is inadequate to conclude as much simply because reconsideration by the Board is possible; it must provide an effective avenue for adjudicating Mr. Bird's claim and providing a suitable remedy. While I agree with the majority that s. 134.1(4) offers some recourse to someone like Mr. Bird, I disagree that it is effective to the point of signalling legislative intent to have *Charter* claims adjudicated exclusively by a vote of the members of the Board upon a request for reconsideration. I come to this conclusion for the following three reasons.

[120] First, the simplicity of the Board's reconsideration process — a paper application followed by a vote — does not lend itself to the adjudication of potentially complex constitutional questions. By virtue of the decision being made by vote, it seems that Mr. Bird would not receive anything resembling a set of reasons explaining the success or failure of the *Charter* claim. Further, as I have already noted, it is agreed before this Court that Parliament declined to allow claims like Mr. Bird's to be considered by the Appeal Division of the Board, even after a reconsideration under s. 134.1(4) occurs.

[121] Second, it is not clear how the Board is intended to take *Charter* claims into account. The Board's scope for setting conditions as part of an LTSO is limited to the question of whether a given condition is reasonable and necessary to protect society and facilitate reintegration. Assuming that Board members correctly identify and consider the relevant *Charter* considerations when voting on the reasonableness and necessity of an impugned condition, the *CCRA* provides no guidance on how

such *Charter* considerations must be assessed against the factors relating to protecting society and reintegration. If Mr. Bird's circumstances at Oskana Centre constituted an arbitrary detention, for example, how would this weigh in the Board's reconsideration if there were other significant public safety and societal reintegration concerns at play? Would Board members simply need to consider Mr. Bird's claim? Or would a formal analysis under s. 9 of the *Charter* be required? Given the process is by vote, it would in any event be impossible to discern which approach had been followed.

[122] While the Board might be equipped to consider questions of law and make orders that respect the *Charter*, that alone does not in my view prove legislative intent to confine *Charter* claims like Mr. Bird's to adjudication by the Board. To find otherwise would be to categorically tip the balance in favour of barring collateral attacks in all cases where the administrative body is capable of deciding questions of law, even if there is no indication in the enabling statute that the legislature intended for that body to be the *only* body which could deal with the questions at issue. Such a categorical conclusion is particularly troublesome where, as here, Mr. Bird alleges that the administrative body misinterpreted *its own authority* under the enabling statute when it imposed the impugned condition in the first place. Here, a reconsideration by the Board would not be a review on a question of law by an independent body, like an appeal, but a reconsideration by the Board of its own decision on constitutional grounds.

[123] Third, it is not apparent that the Board would receive the requisite information to properly adjudicate *Charter* claims in the course of a reconsideration. In reading s. 134.1 and the Board's letter to Mr. Bird together, it is clear that the parole officer's report plays a key role in the reconsideration process. In all likelihood, the officer's report will not be prepared with a view to presenting all facts necessary to assist the Board with its evaluation of a *Charter* claim raised by the offender. Rather, it is likely to focus on questions of safety, conduct and reintegration. In my view, this underlines the factual and case-specific nature of the question before the Board when faced with an application for reconsideration under s. 134.1(4). That factual inquiry is distinct from the more substantive legal questions posed by *Charter* claims.

[124] For those reasons, I conclude that Parliament did not intend the internal review process to be an adequate proxy for an appeal process designed to address *Charter* claims like Mr. Bird's to the exclusion of courts. My conclusion in this regard brings into sharp focus the detrimental impact on Mr. Bird's ability to make full answer and defence if he is barred from challenging the constitutionality of the order he is charged with breaching (*Maybrun*, at para. 61).

[125] I note here that, while the Board is clearly equipped to consider the subject matter of Mr. Bird's claim (the LTSO residency condition) under s. 134.1, for the reasons just stated I am not convinced that its *raison d'être* under s. 134.1(4) is to

adjudicate complex *Charter* claims. Accordingly, I would not give the same weight to factor (4) of the *Maybrun* framework that the majority does.

