Court File No. 37596

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

BETWEEN:

SPENCER DEAN BIRD

Appellant
(Respondent)

- and -

HER MAJESTY THE QUEEN

Respondent
(Appellant)

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PART I – OVERVIEW AND STATEMENT OF FACTS

A. Overview

1. Court-ordered long-term supervision of dangerous and long-term offenders under the *Criminal Code* protects the public from a small group of high-risk sex offenders and other violent offenders who pose an ongoing threat to the safety of society. Section 134.1(2) of the *Corrections and Conditional Release Act* (*CCRA*) is an essential component in the legislative regime for managing these offenders. It provides the Parole Board of Canada with a broad discretion to impose conditions for such an offender's long-term supervision "that it considers reasonable and necessary in order to protect society and to facilitate the successful reintegration into society of the offender."[1]

2. Purposively and contextually interpreted, s. 134.1(2) of the *CCRA* authorizes the Parole Board to require that an offender reside at a community-based residential facility, including a community correctional centre, as a condition for an offender's long-term supervision. A community correctional centre is a federally operated community-based residential facility for accommodating offenders on conditional release or on a long-term supervision order.[2] As the Parole Board's imposition of a residency condition is authorized by a non-arbitrary law it does not violate s. 9 of the *Charter*.[3]

3. The Parole Board's decision to do so is also rationally connected to the dual purposes of long-term supervision. The Parole Board will impose a residency condition when a period of controlled community re-entry is considered a necessary stepping-stone to protect the public and to facilitate the offender's reintegration and rehabilitation. Given the direct connection between the condition's effect and the statutory objectives, its imposition is not arbitrary under s. 7 of the *Charter*.

4. Finally, the residency condition does not violate s. 11(h) of the *Charter* because it is not an additional punishment within the meaning of this provision.

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[1] *Corrections and Conditional Release Act*, SC 1992, c 20, s 134.1(2) [***CCRA***].
[2] Commissioner's Directive [**CD**] 706 - Classification of Institutions at para 31.
[3] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [***Charter*****]**.

B. Facts

5. The Attorney General of Canada ("Canada") relies on the facts as set out by the parties to this appeal.

PART II – CANADA'S POSITION ON THE QUESTIONS IN ISSUE

6. Canada intervenes on the constitutional questions asserted by Mr. Bird. Canada's submissions are made in the event that this Court finds that the collateral attack doctrine does not preclude Mr. Bird from challenging the Parole Board's decision outside of the review process established by Parliament. Canada's position is that the stated constitutional questions should be answered as follows:

a) Does an Order of the Parole Board of Canada, made pursuant to s. 134.1(2) of the *Corrections and Conditional Release Act* that requires an individual subject to a Long Term Supervision Order to reside at a Community Correctional Centre, infringe that individual's rights under ss. 9 or 11 of the *Charter of Rights and Freedoms*? **Answer**: No.

b) Does an Order of the Parole Board of Canada, made pursuant to s. 134.1(2) of the *Corrections and Conditional Release Act* that requires an individual subject to a Long Term Supervision Order to reside at a Community Correctional Centre, infringe that individual's rights under s. 7 of the *Charter of Rights and Freedoms*? **Answer**: No.

c) If the Order infringes any of ss. 7, 9 or 11 of the *Charter of Rights and Freedoms*, is the infringement nevertheless justified under s. 1 of the *Charter of Rights and Freedoms*? **Answer**: Section 1 is not applicable. Because the appeal impugns the validity of a legislatively authorized discretionary administrative decision, this Court's decision in *Doré v Barreau du Québec*, 2012 SCC 12, sets out the applicable review framework. In this case, the Parole Board proportionately balanced the relevant *Charter* interests to ensure that they are limited no more than necessary given the statutory objectives.

PART III – ARGUMENT

A. The imposition of a residency condition is authorized by law and thus not arbitrary under s. 9 of the *Charter*

7. As the Court stated in *Grant*, "[a] lawful detention is not arbitrary within the meaning of s. 9 […], unless the law authorizing the detention is itself arbitrary." [4] Proper interpretation of s. 134.1(2) of the *CCRA* shows that the Parole Board is legislatively authorized to impose a residency condition on an offender's long-term supervision on the basis of non-arbitrary criteria.

8. The modern approach to statutory interpretation begins with the words of the legislation, which are read contextually and harmoniously with the Act's scheme and object, and with Parliament's intent. This approach emphasizes the importance of context when interpreting the written words of a statute. When the provision being interpreted is "a component of a larger statutory scheme, the surroundings that colour the words and the scheme of the Act are more expansive."[5]

i. The legislative text broadly defines the Parole Board's discretion

9. On their face, the grammatical and ordinary meaning of the words in s. 134.1(2) of the *CCRA* confer a wide discretion on the Parole Board. The only limitations are that the Board must consider the conditions to be reasonable and necessary to protect society and facilitate the offender's reintegration into society. The text provides that:

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	La Commission peut imposer au délinquant les conditions de surveillance qu'elle juge raisonnables et nécessaires pour protéger la société et favoriser la réinsertion sociale du délinquant.

