S.C.C. File No. 37596

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

BETWEEN:

SPENCER DEAN BIRD

Appellant

-and-

HER MAJESTY THE QUEEN

Respondent

-and-

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

Intervener

FACTUM OF THE INTERVENER, THE CANADIAN CIVIL LIBERTIES ASSOCIATION

(Rules 37 and 42 of the *Rules of the Supreme Court of Canada*)

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PARTS I & II: OVERVIEW, STATEMENT OF POSITION AND FACTS

A. *Overview and Statement of Position*

1. Orders handed down by the Parole Board of Canada (PBC) – including long-term supervision orders (LTSO) – will often have substantial impacts on the liberty interests of those subject to them. The restrictions on individual rights that flow from these orders, and from the consequences of their breach, are significant, yet an individual's ability and opportunities to challenge such orders are often quite limited, sometimes by the application of the common law doctrine prohibiting collateral attack. This is despite the fact that, on its face, s. 24(1) of the *Canadian Charter of Rights and Freedoms*[1] allows anyone whose *Charter* rights or freedoms have been infringed or denied to apply to a court of competent jurisdiction for a remedy.

2. The present appeal therefore raises the question whether the doctrine prohibiting collateral attack can effectively preclude recourse to s. 24(1) of the *Charter*, even in circumstances where other opportunities for recourse will be very limited.

3. In so doing, the appeal highlights an obvious tension between the value of upholding the finality of administrative decisions and orders and the clear affront to Canadian values in convicting and imprisoning an individual for breaching what may be an unconstitutional decision or order. This tension requires this Court to re-examine the common law rule against collateral attack in circumstances where its application would prevent an individual from being able to seek an appropriate and just remedy for the breach of his or her *Charter* rights.

4. The Canadian Civil Liberties Association (CCLA) submits that this tension should be reconciled by adapting the analysis set out in *R. v. Consolidated Maybrun Mines*[2] to include considerations that become relevant when an individual seeks a *Charter* remedy by way of collateral attack. In particular, courts should consider (i) the severity of the impact on *Charter* rights as a result of foreclosing a collateral attack, (ii) the utility of existing review mechanisms for remedying or preventing the alleged *Charter* breach, and (iii) the real availability – to the individual challenging the order – of alternative remedies that would meaningfully vindicate *Charter* rights.

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[1] *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.
[2] *R. v. Consolidated Maybrun Mines Ltd.*, [1998] 1 SCR 706 [*Maybrun*].

5. Developing the *Maybrun* analysis so as to take account of *Charter* claims is in keeping with this Court's jurisprudence, which recognizes that a right is only as meaningful as the remedies available for its breach, and that existing common law and statutory rules must be adapted and interpreted to reflect *Charter* rights and values. In addition, focussing on the severity of the impact on *Charter* rights as well as the utility and availability of alternative remedies enables a holistic, fact-sensitive approach that protects individuals' ability to seek remedies under s. 24(1) through collateral attack where doing so is truly necessary, but avoids promoting a "breach first, challenge later" mentality with respect to administrative orders, including LTSOs.

6. The CCLA takes no position on the constitutional question in this appeal.

B. *Facts*

7. The CCLA takes no position on the facts of this case.

PART III: ARGUMENT

A. *A strict application of the doctrine of collateral attack limits access to* Charter *remedies*

8. There is no question that the common law doctrine prohibiting collateral attack serves important public purposes. Enforcing finality in adjudicative proceedings respects legislative intent, creates a degree of certainty in the adjudicative process, avoids duplicative proceedings, and ultimately promotes respect for the rule of law.[3]

9. However, since the advent of the *Charter*, this Court has consistently recognized that a right, no matter how expansive, is "only as meaningful as the remedy provided for its breach."[4] The right to seek an appropriate and just remedy for a *Charter* breach – as guaranteed by s. 24(1) of the *Charter* – is the principal legal means of enforcing the *Charter's* protections.

10. A strict application of the doctrine of collateral attack will at times be irreconcilable with an individual's right to seek a remedy for a *Charter* breach. It may also subvert the bedrock *Charter* principle that individuals should not be convicted under unconstitutional laws or orders. Both of these tensions are palpable in the present case, but they may equally arise when an individual challenges other types of LTSO conditions or administrative orders, particularly where the individual faces penal sanctions for failure to comply with these orders.

