SCC File No. 38540

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

B E T W E E N :

CHAYCEN MICHAEL ZORA

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

- and –

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PART I – OVERVIEW

1. The offence of breach of recognizance is one of the most commonly-charged criminal offences. The proliferation of charges for this offence is in part due to the overreliance on conditions of release, and the failure to abide by the ladder principle. Bail practices across Canada are frequently at odds with constitutional, statutory and jurisprudential frameworks that are intended to favour pre-trial release on the least onerous conditions necessary. The majority of the Court of Appeal failed to account for the reality of how bail orders are crafted.

2. Uniquely, this offence's main purpose is to address conduct that is *not* inherently criminal. Yet the consequences for an accused charged with breach of recognizance are serious. A charge or conviction for breach of recognizance means that it will be more difficult for the accused to be released in the future, and if the accused is released, it will be on more stringent conditions, thereby potentially leading to a cycle of re-offending and re-incarceration.

3. The above considerations support the conclusion that the *mens rea* for breach of recognizance is subjective, and that the Crown should be required to prove that the accused *intended* to breach a condition of release, or that – bearing in mind his or her particular characteristics – the accused was subjectively reckless or willfully blind to that possibility.

PART II – POSITION ON QUESTIONS IN ISSUE

4. The CLA only takes a position in respect of the first question raised by the Appellant: whether Parliament intended s. 145(3) to attract an objective or subjective standard of fault. The CLA will argue that the standard is subjective.

PART III – ARGUMENT

A. Administration of justice charges are clogging up the system

5. Criminal charges for violating recognizance conditions are very common. The 2016/2017 statistics released by Statistics Canada confirm that failure to comply with a court order is one of the five most frequent charges faced by adults in Canada, representing nearly 10% of all charges

in adult criminal courts across the country.[1] According to the Senate Committee for Legal and Constitutional Affairs' report *Delaying Justice is Denying Justice*, administration of justice offences represent 23% of completed cases in adult criminal court, pertaining in large part to breaches of release conditions.[2]

6. As the Senate Committee aptly observed, these offences are "clogging the courts".[3] More specifically, the Committee's report, which sought to address the systemic issue of delay in the criminal justice system, found that "administration of justice offences are taking up an inordinate amount of court time, which is thereby contributing to court delays for trials".[4] They represent a disproportionate number of prosecutions given the relative seriousness of the underlying conduct.

7. Indeed, the Senate Committee observed that administration of justice offences "rarely involve harm to a victim, other than to the justice system itself; they do not involve behaviour that is popularly considered 'criminal': rather they involve disobeying orders of the court or other parts of the justice system".[5] The Committee was particularly concerned about "cases where an accused person is back in court for minor matters, such as a breach of curfew or arriving late for trial".[6]

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[1] Statistics Canada, *Adult criminal and youth court statistics in Canada, 2016/2017*, by Zoran Miladinovic (January 24, 2019), at p. 6. See also: Canadian Civil Liberties Association and Education Trust, *Set Up to Fail: Bail and the Revolving Door of Pre-trial Detention*, by Abby Deshman and Nicole Myers (July 2014), at pp. 2, 8 ["CCLA Report"]. Moreover, the majority of people impacted by breaches of bail are already-marginalized accused persons including racialized accused: see, for instance, CCLA Report, *supra*, at pp. 4, 52, 72 and 75

[2] Report of the Standing Senate Committee on Legal and Constitutional Affairs, *Delaying Justice is Denying Justice: An Urgent Need to Address Lengthy Court Delays in Canada*, by The Hon. Bob Runciman and The Hon. George Baker (August 2016), p. 4 ["Senate Report"]

[3] Senate Report, *supra*, p. 140

[4] *Ibid.*, p. 6

[5] *Ibid.*, p. 139

[6] *Ibid.*, p. 6

B. Breaches of recognizance target conduct that is not inherently criminal

8. In most cases, the conduct underlying the charge of breach of recognizance is not inherently harmful to others and would not be criminal but for the fact of the recognizance. If a purported breach *is* inherently criminal and *does* cause actual harm – for instance, uttering a threat, committing an assault, or criminally harassing a person – then a separate non-administration of justice charge can generally be laid. There is no need for an independent breach charge to accompany the main charge in order to address the underlying conduct. Should the accused eventually be convicted of the underlying offence, the fact that it was committed while the accused was bound by a recognizance – and indeed in breach of that recognizance – will be an aggravating factor on sentence. In one sense, the offence of breach of recognizance is thus really only needed when the underlying conduct *is not* criminal.

