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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DAVID ASPER CENTRE FOR CONSTITUTIONAL RIGHTS
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PART I - OVERVIEW AND STATEMENT OF FACTS

1. The David Asper Centre for Constitutional Rights (the "Asper Centre") intervenes on the issue of the proper application of the collateral attack doctrine in this appeal. It takes the position that the *Maybrun* framework – which focuses almost exclusively on legislative intent – must explicitly consider countervailing factors to ensure that administrative orders are *Charter* compliant. Failure to consider the *Charter*, particularly where the liberty interest of an accused person is at stake, would undermine constitutionalism. As a check against such a result, the Asper Centre proposes adding two considerations to the *Maybrun* framework: the administration of, and access to, justice.

2. Judicial complicity in enforcing unconstitutional administrative orders under the collateral attack doctrine would bring the administration of justice into disrepute. It would be contrary to the court's role in protecting the rule of law and the constitution. Courts should not condone unconstitutional administrative orders by relying on them to deprive individuals of their liberty.

3. Courts should also consider the practical availability to the accused of prescribed review mechanisms. The review of an unconstitutional order is procedurally onerous and effectively unavailable for long-term offenders wishing to challenge a temporary residence condition. Denying a collateral attack where constitutional rights are at stake and prescribed review mechanisms are inaccessible would render *Charter* rights meaningless.

4. The Asper Centre relies upon the facts as set out in the parties' Memoranda of Argument, and in particular, the facts and evidence related to the unconstitutionality of the appellant's residence condition. Where there is a dispute in respect of the facts between the parties, the Asper Centre takes no position.

PART II – THE ASPER CENTRE'S POSITION ON THE QUESTIONS IN ISSUE

5. The Asper Centre's position in respect of the issue on which it has intervened is set out above.

PART III – STATEMENT OF ARGUMENT

A. The *Maybrun* Framework Should Make Constitutional Considerations Explicit

6. L'Heureux-Dubé J. laid out the test for when an administrative order can be collaterally attacked in *R. v. Consolidated Maybrun Mines Ltd* and *R. v. Al. Klippert Ltd*.[1] Due to a lack of Canadian case law, L'Heureux-Dubé J. drew on American jurisprudence to identify relevant considerations for the analysis.[2] Legislative intent underpins all five elements of the *Maybrun* framework.[3] It was unnecessary for L'Heureux-Dubé J. to include in the test countervailing factors that might favour allowing a collateral attack in cases such as this. Neither *Maybrun* nor *Klippert* involved constitutional rights or potential incarceration. Although *Maybrun* implicitly recognized the importance of constitutional considerations, they should be made explicit. This will ensure the focus rightly remains on the rights of the accused, the protection of the integrity of the administration of justice and ensuring access to justice.

i. *Jurisprudence Underpinning Maybrun Considers Countervailing Factors*

7. The U.S. jurisprudence upon which L'Heureux-Dubé J. relied in *Maybrun* does provide for a balancing of legislative intent against constitutional considerations. For example, the U.S. Supreme Court has allowed claimants to launch collateral attacks of administrative orders when those orders violated due process rights and when requiring exhaustion would cause non-compensable harm.[4] Dissenting in *Woodford v. NGO*, Stevens J. argued that individuals can "raise constitutional complaints for the first time in federal court, even if they failed to raise those claims properly before the agency."[5] Writing for the majority in *Woodford*, Alito J. agreed that Justice Stevens' point was relevant to the administrative exhaustion doctrine in which countervailing factors are considered, though Alito J. found it was irrelevant to the facts of *Woodford*, which involved the interpretation of a statutory exhaustion requirement.[6]

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[1] *R v Consolidated Maybrun Mines Ltd*, 1 SCR 706 [*Maybrun*]; *R v Al. Klippert Ltd*, [1998] 1 SCR 737 [*Klippert*].
[2] *Maybrun*, *supra* note 1 at para 38.
[3] *Klippert*, *supra* note 1 at para 14.
[4] *Matthews v Eldridge*, 434 US 319 at 340-341 (1976).
[5] *Woodford et al v NGO*, No 05-416 1 at 11 (US 2006) (Stevens J).
[6] *Woodford et al v NGO*, No 05-416 at 9 (US 2006) (Alito J).