(b) *Applying for Judicial Review in the Federal Court*

[126] The Crown submits, and the majority accepts, that Mr. Bird had access, albeit imperfect, to judicial review by the Federal Court. Had Mr. Bird asked the Board to reconsider the residency condition and been dissatisfied with the Board's response, he could have sought judicial review by the Federal Court pursuant to ss. 18 and 18.1 of the *Federal Courts Act*, R.S.C. 1985, c. F-7. He could also have sought judicial review of the original LTSO residency condition itself.

[127] I agree with the majority that even if Mr. Bird had followed all of the appropriate steps to apply for judicial review, “the reality remains that a decision by the Federal Court might not have been released before the majority, if not all, of Mr. Bird's residency condition had been completed” (Majority Reasons, at para. 60; see also *May v. Ferndale Institution*, 2005 SCC 82, [2005] 3 S.C.R. 809, at para. 69; *Normandin v. Canada (Attorney General)*, 2005 FCA 345, [2006] 2 F.C.R. 112, at para. 2). This reality ultimately undermines the effectiveness of that recourse. Even though a reviewing court is competent to consider whether an administrative order is *Charter*-compliant, if an ordered period of what is determined to be unlawful detention has expired, the adequacy of any available remedies likely falls short.

[128] I add this. I agree with Mr. Bird and certain interveners that it is questionable that someone in Mr. Bird's circumstances would have the resources to secure counsel or the capacity to be self-represented for the purpose of navigating the judicial review process. Mr. Bird received no notification from the Board about the possibility of judicial review. Mr. Bird only obtained counsel in his criminal proceedings once a judge determined that his case was complex and raised important constitutional questions; no such opportunity is likely to have been available to Mr. Bird on judicial review.

[129] These considerations raise important access to justice concerns. Moreover, they illustrate the key distinction between a legislature laying out a clear, internal statutory avenue of appeal (as in *Maybrun* and *Klippert*) versus simply expecting individuals to navigate the judicial review process alone. A clear statutory appeal process indicates a legislature's intention to have matters adjudicated by the designated body or bodies, according to specific, cognizable steps. By contrast, the absence of such an appeal process leads to no such conclusion. For these reasons, I conclude that the availability of judicial review evinces no specific intention on the part of Parliament to bar constitutional challenges like Mr. Bird's.

(c) *Applying for Habeas Corpus*

[130] Finally, the Crown suggests, and the majority accepts, that the availability of *habeas corpus* outside of the *CCRA* carries significant weight in the analysis. I disagree. Even accepting the majority's assumptions that Parliament can be taken to

know of *habeas corpus* and that it would have been available to Mr. Bird does not lead me to the conclusion that the *CCRA* demonstrates an intent to bar Mr. Bird's challenge to his residency condition at trial or to *prescribe habeas corpus* as the *forum* for raising that challenge.

[131] The independent availability of *habeas corpus* outside of the *CCRA* simply cannot demonstrate that, through the *CCRA*, Parliament has “set up a complete procedure, independent of any right to apply to a superior court for review” (*Maybrun*, at para. 57 (emphasis added)), or “set up internal mechanisms and establish[ed] appropriate forums to enable . . . individuals to assert their rights” (*Maybrun*, at para. 27). Had Parliament set up such an effective procedure or mechanism within the *CCRA*, it may well have weighed against allowing Mr. Bird to raise his constitutional challenge to his LTSO condition at trial. However, as set out above, no such effective internal procedure or mechanism exists here to qualify as the only prescribed forum for raising that challenge.

[132] In this vein, it is noteworthy that *both* a challenge to an LTSO residency condition in a criminal trial and an application for *habeas corpus* represent external challenges to the condition; like the long-term offender who challenges his or her residency condition in the course of a criminal trial, the long-term offender who pursues *habeas corpus* in lieu of reconsideration by the Board also disregards the “administrative appeal process” contemplated by the *CCRA*. Given that bringing an application for *habeas corpus* and challenging an LTSO condition at trial both

represent deviations from the *CCRA* process, I do not see how the former can serve as persuasive evidence that the *CCRA* intends to bar the latter.