9. The true purpose served by breach of recognizance charges, then, is to provide a mechanism for enforcing court orders. The fairness of the underlying orders, and what they require of accused persons who are presumed innocent, thus need to be carefully considered.

10. The Court of Appeal's analysis acknowledges the import of the underlying bail-crafting exercise. Indeed, it places great significance on the principle that the conditions imposed on an accused person on judicial interim release are to be the *minimum* required to satisfy the objectives set out in s. 515(10) of the *Criminal Code.* The majority reasoned that an objective standard of fault for breach of recognizance would not render the scope of potential liability "unduly broad" because the conditions imposed on the accused must be "minimal, reasonable, and necessary".[7] In considering the fact that the objective fault standard is "uniform" and does not incorporate individualized characteristics such as age and experience, the majority also took into account that if an accused person has "cognitive difficulties that could potentially impact their ability to comply with conditions of release, the bail judge would account for these in assessing the appropriate form of release".[8]

11. The majority's reasoning reflects an idealized conception of our bail courts that simply does not accord with reality.

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[7] Reasons of the majority, at para. 60
[8] Reasons of the majority, at para. 62

C. There is an overreliance on conditions of release that are neither tailored nor required

12. Despite this court's direction to abide by the principle "that release is favoured at the earliest reasonable opportunity and … on the least onerous grounds,"[9] this so-called "ladder principle" often does not reflect the reality of how bail orders are crafted in practice.[10] An awareness of that reality is essential to the present analysis.

13. The proliferation of breach of recognizance charges can in part be attributed to the overreliance on conditions of release. Despite there in fact being no requirement that release conditions be imposed at all, and the fact that – in accordance with the ladder principle – none *should* be imposed if they are not required to address s. 515(10) concerns, it can safely be said that virtually no accused person is ever released without conditions.[11]

14. Moreover, the conditions imposed most frequently do *not* abide by the ladder principle, owing to a number of factors.

15. First, and importantly, accused persons are often released on recognizances of bail on the consent of the Crown. In that circumstance, the trade-off for the accused being able to obtain a consent release is to acquiesce to the conditions devised by the Crown. Given the culture of risk management and risk aversion discussed below, too often are these not "the minimum required to satisfy the objectives set out in s. 515(10)".

16. In many cases, at least in Ontario, Crown counsel's consent is conditional on all of the proposed conditions being accepted by the accused. In other words, the Crown's consent to release may be a "take it or leave it" proposition, wherein the accused will not be able to challenge any of the proposed conditions and require the justice of the peace to rule on whether they are warranted.

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[9] *R. v. Antic*, 2017 SCC 27, [2017] 1 S.C.R. 509, at para. 29; *R. v. Anoussis*, 2008 QCCQ 8100, 242 C.C.C. (3d) 113, at para. 23

[10] See, for instance, *R. v. Tunney*, 2018 ONSC 961, at paras. 34, 43-46, 48, 50-54 and 57

[11] This is so even though the Court as recently as this year in *R. v. Myers*, 2019 SCC 18, at para. 51, referenced the possibility that a person eventually released following a 90-day bail review and the passage of time, could be released "with or without conditions".

17. Faced with such a conditional consent on the part of the Crown, it is no wonder that accused persons will rarely challenge the conditions proposed by Crown counsel. Their inclination to resist the imposition of unnecessary conditions is predictably subordinate to their desire to be released, on any terms, as soon as possible.[12] In many cases, the choice is between the risk of being detained by a justice of the peace following a contested hearing, or an assured release on unreasonable or unnecessary conditions. Almost without fail, accused persons will accept unduly onerous conditions "to secure immediate release by consent of the Crown".[13] Few will opt for a course of action that includes the risk of being detained.

