SCC 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)

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 ASSOCATION,
CANADIAN CIVIL LIBERTIES ASSOCIATION,
INDEPENDENT CRIMNAL DEFENCE ADVOCACY SOCIETY,
PIVOT LEGAL SOCIETY and
ASSOCIATION QUÉBÉCOISE DE AVOCATS ET AVOCATES DE LA DÉFENSE

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

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TABLE OF CONTENTS

PART I – OVERVIEW AND STATEMENT OF FACTS

1. The refrain – "the sky will not fall if the Crown has to prove a mental element"[1] – has a catchy quality because it is repeatedly cited, including by the appellant and the minority judge in this case.[2] Yet it is devoid of substance. First, objective fault *is* a mental fault element recognized by this Court.[3] Conflation between legal standards - e.g. "strict liability", "mere negligence", and "penal negligence" - pervades the appellant's legal analysis.[4] That conflation finds roots in the Court of Appeal for Ontario's (ONCA) decision in *Legere*;[5] earlier versions of academic texts relied on by the appellant;[6] and the Court of Appeal for Manitoba's analysis in *Custance*.[7] To be clear, the modified objective standard is proof of a *mental element* according to this Court's jurisprudence, which was applied by the Court of Appeal for British Columbia (BCCA) in 1999 in *Ludlow*[8] and recently reaffirmed by the majority in this case.[9]

2. Second, it is unclear how this "sky-fall" test is related to discerning Parliament's intent. The role of the courts is not to create public policy but to interpret legislation by application of the modern principles of statutory interpretation.[10] Those principles dictate that section 145(3) of the *Criminal Code* is a general intent offence, and that *mens rea* can be satisfied by an

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[1] *R. v. Loutitt*, 2011 ABQB 545, ¶17

[2] Appellant's Factum, ¶79*; R. v. Zora,* 2019 BCCA 9 ("*Zora BCCA*"), per Fenlon JA, ¶90 [Appellant's Record, p.46]

[3] *R. v. Hundal*, [1993] 1 SCR 867, 1993 CanLII 120; *R. v. Creighton*, [1993] 3 SCR 3, 1993 CanLII 61; *R. v. Gosset*, [1993] 3 SCR 76, 1993 CanLII 62; *R. v. Naglik*, [1993] 3 SCR 122, 1993 CanLII 64; *R. v. Finlay*, [1993] 3 SCR 103, 1003 CanLII 63

[4] Appellant's Factum, ¶¶65-67

[5] *R. v. Legere* (1995), 95 CCC (3d) 555, 1995 CarswellOnt 1711 (CA), ¶32 [Appellant's Book of Authorities, Tab 1]: The Court distinguished between a true criminal offence requiring proof of *mens rea* and mere carelessness, without regard the then-recent line of cases endorsing the modified objective intent cited at *supra*, fn2

[6] Appellant's Factum, ¶¶79, 81, 86-87 citing to Trotter, Gary. *The Law of Bail in Canada*, 3d ed (Toronto: Carswell, 2010) (loose-leaf 2016) [Appellant's Book of Authorities, Tab 11]. The updated version is (loose-leaf 2019, release 1)

[7] *R. v. Custance*, 2005 MBCA 23, ¶12

[8] *R. v. Ludlow*, 1999 BCCA 365, ¶¶18-40

[9] *Zora BCCA*, *supra* fn2, ¶¶21-67 [Appellant's Record, pp.24-36]

[10] *R. v. A.D.H.*, 2013 SCC 28, ¶¶19-21

objective fault standard. The Attorney General of British Columbia (AGBC) agrees with the arguments advanced by the Public Prosecution Service of Canada (PPSC).

3. The AGBC further submits that the appellant's counter to the duty-based nature of the offence – i.e., s.145(3) "is not defined in terms of dangerous or harmful conduct"[11] – is without merit. Moreover, the public policy assumptions underpinning the appellant's arguments in support of a subjective *mens rea* are unsupported. Legitimate concern about marginalized people whose breach of bail pose an attenuated risk is effectively tackled at the front-end of the process. In balancing the various interests at stake, Parliament initiated bail reform to promote release on bail on the least onerous conditions at the early stages of the criminal process, as recognized by this Court.[12]

4. In contrast, this appeal deals with an end-of-the-line issue in the judicial interim release scheme: namely, the standard of mental fault applicable to *all* prosecutions of a s.145(3) offence. At this late stage of the process, it furthers the countervailing objectives of Parliament to both protect the public and its confidence in the administration of justice by holding people who engage in "dangerous or harmful conduct" (specifically identified at the front-end and mitigated by the release conditions imposed) accountable for breaches that amount to a marked departure from a reasonable person standard of care.

