

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)

- AND -

ATTORNEY GENERAL OF ONTARIO,
ATTORNEY GENERAL OF BRITISH COLUMBIA,
CRIMINAL LAWYERS' ASSOCIATION OF ONTARIO,
VANCOUVER AREA NETWORK OF DRUG USERS,
BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION,
CANADIAN CIVIL LIBERTIES ASSOCIATION,
INDEPENDENT CRIMINAL DEFENCE ADVOCACY SOCIETY,
PIVOT LEGAL SOCIETY and
ASSOCIATION QUÉBÉCOISE DE AVOCATS ET AVOCATES DE LA DÉFENSE

INTERVENERS

FACTUM OF INTERVENER
CANADIAN CIVIL LIBERTIES ASSOCIATION
(Pursuant to Rule 37 of *The Rules of the Supreme Court of Canada*)

Paliare Roland Rosenberg Rothstein LLP
155 Wellington St. W., 35th Floor
Toronto, ON M5V 3H1

Gowling WLG (Canada) LLP
160 Elgin Street, Suite 2600
Ottawa, ON K1P 1C3

Danielle Glatt (LSO #65517N)
Tel.: 416.646.7440
Fax.: 416.646.4301
Email: danielle.glatt@paliareroland.com

D. Lynne Watt
Tel.: (613) 786-8695
Fax.: (613) 788-3509
Email: lynne.watt@gowlingwlg.com

Counsel for the Intervener, Canadian Civil Liberties Association

Ottawa Agent for Counsel for the Intervener, Canadian Civil Liberties Association

:

Marion & Runyon, Criminal Lawyers

1301 Cedar Street
Campbell River, B.C. V9W 2W6

Sarah Runyon

Garth Barriere

Tel: (250) 286-0671

Fax: (250) 287-7361

Email: runyon@marionandcompany.ca

Email: gbarriere@telus.net

Counsel for the Appellant

Michael J. Sobkin

Barrister & Solicitor

331 Somerset Street West
Ottawa, ON K2P 0J8

Tel: (613) 282-1712

Fax: (613) 288-2896

Email: msobkin@sympatico.ca

Ottawa Agent for Counsel for the
Appellant

Public Prosecution Service of Canada

900-840 Howe Street
Vancouver, B.C. V6Z 2S9

Ryan J. Carrier

Tel: (604) 666-5250

Fax: (604) 666-1599

Email: ryan.carrier@ppsc-sppc.gc.ca

Counsel for the Respondent

Public Prosecution Service of Canada

Ottawa, ON K1A 0H8

Francois Lacasse

Tel: (613) 957-4770

Fax: (613) 941-7865

Email: francois.lacasse@ppsc.sppc.gc.ca

Ottawa Agent for Counsel for the
Respondent

Attorney General of Ontario

720 Bay Street
10th Floor
Toronto, ON M5G 2K1

Susuan L. Reid

Tel: (416) 326-2682

Fax: (416) 326-4656

Email: susan.reid@ontario.ca

Counsel for the Intervener, Attorney General
of Ontario

Borden Ladner Gervais LLP

1300-100 Queen Street
Ottawa, ON K1P 1J9

Karen Perron

Tel: (613) 369-4795

Fax: (613) 230-8842

Email: kperron@blg.com

Ottawa Agent for Counsel for the
Intervener, Attorney General of Ontario

Attorney General of British Columbia

Criminal Appeals & Special Prosecutions
6th Floor, 865 Hornby Street
Vancouver, BC V6Z 2G3

Susanne E. Elliott

Tel: (604) 660-1126

Fax: (604) 660-1133

Gowling WLG (Canada) LLP

160 Elgin Street
Suite 2600
Ottawa, ON K1P 1C3

Robert E. Houston, Q.C.

Tel: (613) 783-8817

Fax: (613) 788-3500

Email: susanne.elliott@gov.bc.ca

Counsel for the Intervener, Attorney General
of British Columbia

Henein Hutchison LLP
202-445 King Street West
Toronto, ON M5V 1K4

Christine Mainville
Lauren Binhammer
Tel: (416) 368-5000
Faz: (416) 368-6640
Email: cmainville@henein.com

Counsel for the Intervener, Criminal
Lawyers' Association Ontario

Gratl & Company
511-55 East Cordova Street
Vancouver, BC V6A 0A5

Jason B. Gratl
Toby Rauch-Davis
Tel: (604) 694-1919
Fax: (604) 608-1919
Email: jason@gratlandcompany.com

