File No.: 38540

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA)

BETWEEN:

CHAYCEN MICHAEL ZORA

APPELLANT
(APPELLANT)

AND

HER MAJESTY THE QUEEN

RESPONDENT
(RESPONDENT)

APPELLANT'S FACTUM

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

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PART I – OVERVIEW AND STATEMENT OF THE FACTS

A. Overview

1. This appeal requires the Court to determine whether Parliament intended s.145(3) of the *Criminal Code* to attract a subjective standard of fault, as is presumed and suggested by the Appellant, or whether it attracts an objective fault element of a marked departure, as suggested by the Respondent. This subsection creates the offence of failing to comply with conditions of a recognizance of bail and thus belongs to a suite of offences classified as administration of justice offences or "AJOs." AJOs differ from other offences in that they rarely involve harm to a victim and they can be committed only after a substantive offence has been committed or alleged. The Canadian Department of Justice has acknowledged that AJOs are particularly at risk of contributing to the revolving door syndrome.[1]

2. In recent years there has been a considerable amount of attention paid to the proliferation of these offences and the characteristics of those who tend to commit them.[2] These offences have the most devastating impact on those with marginal social support, who are struggling with addiction, poverty, and cognitive dysfunction. Members of Canada's Indigenous population, recognized by this Court as being disproportionately impacted by these forms of marginalization, are acutely affected.[3]

3. In this context the Appellant asks this Court to reaffirm its commitment to subjectivism as an expression of our criminal justice system's founding principle: those without a guilty mind will not be punished.

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[1] Canada, Department of Justice, *Police Discretion with Young Offenders* (Ottawa: Department of Justice, 2003) (online) at https://www.justice.gc.ca/eng/rp-pr/cj-jp/yj-jj/discre/descript/discretion.html .

[2] Canadian Civil Liberties Association and Education Trust, "Set Up to Fail: Bail and the Revolving Door of Pre-Trial Detention," by A. Deshman and N. Myers (2014) (online) at https://ccla.org/dev/v5/_doc/CCLA_set_up_to_fail.pdf ("CCLA Report"); Statistic Canada, *Trends in Offences Against the Administration of Justice*, by Marta Burczycka and Christopher Munch, Catalogue No. 85-002-X (Ottawa: Statistics Canada, 2015) (online) at https://www150.statcan.gc.ca/n1/pub/85-002-x/2015001/article/14233-eng.htm .

[3] *R v Boudrault*, 2018 SCC 58 at para 83.

4. The Appellant's position is that the modern approach to statutory interpretation repeatedly endorsed by this Court and recently accepted and applied in *R. v. H. (A.D.)*[4] lends itself to one interpretive outcome: failure to comply with conditions of release must attract a subjective level of fault.

B. Summary of the Facts

5. The Appellant was charged with three counts of possession of a controlled substance for the purpose of trafficking contrary to s.5(2) of the *Controlled Drugs and Substances Act*. He was released on his own recognizance with one surety. The conditions of his recognizance included house arrest, with exceptions, and a requirement that he present himself at the door of his residence within five minutes of any police officer's or bail supervisor's attending there to determine his compliance with the house arrest condition. The house arrest condition effectively operated as a curfew from 6:00pm to 8:00am, for the purpose of that enforcement condition, as he was entitled to be out of his residence during those day-time hours in the company of his mother or father.[5] The trial judge referred to the house arrest condition as a "curfew".[6]

6. On October 9, 2015, the Friday before the Thanksgiving long-weekend, Constable Mellin attended at the Appellant's residence during the curfew hours at about 10:30pm. The officer rang the front door doorbell three times and, after having no response, knocked loudly with his fist. He waited for five minutes. There were no lights on in the residence, there was a car parked in the driveway and he did not recall hearing any barking dogs.[7]

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[4] *R v H. (A.D.)*, 2013 SCC 28, [2013] 2 SCR 269.
[5] *R v Zora* (29 March 2017), Courtenay, BC (BC Prov Ct) ["Trial Court Decision"] at paras 1- 2 [Appellant's Record at Tab 1, pp 2-3]; Recognizance of Bail (17 September 2015) [Appellant's Record at Tab 12, pp 135-137].
[6] Trial Court Decision at para 2 [Appellant's Record at Tab 1, p 3].
[7] Trial Court Decision at paras 3-4 [Appellant's Record at Tab 1, pp 3-4].

7. On October 11, 2015, Constable Furtmann attended at the Appellant's residence at 10:25pm. The officer observed a sign on the door that read "use the doorbell," which he did. He went back to his police car where he remained for six or seven minutes and he observed no signs of life in the house.[8]

8. Both officers had previously attended at the Appellant's residence for similar checks and the Appellant was found to be in compliance.[9]

9. The Appellant, his mother, and his girlfriend testified that they were present at the residence over the Thanksgiving weekend and recalled having Thanksgiving dinner on October 11, 2015. Both testified that two dogs were typically present in the residence and these dogs bark with little provocation even if someone is walking by the area.[10]

10. The Appellant testified in his own defence that he was home on both nights and may have been sleeping. He testified he didn't hear the Constables when they attended.[11] He had been addicted to heroin at that the time of his arrest and after his release on bail he made efforts to go back on the methadone program and that that caused him, between withdrawal and methadone, to be sleepy and to go to bed earlier than usual.[12]

11. Constable Furtmann testified that he informed Mr. Zora that he was to be charged on October 29, 2015, that Mr. Zora was surprised and that Mr. Zora stated that he had been home on those dates.[13]

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[8] Trial Court Decision at para 5 [Appellant's Record at Tab 1, p 4].
[9] Trial Court Decision at para 4, 6 [Appellant's Record at Tab 1, pp 3-4].
[10] Trial Court Decision at para 7 [Appellant's Record at Tab 1, pp 4-5].
[11] Trial Court Decision at para 8 [Appellant's Record at Tab 1, p 5]; Supplementary Transcript (Provincial Court Trial) at p 21, ln 17 – p 22, ln 21 [Appellant's Record at Tab 11, pp 80-81].
[12] Trial Court Decision at para 8 [Appellant's Record at Tab 1, p 5].
[13] Supplementary Transcript (Provincial Court Trial) at p 15, ln 38 - p 16, ln 6 [Appellant's Record at Tab 11, pp 74-75].

12. After learning of the alleged breaches, the Appellant set up an audio-visual system to help alert him to future police checks and he had no problem since.[14]

13. The Appellant was subsequently charged with two counts of breaching his curfew and two counts of failing to comply with the condition that he present himself at the door of his residence.[15]

C. The Positions at Trial and Trial Judge's Reasoning

14. The Appellant admitted he had failed to present himself at the door on October 9 and 11, 2015. The defence argued the only issue was whether he possessed the requisite *mens rea*, the intent to not present himself at the door as required by the condition. The Appellant argued as he did not hear the doorbell or knocks and did not intend to not attend at the door, he lacked the intent required for a conviction under s. 145(3).[16]

15. The Crown made no submissions on the fault element, subjective or objective. In particular, the Crown made no submissions on how the failure to attend at the door was not only a departure but a marked departure, which is the objective fault element the Respondent now says applies for these offences. Instead, the Crown at trial argued that having failed to present himself, he should be convicted unless he had a lawful excuse and that he had failed to meet his burden of establishing a lawful excuse.[17]

16. The trial judge, while expressing credibility and reliability concerns with respect to the Appellant and his witnesses, did not make an ultimate determination regarding those issues. He neither accepted nor rejected the defence evidence.[18] The judge did give some weight to the "defence evidence", in conjunction with the absence of any direct evidence that the

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[14] Trial Court Decision at para 8 [Appellant's Record at Tab 1, p 5].
[15] Information #38989-6 and #38980-7 [Appellant's Record at Tabs 9 and 10].
[16] Supplementary Transcript (Provincial Court Trial) at p 61, ln 9 - ln 40 [Appellant's Record at Tab 11, p 120].
[17] Supplementary Transcript (Provincial Court Trial) at p 61, ln 45 – p 63, ln 39 [Appellant's Record at Tab 11, pp 120-122].
[18] Trial Court Decision at paras 9-14 [Appellant's Record at Tab 1, pp 5-8].