[4] *R v Grant*, 2009 SCC 32, [2009] 2 SCR 353 at para 54.
[5] *Bell ExpressVu Limited Partnership v Rex*, 2002 SCC 42, [2002] 2 SCR 559 at paras 26, 27, 45-48; see also *R v Steele*, 2014 SCC 61, [2014] 3 SCR 138 at paras 23, 24, 27 [***Steele***];

ii. The purpose of the dangerous and long-term offender regime supports a broad interpretation of the Parole Board's discretion

10. Consistent with the legislative text, a purposive interpretation of s. 134.1(2) of the *CCRA* in its larger legislative context supports a broad construction of the Parole Board's discretion. A purposive interpretation of s. 134.1(2) requires consideration of the purpose and processes resulting in the imposition of a long-term supervision order under Part XXIV of the *Criminal Code*. Both support interpreting s. 134.1(2) as authorizing the Parole Board to impose a residency condition for an offender's long-term supervision, including possible residence in a community correctional centre.

11. The dangerous and long-term offender regime targets a small group of habitual offenders who "pose an ongoing threat to the public."[6] It allows courts to identify dangerous and other high-risk offenders using rigorous criteria, then gives courts the discretion to fashion a sentence that protects the public while restricting the offender's liberty only to the extent necessary.

12. Throughout the regime's evolution, its dominant objective has remained public protection.[7] The dangerous offender regime was enacted in 1977 and upheld as constitutional by this Court in *Lyons*. Parliament amended the regime in 1997 to improve the dangerous offender provisions, create the long-term offender designation, and add long-term supervision orders as an alternative to indeterminate detention.[8] The dangerous offender regime was further amended in 2008 to shift the judge's discretion to consider whether a long-term supervision order would be sufficient to control an offender's risk from the designation stage to the sentencing stage of the dangerous offender process.[9]

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[6] *Steele* at para 1; *Criminal Code*, RSC, 1985, c C-46, ss 752.1, 753, 753.1 [***Criminal Code***].
[7] *R v Lyons*, [1987] 2 SCR 309 at 321-323, 329; *R v Johnson*, 2003 SCC 46, [2003] 2 SRC 357 at para 19; *Steele* at para 29.
[8] *House of Commons Debates*, Official Report (Hansard) (3 October 1996), Vol 134, No 080, 2nd Session, 35th Parl at 5037 [**Bill C-55 *Commons Debates***].
[9] *Criminal Code*, ss 753(1), 753(4), 753(4.1); *Steele* at paras 30, 31.

13. The criteria for designating an offender as dangerous are set out in s. 753(1) of the *Criminal Code*. Only offenders who pose a serious future risk to public safety will meet the stringent criteria, which the Crown must establish beyond a reasonable doubt. If a designation is made, there is a presumption in favour of an indeterminate sentence at the sentencing stage. However, a long-term supervision order may be imposed on a dangerous offender if the court is satisfied that this lesser measure will adequately protect the public against the commission by the offender of murder or a serious personal injury offence.[10]

14. The criteria for designating an offender to be a long-term offender are set out in s. 753.1(1) of the *Criminal Code*. The court may find the offender to be a "long-term offender" if it is satisfied that a sentence of two years or more is appropriate for the offence for which the offender was convicted, "there is a substantial risk that the offender will reoffend", and "there is a reasonable possibility of eventual control of the risk in the community". Subsection 753.1(2) defines what constitutes a substantial risk that the offender will reoffend, focussing the inquiry on sex offence convictions and the likelihood of the offender causing death or injury to other persons, or inflicting severe psychological damage, or "other evil" through conduct of a sexual nature.

15. When the *Criminal Code* criteria for designation as a dangerous or long-term offender are met, the sentencing judge may impose a long-term supervision order of up to ten years. Long-term supervision orders are an important tool in reducing the risk posed by this targeted group of offenders. Their purpose "is twofold: to protect the public and to rehabilitate offenders and facilitate their reintegration into the community".[11]

16. The dominant public protection purpose of Part XXIV of the *Criminal Code*, and the more attenuated dual purposes of a long-term supervision order, are best achieved by interpreting s. 134.1(2) of the *CCRA* as authorizing the Parole Board to require that an offender reside in a community-based residential facility, including a community correctional centre. As the Parliamentary Secretary to the Minister of Justice stated on