Counsel for the Intervener, Vancouver Area
Network of Drug Users

Blake, Cassels & Graydon LLP
595 Burrard Street, P.O. Box 49314
Suite 2600, Three Bentall Centre
Vancouver, BC V7X 1L3

Roy W. Millen,
Alexandra Luchenko
Danny Urquhart
Tel: (604) 631-3300
Fax: (604) 631-3309
Email: roy.millen@blakes.com

Counsel for the Intervener, British Columbia
Civil Liberties Association

Email: robert.houston@gowlingwlq.com

Ottawa Agent for Counsel for the
Intervener, Attorney General of British
Columbia

Goldblatt Partners LLP
500-30 Metcalfe St.
Ottawa, ON K1P 5L4

Colleen Bauman
Tel: (613) 482-2463
Fax: (613) 235-3041
Email: cbauman@goldblattpartners.com

Ottawa Agent for Counsel for the
Intervener, Criminal Lawyers' Association
Ontario

Michael J. Sobkin
331 Somerset Street West
Ottawa, Ontario K2P 0J8
Tel: (613) 282-1712
Fax: (613) 288-2896
Email: msobkin@sympatico.ca

Ottawa Agent for Counsel for the
Intervener, Vancouver Area Network of
Drug Users

Power Law
130 Albert Street
Suite 1103
Ottawa, ON K1P 5G4

Maxine Vincelette
Tel: (613) 702-5573
Fax: (613) 702-5573
Email: mvincelette@powerlaw.ca

Ottawa Agent for Counsel for the
Intervener, British Columbia Civil Liberties
Association

Peck and Company

744 West Hastings Street
Suite 610
Vancouver, BC V6C 1A5

Jeffrey T. Campbell

Tel: (604) 669-0208
Fax: (604) 669-0616
Email: jcampbell@peckandcompany.ca

Counsel for the Intervener, Independent
Criminal Defence Advocacy Society

David N. Fai, Law Corporation

300 - 1401 Lonsdale Avenue
North Vancouver, BC V7M 2H9

David N. Fai

Tel: (604) 685-4150
Fax: (604) 986-3409
Email: davidfai@telus.net

Counsel for the Intervener, Pivot Legal
Society

Desrosiers, Joncas, Nouriaie, Massicotte

500 Place d'Armes, Bureau 1940
Montréal, QC H2Y 2W2

Nicholas St-Jacques**Pauline Lachance**

Tel: (514) 397-9284
Fax: (514) 397-9922
Email: nsj@legroupenouraie.com

Counsel for the Intervener, Association
québécoise des avocats et avocates de la
défense

Gowling WLG (Canada) LLP

2600 - 160 Elgin Street
P.O. Box 466, Stn. A
Ottawa, ON K1P 1C3

Matthew Estabrooks

Tel: (613) 786-0211
Fax: (613) 788-3573
Email:
matthew.estabrooks@gowlingwlg.com

Ottawa Agent for Counsel for the
Intervener, Independent Criminal Defence
Advocacy Society

Goldblatt Partners LLP

500-30 Metcalfe St.
Ottawa, ON K1P 5L4

Colleen Bauman

Tel: (613) 482-2463
Fax: (613) 235-3041
Email: cbauman@goldblattpartners.com

Ottawa Agent for Counsel for the
Intervener, Pivot Legal Society

TABLE OF CONTENTS

	Pages
PART I: Overview and Statement of Facts	1
PART II: Statement of Issues	2
PART III: Argument	2
A. Policy Reasons and Recent Jurisprudence Support a Subjective Fault Element for Breach of Recognizance	2
B. Breach of Recognizance is not a Duty Based Offence	6
C. If s. 145(3) is Ambiguous a <i>Charter</i> Values Interpretation Supports a Subjective Fault Standard	9
PART IV: COSTS	10
PART V: ORDER REQUESTED	10
PART VII: TABLE OF AUTHORITIES	11

FACTUM OF INTERVENER CANADIAN CIVIL LIBERTIES ASSOCIATION

PART I. OVERVIEW AND STATEMENT OF FACTS

1. This appeal engages significant issues related to an individual's liberty interests, and the statutory interpretation of s. 145(3) of the *Criminal Code* in respect of breach of recognizance. It requires the Court to determine if the fault standard applicable to breach of recognizance is subjective or objective.