Appellant was outside his residence, to find the Appellant not guilty to the two counts of breach of the curfew.[19]

17. The trial judge did not expressly determine the fault element for this offence, whether subjective or objective, and did not refer to the marked departure standard, which is not surprising as no party suggested that was the applicable standard of fault. Instead, the trial judge treated this case as one akin to strict liability or at best one involving the issue of lawful excuse to be established by the accused:

> The court would observe that, with respect to bail conditions, there is an element of practicality to them. One does not write out a whole new Code with respect to them. If they are to be treated with a high degree of technicality, then perhaps bail will become less available. There is variance of the reporting condition that is present in this case. Some of them add words to the effect, 'Upon the attendance of a peace officer to the front door of your residence and making their presence known,' but the particular condition before me is sufficient for enforcement purposes. One would interpret these conditions with an element of reasonableness. One would not expect a situation where a peace officer during curfew hours went surreptitiously to the door and then tried to say that non-presentation amounted to an offence, but this type of condition, I would say, in terms of compliance has analogies to strict liability offences.
>
> I would not think that a defence, obviously, would arise if a person said they just chose not to answer the door. I do not think that a defence would arise if they said, "I was passed out from drugs or alcohol" at the time the police came to the door. I do not think that a defence would be established if the person said that, "I was in my bedroom with headphones or earbuds on and didn't hear" or had the radio or TV too loud. I believe that if a person wants the benefit of bail conditions and, in particular, the continuation of bail conditions it behooves that person to arrange their life to comply with the terms of the bail and that, in fact, is reflected in some of the additional steps that Mr. Zora took subsequently as the bail went on.
>
> Not answering the door is some circumstantial evidence of non-compliance with the curfew terms, but is not conclusive. The defence evidence in this case, in conjunction with the absence of any direct evidence that Mr. Zora was outside of his residence, I consider sufficient to find Mr. Zora not guilty with respect to the two counts of curfew violation.
>
> I do not consider, upon my assessment of the strength of the defence evidence, that it is sufficient to establish a substantive defence to the failing-to-report-to-the-door

[19] Trial Court Decision at para 17 [Appellant's Record at Tab 1, pp 9-10].

> condition. What has been provided is at most a possible explanation for not reporting to the door, not a legal defence and, accordingly, I find Mr. Zora guilty as charged with respect to the two counts relating to the failing to report to his door.[20]

18. The Appellant was sentenced to a $400.00 fine and $60.00 victim fine surcharge for each offence.[21]

D. The Summary Conviction Appeal Court Decision

19. The Appellant appealed his summary convictions to the Supreme Court of British Columbia, arguing the trial judge erred in law by applying the wrong standard of fault to s. 145(3).[22] The summary conviction appeal judge, Thompson J., noted divergent authorities on the issue of *mens rea* for s. 145(3) but ultimately concluded he was bound by *R v Ludlow,* a decision of the Court of Appeal for British Columbia on the fault element for failure to appear in s.145(2) of the *Criminal Code*, a similar offence.[23] He stated:

> The subsection is not clear as to what *mens rea* is required for conviction. There is a line of cases, led by *R v Legere,* holding that s.145(3) charges a true criminal offence and failure to take steps that a reasonable person would take to ensure that they are in a position to comply with the recognizance will not support a conviction. However, in *R v Ludlow*, Hall J.A., writing for himself and Cumming J.A., thoroughly considered the question and expressed the opinion, albeit in *obiter*, that the *mens rea* requirement is largely objective.[24] [case citations omitted]

20. The summary conviction appeal court concluded that *Ludlow* should be followed until reconsidered or overruled and dismissed the appeal.[25]

E. The British Columbia Court of Appeal Decision

21. The Appellant obtained leave to appeal the summary conviction appeal court's decision to the Court of Appeal for British Columbia pursuant to s.839(1) of the *Criminal Code,* on the

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[20] Trial Court Decision at paras 15-18 [Appellant's Record at Tab 1, pp 8-10].
[21] Fine Order and Notice of Victim Surcharge [Appellant's Record at Tab 2].
[22] *R v Zora*, 2017 BCSC 2070 ["Summary Conviction Appeal Court Decision"] at para 1 [Appellant's Record at Tab 3, p 14].
[23] *R v Ludlow*, 1999 BCCA 365, 136 CCC (3d) 460.
[24] Summary Conviction Appeal Court Decision at para 3 [Appellant's Record at Tab 3, p 14].
[25] *Ibid* at para 7 [Appellant's Record at Tab 3, p 14].

correct fault element for the offence under s.145(3), and was heard before a five-member division of the Court of Appeal.[26] More specifically, the Appellant argued that to prove that an offence under s. 145(3) occurred, the Crown must prove the action or omission that constituted the failure to comply was done with knowledge or wilful blindness as to the circumstances and was intentional or reckless.

22. A majority of the British Columbia Court of Appeal (*per* Stromberg-Stein J.A., Willcock, Savage, Fisher JJ.A. concurring) dismissed the appeal from conviction, holding that a review of the language, breadth, context and purpose of s.145(3), as well as the gravity of the crime and social stigma attached, confirms the offence is duty-based, requiring objective *mens rea* to establish the fault element of the offence.

23. To begin its analysis, the majority acknowledged and summarized the conflicting courts of appeal[27] and lower level[28] case law on the *mens rea* issue, observing that "[u]ltimately the Supreme Court of Canada may have to settle the conflicting law across Canada...".[29]

24. The majority then applied the modern approach to statutory interpretation to determine the requisite fault element under s. 145(3). In concluding the standard of fault was objective, the majority held that those who demonstrate a "marked departure from the standard of care that a reasonable person would observe in the circumstances" fulfils the requisite standard of fault under s. 145(3).[30] [underlining by Court of Appeal]

25. Applying this standard, the majority determined that the Appellant's conduct constituted a marked departure from what a reasonable person would have done in the circumstances and therefore dismissed the appeal.[31]

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[26] *R v. Zora*, 2019 BCCA 9 at para 17 ["Court of Appeal Decision"] [Appellant's Record at Tab 5 at p 22].
[27] *Ibid* at paras 24-40 [Appellant's Record at Tab 5, pp 24-28]. See especially: *R v Custance*, 2005 MBCA 23, 194 CCC (3d) 225; *R v Legere* (1995), 95 CCC (3d) 555 (Ont CA).
[28] Court of Appeal Decision at paras 41-42 [Appellant's Record at Tab 5, pp 28-29].
[29] *Ibid* at para 43 [Appellant's Record at Tab 5, p 30].
[30] *Ibid* at para 61 [Appellant's Record at Tab 5, p 35].
[31] *Ibid* at para 68 [Appellant's Record at Tab 5, p 36].

26. In her concurring reasons, Madam Justice Fenlon concluded that while she too would dismiss the appeal, she would do so on the basis of a subjective, rather than objective, standard of fault. In her view, neither the words used s.145(3) nor the design of the offence supported a clear legislative intent to displace the presumption of subjective fault.