[133] The fact that long-term offenders subject to residency conditions can avail themselves of one avenue of recourse outside the legislative scheme (namely *habeas corpus*) says nothing about whether they can *also* avail themselves of another (namely challenges in the course of criminal trials). Because the *CCRA* does not prescribe a specific forum for raising constitutional challenges to LTSO conditions, my view is that *both habeas corpus* and challenge at trial are available to Mr. Bird. To this end, this Court's comment in *Maybrun* bears repeating:

. . . it must, *inter alia*, be presumed that the legislature did not intend to deprive citizens affected by government actions of an adequate opportunity to raise the validity of the order. The interpretation process must, therefore, determine not whether a person can challenge the validity of an order that affects his or her rights, but whether the law prescribes a specific forum for doing so.

(para. 46 (emphasis added); see also para. 52)

[134] This brings me to a second and more fundamental concern. According to the majority, whenever an administrative order puts an individual's physical liberty at stake, *habeas corpus* will be available. If the availability of *habeas corpus* is itself permitted to stand in the way of a challenge to the validity of the order at trial, it is difficult to imagine when, if ever, accused persons will be able to challenge at trial the liberty-restricting administrative orders imposed on them. In my view, allowing the existence of *habeas corpus* to foreclose challenges at trial involves much too

limited an approach to the *Maybrun* framework, which is aimed, in a larger and more nuanced way, at determining legislative intent. Parliament should not be taken as precluding all accused persons from challenging the liberty-restricting administrative conditions imposed on them simply because they missed an earlier opportunity to challenge their conditions through *habeas corpus* applications.

[135] Further, and relatedly, factoring *habeas corpus* into the *Maybrun* analysis in the manner suggested by the majority has the following paradoxical implication: the *less* the impugned order impacts the offender's physical liberty, the more likely the collateral attack will be *permitted*; the *more* the impugned order impacts the offender's physical liberty, the *less* likely the collateral attack will be permitted. If, for instance, Mr. Bird breached an order that did not impact his physical liberty — a prohibition on associating with specific individuals or groups, for example — and wished to challenge that order at his criminal trial for its breach, *habeas corpus* would not be available as a factor standing in the way of his challenge. Absent clear legislative direction, I am not prepared to assume that Parliament intended for those subject to orders that impose physical constraints to face a stronger barrier to challenging those orders than others.

[136] Finally, I note that the access to justice considerations discussed above (at paras. 41-42) equally undercut the suggestion that *habeas corpus* is the designated forum for challenging LTSO conditions. It is questionable whether, without access to

counsel, Mr. Bird would have known of the availability of *habeas corpus*, let alone how to pursue it.

[137] The Crown has pointed to no other viable option for Mr. Bird to challenge his residency condition. In my view, the three options offered by the majority do not indicate Parliament's intention to have Mr. Bird's *Charter* claim adjudicated exclusively outside of the criminal process. I also conclude that it is inappropriate to suggest that insufficient individual options might become effective when pursued in tandem. Even if Mr. Bird had sought internal review, applied for judicial review, and made an application for *habeas corpus*, one has no bearing on the others; the adequacy of one route is not bolstered by the existence of another.

[138] The question is not whether there were options available to Mr. Bird. There were. The question is whether it can be said that Parliament prescribed any one of them as the particular forum for raising a constitutional challenge to an LTSO condition. In my view, Parliament did not.

(3) Penalty on a Conviction (Factor (5))

[139] The majority and the courts below all recognize the severity of the penalty upon a conviction under s. 753.3 of the *Criminal Code*: up to ten years' imprisonment. It is important to reiterate that barring Mr. Bird's attack on the constitutionality of the condition is to deny his defence at trial where he is facing a lengthy period of imprisonment.