8. Similarly, the U.S. Supreme Court has allowed a collateral attack in penal proceedings where the defendants' due process rights were violated. In *United States v. Mendoza-Lopez,* an immigration law judge ordered the defendants deported, but failed to explain to them their right of appeal. After the defendants re-entered the U.S. and were criminally charged, the Supreme Court allowed them to contest the deportation order during the subsequent prosecution despite the intent of Congress to the contrary. Marshall J. held that, "where the defects in an administrative proceeding foreclose judicial review of that proceeding, an alternative means of judicial review must be made available before the administrative order may be used to establish conclusively an element of a criminal offence."[7] In other words, Courts should not ignore a defendant's constitutional rights or the practical availability of prescribed remedies when deciding whether to permit a collateral attack on an administrative order.

ii. *Maybrun Implicitly Permits Constitutional Considerations*

9. The Supreme Court of Canada was clear in *Maybrun* that the rule against collateral attacks is intended to protect the rule of law.[8] But just as the rule of law requires that all government action adhere to the law, the principle of constitutionalism demands that all state action comply with the constitution.[9] If the *Maybrun* framework is to protect the rule of law by determining the legislature's intended forum for relief, it must do so in a way that encourages compliance with the constitution.

10. The protection of the rule of law discussed by L'Heureux-Dube in *Maybrun* implicitly requires consideration of whether the order in question is constitutionally compliant. *Maybrun* directed courts to ensure that the government act within the law and safeguard access to remedies.[10] This obligation aligns with the courts' role in upholding *Charter* rights against legislative and executive action.[11] The present case demonstrates the perverse consequences of divorcing *Charter* rights from the existing *Maybrun*'s factors. By denying the Appellant's collateral attack on an impugned administrative order, the Saskatchewan Court of Appeal potentially permitted state conduct that is neither rooted in the law nor constitutionally

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[7] *United States v Mendoza-Lopez,* 481 US 828 at 838 (1987).
[8] *Maybrun supra* note 1 at para 2.
[9] *Reference re Secession of Quebec,* [1998] 2 SCR 217 at para 72.
[10] *Maybrun supra* note 1 at para 44.
[11] *The Queen v Beauregard,* [1986] 2 SCR 56 at 72.

compliant. This would be contrary to the express goal of the collateral attack rule, namely to preserve the rule of law. To avoid such a result, the constitutionality of the order in question should be added as a relevant consideration when deciding whether a collateral attack on an administrative order is permissible.

11. While an accused may not attack a court order collaterally based on *Charter* considerations,[12] the rationale underlying this rule is inapplicable to administrative orders. For court orders, an accused has a right of appeal, which aims to protect, in part, their *Charter* rights. For administrative orders, a claimant may not have a right of appeal. Relief is often contingent on discretionary judicial or administrative review. For this reason, judicial and administrative decisions should not be conflated.

B. The Repute of the Administration of Justice Requires That Courts Disassociate Themselves from Unconstitutional Administrative Orders

12. The repute of the administration of justice should be an enumerated factor under the *Maybrun* framework. To deny a collateral attack when *Charter* rights and an accused person's liberty are at stake would bring the administration of justice into disrepute. The judiciary would be complicit in undermining the rule of law and the constitution. In other contexts, this Court has been quick to condemn state conduct that offends an accused person's rights in order to protect the repute of the administration of justice. The same principle should extend to considerations of whether a collateral attack is warranted..

13. For example, this Court recognized in *R. v. Grant*, the leading case on the exclusion of evidence, when courts admit evidence obtained in contravention of the *Charter*, they may be sending a message to the public that they condone state unlawfulness by refusing to disassociate themselves from its fruits.[13] This Court further stated in *R. v. Harrison* that judicial condonation of such wrongful conduct "undermines" the long-term repute of the administration of justice.[14]

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[12] *R v Domm,* [1996] 31 OR (3d) 540 at 15.
[13] *R v Grant*, 2009 SCC 32 at para 72, [2009] 2 SCR 353.
[14] *R v Harrison*, 2009 SCC 34 at para 39, [2009] 2 SCR 494.