27. Fenlon J.A. employed the modern approach to statutory interpretation and found that the statutory language,[32] the potentially significant consequences of a conviction under s. 145(3),[33] and the personalized expectations of conduct imposed on an accused in his or her bail conditions attracted a subjective standard of fault.[34]

28. She also observed that under an objective fault standard, "only incapacity or virtual inability to comply with a bail condition…would prevent conviction,"[35] which some have argued may in effect amount to absolute liability for some offenders.[36]

29. According to Fenlon J.A, to prove the mental element of a breach of a bail condition, the Crown must prove that the accused person knew their conduct would infringe a condition of release, was reckless, or was wilfully blind.[37] She ultimately concluded that the Appellant's appeal ought to be dismissed because, in her view, he had been reckless as to his compliance with his recognizance.[38]

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[32] *Ibid* at para 76 [Appellant's Record at Tab 5, p 39].
[33] *Ibid* at para 75 [Appellant's Record at Tab 5, p 39].
[34] *Ibid* at para 83 [Appellant's Record at Tab 5, p 42].
[35] *Ibid* at para 87 [Appellant's Record at Tab 5, p 44].
[36] *Ibid*, citing Professor Don Stuart, *Canadian Criminal Law: A Treatise*, 6th ed (Scarborough: Carswell, 2011) at 280 [Appellant's BOA at Tab 9, p 280] and *R v Creighton*, [1993] 3 SCR 3 at 26 per Lamer CJ.
[37] Court of Appeal Decision at para 93 [Appellant's Record at Tab 5, p 46].
[38] *Ibid* at paras 94-96 [Appellant's Record at Tab 5, p 46-48].

PART II – QUESTIONS IN ISSUE

30. The questions on appeal are as follows:

i) Did Parliament intend s.145(3) to attract an objective or subjective standard of fault?

ii) If the lower courts erred in law in applying an objective standard should a new trial be ordered?

PART III – STATEMENT OF ARGUMENT

A. The Proliferation & Consequences of Administrative Offences in Canada

31. Canadian courts are oversaturated by AJO charges. Between 2006 and 2012, the number of charges of failing to comply with a bail order increased from 131,841 to 167,291 – an increase of 27 per cent.[39] In 2011-2012, an AJO offence was the most serious charge in 22 per cent of completed criminal and federal cases;[40] 44 per cent of these administrative charges stemmed from violations of bail conditions.[41] In 2015-16, there were almost 78,000 administrative offences in adult criminal court, representing 23 percent of all cases.[42] In 2014, custody was the most common sentence involving AJOs. These findings are consistent with research that indicates Canadian criminal court judges often view custody as an appropriate sentence for administration of justice offences, in response to the accused person's history of noncompliance with conditions and in order to communicate to the accused the need to respect orders of the court.[43]

32. Bail violations also comprise a non-trivial proportion of youth court cases. In 2009, 12.2 per cent of all youth charged with a substantive offence were also charged with failing to comply with a condition of their bail order. In 2008, 24 per cent of all youth admissions to pre-sentence custody involved an AJO charge.[44] In 2014, 55 per cent of youth accused of substantive *Criminal Code* offences were dealt with by way of alternative measures, while the remaining 45 per cent were formally charged by police.[45] Significantly, rates of youth

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[39] CCLA Report, *supra* note 2 at 36. (The CCLA Report was previously referred to by this Court: *R. v. Antic*, 2017 SCC 27 at para 65 and footnote 4, [2017] 1 SCR 509 and *R v Penunsi*, 2019 SCC 39 at para 80.)
[40] *Ibid*.
[41] *Ibid*.
[42] Canada, Department of Justice, *Jordan: Statistics Related to Delay in the Criminal Justice System* (Ottawa: Department of Justice, 2017) (online) at https://www.justice.gc.ca/eng/rp-pr/jr/jf-pf/2017/docs/dec01.pdf
[43] *Trends in Offences Against the Administration of Justice*, *supra* note 2.
[44] Nicole M. Myers and Sunny Dhillon, "The Criminal offence of entering any Shoppers Drug Mart in Ontario: criminalizing ordinary behaviour with youth bail conditions" (April 2013) 55:2 Can J Crimin & Crim Jus 187 at 192 [Appellant's BOA at Tab 6, p 192].
[45] *Trends in Offences Against the Administration of Justice*, *supra* note 2.

charged with AJOs are considerably higher: in 2014, 85 per cent were subjected to formal charges instead of extrajudicial measures.[46]

33. The proliferation and consequences of administrative offences are increasingly recognized as a national issue.[47] Despite the fact that administrative court orders rely on preventative discourses and pursue rehabilitative objectives, they are often blind to the systemic barriers that colour the lives of the criminally accused. As a result, these court orders often have punitive effects and contribute to creating and reproducing socio-economic inequality, generating rather than curtailing crime. Given these consequences it is more likely that Parliament intended there to be subjective standard, consistent with the presumption of subjective intent. This is especially true as Parliament was aware of the challenges facing many accused when it legislated the offence at issue in 2008.[48]

34. In her concurring judgment, Fenlon J.A. recognized the following:

> An objective standard of fault does not permit consideration of the inexperience, lack of education, youth, cultural experience, or any other circumstance of the accused: *Creighton* at 58-74 (*per* McLachlin J.), 38–39 (*per* La Forest J.); *Naglik* at 148 (*per* McLachlin J.), 149 (*per* L'Heureux-Dubé J.). Under an objective fault standard, only incapacity or virtual inability to comply with a bail condition — such as a severe illness or severe weather preventing travel — would prevent conviction. Some have argued that "[j]udging everyone by an inflexible standard of a monolithic reasonable person, where an accused could not have measured up" may in effect amount to absolute liability: see Stuart, *Canadian Criminal Law* at 280; see also *Creighton* at 26 (*per* Lamer C.J.). Further, the addition of a defence of "lawful excuse" does not address all of the circumstances in which an objective standard could work an injustice — which in part explains, in my view, the reluctance of trial judges to adopt it.[49]

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[46] *Ibid.*
[47] Canada, Department of Justice, *Assessments and Analyses of Canada's Bail System* (Ottawa: Department of Justice, 2018) (online) at https://www.justice.gc.ca/eng/rp-pr/jr/rib-reb/bail-liberte/index.html
[48] SC 2008, c 18, s 3; Ruth Sullivan, *Sullivan on the Construction of Statutes*, 7th ed, (Markham: LexisNexis, 2014) at 205-206, 643-644 [Appellant's BOA at Tab 10, pp 205-206, 643-644]; Kent Roach, "Mind the Gap: Canada's Different Criminal and Constitutional Standards of Fault" (2011), 61:4 UTLJ 545 at 565 [Roach, "Mind the Gap"] [Appellant's BOA at Tab 8, p 565 (journal) p 11 (printout).
[49] Court of Appeal Decision at para 87 [Appellant's Record at Tab 5, p 44].

35. The normative concerns associated with administrative offences are gaining considerable attention. In its recent report, the Pivot Legal Society opined that for many living in poverty and homelessness, especially people who rely on drugs and alcohol, court and police imposed conditions play a ubiquitous role in shaping their lives.[50] Administrative offences are characterized as creating a cycle of criminalization and incarceration for innocuous behaviours, criminalizing those with addiction, and ignoring how the intersections of poverty, substance use, mental health, disability and racism shape people's lives and daily activities. These orders become, in effect, a means of controlling marginalized populations as opposed to preventing true crime.[51]

36. A subjective fault requirement imposes an important restraint on the use of criminal sanctions and an important reminder about the need to understand each accused as an individual. It also reaffirms the criminal law's commitment to fairness for all individuals.[52] Normative concerns aside, the statutory architecture supports the imposition of a subjective standard of fault.

B. The Provision at Issue

37. When the Appellant committed the alleged offences, s. 145(3) provided as follows:[53]

> Every person who is at large on an undertaking or recognizance given to or entered into before a justice or judge and is bound to comply with a condition of that undertaking or recognizance, and every person who is bound to comply with a direction under subsection 515(12) or 522(2.1) or an order under subsection 516(2), and who fails, without lawful excuse, the proof of which lies on them, to comply with the condition, direction or order is guilty of

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[50] Pivot Legal Society, "Project Inclusion: Confronting Anti-Homeless & Anti-Substance User Stigma in British Columbia", by Darcie Bennett & DJ Larkin (Pivot Legal Society, 2019) ("Project Inclusion") at p 83 (online) at http://www.pivotlegal.org/project_inclusion_full

[51] *Ibid*.