2. The results of this appeal will impact the civil liberties of every accused person who faces a charge of breach of recognizance. There is no dispute that the bail system in Canada faces significant challenges. This Court has previously acknowledged broader systemic issues that arise from bail practices in Canada, including the harmful impact of restrictive bail on individuals' fundamental rights.

3. An objective standard of fault in breach of recognizance, endorsed by the majority of the British Columbia Court of Appeal ("**BCCA**"), removes any individualized analysis from the determination of whether the accused had the requisite *mens rea* and, instead only requires a consideration of whether the breach was a marked departure from the standard expected of a reasonable person in the same situation.

4. The Canadian Civil Liberties Association's ("**CCLA**") position that a purposive interpretation of s. 145(3) requires consideration of the broader systemic issues that arise from bail practices in Canada including those accepted by this Honourable Court previously in the CCLA 2014 report, *Set Up to Fail: Bail and the Revolving Door of Pre-Trial Detention* (the "**CCLA Bail Report**"),¹ is supported by policy and recent

¹The Canadian Civil Liberties Association and Education Trust "Set up to Fail: Bail and the Revolving Door of Pre-Trial Detention", (July, 2014) [the "**CCLA Bail Report**"]: the CCLA Bail Report has been cited in numerous judicial decisions, including by the this Honourable Court (*R v Myers*, 2019 SCC 18; *R v Penunsi*, 2019 SCC 39; and *R v Antic*, 2017 SCC 27 [**Antic**]); and by lower courts across the country (*R v Tunney*, 2018 ONSC

jurisprudence. If s. 145(3) is interpreted purposively and in accordance with *Charter* values, there is no basis to displace the presumption of subjective intent.

5. The CCLA adopts and relies on the facts as summarized by the parties and takes no position on the appropriate finding in the appellant's case.

PART II: STATEMENT OF ISSUES

6. The CCLA submits the following: (i) policy reasons and recent jurisprudence support a subjective fault requirement for s. 145(3); (ii) breach of recognizance is not a duty-based offence as there are important distinctions between the nature and consequences of true duty-based offences and breach of recognizance that were not properly considered by the majority of the BCCA; and (iii) if the Court finds s.145(3) to be ambiguous, a subjective intent aligns with *Charter* values.

PART III: ARGUMENT

A. Policy Reasons and Recent Jurisprudence Support a Subjective Fault Element for Breach of Recognizance

7. There are just policy reasons for why the appropriate *mens rea* for a breach of recognizance is subjective, anchored in this Courts' jurisprudence, which has increasingly recognized how certain personal circumstances, such as mental and physical disability (including addictions), poverty, homelessness and a combination of those factors, impact an individual's ability to comply with certain laws and his or her degree of moral blameworthiness.²

961; *R v ADM*, 2017 NSPC 77; *R v Murphy*, 2017 YKSC 34; *R v Schab*, 2016 YKTC 69; *R v Mead*, 2016 ONCJ 308; and *R v K.(R.)*, 2014 ONCJ 566).

² See e.g. *R v Boudreault*, 2018 SCC 58 [**Boudreault**]; see also: *Canada (Attorney General) v PHS Community Services Society*, 2011 SCC 44 at paras 97-106 [**Insite**]; Margot Young, "Context, Choice, and Rights: *PHS Community Services Society v.*

8. Contrary to the majority of the BCCA's finding that a subjective fault would undermine the function of the bail system, the CCLA's Bail Report and other reports published since³ show that the individual and societal costs of an objective fault standard are likely to be severe, especially for those most marginalized and underserved by the criminal justice system. This is unacceptable. The bail system must uphold rather than undermine fundamental rights, public safety and the administration of justice, particularly given that bail conditions are typically tailored to the defendant themselves, *subjectively*.

9. The CCLA Bail Report examines the cycle of detention, restrictive release and re-arrest and concludes, among other things, that individuals released on bail are often subject to disproportionate, unnecessary and onerous conditions of release that may be virtually impossible for an accused to comply with.⁴

10. The CCLA Bail Report concludes that this cycle has a disproportionate impact on Indigenous peoples and criminalizes poverty, addiction and mental illness:

Legally innocent individuals are processed through a bail system that is chaotic and unnecessarily risk-averse and that disproportionately penalizes – and frequently criminalizes – poverty, addiction and mental illness. Canadian bail courts regularly impose abstinence requirements on those addicted to alcohol or drugs, residency conditions on the homeless, strict check-in requirements in difficult to access locations, no-contact conditions between family members, and rigid curfews that interfere with employment and daily life. Numerous and restrictive conditions, imposed for considerable periods of time, are setting people up to fail – and failing to comply with a bail condition is a criminal offence, even if the underlying behaviour is not otherwise a crime.⁵

Canada (Attorney General)" (2011) 44 UBC L Rev 221 at 242-5, 248-50; and *Canada (Attorney General) v Bedford*, 2013 SCC 72 at para 86 [***Bedford***].