Therefore, the need for courts to disassociate themselves from *Charter*-infringing state conduct may, for example, outweigh pressing societal interests in truth-seeking in a criminal trial.[15]

14. Likewise, the abuse of process doctrine is premised on the notion that condoning abusive state conduct in criminal proceedings may bring the administration of justice into disrepute. While the main category of abuse of process relates to trial fairness, the residual category encompasses conduct that undermines the integrity of the court process even if it does not threaten trial fairness.[16] The test requires the court to assess the effect of abusive state conduct on the administration of justice. In considering alternatives to a stay of proceedings, the court must consider whether an alternative remedy will "adequately disassociate" the justice system from the state misconduct.[17] As this Court stated in *R. v. Babos*, the residual category is designed to prevent further harm to the integrity of the judicial process and requires courts to consider whether continuing the proceeding would lend "judicial condonation" to the impugned state conduct.[18]

15. Finally, this Court has refused to enforce foreign judgments that are contrary to Canadian fundamental values. The public policy defence blocks the enforcement of a foreign judgment that is based on a law that offends "the fundamental morality of the Canadian legal system."[19] If a foreign law offends fundamental norms, the court must decline to enforce it.[20] In *Pro-Swing Inc. v. ELTA Golf Inc.*, Deschamps J. stated that courts are the "guardians of Canadian constitutional values" and that "public policy and respect for the rule of law go hand in hand."[21] Since constitutional rights reflect Canadian fundamental values, courts may be duty-bound to raise public policy issues and take constitutional values into consideration even when the parties themselves do not do so.[22]

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[15] *Ibid* at paras 36, 39-42.
[16] *R v Babos*, [2014] 1 SCR 309 at para 32.
[17] *Ibid* at para 39.
[18] *Ibid* at para 39.
[19] *Beals v Saldanha*, 2003 SCC 72 at para 72, [2003] 3 SCR 416 [*Beals*].
[20] *Boardwalk Regency Corp v Maalouf*, 1992 CanLII 7528 at 9, 6 OR (3d) 737 (CA); *Society of Lloyd's v Meinzer* (2001), 55 OR (3d) 688 at para 65, 2001 CanLII 8586 (CA).
[21] *Pro-Swing Inc v ELTA Golf Inc*, 2006 SCC 52 at para 59, [2006] 2 SCR 612 [*Pro-Swing*].
[22] *Ibid*.

16. This same consideration is relevant to the issue of whether a collateral attack is permitted. Courts must be permitted to consider whether, in all the circumstances of a case, enforcing an unconstitutional administrative order would bring the administration of justice into disrepute.

C. The *Maybrun* Test Should Consider Access to Justice

17. This Court in *Hyrniak v. Mauldin* stated that "[e]nsuring access to justice is the greatest challenge to the rule of law in Canada today."[23] This is especially true where the liberty interests of an accused person are at stake. When an administrative order faces collateral attack, courts ought to consider the practical availability of prescribed review mechanisms as a factor of the *Maybrun* framework. Otherwise, *Charter* rights would be rendered meaningless where prescribed review mechanisms are neither accessible nor effective.

18. Judicial review of long-term supervision order conditions in Federal Court is neither timely nor accessible due to:

1. The requirement that an offender exhaust complex and ineffective internal reviews;
2. The difficulty of obtaining deadline extensions under the *Federal Courts Act*; and
3. The protracted time period required to obtain a judicial review hearing.

These challenges place a heavier burden on the all-too-common self-represented individual, such as the Appellant,[24] unfamiliar with the intricacies of the federal court system.

i. *Internal Review is Ineffective and Exhaustion Requirements Delay Effective Judicial Review*

19. Access to justice is undermined where *Charter* remedies are withheld pending lengthy and ineffective administrative processes. The two alternative remedies to judicial review within the *Corrections and Conditional Release Act*[25] ("**CCRA**") noted by the Respondents at paragraphs 90 and 91 of their factum, are not sufficient to address the issue at hand. Indeed, the fact that not one approach is clear from the legislation suggests that the law does not "prescribe a

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[23] *Hryniak v Mauldin*, 2014 SCC 7, [2014] 1 SCR 87 at para 1.
[24] Intervenor Aboriginal Legal Service's Factum, paras 20-24.
[25] SC 1992, c 20.

specific forum" to challenge the validity of the order as contemplated by the *Maybrun* framework.[26]

20. The first alternative for a long-term offender is to apply for his or her conditions to be varied or removed under s. 134.1(4)(b) of the CCRA. Where a long-term offender ("**LTO**") applies for a removal or variance of a condition, the Parole Board of Canada ("**PBC**") bases its decision on how risk to the community has been increased or decreased by the offender's behaviour,[27] rather than the constitutional parameters of the original decision.