[140] The general rule against collateral attacks flows from rule of law and administration of justice considerations — namely, that it is improper to bypass adjudicative processes established by the legislature. However, when criminal defences are barred in the face of severe sanctions, separate aspects of the rule of law and the administration of justice are clearly invoked. In particular, the rule of law instructs us to avoid outcomes predicated on legal errors and dictated purely by process, and to turn our minds to the repute of the administration of justice (*R. v. Litchfield*, [1993] 4 S.C.R. 333, at pp. 349-50). This must be especially so where any potential error — for example convicting someone for breaching an invalid order — results in imprisonment. In my view, the trial judge’s task in a case such as this is to ask whether full answer and defence considerations and fair trial rights, which here arise in the face of serious criminal sanctions, outweigh rigid adherence to administrative structures, particularly where those structures are limited. In this vein, the words of the U.S. Supreme Court in *McKart v. United States*, 395 U.S. 185 (1969), at p. 197, are apt:

First of all, it is well to remember that use of the [rule barring challenges to administrative orders] in criminal cases can be exceedingly harsh. The defendant is often stripped of his only defense; he must go to jail without having any judicial review of an assertedly invalid order. This deprivation of judicial review occurs not when the affected person is affirmatively asking for assistance from the courts but when the Government is attempting to impose criminal sanctions on him. Such a result should not be tolerated unless the interests underlying the . . . rule clearly outweigh the severe burden imposed upon the registrant if he is denied judicial review.

[141] Mr. Bird could be sentenced to up to ten years in prison if he is convicted. As set out above, his challenge to his residency requirement is the only defence he advanced. He could go to jail for a significant period of time without ever having the basis for that sentence — the residency condition — reviewed by a court for constitutional validity. While I ultimately conclude that Mr. Bird's *Charter* claim is not made out in this case, in my view the prospect of someone in a situation like Mr. Bird's mounting a meritorious *Charter* claim, yet being ineligible for a corresponding remedy because of the forum in which the claim was advanced, is an affront to both the administration of justice and the accused's *Charter*-protected right to make full answer and defence.

[142] I conclude that this factor weighs heavily in favour of finding that Parliament could not have intended a claim like Mr. Bird's to be barred in these circumstances.

(4) Conclusion on Collateral Attack

[143] I agree with the majority that the words and purpose of the relevant provisions of the *CCRA* indicate a broad and discretionary public safety mandate for the Parole Board in its supervision of long-term offenders. That purpose suggests that Parliament intended long-term offenders to be the responsibility of the Board. However, when the other *Maybrun* factors are considered, I am unable to conclude that the statute indicates legislative intent to provide an effective avenue for recourse to Mr. Bird to the extent that his defence at trial should be barred. I conclude that the

Maybrun factors, considered together, indicate that Parliament cannot have intended to bar Mr. Bird's constitutional challenge to this LTSO condition. The Crown has not pointed to any other factors outside of the *Maybrun* framework to support its response in this appeal. Therefore, I find that Mr. Bird should be allowed to raise his defence at this time and in this forum.

B. *Charter Arguments*

(1) Preliminary Matter: New Charter Arguments Raised on Appeal

[144] At trial and in response to the Crown's appeal before the Saskatchewan Court of Appeal, Mr. Bird alleged that the residency order infringed his right to liberty under s. 7 of the *Charter*.

[145] By way of a Notice of Constitutional Question before this Court, Mr. Bird additionally raised claims under both ss. 9 and 11(*h*) of the *Charter*. Under these provisions, he argued that his residency condition is unauthorized by s. 134.1(2) of the *CCRA* and therefore constitutes an arbitrary detention (s. 9) and an additional carceral sentence frustrating his expectation of liberty (s. 11(*h*)).

[146] While this Court has the discretion to hear new constitutional arguments on appeal, this discretion "should only be exercised exceptionally and never unless the challenger shows that doing so causes no prejudice to the parties" (*Guindon v. Canada*, 2015 SCC 41, [2015] 3 S.C.R. 3, at para. 23). The Court must take into

account “all of the circumstances, including the state of the record, fairness to all parties, the importance of having the issue resolved by this Court, its suitability for decision and the broader interests of the administration of justice” (*Guindon*, at para. 20).