[52] Kent Roach, "Mind the Gap", *supra* note 48 at 565 [Appellant's BOA at Tab 8, p 565 (journal) p 11 (printout); *R. v Josephie*, 2010 NUCJ 7 at paras 23-25.

[53] *Criminal Code*, RSC 1985, c C-46, s 145(3), as amended by SC 1994, c 44, s 8(1), as amended by SC 2008, c 18, s 3.

> (a) an indictable offence and is liable to imprisonment for a term not exceeding two years; or
> (b) an offence punishable on summary conviction.

38. Subsequent to the commission of the alleged offences, Parliament replaced s.145(3) and in doing so eliminated the phrase "the proof of which lies on them" in regard to the statutory defence of lawful excuse.[54] It is uncertain whether that change actually removed the onus on the accused to prove any lawful excuse, at least in summary proceedings.[55]

39. The subsequent amendment has no bearing on the question of the fault element for this offence. The Appellant addresses the provision in force at the time of his alleged offending, as that is the provision at issue on this appeal and the provision to be applied should a new trial be ordered.

C. The Nature of Subjective Fault in this Case

40. A subjective fault element has two components. First, the accused must know of the factual circumstances that are necessary to give rise to the required intention. Second, the accused must possess that required intention.

41. In *Sault Ste. Marie*, this Court described these components in this way:

> Where the offence is criminal, the Crown must establish a mental element, namely, that the accused who committed the prohibited act did so intentionally or recklessly, with knowledge of the facts constituting the offence, or willful blindness towards them.[56]

42. In *H. (A.D.)*, this Court cited the aforementioned passage with approval and described the knowledge component as "an individual appreciation of the circumstances", in that case that the child the accused abandoned was alive at the time she abandoned him.[57] This Court in

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[54] *An Act to amend the Criminal Code and the Department of Justice Act and to make consequential amendments to another Act*, SC 2018, c 29, s 9(7).
[55] *Criminal Code*, s 794(2); *R v Goleski*, 2014 BCCA 80, 307 CCC (3d) 1, appeal dismissed 2015 SCC 6, [2015] 1 SCR 399.
[56] *R v Sault Ste. Marie*, [1978] 2 SCR 1299 at 1309-1310.
[57] *R v H. (A.D.), supra* note 4 at paras 2-3, 62.

Briscoe found the obligation to prove the accused's knowledge of the circumstances constituting the offence a matter of common sense.[58] An intention is always formed in a specific known factual context. An accused cannot form the required intent if he is not fixed with the facts that are necessary to form that very intent. That is why a reasonable doubt on an accused's mistake of fact as to the circumstances results in a failure of the Crown to prove subjective fault.[59]

43. Indeed, as this Court found in *H. (A.D.)*, one of the fundamental distinctions between subjective and objective fault is that the Crown must prove the accused's knowledge where the fault is subjective but not where the fault is objective.[60]

44. Therefore, if the fault element is subjective for s.145(3), the Crown must prove:

a. The accused was required to act (or refrain from acting) in a certain way by a condition and the accused failed to act as required; (*actus reus*)
b. The accused knew at that time the factual circumstances that required him to act in order to comply, or was wilfully blind to those circumstances; and
c. The accused's failure to act was intentional or was reckless.

45. Culpability relates to the accused's knowledge that he is bound to comply, knowledge of the factual circumstances that require compliance at that time, and his decision to act contrary to that knowledge.[61]

46. In *R v Shoker*, this Court found the nature of the probation condition imposed by the sentencing judge defines the alleged offence of beach of probation. [62] In the same way the bail judge's exercise of discretion in crafting release conditions defines the knowledge requirement the Crown must prove. In this case, the condition defined the offence as Mr. Zora's failing to present at the door of his residence within five minutes of a peace officer's

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[58] *R v Briscoe*, 2010 SCC 13 at para 17, [2010] 1 SCR 411.
[59] *R v H. (A.D.)*, *supra* note 4 at paras 2-3, 16, 23; Stuart, *supra* note 36 at 299 [Appellant's BOA at Tab 9, p 299].
[60] *R v H. (A.D.)*, *supra* note 4 at paras 2-3.
[61] *R v H. (A.D.), supra* note 4 at paras 16, 62.
[62] *R v Shoker*, 2006 SCC 44 at para 20, [2006] 2 SCR 399.

or bail supervisor's attending for the purpose of determining compliance with curfew condition. The Crown had to prove Mr. Zora knew that the police had attended at his residence. Lack of knowledge or mistake as to that fact would provide a complete defence. Alternatively, the Crown could prove Mr. Zora was wilfully blind. In addition to that knowledge, the Crown also had to prove he intentionally did not present himself at the door or was reckless in that regard.

47. The Crown in the Court below argued it was absurd to require the prosecution to prove that Mr. Zora knew the police were in attendance because, if he were outside his residence, he could not know that the police were in attendance. But in those circumstances, he would be guilty of failure to comply with the curfew condition, the far more serious circumstance. The condition to present himself at the door of his residence is an ancillary enforcement condition to the curfew condition. In any case, any difficulty of proof is never an invitation to skip proof of a component of an offence.

48. The Crown also appeared to suggest that an accused charged with the failure to present at door could simply refrain from testifying and then claim a reasonable doubt exists because his failure is equally consistent with having been out, indisposed or sleeping. This concern ignores a trial judge's basic task: drawing common sense inferences of knowledge or wilful blindness from all the facts. In this case, a judge presiding over a new trial can consider the fact that: Mr. Zora was under a curfew condition and was expected to be at home when the police attended; the police rang the doorbell and knocked at a late but not unreasonable hour; and waited the required five minutes. From those facts, the trier of fact could conclude Mr. Zora knew or was wilfully blind to the police officer's attendance and intentionally failed to present himself as required. Of course, if Mr. Zora testifies that he was home but had no knowledge the police were in attendance, as he did at his first trial, the trier of fact must also consider his evidence, in the context of the evidence as a whole, against the reasonable doubt standard. Indeed, it is the intentional failure to present at the door with that knowledge or wilful blindness that is the gravamen of this offence on a subjective standard.

D. The Modern Approach to Canadian Statutory Interpretation and the Presumption of Subjective Fault

49. The modern approach to statutory interpretation can be simply stated: to seek the intention of Parliament by reading the words of the provision in context and according to their grammatical and ordinary sense, harmoniously with the scheme and object of the statute.[63] The Appellant will address those component parts below. First, however, the Appellant will address the presumption of subjective fault, as courts have, for centuries, relied on presumptions of legislative intent in their interpretation of statutory language.[64]

50. Substantive presumptions bring to bear on the interpretative process certain policies and values to which society is committed and that legislatures are assumed to have respected when enacting legislation. Often referred to as substantive canons, these presumptions will require a clear legislative statement of contrary intent in order to be displaced.[65]

51. There is a fundamental and general presumption that Parliament intends crimes to have a subjective fault element. The presumption of subjective intent is part of the context in which Parliament enacts criminal offences and in which the modern approach to statutory interpretation must be considered.[66]

52. It is precisely because of this presumption that Parliament is not required to expressly state the fault element. As recognized by Professor Roach, "common law presumptions remain quite important given the frequency with which Parliament enacts criminal offences without specifying any fault element."[67]

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[63] Stéphane Beaulac and Pierre-André Côté, "Driedger's 'Modern Principle' at the Supreme Court of Canada: Interpretation, Justification, Legitimization" (2006) 40 RJT 131 at para 48 [Appellant's BOA at Tab 4, p 12, para 48].
[64] The Honourable Thomas A Cromwell, Siena Anstis & Thomas Touchie, "Revisiting the Role of Presumptions of Legislative Intent in Statutory Interpretation" (2017) 95 Can Bar Rev 297 at para 1 [Appellant's BOA at Tab 5, p 2, para 1].
[65] *Ibid*.
[66] *R v H. (A.D.), supra* note 4 at paras 25-28.
[67] Kent Roach, *Criminal Law,* 6th ed (Toronto: Irwin Law, 2015) at 177 [Roach, "*Criminal Law*"] [Appellant's BOA at Tab 7, p 177].