21. The second alternative is an internal grievance procedure established by s. 90 of the CCRA and s. 74 of the *Corrections and Conditional Release Regulations.*[28] This procedure can only be used to challenge the actions or decisions of CSC employees. It is unclear whether a special condition imposed through a Long Term Supervision Certificate, prepared by the CSC, constitutes an action or decision which may be challenged through this procedure. If not, the constitutionality of the special condition would be outside the jurisdiction of the institutional head, and the Appellant would have to pursue a judicial review application.[29]

22. Federal courts have required LTOs to exhaust internal CSC grievance procedures prior to allowing judicial review, barring exceptional circumstances. [30] In *Gates v. Canada (Attorney General)*, the Federal Court held that exceptional circumstances exist where an applicant can show "actual physical or mental harm or clear inadequacy of the process."[31] To establish inadequacy of the process, the Appellant would have to understand an opaque statutory scheme that does not define the scope of the procedure. Only then might he argue that the subject-matter of his grievance is outside of that procedure. The U.S. Supreme Court recognized in *Ross v. Blake* that administrative remedies in the *Prison Litigation Reform Act* are not available if, *inter*

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[26] *Maybrun, supra*, note 1 at para 46.
[27] Parole Board of Canada, *Decision-Making Policy Manual for Board Members*, 2nd Ed. (Ottawa: Parole Board of Canada, 2017), ss 7.1(10), (12).
[28] SOR/92-620.
[29] *Ibid*, ss 76(1), (2).
[30] *Robertson v Canada (Attorney General)*, 2015 FC 303, [2015] FCJ No 371 (QL) at para 33.
[31] *Gates v Canada (Attorney General)*, 2007 FC 1058, [2007] FCJ No 1359 (QL) at para 26.

alia, they are so complicated that they are practically incapable of use because no ordinary prisoner can navigate them.[32]

ii. *Time Extensions Under s. 18.1(2) of the Federal Courts Act are Difficult to Access*

23. If the Saskatchewan Court of Appeal is right, individuals, like the Appellant, who do not apply for judicial review of their CSC decisions within thirty days must seek a discretionary time extension in the Federal Court. Courts have unfettered discretion in granting late applications, but generally consider factors including whether the intention to seek judicial review was sustained, the case's merit, potential prejudice against the respondent, and justification for the delay.[33] These factors are onerous for unrepresented individuals: they may not form a sustained intention to seek judicial review within the requisite thirty days and are unlikely to know that their conditions are unreasonable, illegal, or unconstitutional. Although courts have looked sympathetically at self-represented individuals in allowing late applications for judicial review, it has been in the context of a sustained intention to challenge the individual's conditions.[34] However, unrepresented individuals unfamiliar with the *Federal Courts Act* would be unlikely to apply for extensions that they do not know exist.[35]

iii. *Obtaining Judicial Review is Time-Consuming*

24. Although courts are mandated to address judicial review in an efficient manner,[36] this intention does not often translate into judicial efficiency on the ground. As LeBel and Fish J.J. noted in *May v. Ferndale Institution*, if all time limits are run out completely, it would take 160 days following the impugned decision for the parties to be in a position to request a hearing.[37] As Bielby J.A. noted in *D.G. v. Bowden Institution*, the totally delay is likely 250 days, or more, if one considers the time it take for the hearing to conclude and the decision to be released.[38] This calculation does not include time spent navigating the internal appeal system, which took almost