[147] Mr. Bird has not demonstrated that this is one of those “rare cases” that warrants this Court’s consideration of new constitutional arguments on appeal (*Guindon*, at para. 37). While the Crown and the Attorneys General of Canada and Ontario made submissions regarding all of Mr. Bird’s *Charter* claims, the Crown argued that it would not be proper to consider the new claims, despite any overlap between them and Mr. Bird’s original s. 7 claim. I am unable to determine whether the parties were prejudiced in the presentation of their cases by Mr. Bird’s failure to advance his ss. 9 and 11(*h*) claims at first instance. Further, I find that it would be unwise to proceed without the benefit of a record on Mr. Bird’s ss. 9 and 11(*h*) claims. As such, I consider only Mr. Bird’s s. 7 claim.

(2) Section 7

[148] Before this Court, Mr. Bird claims that his residency condition represents an arbitrary infringement of his right to liberty under s. 7 of the *Charter*. (Mr. Bird challenges only the constitutionality of his residency condition, and not the constitutionality of any applicable statutory provisions.) In essence, Mr. Bird argues that his residency condition is arbitrary because it is contrary to the purpose of the long-term offender regime: to manage the release offenders back into the community.

He places great emphasis on Oskana Centre's status as a "penitentiary" under the *CCRA*, arguing that he should not be required to serve as an inmate in a "penitentiary" after the expiry of his carceral sentence. He says that a contextual interpretation of s. 134.1 of the *CCRA* demonstrates that Parliament did not contemplate residency in "penitentiaries" for long-term offenders.

[149] The Crown concedes that Mr. Bird's residency condition engages his liberty interest under s. 7 of the *Charter*. As such, the only question is whether the residency condition is arbitrary in respect of the purpose of s. 134.1(2) of the *CCRA* and the long-term offender regime generally. An infringement of liberty will be arbitrary in a manner that infringes s. 7 of the *Charter* where it bears no rational connection to the purpose of the governing law (*Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101, at para. 111; *Carter v. Canada (Attorney General)*, 2015 SCC 5, [2015] 1 S.C.R. 331, at para. 83). As arbitrariness requires *no connection* between the purpose of the law and its impugned effects, it will generally be difficult for a claimant to establish (*Bedford*, at para. 119).

[150] The question before us is essentially one of statutory interpretation. Accordingly, our task is to assess the scope of s. 134.1(2) in light of its text, context, and purpose (*Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27). We must ask whether s. 134.1(2) empowers the Board to require Mr. Bird to "[r]eside at a community correctional centre . . . approved by the Correctional Service of Canada,

for a period of 180 days”. Is such a requirement “reasonable and necessary in order to protect society and to facilitate . . . successful reintegration into society”?

(a) *Section 134.1(2) and the Purpose of the Long-Term Offender Regime*

[151] Long-term supervision is a form of “exceptional” sentence “reserved for individuals who pose an ongoing threat to the public and accordingly merit enhanced sentences on preventive grounds” (*R. v. Steele*, 2014 SCC 61, [2014] 3 S.C.R. 138, at para. 1). An offender is not declared a long-term offender lightly; among other things, the sentencing court must be satisfied that there is a substantial risk that the offender will reoffend (*Criminal Code*, s. 753.1(1)(b)). In *R. v. L.M.*, 2008 SCC 31, [2008] 2 S.C.R. 163, at para. 46, this Court held that the specific objective of long-term supervision is “to ensure that the offender does not reoffend and to protect the public during a period of supervised reintegration into that society” (see also *R. v. Ipeelee*, 2012 SCC 13, [2012] 1 S.C.R. 433, at para. 48). Rehabilitation is a critical component of an offender’s reintegration (*Ipeelee*, at paras. 48 and 50).

[152] These purposes are reflected in the language of s. 134.1(2) of the *CCRA*, which states:

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.