³ See e.g. Pivot Legal Society "Project Inclusion: Confronting Anti-Homeless & Anti-Substance User Stigma in British Columbia", (December, 2018); John Howard Society "Reasonable Bail?",(September, 2013) [**"Reasonable Bail"**].

⁴The CCLA Bail Report, *supra* note 1.

⁵ The CCLA Bail Report, *supra* note 1 at 1.

11. These policy considerations are strengthened by the presumption of innocence and the general principle in bail and pre-trial detention that the government must justify restrictions on an individual's liberty.⁶

12. As the Appellant submits, if an accused has been charged with a breach of recognizance, the onus is placed on the accused to show cause why they should be released.⁷ The accused may be held either until they have discharged their onus to show why they ought to be re-released, or until the charges they were originally facing have been settled.⁸ The likelihood of release often depends on how many times the accused has breached before, and concerns that they will breach conditions again if released once again.⁹

13. As the CCLA Bail Report proves, the stakes are high, both for the administration of justice and for the accused. Regarding the former, bail breach charges have come to dominate the court docket; administration of justice charges are laid more than any other in the Code. It is the number one 'crime' in Canada. Regarding the latter, an accused person's conviction for breach of recognizance therefore can affect the conduct of the proceeding as detained persons frequently plead guilty to obtain their release.¹⁰

14. Detained accused persons who proceed to trial do so at a distinct disadvantage when compared to those who are not detained; in particular, their ability to participate in

⁶ *Antic*, *supra* note 1.

⁷ Factum of the Appellant at para 73.

⁸ As noted in the CCLA Bail Report, *supra* note 1 at 62: "everybody gets revoked bail if they breach in Manitoba. There's a Crown policy that everyone is to be revoked...even for the silliest breaches, people find themselves in custody because Manitoba is taking a zero tolerance approach towards breaching bail conditions".

⁹ *Ibid* at 63 and 66: "The reverse onus provision legally reinforces the cycle of increasingly restrictive release conditions, accumulation of more breach charges and ultimately further pre-trial detention".

¹⁰ The CCLA Bail Report, *supra* note 1 at 10.

their defence by meeting with counsel, reviewing disclosure, and preparing to give evidence is compromised.¹¹

15. Further, a proper consideration of the context of the offence would have included reference to this Court's reasoning in previous decisions, including recently in *R. v. Boudreault*, 2018 SCC 58, which has affirmed an increasing recognition that the personal circumstances of marginalized individuals and groups can broadly constrain their freedom of choice.¹²

16. In *Boudreault*, a case about the constitutionality of the mandatory victim surcharge, this Court recognized that the defendants' personal circumstances, including poverty and addiction, did not meet the threshold for incapacity, but nevertheless resulted in a lower level of moral culpability.¹³ This Court further acknowledged that the defendants' personal circumstances affected their likelihood to appear in court and obey court orders requiring them to do so.¹⁴ The defendants in *Boudreault* have the same personal circumstances that Canadian courts have increasingly found undermine free choice and decrease moral blameworthiness.¹⁵

¹¹ *Ibid*, at 81; also see 5 to 8.

¹² See e.g. Terry Skolnik, *Beyond Boudreault: Challenging Choice, Culpability, Punishment*, 50 CR (7th) 283 at 2, Book of Authorities of Intervener [**CCLA BOA**], Tab 1, citing Marie-Eve Sylvestre, *Rethinking Criminal Responsibility for Poor Offenders: Choice Monstrosity, and the Logic of Practice*, (2010) 55:4 McGill LJ 771 at 776.

¹³ *Boudreault*, *supra* note 2 at para 68; Skolnik, *supra* note 12 at 2, CCLA BOA Tab 1.

¹⁴ *Boudreault*, *supra* note 2 at para 70.

