

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

BETWEEN:

CHAYCEN MICHAEL ZORA

APPELLANT

- and -

HER MAJESTY THE QUEEN

RESPONDENT

- and -

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INTERVENERS

FACTUM OF THE INTERVENER
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(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

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PART I – OVERVIEW AND STATEMENT OF FACTS

A. Overview

1. Faced with an array of interpretive choices from the Courts below and elsewhere, it falls to this Court to establish that the correct *mens rea* under s. 145(3) of the *Criminal Code* is subjective, not objective.¹ Pivot Legal Society (“Pivot”) intervenes in support of a subjective *mens rea*, and to provide the necessary *Charter* values analysis in light of that ambiguity found by other courts.
2. An objective *mens rea* is inconsistent with the values of both equality and liberty. It would result in an increased rate of conviction and disproportionately harsh outcomes for people who are already over-criminalized. This includes racialized and poor communities, among other groups with which Pivot engages.
3. Sensitivity to equality and liberty values requires this Court to adopt a subjective *mens rea*, which necessitates a finding of guilt to be available only when the accused has a “truly guilty mind” or subjective intent.

B. Statement of Facts

4. Pivot takes no position as to the facts of this appeal. Pivot is concerned that s. 145(3) be interpreted in a manner consistent with *Charter* values and provides the following context to assist the Court in its deliberations.
5. The communities Pivot engages face multiple, often intersecting disadvantages, in part due to prohibitions and stigma against their racialization, social condition, income-generating activities, and/or use of substances.

¹ *Criminal Code*, RSC 1985, c. C-46, s. 145(3).

6. Pivot’s clients are over-policed and over-incarcerated. They routinely face criminal charges and bail conditions imposed pre-trial. The practical untenability of many bail conditions leads to frequent breaches and subsequent arrests. *Project Inclusion*, Pivot’s 2018 report on the deleterious impact of laws and policies on marginalized communities throughout B.C.,² made the following relevant conclusions regarding bail conditions:

- a. some people are set up to fail, leading to a cycle of criminalization and incarceration for relatively innocuous (and otherwise legal) behaviours;
- b. jail stays for breaching conditions can have long-term, serious, or life-threatening consequences;
- c. homeless individuals experience uniquely negative impacts of bail conditions;
- d. conditions can create homelessness or housing precarity; and
- e. some conditions cause more harm than others:
 - I. abstinence conditions criminalize people with addictions;
 - II. prohibitions on carrying so-called “drug paraphernalia” (i.e. sterile needles and injection equipment, which public health officials regard as harm reduction supplies) criminalize health care and put people’s health at risk; and
 - III. area restrictions (better known as “red zones”) prohibit people from accessing the services, spaces, and communities they rely on.³

7. S. 145(3) offences carry a maximum penalty of 2 years, plus the possibility of denial of bail on the substantive charge. Incarceration has harsh impacts for marginalized communities,

² Darcie Bennett and D.J. Larkin, *Project Inclusion: Confronting Anti-Homeless and Anti-Substance User Stigma in British Columbia*, (Vancouver: Pivot Legal Society, 2018) at page 73 [*Project Inclusion*].

³ *Project Inclusion* at page 73.

including loss of housing, loss of employment, risk of drug overdose or infectious disease exposure, and stigma relating to a criminal record and time served in prison.⁴

PART II – QUESTIONS IN ISSUE

8. Pivot takes the position that s. 145(3) of the *Criminal Code* imports a subjective *mens rea*.

PART III – STATEMENT OF ARGUMENT

9. If this Court concludes that s. 145(3) is ambiguous, *Charter* values must guide its interpretation, with preference being given to the interpretation most in keeping with those principles.⁵ As an objective *mens rea* would be inconsistent with the *Charter* values of equality and liberty, a subjective standard must be adopted.

i. If section 145(3) is ambiguous, *Charter* values must guide its interpretation

10. In *Loyola High School v. Quebec (Attorney General)*, this Court described *Charter* values as “those values that underpin each right and give it meaning.”⁶ Though every *Charter* right likely has a directly corresponding *Charter* value, the latter are construed more generally, reflecting broader principles and having flexible characterizations and threshold tests.⁷ A

⁴ *Project Inclusion* at pages 80-81.

⁵ *R. v. Rodgers*, 2006 SCC 15 at para 18 [*Rodgers*].

⁶ *Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12 at para 36.