[153] These purposes are also reflected in s. 100 of the *CCRA*, which applies to long-term offenders by virtue of s. 99.1. Section 100 sets out the overarching purpose of conditional release — of which long-term supervision is a form:

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.

[154] In light of the above, it is not accurate to say, as Mr. Bird does, that the purpose of long-term supervision is the release of offenders into the community. Rather, long-term supervision is designed to facilitate the *controlled or supervised community re-entry* of offenders who have been found to pose a risk to society.

[155] Although sentencing courts are responsible for declaring individuals long-term offenders under s. 753.1(3) of the *Criminal Code*, the management of those offenders and the establishment of LTSOs and attendant conditions are the responsibility of the Board (s. 753.2(1)). In this regard, the Board is governed by the relevant provisions of the *CCRA* — most notably s. 134.1.

[156] The text of s. 134.1(2), excerpted above, explicitly grants the Board broad discretion to set LTSO conditions. This discretion is limited only by the requirement that the conditions must aim at protecting society or facilitating the long-term offender's reintegration into society. It is for the Board to determine what *it* considers to be reasonable and necessary to meet those objectives. On its own, the text of the

provision strongly supports the conclusion that the Board is authorized to impose residency requirements.

[157] Moreover, and more crucially, the purposes of the long-term offender regime are best achieved by interpreting s. 134.1(2) as authorizing the Board to order residency where it deems fit, including in a community-based residential facility such as Oskana Centre. It goes without saying that requiring a long-term offender to spend a transitional period within a facility like Oskana Centre enables increased supervision, which in turn contributes to protecting society and facilitating effective reintegration. An interpretation of s. 134.1(2) which limits the availability of transitional facilities would hinder the effectiveness of efforts to rehabilitate and reintegrate long-term offenders. Supervision for the purpose of protecting the public *and* facilitating reintegration into society is a careful and case-specific exercise. As stated in *Ipeelee*, at para. 43, LTSOs were designed to “supplement the all-or-nothing alternatives of definite or indefinite detention”. Section 134.1(2) must be read in a manner consistent with this intent.

(b) *The Significance of Oskana Centre Being a “Penitentiary” Under the CCRA*

[158] Mr. Bird argues that because community correctional centres like Oskana Centre fall within the definition of “penitentiary” in s. 2 of the *CCRA*, long-term offenders cannot be ordered to reside in them. Framed differently, Mr. Bird essentially submits that his mandated presence at Oskana Centre under his LTSO

amounts to an impermissible (and therefore arbitrary) extension of his carceral sentence. I am unable to agree with this submission.

[159] For the purposes of the *CCRA*, “penitentiary” encompasses *all* facilities that are “operated, permanently or temporarily, by the [CSC] for the care and custody of inmates” (s. 2). In practical terms, and based on the record before us, this means that “penitentiary” captures two categories of facilities: (1) federal “institutions” operated by CSC, which includes what are colloquially known as “prisons” or “penitentiaries”, and (2) those “community-based residential facilities” that are operated by CSC. (These include what are commonly called “halfway houses” and other forms of placements.) “Community correctional centres”, like Oskana Centre, fall into the second category; accordingly, they are “penitentiaries” under the *CCRA*. Community-based residential facilities that are operated by contractors are known as “community residential facilities”; these are not “penitentiaries”.

[160] As per CSC’s *Commissioner’s Directive 706*, “Classification of Institutions”, made under the authority of s. 98 of the *CCRA*, community correctional centres like Oskana Centre are:

federally operated community-based residential facilit[ies] that provid[e] 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.

[161] While Mr. Bird is correct to note that Oskana Centre falls within the definition of “penitentiary” in s. 2 of the *CCRA*, I do not accept the significance he places on this classification. As set out above, “penitentiary” is broadly defined to include facilities which do not conform with the colloquial concept of “penitentiaries”. There is nothing in the text or context of the *CCRA* to suggest that CSC-operated community-based residential facilities can *only* house inmates serving carceral sentences; indeed, as discussed further below, Parliament expressly contemplated that long-term offenders could reside at (any) community-based residential facilities where required to limit risks (s. 135.1).