¹⁵ Skolnik, *supra* note 12 at 2, CCLA BOA Tab 1. See e.g.: *Bedford*, *supra* note 2 at para 86: this Court recognized that many prostitutes lack a realistic choice to engage in sex work due to personal circumstances such as financial desperation, addiction, and/or mental illness; *Insite*, *supra* note 2 at para 99: this Court recognized that individuals who suffer from addiction can lose control over their freedom to choose to use drugs; *R v Ramsay*, 2012 ABCA 257 at paras 16-17: recognizing that when crafting a sentence for an offender with Fetal Alcohol Spectrum Disorder ("**FASD**"), it is important to consider that the moral blameworthiness of the offender may be reduced in light of the effects of

17. *Boudreault* therefore challenges the legitimacy of the “criminal law's fidelity to a choice-based conception of culpability”.¹⁶ *Boudreault* is “consistent with the judiciary's increasing recognition that the personal circumstances of marginalized individuals and groups characteristically constrain their freedom of choice — constraints that most individuals do not experience and that put into question the imposition of criminal liability based on rational and free choice.”¹⁷

18. Given the realities of bail conditions, including as reported in the CCLA Bail Report, that “cycle[s] of addiction and detention”¹⁸ are often “reinforced by conditions of release requiring those with addiction issues to abstain absolutely”,¹⁹ having the effect of “criminaliz[ing] the accused’s addiction”²⁰, a subjective fault element will assist in limiting the scope of liability for breach of recognizance to breaches that involve moral blameworthiness and will follow this Court’s recent jurisprudence in respect of acknowledging and accounting for the personal circumstances in determinations of the moral blameworthiness of marginalized individuals.

B. Breach of Recognizance is not a Duty Based Offence

19. The CCLA agrees with the Appellant’s submission that the majority of the BCCA erred in its application of the analysis in *R v H (AD)*, 2013 SCC 28 (**H (AD)**), in its finding that s. 145(3) is a duty-based offence.²¹

FASD; *R v Laquette*, 2015 MBQB 79 at para 28: in which the Court noted that an accused’s FASD led to diminished moral culpability; and *R v J.M.O.*, 2017 MBCA 59 at para 159: recognizing that when considering an appropriate sentence for a young person, a court is required to consider an accused person’s FASD, which may reduce moral blameworthiness. See e.g. the CCLA Bail Report, *supra* note 1 at 48 for an example from a Yukon interviewee regarding an experience with a client with FASD.

¹⁶ Skolnik, *supra* note 12 at 2, CCLA BOA Tab 1.

¹⁷ *Ibid.*

¹⁸ The CCLA Bail Report, *supra* note 1 at 73.

¹⁹ *Ibid.*

²⁰ *Ibid.*

²¹ Factum of the Appellant, at para. 58.

20. There are important distinctions between the nature and consequences of true duty-based offences and breach of recognizance that were not properly considered by the majority.

21. First, duty-based offences are grounded in a comparison of the conduct of the accused to an objective societal standard. In contrast, bail conditions, as reported in the CCLA Bail Report are often “highly restrictive”²² and onerous. Most people outside the bail context would find it very difficult to perfectly comply with curfew, communication and geographic restrictions typical of bail conditions.²³

22. Bail conditions do not require adherence to a minimum standard of conduct but instead, “detailed and particular expectations of conduct are imposed”.²⁴ Accordingly, as noted by Justice Fenlon in her Honour’s concurring reasons, there is no need to import a societal standard against which the accused’s conduct should be objectively measured in order to give effect to the obligation imposed by s. 145(3).²⁵

23. Second, the societal consequences of a breach of s. 145(3) are drastically less severe and harmful than duty based offences, especially as compared to the severe and harmful consequences of a conviction of breach of recognizance to a legally innocent accused awaiting trial, as described above.

²² The CCLA Bail Report, *supra* note 1 at p. 4.

²³ The CCLA Bail Report, *supra* note 1 at 53: ongoing research is highlighting the way in which broad overlapping or variable bail conditions can combine to result in highly restrictive, and at times unconstitutional, legal prohibitions. Even standard bail conditions can significantly impair basic constitutional and statutory rights, including mobility rights...these conditions have particularly dramatic impacts on marginalized individuals who may find themselves legally prohibited from accessing the basic welfare services they need in order to survive as a result of overlapping, stringent restrictions on location, contact and movement.

²⁴ *R v Zora*, 2019 BCCA 9 at para 83 [***R v Zora***].