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[10] *Criminal Code*, ss 753(1), (4) and (4.1); *Steele* at paras 28-31.
[11] *Steele* at para 30; *R v Ipeelee*, 2012 SCC 13, [2012] 1 SCR 433 at para 50 [***Ipeelee***]; *Criminal Code*, ss 753(1)(4)(b), 753.1(3)(b).

second reading of the 1997 amendments, "[c]ommunity safety is not assured by the sudden release of offenders from a prison environment."[12]

17. This interpretation is also consistent with the "possibility of *eventual control* of the risk in the community" criteria in s. 753.1(2) of the *Criminal Code*. The Parole Board will impose a residency condition when a period of controlled community re-entry is considered reasonable and necessary to protect the public and facilitate the offender's reintegration and rehabilitation. Residence in a community-based residential facility allows for enhanced ongoing supervision and provides a stepping-stone towards independent community residence for those offenders for whom a gradual easing of structure is required.

iii. The specific purpose of s. 134.1(2) within the dangerous and long-term offender regime supports a broad interpretation of the Parole Board's discretion

18. In the context of this larger statutory scheme, by adding s. 134.1(2) to the *CCRA* Parliament assigned to the Parole Board the responsibility of determining the conditions necessary to meet the twofold objectives of a long-term supervision order. The legislative history of Bill C-55 confirms that Parliament intended to give the Parole Board a broad discretion under s. 134.1(2) as a means to achieve the larger legislative objectives.

19. Interpreting s. 134.1(2) as authorizing the Parole Board to require that an offender reside in a community-based residential facility, including possible residence in a community correctional centre, as a condition of his or her long-term supervision best provides for public safety and for the "managed reintegration"[13] that Parliament envisioned.

20. The Parole Board has long been recognized as an expert administrative tribunal[14] with regards to assessing the risk offenders pose to society so that reintegration into the community can be managed in a structured and supported manner. Parliament relied on this expertise as an essential component of the long-term supervision scheme. For

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[12] Bill C-55 *Commons Debates* at 5038.
[13] Bill C-55 *Commons Debates* at 5038-39 (reproduced in Mr. Bird's Factum at para 82).
[14] *R v Chaisson*, [1995] 2 SCR 1118 at para 11, citing *R v Goulet* (1995), 22 OR (3d) 118 at 122-23, 1995 CanLII 1198 (ONCA).

example, in introducing Bill C-55 on second reading, the Parliamentary Secretary to the Minister of Justice explained how a long-term supervision order might be implemented:

> … after completing the full sentence of imprisonment and any parole time, the offender would begin 10 years of supervision. The National Parole Board would set whatever conditions were necessary. These could involve very intensive rules for the offender, controlling his conduct, his use of alcohol, his access to places where children congregate and so forth. A requirement to report to a Correctional Service of Canada supervisor as often as is deemed necessary could also be made a condition.[15]

21. The then Minister of Justice, in his remarks to the Standing Committee on Justice and Legal Affairs, confirmed that Parliament intended long-term supervision to be intensive. He stated:

> I will not go into the details concerning the conditions to be imposed on long-term offenders. I will simply say that I expect the supervision provided by the Correctional Service of Canada, in conjunction with the National Parole Board, to be more intensive, more frequent, and probably more costly than it is for the usual parole cases.[16]

22. This was further confirmed by a representative of the Correctional Service of Canada testifying before the Standing Committee on Justice and Legal Affairs, who explained: "[w]here possible, the use of existing release programs will be important, in our view, so offenders are not released directly from, for instance, a maximum security institution onto the streets."[17]

23. For clarification, two of the legislative history extracts in Mr. Bird's factum are materially presented out of context. At paragraph 83, the reproduced extract is from the Minister's response to being asked why long-term supervision could not go "one step further" and be applied to high-risk offenders already sentenced and in the prison system. In this context, the Minister confirms that Bill C-55 provides for a "whole range of controls

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[15] Bill C-55 *Commons Debates* at 5038. This statement comes after the extract reproduced at paragraph 81 of Mr. Bird's factum.
[16] House of Commons, Standing Committee on Justice and Legal Affairs, *Evidence*, No 88, 2nd Sess, 35th Parl, December 3, 1996 at 1110 [**JULA, Dec 3, 1996**].
[17] House of Commons, Standing Committee on Justice and Legal Affairs, *Evidence*, No 92, 2nd Sess, 35th Parl, December 11, 1996 at 1545 [**JULA, Dec 11, 1996**].

and supervision" for a long-term offender, but it does not retroactively provide powers to impose an additional sanction or extend the sentences of those already sentenced.[18]

24. At paragraph 84, the extract reproduced is the answer provided by a representative of the National Parole Board to a similar question, asking why the proposed provisions in Bill C-55 do not extend to "known dangerous offenders who are not designated under the dangerous offender category, those individuals who are presently incarcerated".[19] The reproduced answer does not speak to the issues in this appeal.

iv. The scheme of the *CCRA* supports interpreting s. 134.1(2) as authorizing the Parole Board to impose a residency condition

25. Consistent with the text of s. 134.1(2), the scheme of the *CCRA* supports interpreting this provision as authorizing the Parole Board to impose a residency condition if it is considered to be reasonable and necessary to achieve the legislative objectives.