[162] If long-term offenders were not permitted to live anywhere deemed a “penitentiary” under the statute, the Board’s capacity to tailor conditions to the specific needs of the long-term offender with an eye to public safety and rehabilitation would be severely limited.

[163] Finally, I do not see a principled basis for concluding that long-term offenders like Mr. Bird can be ordered to reside in community residential facilities operated by contractors, but not community-based residential facilities operated by CSC (such as community correctional centres) because of a definitional distinction (the latter, unlike the former, constituting “penitentiaries” under the *CCRA*). The fact that some community-based residential facilities can technically be called “penitentiaries” under the *CCRA* has no bearing on their availability for long-term offenders at the discretion of the Board under s. 134.1(2).

(c) *Contextual Interpretation of Section 134.1(2)*

[164] Finally, Mr. Bird argues that a contextual interpretation of s. 134.1(2) demonstrates that the Board does not have the authority to order residency in community correctional centres under that provision.

[165] First, Mr. Bird distinguishes s. 134.1, which does not *expressly* contemplate residence in a community correctional centre for long-term offenders, from ss. 133(4) to (4.2), which do in the case of parolees, inmates on unescorted temporary absences, and those subject to statutory release. Referring to that distinction, Mr. Bird submits that Parliament chose to exempt long-term offenders from having to reside in community correctional centres. The explanation for this distinction, in Mr. Bird's view, is that an offender governed by s. 133 has yet to complete his or her sentence, while an LTSO only begins once the offender's carceral sentence has expired. Increased restrictions — such as a requirement to reside in a community correctional centre — are justifiable for those still serving sentences.

[166] I disagree that the distinction between ss. 134.1 and 133 sheds light on the scope of the Board's discretion under s. 134.2(1) in the manner urged by Mr. Bird. Sections 133(4) and (4.1) serve a clear purpose in the context of s. 133; they clarify the circumstances in which ordinary offenders on parole, temporary absence or statutory release can be placed in community-based residential facilities, including community correctional centres (s. 133(4.2)). In particular, they clarify that the Board (or releasing authority's) jurisdiction to impose residency is more limited for

offenders on statutory release than it is for offenders on parole or unescorted temporary absence. Parliament's choice to treat different categories of offenders serving carceral sentences differently (with respect to residency) under s. 133 has no bearing on the availability of residency requirements for long-term offenders under s. 134.1.

[167] In addition, I agree with the Federal Court of Appeal's decision in *Normandin*, at paras. 33-38, that Mr. Bird's reading of ss. 133 and 134.1 would result in ordinary offenders with a low risk of recidivism being subject to residency conditions like Mr. Bird's, while those declared long-term offenders — who by definition pose a high risk of recidivism — being subject to less state control. This interpretation is at odds with the purpose of the long-term offender regime and the broad discretion afforded the Board under s. 134.1(2) to set conditions with an eye to public safety and facilitating reintegration.

[168] I add this. If Mr. Bird's interpretation of the distinction between ss. 133 and 134.1 were accepted, the implication would be that conditions which are explicitly contemplated in other parts of the statute — such as limitations on drug and alcohol use in s. 133(3) — would be impermissible under s. 134.1(2). Given the purpose of s. 134.1(2) and the long-term offender regime, it would be absurd to interpret s. 134.1(2) as prohibiting conditions related to drugs and alcohol for long-term offenders whose risk of recidivism is tied to those substances.

[169] Second, Mr. Bird points to ss. 135.1(1)(c) and (2), which give the Board the authority to commit a long-term offender to 90 days in a community-based residential facility if that offender breaches a condition of his or her LTSO or if the Board is “satisfied that it is necessary and reasonable” to prevent such a breach. He argues that this provision must be taken as outlining the only circumstances in which a long-term offender can be ordered to reside in community-based residential facilities. He adds that the prescribed 90-day period should be taken as indicative of what Parliament deems to be an appropriate tenure for a long-term offender within a community-based residential facility.