⁷ *Hill v. Church of Scientology of Toronto*, [1995] 2 SCR 1130, at paras 97-98. See also: Peter W. Hogg, “Equality as a Charter Value in Constitutional Interpretation”, *The Supreme Court Law Review: Osgoode’s Annual Constitutional Cases Conference* 20 [2003] at pp. 117-118 [*Hogg*]. Available online at:

<https://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=1037&context=sclr>

range of *Charter* values is established in the case law, including “human dignity, equality, liberty, respect for the autonomy of the person, and the enhancement of democracy.”⁸

11. *Charter* values are an important tool in judicial decision-making.⁹ Their application has steered Courts through the process of statutory interpretation, but only where legislation is genuinely ambiguous.¹⁰ In those cases, interpretation should strive to bring the law into step with the justice system’s core principles: “where the legislation permits two different, yet equally plausible, interpretations...it is appropriate to prefer the interpretation that accords with *Charter* principles.”¹¹

12. The Courts below and elsewhere have noted that s. 145(3) is ambiguous. As the Appellant points out, offences under s. 145(3) “sit in a tatter of conflicting judgments.”¹² In her concurring reasons from the B.C. Court of Appeal, Fenlon J.A. attributed this judicial disagreement to a lack of clarity in the provision:

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...”¹³

13. A *Charter* values analysis supports Fenlon J.A.’s finding that a subjective *mens rea* is appropriate. Pivot offers this analysis to aid interpretation primarily if this Court finds

⁸ *Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27 at para 81.

⁹ *Law Society of British Columbia v. Trinity Western University*, 2018 SCC 32 at para 41.

¹⁰ *Rodgers*, at para 18.

¹¹ *Rodgers*, at para 18 [Emphasis added].

¹² Factum of the Appellant at para 54.

¹³ *R v. Zora*, 2019 BCCA 9 at para 74 [Emphasis added].

ambiguity in the legislation, though it may also assist in determining legislative intent to the extent it is informed by principles of the *Charter*. In any event, if the Court agrees with the parties that s. 145(3) articulates a particular *mens rea*, then it “must give effect to the clearly expressed legislative intent and not use the *Charter* to achieve a different result.”¹⁴

ii. An objective *mens rea* standard is inconsistent with the equality value

14. As the Appellant and many of the interveners argue, an objective standard under s. 145(3) will not affect all offenders equally. Marginalized and over-criminalized groups will be adversely impacted by the reasonable person standard, contra the *Charter* value of equality. In order to calibrate s. 145(3) to substantive equality principles, a subjective *mens rea* is necessary.

15. Equality, and substantive equality in particular, are values lying at the heart of the equality right under s. 15 of the *Charter*. Sections 15(1) and (2) “work together to promote the vision of substantive equality that underlies s. 15 as a whole.”¹⁵ Where the impact of a law perpetuates disadvantage for a particular group of people—here, groups who are over-criminalized, including poor and racialized communities—substantive equality is compromised.

16. The triumph of substantive over formal equality in our justice system (and corresponding s. 15 jurisprudence) is premised on recognition that the law—even where facially neutral—does not apply equally to all people in Canada. This Court has already acknowledged that

¹⁴ *Rodgers*, at para 18.

¹⁵ *R v. Kapp*, 2008 SCC 41 at para 16. See also: Angela Cameron & Paul Daly, “Furthering Substantive Equality through Administrative Law: Charter Values in Education” *The Supreme Court Law Review: Osgoode’s Annual Constitutional Cases Conference* 63 (2013), pp. 189-194. Available online at:

<https://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=1267&context=sclr>

Indigenous people face “widespread racism...within our criminal justice system.”¹⁶ It has moreover recognized the disproportionate policing of racialized and poor people and the ways in which one’s experience of race and policing inform the point at which that person’s liberty interests have been engaged.¹⁷ We have, as this Court affirmed in *R v. Le*, “arrived at a place where the research now shows disproportionate policing of racialized and low-income communities.”¹⁸