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[3] *R. v. Litchfield*, [1994] 4 SCR 333 at 349
[4] *R. v. 974649 Ontario Inc.*, [2001] 3 SCR 575 at para. 20.

11. This Court has already attenuated the doctrine of collateral attack in certain contexts. First, in *Consolidated Maybrun* and *Klippert*, the Court indicated that there may be some situations in which a collateral attack on an administrative decision could be allowed, based on an appreciation of five factors that provide clues as to the forum in which legislators intended for that particular decision to be challenged.[5]

12. Second, in *TeleZone*, the Court held that the rule against collateral attack could not bar an action for damages alleged to result from a deficient administrative decision.[6] Binnie J.'s reasons were based on the logic that in a suit for damages, the purpose of the action is not to avoid the application of the administrative decision, but rather to obtain reparation for its unwanted effects.

13. The CCLA submits that the doctrine of collateral attack must now be clarified, or modified, so as to address cases that seek to nullify or moderate the effects of an administrative order, but only in order to remedy a serious breach of an individual's *Charter* rights and to avoid their further violation. A strict application of the common law rule could otherwise unjustly limit an individual's ability to obtain a remedy under s. 24(1) of the *Charter*.

14. In particular, in the context of an LTSO or some other form of supervision order, certain conditions imposed by the PBC may have an immediate and significant deleterious impact on individuals' *Charter* rights, which could not be effectively avoided or relieved without the individual breaching those conditions prior to any administrative or legal proceeding that considers the constitutionality of the conditions. As elaborated below, in these circumstances – such as in the case of an individual who has been given an unconstitutional treatment order – the only way to remedy the breach of an individual's rights may be to allow them to raise the constitutional invalidity of the order in defense to any subsequent or associated criminal charges.

15. While carving out *Charter*-based exceptions to the rule against collateral attack, as elaborated below, would permit individuals to breach contested conditions in certain narrow circumstances, it would still preserve the full force of criminal sanction for conditions that are upheld as constitutional, obviating any incentive to breach conditions unless truly necessary. However, a strict application of the rule against collateral attack would preclude an individual from formulating a *Charter*-based defense altogether, as the Crown alleges the appellant in this

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[5] *Maybrun* at 728-729; *R. v. Al Klippert Ltd.*, [1998] 1 SCR 737 at 746.
[6] *Canada (Attorney General) v. TeleZone Inc.*, 2010 SCC 62.

case is foreclosed from doing. Incongruously, while that individual could receive damages for the *Charter* breach caused by the imposition of the condition, they could not attempt to *prevent* the *Charter* breach by challenging the condition itself in a parallel proceeding! [7]

16. This result simply does not accord with the exceptional nature of *Charter* rights, including the s. 24(1) right to an appropriate and just remedy for their breach. The potential availability of damages for such a breach will be little solace to an individual whose liberty has been unconstitutionally restricted.

B. *The common law must evolve in a manner that respects* Charter *rights and values*

17. It is clear that the common law must evolve in a manner that respects constitutional supremacy and, in particular, the rights enshrined in the *Charter*.[8] This has at times required the courts to adjust and adapt existing common law rules so as to render them consistent with *Charter* values.[9] In *R. v. Salituro*, Iacobucci J. explicitly wrote that "[w]here the principles underlying a common law rule are out of step with the values enshrined in the *Charter*, the courts should scrutinize the rule closely. If it is possible to change the common law rule so as to make it consistent with *Charter* values […], then the rule ought to be changed."[10]

18. Accordingly, in *Dagenais*, this Court varied the common law rule on publication bans to permit courts to consider both the objective of a proposed ban and the proportionality of its effects on *Charter* rights.[11] And in *Swain*, the Court revised the common law rule authorizing the Crown to raise an insanity defense over the wishes of the accused, on the basis that it violated the accused's right to control his defense, and thus his rights under s. 7 of the *Charter*.[12]

19. Section 24(1) of the *Charter* functions as a cornerstone of the protections guaranteed by the *Charter*, since without it, the other rights and freedoms enunciated therein would often be incapable of enforcement. As such, respect for individuals' ability to seek appropriate remedies must be at the forefront of courts' attention when they are asked to apply statutory or common