26. In 2005, in *Normandin*, the Federal Court of Appeal undertook a detailed analysis of s. 134.1(2) within the scheme of the *CCRA* and concluded that it provides the Parole Board with the jurisdiction to impose a residency condition.[20] *Normandin* reflects a principled approach to interpreting the Parole Board's jurisdiction in a manner that fully accords with the objectives of long-term supervision, to which the reasons made repeated references.[21] The conclusion in *Normandin* warrants confirmation by this Court.

27. *Normandin* addresses two interpretive issues raised in this appeal specific to the scheme of the *CCRA*. First, the Parole Board's discretion to establish a residency condition under s. 134.1(2) is not inconsistent with the long-term supervision suspension provision.[22] Under s. 135.1(1), "a member of the Board, or a person designated by the Chairperson of the Board or by the Commissioner," may suspend an offender's long-term supervision.

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[18] JULA, Dec 3, 1996 at 1150-1200.
[19] JULA, Dec 11, 1996 at 1635-1640.
[20] *Normandin v Canada (Attorney General)*, 2005 FCA 345 (CanLii), [2006] 2 FCR 112 [***Normandin***]; leave to appeal refused, 2006 CanLii 28018.
[21] *Normandin* at paras 29, 33, 37, 40, 41, 44, 46; compare *R v LM*, 2008 SCC 31, [2008] 2 SCR 163 at para 46; *Ipeelee* at para 50; *Steele* at para 30
[22] *Normandin* at paras 14, 15, 29, 53-61.

Suspension is permitted, by warrant, "when an offender breaches a condition of a long-term supervision order or a condition referred to in section 134.1 or when the member or person is satisfied that it is necessary and reasonable to suspend the long-term supervision in order to prevent a breach of any condition or to protect society." Upon suspension, the Parole Board or a designated person has the discretion to authorize the commitment of an offender to a community-based residential facility or, where necessary, to custody.

28. These discretionary powers are not mutually exclusive. Not all dangerous or long-term offenders will have a residency condition imposed on their long-term supervision. If an offender without a residency condition has his or her long-term supervision suspended, commitment to a community-based residential facility, which could include a community correctional centre, may provide sufficient additional supervision to manage the offender's risk during the review process set out in s. 135.1. For a dangerous or long-term offender whose long-term supervision is subject to a residency condition, commitment to a closed-custody penitentiary may be necessary. The graduated set of consequences for breaching a condition of a long-term supervision order in s. 135.1 of the *CCRA* in no way limits the scope of the Board's discretion to establish those conditions under s. 134.1(2).

29. Moreover, the precise and detailed outline of the process and consequences of a suspension, and their timing, reflects the fact that a wider range of administrative decision makers are authorized to make a decision under s. 135.1.[23] In practice, Correctional Service of Canada officials, not the Parole Board, decide when to issue a warrant of suspension in accordance with the *CCRA* and the applicable Commissioner's Directives.[24] Parliament's conferral of a broad discretion on the Parole Board under s. 134.1(2) is not inferentially limited by its use of more precise language in s. 135.1.

30. The second interpretive point addressed in *Normandin* is that the broad language in s. 134.1(2) is not contextually limited by the existence of provisions in the *CCRA* that expressly address the Parole Board's jurisdiction to impose a residency condition on an

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[23] CD 718 - Designation of Persons with Authority for Suspension.
[24] CD 719 – Long-Term Supervision Orders at para 24, 25; CD 715-2 – Post-Release Decision Process.

offender for parole (s. 133(4)) and statutory release (s. 133(4.1)).[25] The scheme that governs the supervision of long-term offenders is primarily found in ss. 134.1 and 135.1 of the *CCRA*. The provisions in s. 133 are applicable to the entire population of federal offenders, not just the small group of high-risk offenders designated as dangerous or long-term offenders pursuant to Part XXIV of the *Criminal Code*.

31. With respect to the entire offender population, s. 133(4) confirms the Parole Board's jurisdiction to impose a residency condition on an offender's parole in any case where "the circumstances of the case so justify". But Parliament chose to place a risk-based limitation on the Parole Board's jurisdiction to do so as an offender moves further along the conditional release spectrum. Specifically, under s. 133(4.1) the Parole Board may only impose a residency condition on an offender's statutory release if "in the absence of such a condition, the offender will present an undue risk to society by committing, before the expiration of their sentence," any of a list of specified offences. As both subsections come within the scheme addressing the Parole Board's general jurisdiction to establish conditions of release, s. 133(4) was included to confirm explicitly the Parole Board's jurisdiction to impose a residency condition on parole given the risk-based limitation placed on the Parole Board's jurisdiction to do so for statutory release.