17. The communities Pivot works alongside are positioned, oftentimes on intersecting grounds, to be routinely targeted by criminal laws and in particular, s. 145(3) offences. Pivot’s clients comprise people whose basic existence translates to being disproportionately policed and incarcerated: people who rely on public space in the absence of housing; people who use drugs; people who engage in informal economies such as sex work for income and survival; and Indigenous and racialized communities facing systemic racism and the ongoing impacts of colonization.
18. An objective *mens rea* under s. 145(3), with its reasonable person standard, is practically unrealistic in these instances because it cannot account for the diverse experiences and systemic barriers that substantive equality jurisprudence has evolved so intentionally to address.¹⁹ Pivot’s clients, though resilient in the face of laws that have historically overlooked their subjective realities, will be set up to fail.
19. Insofar as s. 145(3) convictions may be accompanied by additional sentencing conditions, an objective *mens rea* would moreover allow for individuals with a low level of moral blameworthiness who nonetheless do not meet the standard of the reasonable person to accrue additional liberty restrictions in future. Sentencing conditions have a particularly punitive impact on Pivot’s clients, as compared with offenders whose housing and financial

¹⁶ *R. v. Barton*, 2019 SCC 33 at para 199.

¹⁷ *R. v. Le*, 2019 SCC 34 at paras 90-97 [*Le*].

¹⁸ *Le*, at para 97.

¹⁹ *R v. Creighton* [1993] 3 SCR 3.

situations are more stable. As the findings of *Project Inclusion* detail, abstinence conditions, “no paraphernalia” conditions, and “red zones” jeopardize the health, safety, community and relationships of marginalized people.²⁰ As one *Project Inclusion* participant recounted, being red zoned from downtown was especially difficult given pre-existing poverty and homelessness—it meant being severed from the few places where he could sleep, eat, meet with his service provider, access harm reduction supplies, and see his doctor.²¹

20. An objective standard would also be inconsistent with the equality value contained in the principles of fundamental justice under s. 7.²² The s. 7 framework requires that the effect of a law not be grossly disproportionate to the objective of the State.²³ A proper incorporation of substantive equality values into this framework compels the Court to account not only for the extent of a given harm, but for *who* is affected and how their experience may be uniquely harmful—and out of all proportion to the public safety purpose of pre-trial conditional release.²⁴ This law may seem to have an equal effect on all convicted persons. In reality, a lesser burden for the Crown will come at disproportionate cost to the communities Pivot works alongside.

iii. An objective *mens rea* standard is inconsistent with the liberty value

21. An objective *mens rea* under s. 145(3) will lessen the Crown’s burden to meet its standard of proof. By contrast, it will impose a heavier burden on the accused to establish a defence for

²⁰ *Project Inclusion* at pp. 89-99.

²¹ *Project Inclusion* at page 96.

²² *Hogg* at pp. 126-127.

²³ *Canada (Attorney General) v. Bedford*, 2013 SCC 72 at para 125.

²⁴ See: *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44 at para 133, wherein this Court underscored that the impact of the Minister’s decision to not renew an exemption to the safe injection site was grossly disproportionate because of its impact on “the population [Insite] serves,” a population that was earlier said to comprise “some of the poorest and most vulnerable people in Canada” (para 4).

not being able to comply with restrictive conditions. This is inconsistent with the liberty value.

22. It is not hard to imagine Pivot’s clients in similar circumstances to those of Mr. Zora—inadvertently breaching a condition on account of being sleep-deprived, experiencing “dope sickness” or withdrawal, or because of cognitive impairment. An acontextual, externally imposed requirement of due diligence is unattainable for most of Pivot’s clients. Yet s. 145(3), if read to include an objective standard, will lead to the incarceration of such groups irrespective of not having the subjective intention to commit an offence. Moreover, an objective standard has the effect of barring an accused from arguing any defence not resembling those circumstances in which the “reasonable person” might find him or herself. This impacts the accused’s right to make full answer and defence, a principle integral to the liberty value.²⁵

23. A subjective standard ensures that only those with a truly guilty mind are convicted. This is critical, given that an individual convicted of a criminal offence—in this case, breach of a bail condition pursuant to s. 145(3)—may face serious restrictions on their liberty, including the following:

- a. jail sentence for up to 2 years;
- b. a criminal record and associated risks concerning employment, housing, and child apprehension;
- c. sentencing conditions restricting behaviour and/or geography;
- d. increased likelihood of more stringent bail conditions for unrelated offences in future;
- e. the potential that bail would be denied for subsequent charges because of a record for breaches.

²⁵ *R v. Morrison*, 2019 SCC 15 at para 216. [Abella J., reasons dissenting in part].