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[7] See *Canada (Attorney General) v. McArthur*, 2010 SCC 63.
[8] *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 SCR 573, *Hill v. Church of Scientology of Toronto*, [1995] 2 SCR 1130 [*Hill*]; *R. v. National Post*, 2010 SCC 16.
[9] *Hill* at paras. 91-98.
[10] *R. v. Salituro*, [1991] 3 SCR 654 at 675.
[11] *Dagenais v. Canadian Broadcasting* Corp., [1994] 3 SCR 835.
[12] *R. v. Swain*, [1991] 1 SCR 933.

law rules that might impede such efforts. Where a common law doctrine appears to run contrary to the guarantee enshrined in s. 24(1), courts must consider whether it is necessary and appropriate to modify that doctrine.

20. Notably, the need to safeguard the promise of s. 24(1) has already led courts to read down or decline to apply various statutory restrictions on individuals' ability to take certain legal actions. Certain limitations on damages have been found not to apply to damages sought under the *Charter*;[13] and a statutory provision precluding recourse against the Crown where a pension was available to the claimant was read down so as to avoid an interpretation that would bar s. 24(1) relief.[14] If statutory bars or limitations on legal action must give way to s. 24(1) when a *Charter* remedy is appropriate and just, it is only appropriate that the common law be equally open to modification to the same effect.[15]

21. In one context this Court has already relaxed the common law, permitting individuals to obtain writs of *habeas corpus* as *Charter* remedies against unconstitutional sentences even where the affected individuals had not initially appealed those sentences, and when the remedy was sought in a superior court rather than the sentencing court.[16] In *Gamble*, Wilson J. justified this departure from the general rule that the ordinary appeal process should be relied upon to vindicate the interests at stake by emphasizing the "constitutionally mandated need to provide prompt and effective enforcement of *Charter* rights," particularly when an ongoing breach was alleged.[17]

22. While Wilson J. did not reference specific common law doctrines like the rule against collateral attack, her remarks fit easily into this Court's approach in *Dolphin Delivery* and *Hill*, acknowledging a tension between the classic jurisprudential approach and *Charter* imperatives.

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[13] *Wilson Estate v. Canada*, 1996 CanLII 2417 (BC SC).
[14] *Dumont v. Canada*, [2004] 3 FCR 338, 2003 FCA 475 at paras. 78-79.
[15] See also *Ernst v. Alberta Energy Regulator*, 2017 SCC 1, in which reasons for judgment emphasized that a statutory immunity clause barring *Charter* damages was constitutional only insofar as there was no circumstance in which it would be appropriate and just to award *Charter* damages against the provincial regulator in question, and only insofar as the applicant had another avenue – judicial review – by which to obtain prompt vindication of her *Charter* rights.
[16] *R. v. Gamble*, [1988] 2 SCR 595 [*Gamble*]; *R. v. Pearson*, [1992] 3 SCR 665.
[17] *Gamble* at 634-35.

23. Thus when applying the doctrine of collateral attack, this Court should assess whether a rigid common law restriction on collateral attacks that seek *Charter* remedies is consistent with these rights and values. Insofar as it is not, the Court should incorporate *Charter* considerations into the test for deciding whether to permit a collateral attack of an administrative decision.

C. *The* Maybrun *factors should be clarified or expanded to take account of* Charter *considerations*

24. While *Maybrun* presents an important evolution away from a calcified notion of collateral attack, the analytical framework the Court approved of there is largely silent as to how courts should deal with a collateral attack by which an individual seeks a *Charter* remedy.

25. This silence should not, however, be taken as indicating that the factors in *Maybrun* are comprehensive, or that they ought to be strictly interpreted. In *Klippert*, this Court cautioned that these factors are "not necessarily exhaustive" and that their application is not a "mechanical act";[18] rather, the factors are "important clues" for determining a legislature's intention as to the appropriate forum in which the validity of an administrative order is to be challenged.[19] Moreover, the Court emphasized that "it must be presumed 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."[20]

26. It is thus open to this Court to interpret the existing *Maybrun* factors expansively enough to incorporate considerations unique to collateral attacks that seek *Charter* remedies: these factors should include the severity of an impact on *Charter* rights, as well as the utility and availability of alternative remedies. In adopting this interpretation, the Court can strike a balance between recognizing the need for finality and respect for orders made in the context of criminal proceedings, while ensuring that remedies are available where a *Charter* breach is alleged.