32. For long-term supervision, an express risk-based limitation on the Parole Board's broadly defined jurisdiction would be redundant. In accordance with the criteria for designation as a dangerous or long-term offender, this subset of offenders has already been found beyond a reasonable doubt to present a serious undue risk to the public. As the Federal Court of Appeal noted in *Normandin*:

> It is true, as the appellant states, that section 99.1 of the Act does not refer to subsection 133(4.1) and the residence requirement authority that this subsection contains in relation to offenders on statutory release. But I agree with the respondent's counsel: this subsection 133(4.1) does not apply to long-term offenders who are not on statutory release and it was not necessary for Parliament to make it applicable to them through section 99.1 because the distinct scheme, which provides the conditions for supervision of long-term offenders, gives the Board, through the operation of subsection 134.1(2), an authority, less restrictive than that of subsection 133(4.1), to

[25] *Normandin* at paras 9, 12, 13, 15, 26, 27, 29, 31-46, 48-52.

> impose conditions of release during their period of long-term supervision. Parliament intended to give the Board greater latitude in the exercise of its jurisdiction over this kind of offender.[26]

33. Finally, Mr. Bird's argument places undue reliance on the statutory definition of "penitentiary" in the *CCRA*. While this issue was not addressed in *Normandin*, its consideration does not change the outcome in *Normandin*. It is common ground that community correctional centres meet the definition of a "penitentiary" under the *CCRA*, because they are operated by the Correctional Service of Canada. However, reliance on this definition, without more, ignores the nature and actual status of community correctional centres, which are different from other penitentiaries. Community correctional centres are distinctly classified "for accommodating offenders on conditional release or on a long term supervision order [and] are not required to conform to all minimum security standards."[27] Commissioner's Directive 706 – Classification of Institutions, defines a community correctional centre as:

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

34. Community-based residential facilities, whether owned and operated by non-governmental agencies, or by the Correctional Service of Canada, provide a bridge between incarceration and full release into the community. They provide gradual supervised release, permitting significant access to the community while ensuring close supervision during this transitional period. In this way, community correctional centres are no different from other community-based residential facilities.

35. In sum, interpreting the broad language of s. 134.1(2) of the *CCRA* as authorizing the Parole Board to impose a residency condition, which includes possible residence in a

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[26] *Normandin* at para 48.
[27] CD No. 706 – Classification of Institutions at para 31; *CCRA*, ss. 97, 98.

community correctional centre, is consistent with the scheme and objective of the *CCRA* and best accords with the larger *Criminal Code* context and with Parliament's intent. As the impugned residency condition was authorized by s. 134.1(2) based on non-arbitrary criteria, it is not arbitrary under s. 9 of the *Charter*.

B. The residency condition does not violate s. 7 of the *Charter*

36. The constitutional challenge here is directed at the Parole Board's decision to impose the specific residency condition it placed on Mr. Bird's long-term supervision, not the validity of any law. Mr. Bird's s. 7 *Charter* rights are not violated by the impugned residency condition. Nothing in the decision offends the basic tenets of our legal system.

37. The analytical framework advanced by Mr. Bird at paragraphs 110 and 119 of his factum is not the appropriate framework for assessing the validity of the Parole Board's decision under s. 7 of the *Charter*. Had Mr. Bird directly challenged the Parole Board's decision through a judicial review application in the Federal Court, the administrative law analysis set out by this Court in *Doré* and *Loyola*[28] would have framed the review, and the Federal Court would have had the benefit of a complete tribunal record for that review. Despite the collateral nature of the challenge to the decision in this case, assuming the impugned residency condition is authorized by law, the *Doré*/*Loyola* framework should be applied to assess its constitutionality. Section 1 of the *Charter* is not applicable.