18. When the consent release is addressed before the court, the reasonableness of the conditions put forward by the Crown are not necessarily the subject of an independent assessment by the justice of the peace. Some avoid tinkering with a joint submission by the parties on release, treating it much like a joint position on sentence. In many cases, that is simply attributable to how busy bail courts are and the urgency of moving on to the next matter to ensure that no accused person is unnecessarily detained.

19. Very frequently, an accused will also seek to avoid a contested bail hearing given the risk that the bail court will not even have time to hear the matter before court closes for the day, thereby forcing the accused back into remand for the night. Owing to the reality of our busy and underfunded bail courts (rendered all the busier by arrests for breaches of recognizance), consent releases are typically – and fairly – dealt with as a matter of priority, with contested hearings sometimes being adjourned for lack of court time.

20. Second, where bail is contested by the Crown and a hearing is held, unnecessary and overbroad conditions are still not infrequently imposed by the presiding justice. One explanation for this is the recognized culture of risk-aversity when it comes to judicial interim release. Indeed, there is an "increased focus placed on risk avoidance and risk management within the

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[12] *R. v. St. Cloud*, 2015 SCC 27, [2015] 2 S.C.R. 328, at para. 125

[13] Indeed persons held in pre-trial custody will "do everything in their power to be released as soon as possible": CCLA Report, *supra*, at p. 9. See also: Cheryl Marie Webster, *Broken Bail in Canada: How We Might Go About Fixing It*, Department of Justice Canada, Research and Statistics Division (June 2015) at p. 7 ["Webster Report"]

bail system. A risk averse mentality has influenced key decision makers, police officers, and the courts."[14] For justices of the peace who make bail decisions in Ontario, this may in part be attributable to the fact that there is no legal-training requirement for the position.[15]

21. Moreover, bail hearings are relatively informal and must take place expeditiously to accommodate lengthy court lists. Accused persons are often either not represented by private counsel, or have only just retained counsel. Many tend to be represented by duty counsel. Defence counsel – whether privately retained or not – have very little time to obtain information and present a fulsome picture of the accused's circumstances to the court. In an ideal world, a bail judge dealing with an accused with cognitive difficulties would take that into account in crafting the conditions for release. In the real world, it is possible that the bail judge may not know about the accused's cognitive difficulties. Defence counsel and the Crown could likewise be unaware.

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[14] Department of Justice Canada, *Research in Brief*, by Kyle Coady (2018) [DOJ Research In Brief]. In his 2012 commentary on the bail system, Friedland opined that "[m]any justices [of the peace] are understandably risk averse. There is far less criticism at keeping an accused in custody or releasing the person with stringent conditions than in releasing the accused without such conditions": Martin L. Friedland, "The *Bail Reform Act* Revisited" (2012) 16 C.C.L.R. 287 at 292. See also *R. v. Tunney*, *supra*, at para. 29, and CCLA report, *supra*, at p. 26-27: "Intertwined with this culture of adjournment is an aversion to being the one to make the release decision. … [A]ctual practice would lead one to believe that the onus was almost always on the accused to demonstrate why a release was appropriate – the opposite of what is suggested by current law".

[15] Friedland observed that "[t]he one thing that was different [between 1965 and 2012] – to my surprise – was that the person heading the drama was not a provincial court judge, but rather a justice of the peace, the overwhelming majority of whom in Ontario are not legally trained and who may not in practice enjoy the same degree of independence, confidence, and authority as provincial court judges. Justices of the peace may therefore be more inclined than provincial court judges to play it safe and not take the risk of releasing an accused without sureties and stringent conditions": Friedland, *supra*, at p. 294

22. In Ontario, this reality has been compounded by recent cuts to Legal Aid Ontario's budget, which have translated into slashing funding for defence counsel to appear at bail hearings, and cuts to duty counsel services. This means that even fewer defence counsel are able to assist accused persons at the bail stage, resulting in still fewer safeguards against overly onerous or inappropriate conditions of release.[16]