²⁵ *Ibid.*

24. An objective standard of fault is often used “to penalize conduct which, even though inadvertent, may have appalling consequences for others, such as dangerous driving or careless use or storage of a firearm.”²⁶ The duty-based offences described in the fifth category of *H (AD)* are found in the *Criminal Code* under the heading “duties tending to preservation of life.”²⁷

25. A bail condition is “not of that ilk.”²⁸ The conditions imposed on bail are “intended to minimize flight risk, maintain public confidence in the administration of justice, and protect the public”.²⁹ A breach of a recognizance “will not generally give rise to the same level of risk of direct and significant harm to persons or property.”³⁰

26. As reported by the CCLA Bail Report, bail conditions “generally criminalize behaviour that is not otherwise prohibited under the *Criminal Code*.”³¹

27. Breach of a bail condition often results from conduct such as arriving late for curfew; consuming alcohol or drugs; using a cell phone, computer or the internet; or failing to reside at a particular address.³²

28. Indeed, “in the vast majority of cases, the targeted conduct... is not in itself a crime and does not reflect a risk to public safety.”³³ The literature shows that the overwhelming majority of breach of bail conditions are in respect of behaviours which do not conform to “mainstream or prosocial values” and/or “health problems”³⁴, which then become “subject to ‘policing’ and criminalization.”³⁵

²⁶ *Ibid* at para 86.

²⁷ *R v H (AD)* at para 71; *R v Zora*, *supra* note 24 at para 86.

²⁸ *Ibid*.

²⁹ *Ibid*.

³⁰ *Ibid*.

³¹ The CCLA Bail Report, *supra* note 1 at 65.

³² The CCLA Bail Report, *supra* note 1 at 8, 65.

³³ The CCLA Bail Report, *supra* note 1 at 65.

³⁴ Reasonable Bail, *supra* note 3 at 10.

³⁵ *Ibid*.

C. If s. 145(3) is Ambiguous a *Charter* Values Interpretation Supports a Subjective Fault Standard

29. If this Court finds that s. 145(3) can reasonably be interpreted to require an objective fault standard, the alternative interpretation urged by the Appellant and the interveners, including the CCLA, is an equally reasonable interpretation of the legislature's intent. However, only the interpretation advanced by the Appellant and the interveners aligns with the fundamental values enshrined in the *Charter*.

30. There is a general presumption that legislation is enacted in compliance with the norms embodied in Canada's constitution.³⁶ Courts are to prefer interpretations that promote constitutional norms over those that do not.³⁷

31. Courts must have regard to the "*Charter* values" presumption where there is an "ambiguity".³⁸ There is an ambiguity when, having considered the entire context, the words of a provision are reasonably capable of more than one meaning, each equally in accordance with the intentions of the statute at issue.³⁹

32. Many judges, including Fenlon J.A. in her Honour's concurring reasons, and Mr. Justice Thompson in the court immediately below the BCCA, have noted that s. 145 is not clear as to the *mens rea* required for conviction. The lack of clarity is evident in the conflicting views on the issue expressed in the cases cited by the majority at paras. 41 and 42 of their judgment. While ambiguity cannot be construed from the fact that different courts have reached conflicting decisions on interpretation, Justice Thompson explicitly found that the provision was ambiguous and Justice Fenlon's dissent includes reference to various interpretations that the wording of s. 145(3) can reasonably bear.⁴⁰

³⁶ Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th ed. (Toronto: Lexis Nexis, 2008) [**Construction of Statutes**], at 461, CCLA BOA Tab 2.

³⁷ *Ibid* at 462.

³⁸ *Bell ExpressVu v Rex*, 2002 SCC 42, at para 62 [**Bell ExpressVu**]

³⁹ *Ibid* at para 29.

⁴⁰ *R v Zora*, 2017 BCSC 2070 at para 7; *R v Zora*, *supra* note 24 at para 78; *Bell*

ExpressVu, *supra* note 38 at para 30: a court should determine if "the words are ambiguous enough to induce two people to spend good money in backing two opposing

33. To the extent that s. 145(3) gives rise to a genuine ambiguity, this Honourable Court must avail itself of the interpretive assistance of a *Charter* values analysis:

....where a legislative provision, on a reasonable interpretation of its history and on the plain reading of its test, is subject to two equally persuasive interpretations, the Court should adopt the interpretation which accords with the *Charter* and the values to which it gives expression.⁴¹

34. Interpreted purposively and in accordance with *Charter* values, s. 145(3) requires a subjective fault standard to ensure that civil liberties and substantive equality are protected. A subjective fault standard in breach of recognizance will ensure that equal protections are provided to all, regardless of an individual's background, personal circumstances and vulnerability.