53. This presumption is not a mere principle or tool of statutory interpretation, but embodies a foundational principle of criminal law: those without a guilty mind should not be punished.[68] For this reason, the presumption is not an outdated rule of construction that is at odds with the modern approach to statutory interpretation.[69] Nor is it to be simply stated and then forgotten in the exercise of statutory interpretation. On the contrary, in order to give weight to that important presumption, and the value it supports, this Court in *H. (A.D.)* set a high standard for rebutting that presumption in the form of "clear expressions of a different legislative intent."[70]

54. While the presumption does not depend on ambiguity for its operation, the fact that s.145(3) offences sit in a tatter of conflicting judgments only serves to reinforce a subjective fault requirement. As Madam Justice Fenlon found in her concurring reasons:

> Many judges, including Mr. Justice Thompson in the court immediately below, have noted that s. 145 is not clear as to the *mens rea* required for conviction. That lack of clarity is evident in the conflicting views on the issue expressed in the cases cited by my colleague at paras. 41 and 42 of her judgment. In my view, the lack of clarity in s. 145 regarding the *mens rea* required for conviction weighs heavily in favour of giving effect to the presumption of subjective intent. As Cromwell J. observed in *A.D.H.* "to the extent that Parliament's intent is unclear, the presumption of subjective fault ought to have its full operation...".[71]

i) The Legislative Text Supports a Subjective Fault Standard

55. At a minimum, the language chosen by Parliament in s. 145(3) is neutral. As acknowledged by Fenlon J.A. "fails" can mean neglect but can also imply acting contrary to the agreed legal duty or obligation and being unable to meet set standards and expectations. That definition is equally compatible with intentional conduct or inadvertence.[72] Bearing in mind the presumption, this neutrality supports the imposition of a subjective fault standard.

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[68] *R v Sault Ste. Marie*, *supra* note 56 at 1303; *R v. Creighton,* supra note 36 at 60.
[69] *R v H. (A.D.), supra* note 4 at para 28.
[70] *Ibid* at para 27.
[71] Court of Appeal Decision at para 74 [Appellant's Record at Tab 5, p 39].
[72] Court of Appeal Decision at para 78 [Appellant's Record at Tab 5, p 41].

56. However, it is argued the legislative text is not merely neutral but supports a subjective fault requirement because none of the language typically employed by Parliament to indicate an objective fault element is included. This was a critical consideration in Madam Justice Fenlon's reasons.[73]

57. In *H. (A.D.)* this Court found s.218 of the *Criminal Code* to require subjective fault. The factors that lead to a finding of subjective fault for s.218 offences apply equally to this offence: the provision is not defined in terms of dangerous or harmful conduct, in contrast to offences such as dangerous driving; it is not defined in terms of careless conduct, in contrast to offences such as careless storage of a firearm; it does not involve the context of a predicate offence, such as unlawful act manslaughter, referred to in *Creighton*; and it is not defined in terms of negligence. In *H. (A.D.)*, this Court found the lack of those indicators "strongly" supported subjective fault.[74]

ii) The Legislative Scheme Supports a Subjective Fault Standard

58. The crux of the Respondent's position and the majority of the Court of Appeal's reasoning is that this offence is a so-called "duty-based" or "risk-based" offence governed by a community standard and as such requires objective fault of a marked departure from the standard expected of a reasonable person in the same situation. In what follows, the Appellant argues that s. 145(3) is not concerned with conduct that is governed by a community standard. Rather, it is concerned with the accused's conduct measured against a binding judicial order particularized to the individual accused.

59. The marked departure standard is, by definition, a comparative one. To logically apply, the trier of fact must be able to distinguish between i) activity that falls within the norm, ii) a *mere* departure from the norm or *mere* carelessness, and iii) a *marked* departure. For that reason, all the offences for which the standard has been found to apply involve human activities that, by their very nature, fall on a continuum of behaviour where departures from

[73] Court of Appeal Decision at para 80 [Appellant's Record at Tab 5, p 41].
[74] *R. v. H. (A.D.)*, *supra* note 4 at para 42.

the norm are not only expected but *accepted*, unless the departure is marked.[75] Measuring the departure from the norm is a matter of degree.[76]

60. A good example of the degree to which conduct can vary from the norm may be seen with driving skills. A person's operation of a motor vehicle may be excellent, average, below average, merely negligent or careless or, finally, a marked departure. For criminal law purposes, we *accept* that persons may depart from the norm from time to time. Their driving is only criminal if their departure is a marked departure. As this Court said in *Roy*, "[s]imple carelessness, to which even the most prudent driver may occasionally succumb, is generally not criminal."[77] Every person who has driven with a student driver recognizes this reality of driving. Their driving is often a departure from the norm, but not necessarily a *marked* departure.

61. In contrast, a judge imposing a condition pursuant to s.515(4) is imposing a legal order to be complied with fully, not a community norm or duty from which we *accept* the accused may depart from as long as their departure is not a marked departure. Section 515(4) opens with these words:

> The justice may direct as conditions under paragraphs 2(b) to (e) that the accused <u>shall</u> do any one or more of the things as specified in the order…

62. The condition of release in s.515(4)(a) requires the accused to report to a bail supervisor. Under the Crown's purported theory for this condition, the court is not imposing an order to comply fully, but merely communicating a standard or duty that the accused must not depart from in a marked manner. That theory is unworkable for several reasons. First, it is inconsistent with the nature of the order. Second, there is no principled way to distinguish between a *mere* failure to report and a *marked* failure to report, because the accused is always expected to report. The accused either reported or did not. Unlike driving, there is no

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[75] *R v Roy,* 2012 SCC 26 at para 37, [2012] 2 SCR 60.
[76] *R v Beatty*, 2008 SCC 5 at paras 6-7, 34, 48, 53, [2008] 1 SCR 49; *R v Roy*, *supra* note 75 at paras 1-2, 28-30.
[77] *R v Roy, supra* note 75 at para 37.

principled way to measure the "manner" of the failure to report or for the Crown to show how the failure was not merely a departure but a marked departure.[78]

63. For a further example, consider the condition of release in s.515(4)(b) which requires an accused to remain within a territorial jurisdiction specified in the order. The Crown would not argue that the accused is only guilty depending on how far or for how long he departed. Instead, the Crown argues that any departure is a breach, evidencing that there is no legal continuum of activity on which to distinguish between a mere departure and a marked departure. The ability to draw that distinction is a fundamental principle of the marked departure standard. That principle also has a constitutional dimension.[79]

64. This Court in *Roy* reiterated the principle from *Beatty* that where the *mens rea* is a marked departure, proof of the *actus reus* of the offence, without more, does not support a reasonable inference that the required fault element of a marked departure was present.[80]

65. The Respondent is asking this Court to sanction exactly what this Court itself has found cannot be done, that is to infer from the failure to comply itself, without more, a so-called marked departure. This is exposed in the Crown's argument in the Court below that:

> In summary, *Ludlow* is a considered decision that stands for the principled proposition that the fault element under s.145 is satisfied upon proof of a *marked departure* from the standard of care expected of a reasonably prudent person subject to the terms of the recognizance/undertaking. As such, once the Crown establishes the accused has committed an overt breach of one of the conditions of his recognizance or undertaking, absent evidence of an exculpatory defence, a conviction should follow because the fault element (ie the moral blameworthiness) can be inferred from the substance of the breach itself. [italics in original; underlining added, citations omitted][81]

66. The Crown's argument embodies the scheme for strict liability offences: the fault – *mere* negligence – is inferred from the fact that the prescribed result has occurred (the *actus reus*),

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[78] *R v Beatty, supra* note 76 at para 40.
[79] *Ibid* at para 6; *R v Roy, supra* note 75 at para 24.
[80] *R v Roy, supra* note 75 at para 42.
[81] Respondent's Factum in the Court of Appeal at para 49.

unless the accused establishes an exculpatory defence, without the Crown having to prove anything more.[82] Indeed, the Court of Appeal in *Ludlow*, addressed *infra* at paras 81-88 in the section on the statutory defence of lawful excuse, committed the same error. It is not at all surprising that in applying an objective standard in this case, the trial judge resorted to principles of strict liability, saying:

> One would not expect a situation where a peace officer during curfew hours went surreptitiously to the door and then tried to say that non-presentation amounted to an offence, but this type of condition, I would say, in terms of compliance has analogies to strict liability.[83]

67. The problem of course is that there is an important presumption that Parliament intends *Criminal Code* offences to have a fault element to be proven by the Crown beyond a reasonable doubt, whether subjective or objective. There is no indication whatsoever that Parliament intended the offence to be one of strict liability or for any principles of or analogies to strict liability to apply.[84]

68. In further support of an objective standard of fault, the Crown in the courts below relied on s.215, the offence of failure to provide the necessaries of life. Section 215 was considered by this Court in *R v Naglik*.[85] *Naglik* offers a completely different context. First, the duty to provide necessaries of life is not imposed as a judicial order, but a legal standard based on community norms. Second, the departure from that duty can be measured on a continuum with reasoned distinctions between a *mere* departure and a *marked* departure, because we accept that persons may fail in that duty from time to time. What is culpable is a marked departure from the duty.

69. Where a duty is defined *by community norms*, an objective standard makes sense (and one that must be proven by the Crown beyond a reasonable doubt). In contrast, a subjective

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[82] *R v Sault Ste. Marie, supra* note 56 at 1325-1326; *R v. Wholesale Travel Group Inc.,* [1991] 3 SCR 154 at 248 (Cory J and L'Heureux-Dube J).
[83] Trial Court Decision at para 15 [Appellant's Record at Tab 1, p 9].
[84] *R v Baril; R v Prue*, [1979] 2 SCR 547 at 553; *R v MacDonald*, 2014 SCC 3 at para 54, [2014] 1 SCR 37; *R v Hammoud*, 2012 ABQB 110, 534 AR 80.
[85] *R v Naglik*, [1993] 3 SCR 122.

standard makes sense where the elements of the offence are *particularized to the individual*, through the bail judge's exercise of discretion in imposing conditions and tailoring the conditions to the circumstances of the individual accused.[86]

iii) The Purpose, Stigma and Penalty of s. 145(3) Supports a Subjective Fault Standard

70. The purpose of s.145(3) is to deter failures to comply and punish offenders. This legislative goal can be effectuated by and is best achieved through a subjective standard of fault because it ensures that only those who subjectively set out to create a risk of injurious conduct are punished.

71. In its recent report, the Pivot Legal Society emphasized that those individuals often faced with AJO charges are a far cry from a "criminal mastermind" or "violent predator."[87] Instead, they are often "people making the best choices available to them while navigating a life impacted by poverty, trauma, racism, colonization, homelessness, ill health, and substance use."[88] The application of an objective lens, blind to these systemic factors captures the most sympathetic offender and does little to vindicate the aim of the legislation.[89] The result is ascribing moral blameworthiness to an accused because he failed to meet a standard he may not have the aptitude to meet. This result should generate discomfort, particularly in light of the potential consequences which extend far beyond an entry on a criminal record.

72. First, it is a serious matter to allege that someone has violated a court order and has thus brought the administration of justice into disrepute. For example, where there are reasonable and probable grounds to believe an accused has contravened or is about to contravene a recognizance, they may be arrested without a warrant by a peace officer or a justice may issue a warrant. The arrested accused is then taken before a justice or judge, as the case may be, and if the justice or judge finds, on a balance of probabilities, the accused contravened

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[86] *R v Shoker, supra* note 62 at para 20.
[87] Project Inclusion, *supra* note 50 at 74.
[88] *Ibid.*
[89] See for example *R v Josephie*, *supra* note 52.

or had been about to contravene, the judge "shall" cancel the recognizance and order the accused be detained, unless the accused shows cause why his or her detention is not justified.[90]

73. Second, where an accused is simply charged with a s.145(3) offence, the onus is on the accused to show cause why his detention is not justified. If he fails, the justice shall order the accused be detained.[91] The same applies if charged with an indictable offence that is alleged to have been committed while at large after being released in respect of another indictable offence.[92]

74. Third, the stigma in relation to the failure to comply is itself high as demonstrated by Parliament's decision to make this a hybrid offence punishable by up to two years imprisonment. Indeed, the consequence of imprisonment is frequently contemplated and applied by trial court judges. Statistics released by the Canadian Department of Justice reveal that incarceration rates for AJOs are much higher than for other offences; however, the length of the prison sentences is usually shorter relative to other enumerated offences.[93] The penalty, although not conclusive, tends to support the presumption of a subjective fault requirement.

75. Even short-term jail stays for breaching conditions "can have long-term, serious or life-threatening consequences."[94] Pivot's research revealed that short term jail stays for a charge or conviction of an AJO often lead to withdrawal and an increased risk of overdose upon release. Risks of overdose aside, incarceration was also found to double the probability of needle sharing increasing the risk of HIV infection.[95]

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[90] *Criminal Code*, s 524(1)-(4) and (8); *R v Parsons* (1997) 124 CCC (3d) 92, 1997 CarswellNfld 262 at para 21 (Nfld CA) [Appellant's BOA at Tab 3, p 8, para 21].
[91] *Criminal Code*, s 515(6)(c).
[92] *Criminal Code*, s 515(6)(a)(i).
[93] *Trends in Offences Against the Administration of Justice*, *supra* note 2.
[94] Project Inclusion, *supra* note 50 at p 73.
[95] *Ibid* at p 80-81.

76. Beyond the harm to health and security of those cycling in and out of our correctional institutions, even short-term periods of incarceration "drive stigma" and decrease the ability to access the resources that will allow for successful reintegration into the community.[96]

77. The consequences of being charged with an AJO are equally devastating in the youth context. Violations of a condition of release may justify detention, even if the original charge could not result in a custodial sentence. Failure to comply with a condition of release constitutes a frequent justification for placing youth on remand.[97]

78. In summary, the stigma, harsh penalty and consequences for this offence are manifest. The seriousness of the sanction for what may, on the facts, be of little to no harm, supports a subjective fault requirement before the criminal law reaches the accused.[98]

E. Addressing *In Terrorem* Arguments

79. Requiring the Crown to prove subjective fault does not place an inappropriate or insurmountable obstacle on the Crown. Courts can and will use their common sense to make appropriate inferences from the surrounding circumstances and testimony by the accused, if any, either of intent, no intent (or recklessness or wilful blindness). As Germain J said in *Loutitt*, the "sky will not fall if the Crown has to prove a mental element."[99]

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[96] *Ibid* at 81

[97] Nicole M. Myers and Sunny Dhillon, *supra* note 42 at 192.