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[32] *Ross v Blake*, No 15-339 1 at 9-10 (2016).
[33] *Grewal v Canada (Minister of Employment & Immigration)*, [1985] 2 FC 263, [1985] FCJ No 144 (FCA) at para 23.
[34] *Plante v Canada (Correctional Service)*, 2005 FCA 120, 70 WCB (2d) 373 at para 4; *Bullock v Canada*, 1997 CanLII 5830 (FCA), [1997] FCJ No 1661 at para 17.
[35] *Robertson v Canada (Attorney General)*, 2016 FCA 30, 480 NR 353 at para 7; *Bordage v Cloutier*, 2000 CanLII 16466, [2002] FCJ No 710 (QL), at para 14.
[36] *Federal Courts Act*, RSC 1985, c F-7, s 18.4.
[37] *May v Ferndale Institution*, 2005 SCC 82, [2005] 3 SCR 809 at para 69.
[38] *DG v Bowden Institution*, 2016 ABCA 52, 612 AR 231 at para 43 [*Bowden*].

one year in *Bowden*.[39] Although an applicant may seek an expedited proceeding in urgent circumstances, per Rule 8 of the *Federal Court Rules*,[40] Bielby J.A. emphasized that knowledge of the *Rules* is likely to be limited, even for represented parties, given the comparative rarity with which individuals engage with the federal court system.[41]

25. As a result, the impugned condition will often be moot when the judicial review hearing occurs. This is problematic for two reasons. First, if the applicant's condition is overturned at judicial review, they will have endured the entirety of an unreasonable and unconstitutional condition. Retroactive relief will likely be impossible or inadequate. Second, the court may decline to hear the issue because of its mootness.[42]

26. Upon accessing judicial review, individuals still face the prospects of an unfavourable costs award, where their ability to afford the costs order may be deemed irrelevant.[43] This might de-incentivize would-be applicants from seeking judicial review because of the financial risk.

D. Allowing Collateral Attacks Does Not Prejudice the Crown

27. There is no prejudice stemming from differences in the standard of review. The Respondent claims that allowing the collateral attack would distort the standard of review analysis because judges would effectively consider constitutional considerations on a correctness standard rather than a reasonableness standard.[44] This argument neglects the fact that both the Federal Court and the Provincial Court of Saskatchewan should apply the same reasonableness standard to constitutional issues under the framework set out in *Doré*.[45] In any event, a court will apply the appropriate standard of review for the circumstances before it and will be subject to appellate correction if it applies the wrong standard. This Court allows lower courts to determine

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[39] *Ibid* at paras 43-44.
[40] SOR/98-106.
[41] *Bowden*, *supra* note at 48 at para 44.
[42] *Borowski v Canada (Attorney General)*, [1989] 1 SCR 342, 1989 CanLII 123.
[43] *Stone v Canada (Attorney General)*, 2012 FC 81, 404 FTR 104 at para 14.
[44] Respondent Factum para 94.
[45] *Doré v Barreau du Quebec*, 2012 SCC 12, [2012] 1 SCR 392, at paras 5-7.

the appropriate standard of review where the unlawfulness of an administrative decision was an element in determining whether a writ of *habeas corpus* must be issued.[46]

28. Moreover, provincial Crown prosecutors can access the complete tribunal record during criminal proceedings. The Attorney General of Canada argued that the tribunal record was unavailable during the criminal proceedings against the Appellant, while it would have been available had he pursued judicial review.[47] This argument ignores the well-established principle that inmates may apply for *certiorari* in aid of *habeas corpus* to bring the complete tribunal record before the reviewing judge to allow for full and effective review. Records could equally be summonsed to Court so they are available to the trier in a criminal matter such as this. Neither the Respondent nor the Attorneys General of Canada and Ontario have pointed to any legal barriers to the admission of the complete tribunal record in criminal proceedings when an order is challenged.

PART IV – SUBMISSIONS ON COSTS

29. The Centre does not seek costs and respectfully requests that none be awarded against it.

PART V – NATURE OF THE ORDER REQUESTED

30. The Asper Centre requests that it be allowed 5 minutes to provide oral argument at the hearing of the appeal. The Centre takes no position on the outcome of the appeal but asks that the collateral attack issue be determined in accordance with the foregoing submissions.

All of which is respectfully submitted this 15th day of November, 2017

Per Breese Davies and Cheryl Milne
Counsel for the Intervener

[46] *Mission Institution v. Khela*, 2014 SCC 24, [2014] 1 SCR 502.
[47] AGC Factum at para 37.

PART VI – TABLE OF AUTHORITIES

1. Jurisprudence

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2. Legislation

Citation	Paragraph(s)
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