23. Thus, whether at the initiative of the Crown or of the justice of the peace, "a host of conditions" are routinely imposed that "frequently appear to have little relation to the facts of the alleged offence and do not seem to be necessary to give effect to the criteria for release".[17] Only recently in Ontario have Crown counsel been encouraged to move away from automatically requiring sureties,[18] but surety bails remain the norm. Unrealistic conditions are often imposed, "such as requiring an alcoholic to abstain from drinking alcohol".[19] Conditions imposed can be "overly vague" or "far-reaching", making it difficult to comply over an extended period of time.[20] The simple fact of imposing multiple conditions – a common occurrence – can make it difficult for an accused person to maintain compliance.[21]

24. Altogether, the ladder principle is honoured more in the breach than in the observance. This Court recently acknowledged that the principle has not been consistently applied in practice.[22] In fact, it "has – in many cases – been set aside in favour of increasingly stricter forms of release".[23]

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[16] Duty counsel have no knowledge of the client and far less ability to craft a proper release plan that is properly tailored to any given accused. And duty counsel services have been reduced such that they are now even more at a disadvantage in this regard than they have been in the past. Increasingly, they are not able to be present at all.

[17] Webster Report, *supra*, at p. 7. See also Senate Report, *supra*, at p. 6; CCLA Report, *supra*, p. 27

[18] *Antic*, *supra*, at paras. 64-65; *Tunney*, *supra*, at para. 35

[19] Senate Report, *supra*, at p. 6

[20] CCLA Report, *supra*, at p. 27

[21] DOJ Research In Brief

[22] *Antic*, *supra*, at paras. 64-65

[23] Webster Report, *supra*, at p. 6

25. A bleak picture emerges: accused persons released pending trial and presumed innocent "are living under highly restrictive conditions" and courts are "bogged down with administration of justice charges stemming from unnecessary or overly broad release conditions that should not have been imposed in the first place".[24] Accused persons naturally struggle to comply with conditions of release that are overly-onerous, poorly drafted, or insufficiently tailored to their circumstances.

26. It should also be noted that, once conditions are imposed, there are practical obstacles to obtaining timely variations of the conditions when a change of circumstance arises, or to obtaining a timely review of bail conditions. This can lead to compliance difficulties where a sudden change in circumstance impacts the accused's immediate ability to comply with his or her conditions.

27. While there have been important efforts made both by the Crown and by Parliament to address some of the above issues, the picture painted above remains accurate. For instance, Bill C-75 contains a number of bail-related provisions which come into effect on December 18, 2019, including a codification of *Antic*'s principle of restraint. The Act also provides guidance to police on imposing reasonable, relevant and necessary conditions that are related to the offence and consistent with the principles of bail, and seeks to increase the types of conditions police can impose on accused, so as to divert unnecessary matters from the courts and reduce the need for a bail hearing.[25]

28. While a step in the right direction that will hopefully have *some* impact in certain cases, the practicalities of bail highlighted above will remain and will likely not be impacted by the codification of these pre-existing principles.

D. The criminal justice system is manufacturing its own crime

29. Finally, a charge or conviction for breach of recognizance has profound consequences for an accused person, ones that open a revolving door and risk perpetuating a cycle of re-offending.

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[24] CCLA Report, *supra*, at p. 4

[25] *An Act to amend the Criminal Code, the Youth Criminal Justice Act and other Acts and to make consequential amendments to other Acts,* S.C. 2019 c. 25 (Bill C-75 in the 42nd Parliament), ss. 210 to 236. (future ss. 493.1 and ff. of the *Criminal Code*)

30. As acknowledged by Fenlon J.A. in her concurring reasons, the main and most devastating consequence is that a charge or conviction for breach of recognizance makes it more difficult for an accused to obtain judicial interim release in the future.[26] The accused will face this difficulty in both the short and long term. As the Appellant notes, an accused who is *charged* with one of the offences in s. 145 now bears the onus of proof in seeking further release.[27] And an accused person who has been *convicted* of this type of offence will generally find it more difficult to obtain judicial interim release should that accused face other, unrelated charges later on.