[98] For instance, an accused may leave his residence of work an hour early – and within his curfew – because he failed to adjust his clocks on the assigned night, not because he intended to leave his residence during his curfew. To criminalize such an accused and subject them to any sanctions lacks justification in the criminal law: *R v Josephie*, *supra* note 52 at paras 20-21.

[99] Gary Trotter, *The Law of Bail in Canada,* 3d ed (Toronto: Carswell, 2010) (loose-leaf 2016 – Rel.1) at ch12 at 5 [Appellant's BOA at Tab 11, p 5]; Roach, *Criminal Law*, *supra* note 67 at 173 [Appellant's BOA at Tab 7, p 173]; *R v Loutit*, 2011 ABQB 545 at paras 17-18, 284 C.C.C. (3d) 518.

80. This view was expressed by Fenlon J.A. in her concurring reasons when she held "the fear that an accused will be able to avoid conviction for a breach of a bail condition by simply asserting 'I forgot the date' or 'I did not hear the police knocking' is in my opinion overstated." That fear serves to underestimate the intelligence and common sense of triers of fact.[100]

F. The Role of a Statutory Defence of Lawful Excuse

81. This appeal allows the Court to explain what role, if any, Parliament's inclusion of a statutory defence of lawful excuse has in the determination of a fault element of an offence. This defence is extraneous to the elements of the offence and is not to be confused with the fault element. It is fact and offence specific.[101] Unfortunately, some courts have confused the fault element with the lawful excuse, which has resulted in the offence effectively being one of strict liability, where the accused must show due diligence. This is best demonstrated in the British Columbia Court of Appeal's decision in *Ludlow*,[102] relied on by the Respondent and the Court of Appeal.

82. In *Finlay*, this Court emphasized the evidentiary and legal onus does not shift because the fault element is objective:

> If a reasonable doubt exists either that the conduct in question did not constitute a marked departure from that standard of care, or that reasonable precautions were taken to discharge the duty of care in the circumstances, a verdict of acquittal must follow. … There is, however, no "reverse onus" on an accused to establish on the balance of probabilities that he or she exercised due diligence in order to negate a finding of fault under s. 86(2). [emphasis added][103]

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[100] Court of Appeal Decision at para 90 [Appellant's Record at Tab 5 at p 46].
[101] Trotter, *supra* note 99 at ch 12 at 16-18 [Appellant's BOA at Tab 11, pp 16-18]; *R v Moser* (1992), 71 CCC (3d) 165, 1992 CarswellOnt 87 at paras 41-45 (Ont CA) [Appellant's BOA at Tab 2, paras 41-45]; *R v Legere, supra* note 27 at paras 31-33 (Ont CA) [Appellant's BOA at Tab 1 at pp 8-10, paras 31-33].
[102] *R v Ludlow, supra* note 23.
[103] *R v Finlay*, [1993] 3 SCR 103 at 117.

83. Despite that guidance, the Court of Appeal in *Ludlow*, while purporting to adopt a marked departure standard, found as follows regarding the similar offence of failure to appear in s.145(2):

> As I interpret Code section 145(2), it provides that when the Crown establishes non-attendance by an accused contrary to an undertaking or recognizance, the accused should be found guilty unless he can point to some evidentiary basis supportive of a lawful excuse for his failure to appear. The section speaks of "proof of which lies on him". [emphasis added].[104]

84. No mention is made here of the Crown's obligation to prove *mens rea* before the issue of lawful excuse even becomes relevant. Instead, the Court erroneously imported *into* the lawful excuse component a burden on the accused to show due diligence, a hallmark of strict liability offences:

> Provided it is open to an accused to establish a defence of due diligence, conviction for certain offences on the basis of negligent conduct is constitutionally permissible. I would say the fault or *mens rea* requirement for this class of offence has a large element of the objective about it. Conviction can be avoided if an accused establishes a lawful excuse by a showing of due diligence to satisfy the obligation, including an honest and reasonable belief in a state of facts that would excuse non-attendance.[105] [emphasis added]

85. In *Beatty*, this Court affirmed the mistake of fact defence relates to the objective *mens rea* element. A mistake of fact only has to raise a doubt on the *mens rea* and therefore the Crown must disprove the so-called "defence" of mistake of fact beyond a reasonable doubt. A mistake of fact may arise from the Crown's case, the accused's case, or both. The Court of Appeal erred when it found the accused must establish a mistake of fact, which demonstrates the Court erroneously conceived of the burden of proof.[106]

86. Several authors and judges have commented on the faulty result of the reasoning in *Ludlow*, placing a burden on the accused to demonstrate due diligence when, with a *mens rea* offence,

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[104] *R v Ludlow*, *supra* note 23 at para 30.
[105] *Ibid* at paras 37, 40.
[106] *R v Beatty, supra* note 76 at paras 38-40; *R v Morrison*, 2019 SCC 15 at para 123 (Moldaver J for the majority), para 209 (Abella J in dissent but not on this principle); Stuart, *supra* note 36 at 299 [Appellant's BOA at Tab 9, p 299].

the fault element must be proven by the Crown beyond a reasonable doubt, even when objective.[107]

87. Despite guidance from this Court, the erroneous application of the burden of proof was repeated by the same Court of Appeal in *Ali*.[108] In the case before this Court, the trial judge erred in law when he found: "…this type of condition, I would say, in terms of compliance has analogies to strict liability offences."[109]

88. This case provides an opportunity to reaffirm the important distinction between: i) strict liability and offences with a fault element to be proven by the Crown; ii) the unshifting burden of proof on the Crown to prove the fault element; and iii) the distinction between the fault element and the lawful excuse components.

89. The Appellant submits that the statutory defence of lawful excuse says little about Parliament's intent for the fault element. It is a defence found in many offences and there is no indication Parliament intended its inclusion to indicate the fault element and even less so a "clear" expression of different legislative intent for the fault element than subjective fault.

G. If the Court Below Erred, a New Trial Should Be Ordered

90. If the correct fault element is subjective, the courts below erred in law in applying an objective fault element or worse, in the case of the trial court,[110] analogizing to strict liability. Generally, an error in law calls for allowing the appeal and granting a new trial pursuant to s.686(1)(a)(ii) and (2)(b) of the *Criminal Code*. That is the remedy that should have been

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[107] Trotter, *supra* note 99 at ch 12, pp 3-5 [Appellant's BOA at Tab 11, pp 3-5]; Stuart, *supra* note 36 at 246, footnote 502 [Appellant's BOA at Tab 9, p 246]; *R v Loutitt*, *supra* note 99 at para 14 (Germain J); *R v Eby*, 2007 ABPC 81 at paras 53-54, 95 (Allen J), 47 CR (6th) 289.
[108] *R v Ali*, 2015 BCCA 333, 326 CCC (3d) 408; Trotter, *supra* note 99 at ch 12 at 18 [Appellant's BOA at Tab 11, p 18].
[109] Trial Court Decision at para 15 [Appellant's Record at Tab 1, p 9].
[110] Trial Court Decision at para 15 [Appellant's Record at Tab 1, p 9].

granted on summary appeal,[111] on the further appeal to the Court of Appeal,[112] and that may be given by this Court.[113]

91. Only if the Crown meets its stringent onus under the proviso in s.686(1)(b)(iii) may this Court dismiss the appeal despite that error in law. This Court has previously found the curative proviso can only be applied where the Crown demonstrates the error in law was harmless or the evidence was overwhelming.[114] This Court has decided against watering down the onus and standards on the Crown. Unless the Crown can meet its onus on the strict standards in s.686(1)(b)(iii), "the law should follow its course and a new trial will result."[115] This case provides an opportunity to reaffirm the Crown's onus under the proviso and its strict standards.