27. The third and fifth factors identified by the Court in *Maybrun* – the availability of an appeal, and the penalty on a conviction for failing to comply with the administrative order – are flexible enough for courts to incorporate considerations relevant to whether a collateral attack on the constitutional validity of that order should be permitted.

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[18] *Klippert* at 746-747.
[19] *Maybrun* at 731.
[20] *Ibid*.

28. The third *Maybrun* factor is presently interpreted as referring to the mere *existence* of statutory mechanisms through which the order can be challenged directly, as a means of ascertaining legislative intent as to the appropriate procedure to be followed.[21] However, a number of related circumstances may complicate if not altogether bar individuals' ability to avail themselves of existing mechanisms, in practice making it impossible for them to obtain a remedy for an alleged *Charter* breach through the prescribed statutory mechanism (and thus, to vindicate their *Charter* rights). The presence of one or more such considerations may militate in favour of allowing a collateral attack to proceed.

29. An individual's ability to make use of existing review processes can depend, first, on certain personal circumstances at the time the order was rendered: the person's actual ability to obtain legal advice based on their financial situation; the quality of that legal advice (that is, did a legal representative err at any point in advising the individual); and the person's physical and mental condition, to the extent these affect their ability to challenge the administrative order through appropriate channels. Further, in some cases factors external to the personal circumstances of the affected individual might affect their ability to make use of existing review processes. Notably, in other contexts, courts have recognized some of these circumstances as being valid indicators of an individual's impossibility to act.[22]

30. Thus, for example, in a collateral attack on a condition imposed by an LTSO, courts should be more accommodating of the impecunious person who has no practical means of challenging an order that limits *Charter* rights, than of the individual with full access to an informed attorney who simply decided not to seek prompt judicial review of the order.

31. Second, existing review mechanisms may prove inadequate or unrealistic insofar as there may be occasions on which someone experiences a *Charter* breach after the time limit for appealing the administrative order through the intended channel has expired. This might be the case in the LTSO context, for instance, where a condition imposed by the PBC – such as a restriction on internet access – has the effect of preventing the individual from maintaining employment or even accessing legal information relevant to their ability to challenge the condition. As the statutory deadline for bringing an application for judicial review of a PBC

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[21] See *Maybrun* at 733; *Klippert* at 746.
[22] See e.g. *Gauthier v. Beaumont*, [1998] 2 SCR 3; *Cité de Pont Viau v. Gauthier Mfg. Ltd.*, [1978] 2 SCR 516.

order is 30 days,[23] it is difficult to see what review options are available to someone subject to an order that causes a restriction of their *Charter* rights after that deadline has elapsed.

32. Although the Crown argues that in the LTSO context, individuals can simply ask the Federal Court to relieve them of their failure to bring a motion for judicial review within the appropriate time period, this Court has already cautioned that a motion to be relieved of that default is not in and of itself a *Charter* remedy.[24]

33. Nor will the PBC's ability to vary a condition of an LTSO per s. 134.1(4) of the *Corrections and Conditional Release Act* necessarily provide an individual with the means to obtain the *Charter* remedy sought. Due to the highly variable nature of LTSOs that can be imposed on an individual, there may be specific situations when an individual subject to such an order is forced to breach it in order to preserve their *Charter* rights, and cannot apply to have the order varied in a timely manner.

34. For instance, where a condition of an LTSO obliges an individual to take a medication, the individual who objects to doing so on the basis that this condition violates their physical integrity under s. 7 of the *Charter* may nevertheless face criminal sanction for breach of that condition. Yet an after-the-fact variance of the condition would be cold comfort to individuals who are forced to suffer infringements of their *Charter* rights simply because they are not permitted to raise the illegality of an order as a defense due to the rule against collateral attack.