32. If the accused does manage to obtain release despite a charge or conviction for breach of recognizance, either the Crown or the releasing justice will often insist on more stringent conditions, thereby "creating even greater opportunities for the accused to breach the new release order".[28] Indeed the more stringent the conditions are, the easier it is to breach them inadvertently. This is especially disheartening given that the original release order may *itself* have contained unnecessary or unreasonable conditions that set the accused up to fail.[29]

33. In perpetuating this cycle of ever-increasingly stringent conditions, the criminal justice system is, in some respects, "manufactur[ing] … its own crime".[30]

E. All of these factors militate in favour of a subjective *mens rea*

34. Beyond the considerations of statutory interpretation which also led Fenlon J.A. in her concurring reasons to conclude that the *mens rea* for breach of recognizance is subjective, the considerations set out above cry out for the most stringent standard, interpreted as strictly as possible in its application.

35. Settling for a lower objective standard will mean that persons who do not intentionally set out to breach their conditions, and that are not so negligent as to be reckless regarding

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[26] Concurring reasons, at para. 75
[27] Appellant's Factum, at para. 73; *Criminal Code*, s. 515(6)(c)
[28] Webster Report, *supra*, at p. 8
[29] *Ibid.*, at p. 8
[30] *Ibid.*

compliance, will be labeled criminals and potentially be caught up in a cycle of re-offending. Administration of justice offences should not be used to tack additional charges onto an accused who is trying to comply with challenging conditions, or one who is simply not acting to the standard of a reasonably diligent person.

36. An objective standard would in fact lead to instances where no one has considered the individualized characteristics of the accused such as age, experience, and cognitive difficulties, and whether their conditions of release were tailored to these characteristics such that they would be able to comply with them. It would also lead to instances where no one has considered whether the conditions were the least onerous to address s. 515(10) concerns.

37. The interpretation of s. 145(3) should take into account that Canadian bail courts and accused persons are not perfect. As LeBel J. observed, "The law is designed for the common man, not for a community of saints or heroes."[31] The accused caught up in our bail system are often dealing with overly onerous and confusing conditions, while navigating the stress and uncertainty of criminal proceedings. Broadening the scope of liability for breaches of recognizance will lead to dramatic consequences for these accused in cases where they have a negligible level of moral blameworthiness, and it will not assist courts in applying scarce resources where they are most needed.

PART IV – COSTS

38. The CLA seeks no order as to costs and asks that no costs are awarded against it.

PART V – ORDER SOUGHT

39. The CLA takes no position on the proper disposition of the appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

DATED at Toronto, Ontario this 15th day of November, 2019.

Christine Mainville
Counsel for the Intervener, CLA (Ontario)

[31] *R. v. Ruzic*, 2001 SCC 24, [2001] 1 S.C.R. 687, at para. 40

PART VI – TABLE OF AUTHORITIES

Case Law

Tab	Case	Paragraph
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	Report of the Standing Senate Committee on Legal and Constitutional Affairs, *Delaying Justice is Denying Justice: An Urgent Need to Address Lengthy Court Delays in Canada*, by The Hon. Bob Runciman and The Hon. George Baker (August 2016)	5, 6, 7, 23
1	Cheryl Marie Webster, *Broken Bail in Canada: How We Might Go About Fixing It*, Department of Justice Canada, Research and Statistics Division (June 2015)	17, 23, 24, 32, 33
	Department of Justice Canada, *Research in Brief*, by Kyle Coady (2018)	20, 23
2	Martin L. Friedland, "The *Bail Reform Act* Revisited" (2012) 16 C.C.L.R. 287	20

PART VII – LEGISLATION CITED

Criminal Code, R.S.C. 1985, c. C-46, s. 515

Code criminel, L.R.C. (1985), ch. C-46, art. 515

An Act to amend the Criminal Code, the Youth Criminal Justice Act and other Acts and to make consequential amendments to other Acts, S.C. 2019 c. 25 (Bill C-75 in the 42nd Parliament), ss. 210 to 236

Loi modifiant le Code criminel, la Loi sur le système de justice pénale pour les adolescents et d'autres lois et apportant des modifications corrélatives à certaines lois, L.C. (2019), ch. 25, (Projet de loi C-75, 42e législature), art. 210-236