92. The error in law in this case was not harmless - it went to an essential element of the offence and the central issue raised by the defence at trial.[116] Further, the evidence was nowhere near overwhelming. There was a realistic possibility that a new trial would produce at least a reasonable doubt.[117]

93. The Respondent suggested, in the Court below and in response to the leave application, that Mr. Zora is equally guilty on the objective marked departure and subjective recklessness standards. That position conflated the subjective reckless standard with objective fault or strict liability, by importing a requirement into recklessness that Mr. Zora at all times had a duty to ensure that he would ascertain whether the authorities were in attendance. That is exactly the error the trial judge committed when he analogized compliance with the condition with strict liability.[118]

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[111] *Criminal Code*, s 822(1).
[112] *Criminal Code*, s 839(2).
[113] *Supreme Court Act*, ss 45-46.
[114] *R v Van*, 2009 SCC 22 at paras 34-36, 55, [2009] 1 SCR 716.
[115] *R v Sarrazin*, 2011 SCC 54 at paras 22-28, [2011] 3 SCR 505.
[116] Supplementary Transcript (Provincial Court Trial) at p 61, ln 9 - ln 40 [Appellant's Record at Tab 11, p 120].
[117] *R v Sarrazin*, *supra* at note 115 at para 27.
[118] Trial Court Decision at para 15 [Appellant's Record at Tab 1, p. 9].

94. This Court in *Sault Saint Marie* and again in *Sansregret* emphasized the important distinction between recklessness and negligence. Under the doctrine of recklessness, there is no duty or standard of care on the accused. The mere possibility that factual circumstances might arise that would create a risk, which might be relevant to an assessment of negligence, is irrelevant. For recklessness to apply, the accused must actually see the risk at the time of the *actus reus* and nevertheless takes the chance of the prohibited consequence occurring, in this case that the Appellant knew that someone was in attendance at the door to his residence during his curfew, saw the risk that it was the police but nevertheless took the chance that it was not the police.[119]

95. The trial judge did not reject Mr. Zora's evidence that he was not aware *anyone* had attended, or the corroborating evidence of his witnesses. That makes sense, as the application of an objective standard did not require the trial judge to decide on what Mr. Zora actually knew or did not know.

96. The trial judge relied in part on the "defence evidence" in acquitting Mr. Zora of the other two counts - the alleged curfew breaches - demonstrating that his evidence was not devoid of any value.[120] As the issues of Mr. Zora's subjective knowledge, wilful blindness, intent or recklessness require an assessment of the credibility and weighing of the all evidence against the reasonable doubt standard, a new trial is required if this Court finds the fault element to be subjective.

97. The application of the proviso is a question of law with a standard of review of correctness.[121] There is no deference to be paid to Madam Justice Fenlon's application of the proviso to dismiss the appeal. In any case, Madam Justice Fenlon in the Court of Appeal did not apply the proviso.[122] No mention was made of s.686(1)(b)(iii) or its strict standards. Instead,

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[119] *R v Sault Saint Marie*, supra at note 56 at 1303; *R v Sansregret*, [1985] 1 S.C.R 570 at 581-582.
[120] Trial Reasons at para 17 [Appellant's Record at Tab 1, pp 9-10].
[121] *R v Van*, *supra* note 114 at paras 34-36, 55.
[122] Court of Appeal Decision at paras 92-96 [Appellant's Record at Tab 5, pp 46-48].

Madam Justice Fenlon applied the subjective fault element to the circumstances of the case and, in her view, found the Appellant to be reckless. That is not an appeal court's task - its role is limited to applying the strict standards under s.686(1)(b)(iii). Those standards are not met in this case.

PART IV – SUBMISSIONS ON COSTS

98. The Appellant does not seek costs and costs should not be awarded against him.

PART V – ORDER SOUGHT

99. The Appellant seeks an order allowing the appeal, quashing the convictions and ordering new summary trials on Count #2 on Information #38980-6 and Count #2 on Information #38980-7, Courtenay Registry, Provincial Court of British Columbia, pursuant to s. 686(1)(a) and (2)(b) of the *Criminal Code* and s. 45 of the *Supreme Court Act*.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Sarah Runyon
Garth Barriere
Counsel for the Appellant

September 15, 2019
Vancouver, British Columbia

PART VI – SUBMISSIONS ON CASE SENSITIVITY

There are no orders or statutory provisions that would impact the reasons of this Court.

PART VII – TABLE OF AUTHORITIES

Statutes	**Paragraph(s)**
An Act to amend the Criminal Code (criminal procedure, language of the accused, sentencing and other amendments), SC 2008, c 18, s 3. https://www.canlii.org/en/ca/laws/astat/sc-2008-c-18/latest/sc-2008-c-18.html *Loi modifiant le Code criminel (procédure pénale, langue de l'accusé, détermination de la peine et autres modifications)*, LC 2008, c 18, art 3. https://www.canlii.org/fr/ca/legis/loisa/lc-2008-c-18/derniere/lc-2008-c-18.html	37
An Act to amend the Criminal Code and the Department of Justice Act and to make consequential amendments to another Act, SC 2018, c 29, s 9. https://www.canlii.org/en/ca/laws/astat/sc-2018-c-29/latest/sc-2018-c-29.html *Loi modifiant le Code criminel et la Loi sur le ministère de la Justice et apportant des modifications corrélatives à une autre loi*, LC 2018, c 29, art 9. https://www.canlii.org/fr/ca/legis/loisa/lc-2018-c-29/derniere/lc-2018-c-29.html	38
Criminal Code, RSC 1985, c. C-46, s 515. https://laws-lois.justice.gc.ca/eng/acts/C-46/page-134.html#h-126679 *Code Criminel*, LRC 1985, c C-46, art 515. https://laws-lois.justice.gc.ca/fra/lois/C-46/page-134.html	61, 73
Criminal Code, RSC 1985, c. C-46, s 524. https://laws-lois.justice.gc.ca/eng/acts/C-46/page-137.html#h-126931 *Code Criminel*, LRC 1985, c C-46, art 524. *https://laws-lois.justice.gc.ca/fra/lois/C-46/page-137.html*	72
Criminal Code, RSC 1985, c C-46, s 686. https://laws-lois.justice.gc.ca/eng/acts/C-46/page-175.html#h-130097 *Code Criminel*, LRC 1985, c C-46, art 686. https://laws-lois.justice.gc.ca/fra/lois/C-46/page-175.html	90

Criminal Code, RSC 1985, c C-46, s 794. https://laws-lois.justice.gc.ca/eng/acts/C-46/page-206.html#h-132702 *Code Criminel*, LRC (1985), c C-46, art 794. https://laws-lois.justice.gc.ca/fra/lois/C-46/page-206.html	38
Criminal Code, RSC 1985, c C-46, s 822. https://laws-lois.justice.gc.ca/eng/acts/C-46/page-212.html#h-133192 *Code Criminel*, LRC 1985, c C-46, art 822. https://laws-lois.justice.gc.ca/fra/lois/C-46/page-212.html	90
Criminal Code, RSC 1985, c C-46, s 839. https://laws-lois.justice.gc.ca/eng/acts/C-46/page-214.html#h-133335 *Code Criminel*, LRC 1985, c C-46, art 839. https://laws-lois.justice.gc.ca/fra/lois/C-46/page-214.html	21, 90
Supreme Court Act, RSC 1985, c S-26, s 45. https://laws-lois.justice.gc.ca/eng/acts/S-26/page-4.html#h-443448 Cours suprême, LRC 1985, c S-26, art 45. https://laws-lois.justice.gc.ca/fra/lois/S-26/page-4.html	90
Supreme Court Act, RSC 1985, c S-26, s 46. https://laws-lois.justice.gc.ca/eng/acts/S-26/page-4.html#h-443448 Cours suprême, LRC 1985, c S-26, art 46. https://laws-lois.justice.gc.ca/fra/lois/S-26/page-4.html	90
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