[170] This argument is unconvincing. Section 134.1 addresses the Board’s task of establishing conditions attached to an LTSO. The focus of s. 135.1(1)(c) is different. That section confers a distinct power on “[a] member of the Board or a person designated” in critical or emergency situations in which a long-term offender has breached, or is likely to breach, an LTSO condition or put society at risk. In such situations, one of the specified individuals may, by warrant, authorize the commitment of an offender to a community-based residential facility, a mental health facility, or custody. This power to *move* a long-term offender on short notice into one of these places says nothing about where the long-term offender may properly have been located under s. 134.1(2) prior to the s. 135.1(1) move.

[171] In other words, to the extent that ss. 134.1(2) and 135.1 overlap in addressing the power to place a long-term offender in a community-based residential

facility, there is no conflict between these provisions. As stated in *Normandin*, at para. 61, “the limited applicability of section 135.1 contrasts with the much broader power to set conditions of supervision under subsection 134.1(2).” Where two provisions overlap but do not conflict, it is presumed that both are to be given full effect in accordance with their terms unless there is evidence that one was intended to be an exhaustive account of the applicable law (*Thibodeau v. Air Canada*, 2014 SCC 67, [2014] 3 S.C.R. 340, at para. 98). There is no indication that s. 135.1 was intended to exhaust the circumstances in which a long-term offender can be placed in a community-based residential facility; by its own wording, s. 135.1 is limited to certain particular circumstances, which circumstances might call for placement in a community-based residential facility *or* a mental health facility or custody. The wording and apparent purpose of s. 135.1 do not detract from the Board’s ability to set residency conditions under its broad s. 134.1(2) authority.

[172] I also conclude that there is nothing in s. 135.1 to suggest that Parliament intended for a long-term offender’s residency in a community correctional centre to be limited to 90 days as a general matter. The 90-day period refers specifically to the period of risk or emergency contemplated by s. 135.1(1)(c) itself. It is consistent with the urgent and warrant-driven basis for the provision that the prescribed period be limited.

[173] I conclude that the text, context, and purpose of s. 134.1(2) confirm that the Board is empowered to set residency conditions like the one imposed on Mr. Bird

where they are reasonable and necessary to achieve the objects of the long-term offender regime. The residency condition in this case was informed by Mr. Bird's specific circumstances, as described in his lengthy corrections record and the assessment provided by CSC. Given those circumstances — which include a significant history of failures to comply, substance abuse, and a long criminal record — and the purpose of s. 134.1(2) in the context of the long-term offender regime, Mr. Bird's residency condition is not arbitrary under s. 7 of the *Charter*.

IV. Conclusion

[174] I agree with the trial judge that Mr. Bird's constitutional challenge to his LTSO residency condition should have been permitted at his trial for breach of that condition. Nevertheless, once permitted, I conclude that Mr. Bird's claim under s. 7 of the *Charter* fails. Mr. Bird admits the elements of the offence under s. 753.3. Therefore, I would dismiss Mr. Bird's appeal and uphold his conviction. The parties do not seek costs.

Appeal dismissed.

*Solicitors for the appellant: Community Legal Assistance for Saskatoon
Inner City Inc., Saskatoon; Greenspan Humphrey Weinstein, Toronto.*

Solicitor for the respondent: Attorney General of Saskatchewan, Regina.

Solicitor for the intervener the Attorney General of Canada: Attorney General of Canada, Winnipeg.

Solicitor for the intervener the Attorney General of Ontario: Attorney General of Ontario, Toronto.

Solicitors for the intervener the Aboriginal Legal Services Inc.: Aboriginal Legal Services Inc., Toronto.

Solicitors for the intervener the David Asper Centre for Constitutional Rights: Breese Davies Law, Toronto; David Asper Centre for Constitutional Rights, Toronto.

Solicitors for the intervener the Canadian Civil Liberties Association: IMK, Montréal.