38. Under the *Doré*/*Loyola* framework, the court applies a reasonableness standard of review to assess whether the decision-maker sufficiently took *Charter* values into account in exercising its statutory discretion. The analysis requires decision-makers, first, to consider the statutory objectives underlying the administrative decision, and second, to determine how the *Charter* values at issue can best be protected in light of those objectives. This second step requires the decision-maker to balance the severity of the interference of the *Charter* protections with the statutory objectives. The decision will be found to be

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[28] *Doré v Barreau du Québec*, 2012 SCC 12, [2012] 1 S.C.R. 395 [***Doré***]; *Loyola High School v Québec*, 2015 SCC 12, [2015] 1 SCR 613 [***Loyola***].

reasonable if it reflects a proportionate balancing of the *Charter* protections, in light of the nature of the decision, the statutory context and the facts.[29]

39. Even though this Court lacks the benefit of a full tribunal record, the Parole Board's reasons for decision reflect a proportionate balancing of the *Charter* protections with the statutory objectives. Thus, it is both reasonable and constitutionally valid.[30]

i. Parole Board's decision under s. 134.1(2) of the *CCRA* is directly connected to the law's purpose

40. The *Charter* interest at issue in this appeal is liberty, and the right not to be deprived thereof except in accordance with the principles of fundamental justice. The core principle at issue is the protection against arbitrariness. In *Bedford*, this Court explained that "[a]rbitrariness asks whether there is a direct connection between the purpose of the law and the impugned effect on the individual, in the sense that the effect on the individual bears some relation to the law's purpose."[31] On a proper application of this test, the impugned residency requirement is not arbitrary.

41. The first step is "to determine the object of the prohibition, since a law [or decision] is only arbitrary if it imposes limits on liberty … that have no connections to its purpose".[32] The purposes of a long-term supervision order, conditional release generally, and conditions imposed for an offender's long-term supervision under s. 134.1(2) in particular, are well established. The shared objectives for each are to protect the public and to rehabilitate offenders and facilitate their reintegration into the community.[33]

42. The residency condition imposed by the Parole Board in this case stipulated that Mr. Bird must "reside at a community correctional centre or a community residential facility or other residential facility (such as private home placement) approved by the

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[29] *Doré* at paras 55-58; *Loyola* at paras 3, 4, 35-42.
[30] Record of the Appellant, Vol II at pp 69, 70; *Doré* at para 58.
[31] *Canada (Attorney General) v Bedford*, 2013 SCC 72, [2013] 3 SCR 1101 at para 111 [***Bedford***].
[32] *R v Smith*, 2015 SCC 34, [2015] 2 SCR 602 at para 23.
[33] *Steele* at para 30; *Ipeelee* at para 50; *CCRA* ss. 99.1, 100, 100.1, 134.1(2).

Correctional Service of Canada, for a period of 180 days."[34] A "community residential facility" is a privately operated "community based residential facility". In carrying out this decision, the Correctional Service of Canada, which is responsible for the long-term supervision of offenders, placed him at the Oskana Community Correctional Centre.[35]

43. The Parole Board's reasons for imposing the impugned residency condition confirm its consideration of the dual statutory objectives and its conclusion that the residency condition was necessary to achieve these objectives in this case. Based on its review of "all file information" regarding Mr. Bird, the Parole Board was,

> …satisfied that [Mr. Bird] will require the structure and supervision that only can be provided by a community correctional centre/community residential centre. Therefore, residence is imposed for 180 days. You will be required to return to the facility nightly until you can garner positive resources of support in the community who are prepared to assist in your reintegration and you are able to demonstrate credibility and stability in the community.[36]

44. The Parole Board's reasons show that its decision respects the principle of fundamental justice that an individual's liberty may not be arbitrarily deprived and is thus consistent with s. 7 of the *Charter*. The residency condition is directly related to the law's purposes.

45. As to the effect on Mr. Bird's liberty, there is no evidence before this Court that residency in a privately owned and operated community-based residential facility was an available and less liberty-impairing option than residency in a community correctional centre. In either facility, a residency condition does not entail twenty-four hour supervision and offenders have access to the community except during curfew hours.

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[34] Record of the Appellant, Vol II at pp 64, 68.
[35] *CCRA* s. 5(d); Record of the Appellant, Vol II at p 64.
[36] Record of the Appellant, Vol II at pp 69, 70.

ii. The *Doré*/*Loyola* framework requires *Charter* consistency

46. Broadly, *Doré* and *Loyola* require administrative decision-makers to proportionally balance the *Charter* protections at stake in their decisions with other relevant considerations under their statutory mandate. Contrary to Mr. Bird's suggestion at paragraph 131 of his factum, interpreting s. 134.1(2) of the *CCRA* as authorizing the Parole Board to impose a residency condition that includes possible residence in a community correctional centre does not give the Parole Board "unfettered power". His suggestion that this interpretation "leads to the inescapable conclusion" that the Parole Board could order that an offender continue to be imprisoned in any penitentiary, up to and including a maximum security facility, is unsupportable. The Parole Board's discretion must be exercised reasonably and is always reviewable under the *Doré*/*Loyola* framework.

47. As already discussed, s. 134.1(2) requires that any condition be considered "reasonable and necessary in order to protect society and to facilitate the successful reintegration into society of the offender." A decision imposing a requirement that an offender reside in a maximum security penitentiary, or even a minimum security penitentiary other than a community correctional centre, would not further the second objective of long-term supervision.