24. The long-term negative impacts of these infringements are manifest. Even after release, one's liberty may still be engaged, sometimes permanently. The communities Pivot works alongside, for instance, have reported that involvement with the criminal justice system leads to a loss of income and employment; eviction or housing instability; a loss of personal possessions; and a "ripple effect" that endangers people who rely on them.²⁶ It is well-established that incarceration can have profoundly adverse and long-term health consequences, including greater risk for HIV and HCV infection, risk of overdose upon release, and drug and alcohol withdrawal absent appropriate medical intervention.²⁷
25. A ruling that the standard of proof for *mens rea* under s. 145(3) is objective, being a lower standard, would likely lead to an increase in s. 145(3) convictions and accelerate the cycle of criminalization and incarceration of people for administrative justice offences. The *Charter* value of liberty requires that only the truly guilty ought to be punished and to be truly guilty one must have a guilty mind. Objective *mens rea* has the effect of punishing those with lesser moral culpability.

Conclusion

26. In the event this Court finds s. 145(3) to be ambiguous, *Charter* values can and should inform the interpretation of the provision. An objective *mens rea* undermines the fundamental values of equality and liberty, imposing the threat of incarceration and its attendant liberty restraints on people who are already disproportionately criminalized and marginalized. A subjective *mens rea* is therefore the only appropriate interpretation of s. 145(3).

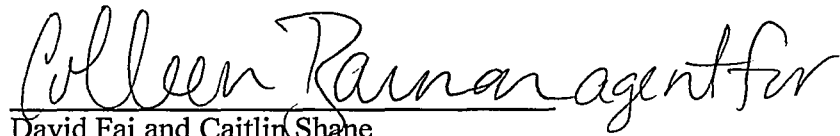
²⁶ *Project Inclusion* at pp. 81, 101.

²⁷ *Project Inclusion* page 80-81.

PART IV – COSTS

27. Pivot does not seek a cost award and asks that no costs be awarded against it.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, this 15th day of November 2019.

A handwritten signature in cursive script that reads "Colleen Rannan agent for".

David Fai and Caitlin Shane

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PART V – LIST OF AUTHORITIES

CASES	CITED AT PARAGRAPH(S)
<i>Canada (Attorney General) v. Bedford</i> , <u>2013 SCC 72</u>	20
<i>Canada (Attorney General) v. PHS Community Services Society</i> , <u>2011 SCC 44</u>	20
<i>Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia</i> , <u>2007 SCC 27</u>	10
<i>Hill v. Church of Scientology of Toronto</i> , <u>[1995] 2 SCR 1130</u>	10
<i>Law Society of British Columbia v. Trinity Western University</i> , <u>2018 SCC 32</u>	11
<i>Loyola High School v. Quebec (Attorney General)</i> , <u>2015 SCC 12</u>	10
<i>R. v. Barton</i> , <u>2019 SCC 33</u>	16
<i>R v. Creighton</i> , <u>[1993] 3 SCR 3</u>	18
<i>R v. Kapp</i> , <u>2008 SCC 41</u>	15
<i>R. v. Le</i> , <u>2019 SCC 34</u>	16
<i>R v. Morrison</i> , <u>2019 SCC 15</u>	22
<i>R. v. Rodgers</i> , <u>2006 SCC 15</u>	9, 11, 13
<i>R v. Zora</i> , <u>2019 BCCA 9</u>	12

STATUTES	CITED AT PARAGRAPH(S)
<p><i>Criminal Code</i>, RSC 1985, c. C-46, <u>s. 145(3)</u></p> <p><i>Code criminel</i>, L.R.C. 1985, ch. C-46, <u>s. 145(3)</u></p>	1, 4, 7, 8, 9, 12, 13, 14, 17, 18, 19, 21, 22, 23, 25, 26
OTHER	CITED AT PARAGRAPH(S)
<p><u>Darcie Bennett and D.J. Larkin, <i>Project Inclusion: Confronting Anti-Homeless and Anti-Substance User Stigma in British Columbia</i>, (Vancouver: Pivot Legal Society, 2018).</u></p>	6, 7, 19, 24
<p><u>Angela Cameron & Paul Daly, “Furthering Substantive Equality through Administrative Law: Charter Values in Education” <i>The Supreme Court Law Review: Osgoode’s Annual Constitutional Cases Conference</i> 63 (2013).</u></p>	15
<p><u>Peter W. Hogg, “Equality as a Charter Value in Constitutional Interpretation”, <i>The Supreme Court Law Review: Osgoode’s Annual Constitutional Cases Conference</i> 20 (2003).</u></p>	10, 20