PART IV: COSTS

35. The CCLA does not seek costs and asks that no costs be awarded against it.

PART V: ORDER REQUESTED

36. The CCLA takes no position on the ultimate disposition of the appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

November 15, 2019



Danielle Glatt

Paliare Roland Rosenberg Rothstein LLP

Counsel for the Intervener Canadian Civil
Liberties Association

views as to their meaning”.

⁴¹ *R v Zundel*, [1992] 2 SCR 731, at para 59. See also *Construction of Statutes*, *supra* note 36 at 461-2, CCLA BOA Tab 2.

PART VII: TABLE OF AUTHORITIES

Jurisprudence	Para.
<u>Bell ExpressVu v Rex, 2002 SCC 42.</u>	31, 32
<u>Canada (Attorney General) v Bedford, 2013 SCC 72.</u>	7, 16
<u>Canada (Attorney General) v PHS Community Services Society, 2011 SCC 44.</u>	7, 16
<u>R v A.D.M., 2017 NSPC 77.</u>	4
<u>R v Antic, 2017 SCC 27.</u>	4, 11
<u>R v Boudreault, 2018 SCC 58.</u>	7, 16
<u>R v H. (A.D.), 2013 SCC 28.</u>	24
<u>R v J.M.O., 2017 MBCA 59.</u>	16
<u>R v K.(R.), 2014 ONCJ 566.</u>	4
<u>R v Laquette, 2015 MBQB 79.</u>	16
<u>R v Mead, 2016 ONCJ 308.</u>	4
<u>R v Murphy, 2017 YKSC 34.</u>	4
<u>R v Myers, 2019 SCC 18.</u>	4
<u>R v Penunsi, 2019 SCC 39.</u>	4
<u>R v Ramsay, 2012 ABCA 257.</u>	16

R v Schab, 2016 YKTC 69.	4
R v Tunney, 2018 ONSC 961.	4
R v Zora, 2017 BCSC 2070.	32
R v Zora, 2019 BCCA 9.	22, 24, 25, 33
R v Zundel, [1992] 2 SCR 731.	33
Secondary Sources	
The Canadian Civil Liberties Association and Education Trust “Set up to Fail: Bail and the Revolving Door of Pre-Trial Detention”, (July, 2014). https://ccla.org/dev/v5/_doc/CCLA_set_up_to_fail.pdf	4,9, 10, 12, 13, 14, 18, 21, 26, 27, 28
Margot Young, "Context, Choice, and Rights: <i>PHS Community Services Society v. Canada (Attorney General)</i> " (2011) 44 UBC L Rev 221. http://commons.allard.ubc.ca/cgi/viewcontent.cgi?article=1352&context=fac_pubs	7
Pivot Legal Society “Project Inclusion: Confronting Anti-Homeless & Anti-Substance User Stigma in British Columbia”, (December, 2018). https://d3n8a8pro7vhmx.cloudfront.net/pivotlegal/pages/1986/attachments/original/1543969275/project-inclusion-digital.pdf?1543969275	8
John Howard Society “Reasonable Bail?”, (September, 2013). https://johnhoward.on.ca/wp-content/uploads/2014/07/JHSO-Reasonable-Bail-report-final.pdf	8, 28
Terry Skolnik, <i>Beyond Boudreault: Challenging Choice, Culpability, Punishment</i> , 50 CR (7 th) 283.	15, 16, 17
Marie-Eve Sylvestre, <i>Rethinking Criminal Responsibility for Poor Offenders: Choice Monstrosity, and the Logic of Practice</i> , (2010) 55:4 McGill LJ 771. https://commentary.canlii.org/w/canlii/2010CanLIIDocs180#!fragment/zoupiO-Toc3Page1/BQCwhgzIBcwMYgK4DsDWszlQewE4BUBTADwBdoAvbRABwEtsBaAfX2zgGYAFMAc0ICMASgA0ybKUIQAIokK4AntADkykRDi5sAG20BhJGmgBCZOsjhcCWfKWrlhAGU8pAEJKASgFEAMt4A1AEEAOT1vEVlwACNoUnYhISA	15
Ruth Sullivan, <i>Sullivan on the Construction of Statutes</i> , 5 th ed. (Toronto: Lexis Nexis, 2008).	30, 33