48. The Parole Board is required to exercise its discretion in compliance with relevant *Charter* values.[37] The impugned order in this case fully meets this *Charter* imperative. The hypothetical decisions described by Mr. Bird would not, but they are not at issue in this proceeding.

C. The residency condition does not violate s. 11(h) of the *Charter*

49. If this Court agrees that the imposition of a residency requirement that includes the potential for residency at a community correctional centre is authorized under s. 134.1(2) *CCRA*, then the s. 11(h) *Charter* argument must necessarily fail. There has not been any "additional sanction or consequence" or "retrospective changes to the conditions of the

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[37] *Doré* at para 24; *Divito v Canada (Public Safety and Emergency Preparedness*), 2013 SCC 47, [2013] 3 SCR 157 at para 49.

original sanction"[38] that would amount to an additional punishment within the meaning of s. 11(h). Thus, s. 11(h) is not violated.

50. The dangerous offender or long-term offender designation and the long-term supervision order are both imposed when the offender is sentenced for the predicate offence. As an inherent part of the dangerous and long-term offender regime, the Parole Board is legislatively authorized to establish a residency condition, which includes the potential for residency at a community correctional centre, during an offender's long-term supervision. There is no additional sanction or retrospective change to the manner in which Mr. Bird, or any offender subject to a long-term supervision order, is required to serve his or her sentence if the Parole Board imposes such a condition. As this Court stated in *Whaling*, "[a]n offender has an expectation of liberty that is based on the parole system in place at the time of his or her sentencing".[39] This expectation has not been frustrated. The Parole Board's imposition of the residency condition, based on the offender's individual circumstances, was a legislative possibility when the long-term supervision order was imposed by the sentencing court.

D. If this Court finds a *Charter* breach, quashing the Parole Board's decision is not an appropriate remedy under s. 24(1) of the *Charter*

51. Section 24(1) of the *Charter* provides a court with the discretion to grant "such remedy as the court considers appropriate and just in the circumstances". Canada takes no position on whether or not a stay of proceedings may be an appropriate remedy here if the court finds that any of Mr. Bird's *Charter* rights have been breached. Regardless of the answer to that question, quashing the Parole Board's decision would not constitute an appropriate remedy.

52. Under s. 18 of the *Federal Courts Act*,[40] the Federal Court has exclusive jurisdiction to quash all or part of the Parole Board's decision. This appeal arises from a criminal prosecution in the Provincial Court of Saskatchewan, a court with no jurisdiction to quash

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[38] *Canada (Attorney General) v Whaling*, 2014 SCC 20, [2014] 1 SCR 392 at paras 54, 56 [***Whaling***].
[39] *Whaling* at para 58.
[40] *Federal Courts Act*, RSC 1985, c F-7, s 18.

the Parole Board's decision. It is neither appropriate nor just to grant a remedy under s. 24(1) that is outside the jurisdiction of the court from which this appeal arises.[41]

53. Nor should this Court accede to the suggestion that the Court may remand the matter to the Parole Board under s. 46.1 of the *Supreme Court Act*.[42] It provides that the Court may "remand an appeal or any part of an appeal to the court appealed from or the court of original jurisdiction". This section does not permit remand to the Parole Board.

54. If this Court finds that the Parole Board's decision is constitutionally invalid, there is no need to quash the Parole Board's decision in order to give an appropriate and just remedy. This Court's decision would effectively require the Parole Board to exercise its jurisdiction under s. 134.1(4)(b) of the *CCRA* to modify the condition imposed under s. 134.1(2), which it can do at any time during the long-term supervision of an offender.[43] Should there be any need for the Parole Board to remove or vary the residency condition associated with Mr. Bird's LTSO, it can be done administratively under the *CCRA* in light of this Court's decision.

PART IV – SUBMISSIONS CONCERNING COSTS

55. Canada does not seek costs and requests that no costs be awarded against Canada.

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[41] *R v Conway*, 2010 SCC 22, [2010] 1 SCR 765 at paras 24, 40, 82, 96, 97, 99.
[42] *Supreme Court Act*, RSC, c S-26, s 46.1.
[43] CCRA, s 134.1(4)(b); *Corrections and Conditional Release Regulations*, SOR/92-620, s 147(i).