35. The efficiency of existing review mechanisms must equally be considered. Judicial review proceedings often take a very long time, potentially longer than the duration of the impugned LTSO. By the time a challenge to an LTSO condition is heard by the Federal Court, that challenge may have become moot – as, for example, occurred in *Normandin*,[25] in which the impugned 90 day residence requirement imposed by the PBC had expired by the time the matter was heard. Indeed, in that case, Létourneau J.A. noted that the questions raised in prison law cases often became moot through lapse of time.[26] The problem of mootness that is endemic in prison law cases means that individuals are commonly prevented from being able to vindicate their *Charter* rights through any remedy other than after-the-fact damages. While damages may

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[23] *Federal Courts Act*, RSC 1985, c F-7, s. 18.1(2).
[24] *Gamble* at 634, citing *Sanders v. The Queen*, [1970] SCR 109.
[25] *Normandin v. Canada (Attorney General)*, 2005 FCA 345.
[26] *Ibid* at para. 2.

constitute an appropriate and just remedy in some circumstances, they should surely not become the only remedy available to individuals who wish to prevent an ongoing breach of rights, in particular in the case of serious or significant rights violations where allowing them to continue is unconscionable in addition to being unconstitutional.

36. Finally, the fifth *Maybrun* factor, which evaluates the penalty on a conviction for failing to comply with an administrative order, should also be broadly construed to take account of the impact on *Charter* rights that results should a collateral attack not be permitted. This can include the additional *Charter* consequences of the penalty for conviction, but it can also allow courts to consider the magnitude of the initial alleged *Charter* breach that the individual was trying to avoid. The more significant and lasting the alleged breach, the more heavily it would weigh in favour of allowing a collateral attack to proceed in the interest of vindicating the individual's *Charter* rights and underscoring the importance of respecting *Charter* values.

37. Thus, an individual subject to a one-time or periodic condition with a minimal impact on *Charter* rights that might appropriately be remedied by damages will have a weaker case for collateral attack than an individual who is subject to a significant, ongoing, onerous condition.

38. Of course, in the event that this Court is of the view that the existing *Maybrun* factors leave no room to take the above considerations into account, it would be wholly appropriate to recognize those considerations as freestanding additional factors that must be evaluated where a *Charter* challenge to an administrative order is raised collaterally.

39. If the Court chooses to treat the above considerations independently of the existing *Maybrun* criteria, the new factors could be characterized as follows:

> (1) the extent of the alleged impact on the *Charter* rights of the individual wishing to challenge the administrative order (based on the moment at which the *Charter* breach becomes apparent, the duration and impact of the breach caused by the administrative order, and whether there is a further *Charter* impact if the collateral attack is not allowed);
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> (2) the utility of existing review mechanisms for remedying or preventing the alleged *Charter* breach (based on the speed with which review can be achieved, and whether there are alternative adequate *Charter* remedies to quashing the administrative decision); and

(3) the actual ability of the individual challenging the administrative order to have made use of existing review mechanisms (based on the individual's impecuniosity, the availability of legal advice, and external or changed circumstances that made review impossible).

40. The CCLA underscores that, whether the above considerations are evaluated within the existing *Maybrun* factors or as additional standalone factors, the clarified or modified *Maybrun* framework would continue to be a flexible and fact-specific endeavour that remains respectful of legislative intent relating to the operation of a given administrative regime, while ensuring that the remedial purposes of s. 24(1) of the *Charter* are given due regard. To the extent the Court accepts "new" considerations into the analysis, they should be considered alongside the traditional *Maybrun* factors, with no single one being determinative.

41. It may be that in some cases, the need to avoid sanctioning a "breach first, challenge later" mentality will weigh in favour of refusing to allow a collateral attack when a *Charter* right is at issue, particularly where there were useful and practically available means to challenge the relevant order. Yet precluding collateral attack without taking into account the impact this would have on an individual's right to seek remedies pursuant to s. 24(1) risks perpetuating a common law doctrine that is out of synch with prevailing *Charter* values, thereby undermining constitutionally protected rights. The weight of this Court's jurisprudence on the importance of *Charter* remedies and the need to develop the common law in a manner consistent with *Charter* principles militates for the more nuanced approach proposed.

PART IV: SUBMISSIONS REGARDING COSTS

42. The CCLA seeks no order as to costs, and asks that no award of costs be made against it.

PART V: ORDER SOUGHT

43. The CCLA takes no position on the disposition of the appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, this 15th day of November, 2017.

M[e] Audrey Boctor |M[e] Olga Redko
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THE CANADIAN CIVIL LIBERTIES ASSOCIATION

PART VI: TABLE OF AUTHORITIES

Statutes