PART V - ORDER SOUGHT

56. Canada requests that the constitutional questions be answered as set out in paragraph 6 above.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated this 23rd day of October, 2017

Sharlene Telles-Langdon
Of Counsel for the Attorney General of Canada

Cameron Regehr

PART VI - TABLE OF AUTHORITIES

Case Law		Cited at Para
1.	*Bell ExpressVu Limited Partnership v Rex*, 2002 SCC 42, [2002] 2 SCR 559 2002 SCC 42	8
2.	*Canada (Attorney General) v Bedford*, 2013 SCC 72, [2013] 3 SCR 1101 2013 SCC 72	40
3.	*Canada (Attorney General) v Whaling*, 2014 SCC 20, [2014] 1 SCR 392 2014 SCC 20	49, 50
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6.	*Loyola High School v Québec*, 2015 SCC 12, [2015] 1 SCR 613 2015 SCC 12	37, 38, 46
7.	*Normandin v Canada (Attorney General)*, 2005 FCA 345 (CanLii), [2006] 2 FCR 112 2005 FCA 345	26, 27, 30, 32
8.	*R v Chaisson*, [1995] 2 SCR 1118 [1995] 2 SCR 1118	20
9.	*R v Conway*, 2010 SCC 22, [2010] 1 SCR 765 2010 SCC 22	52
10.	*R v Goulet (1995)*, 22 OR (3d) 118, 1995 CanLII 1198 (ONCA) 22 OR (3d) 118	20
11.	*R v Grant*, 2009 SCC 32, [2009] 2 SCR 353 2009 SCC 32	7
12.	*R v Ipeelee*, 2012 SCC 13, [2012] 1 SCR 433 2012 SCC 13	15, 26, 41
13.	*R v Johnson*, 2003 SCC 46, [2003] 2 SRC 357 2003 SCC 46	12
14.	*R v LM*, 2008 SCC 31, [2008] 2 SCR 163 2008 SCC 31	26
15.	*R v Lyons*, [1987] 2 SCR 309 [1987] 2 SCR 309	12
16.	*R v Smith*, 2015 SCC 34, [2015] 2 SCR 602 2015 SCC 34	41
17.	*R v Steele*, 2014 SCC 61, [2014] 3 SCR 138 2014 SCC 61	8, 11, 12, 13, 15, 26, 41

Statutes and Regulations		**Cited at Para**
Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11 s 1, s 7, s 9, s 11(h), s 24(1)	Charte Canadienne fes Droits et Libertés, Partie 1, Loi constitutionnelle de 1982, Annexe B de la Loi de 1982 sur le Canada (R-U), 1982, c 11 s 1, s 7, s 9, s 11(h), s 24(1)	2, 3, 4, 6, 7, 35, 7, 37, 40, 44, 49, 51
Corrections and Conditional Release Act, S.C. 1992, c. 20 s 5(d), s 97, s 98, s 99.1, s 100, s 100.1, s 133(4), s 133(4.1), s 134.1(2), s 134.1(4)(b), s 135(1), s 135.1(1)	*Loi sur le système correctionnel et la mise en liberté sous condition*, L.C. 1992, ch. 20 s 5(d), s 97, s 98, s 99.1, s 100, s 100.1, s 133(4), s 133(4.1), s 134.1(2), s 134.1(4)(b), s 135(1), s 135.1(1)	1, 7, 9, 10, 18, 27, 28, 29, 30, 31, 33, 35, 41, 42, 47, 54
Corrections and Condition Release Regulations, SOR/92-620 s 147(i)	*Règlement sur le système correctionnel et la mise en liberté sous condition*, DORS/92-620 s 147(i)	54
Criminal Code, RSC, 1985, c C-46 s 752.1, s 753, s 753(1), s 753(4), s 753(4.1), s 753.1	*Code criminel* (L.R.C. (1985), ch. -46) s 752.1, s 753, s 753(1), s 753(4), s 753(4.1), s 753.1	10, 11, 12, 13, 14, 15, 16, 17
Federal Courts Act, R.S.C., 1985, c.F-7 s 18	*Loi sur les Cours fédérales*, L.R.C. (1985), ch. F-7 s 18	52
Supreme Court of Canada Act, R.S.C., 1985, c. S-26 s *46.1*	*Loi sur la Cour suprême*, L.R.C. (1985), ch. S-26 s 46.1	53
Commissioner's Directive 706 – Classification of Institutions	Directive du commissaire 706 - Classification des établissements	2, 33

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Commissioner's Directive 719 – Long-Term Supervision Orders	Directive du commissaire 719 - Ordonnances de surveillance de longue durée	29

Secondary Sources	**Cited at Para**
House of Commons Debates, Official Report (Hansard) (3 October 1996), Vol 134, No 080, 2nd Session, 35th Parl at 5037	12, 16, 19, 20
House of Commons, Standing Committee on Justice and Legal Affairs, Evidence, No 88, 2nd Sess, 35th Parl, December 3, 1996	21, 23
House of Commons, Standing Committee on Justice and Legal Affairs, Evidence, No 92, 2nd Sess, 35th Parl, December 11, 1996	22, 24