5. The AGBC uses the term "accused" in its argument for the sake of conformity, noting that in each instance "accused" should read "accused/offender". The ambit of section 145(3) is not limited to accused who are presumed innocent: those convicted and on bail pending sentence or appeal are equally subject to the provision if they breach bail.

PART II – INTERVENER'S POSITON ON QUESTIONS IN ISSUE

6. The AGBC's position is: section 145(3) of the *Criminal Code* is a general intent offence, where *mens rea* can be satisfied on proof of an objective fault standard.

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[11] Appellant's Factum, ¶57

[12] *R. v. St-Cloud*, 2015 SCC 27, ¶¶70, 79; *R. v. Antic*, 2017 SCC 27, ¶¶4, 6, 21-30; *R. v. Myers*, 2019 SCC 18, ¶¶1-4; *see also R. v. Oland*, 2017 SCC 17, ¶¶33-51 for a discussion of the factor relevant to release pending appeal under s.679 of the *Code*

PART III – ARGUMENT

A. Section 145(3) of the *Criminal Code* engages risky behaviour

7. The duty-based nature of s.145(3) imports an objective intent. The appellant argues against the duty-based analysis on the basis that "the provision is not defined in terms of dangerous or harmful conduct, in contrast to offences such as dangerous driving".[13] First, this is not a pre-requisite for an objective fault standard.[14] Second, it is not accurate: persons on bail voluntarily participate in highly regulated legal activity that is recognized to be potentially risky or dangerous to the community/administration of justice (hence the justification for conditions to counteract such risks); and by participating in judicial interim release accused are in a position of responsibility *vis-à-vis* other members of the public.[15]

- Persons on bail are, in effect, judicially "licensed"[16] to be at large in the community. Individuals released on conditions deemed necessary to mitigate s.515(10)(b) risks pose a danger to others.

  "*In a society that licences people, expressly or impliedly, to engage in a wide range of dangerous activities posing a risk to the safety of others, it is reasonable to require that those choosing to undertake such activities and possessing the basic capacity to understand their danger take the trouble to exercise that capacity…*"[17]

- The terms of release are crafted after an individualized assessment - required by law to be the least onerous terms necessary to address their risk. If the accused is incapable of compliance, they are morally culpable for agreeing to unrealistic conditions.

  "*Where individuals voluntarily engage in activities for which they lack sufficient knowledge, experience, or physical ability, they may properly be found to be at fault,*

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[13] Appellant's Factum, ¶58
[14] *A.D.H., supra* fn10, ¶63 recognizes that the duty-based nature of an offence may suggest that Parliament intended an objective standard of fault
[15] *Ibid*, ¶¶56-57. The Court in *R. v. Hammoud*, 2012 ABQB 110 applied *Hundal and Creighton* to find objective *mens rea* applied to s.145(2), ¶¶17-22
[16] See Oxford English Dictionary, online: <www.oed.com> sub verbo "*licence*", (n) meaning a formal, usually printed or written permission from a constituted authority to do something, and the document embodying such a permission, (v) to grant a person a licence or authoritative permission to hold a certain status or do certain things
[17] *Creighton, supra* fn3, ¶130

not so much for their inability to properly carry out the activity, but for their decision to attempt the activity without having accounted for their deficiencies."[18]

- Both the protection of the public and the maintenance of public confidence in the administration of justice requires that accused who are licensed by the courts to be in the community conduct their affairs to a minimum standard of care.

  "Without a constant minimum standard, the duty imposed by the law would be eroded and the criminal sanction trivialized."[19]

8. The appellant casts the risk of harm too narrowly, as did the minority judge in the BCCA ("a breach will not generally rise to the same level of risk of direct and significant harm to persons or property"):[20] (1) conduct that is not itself inherently risky garners a different significance in circumstances where it triggers re-offending; (2) Parliament legislated a scheme of release for all people accused of any offence, which includes perverted and violent people who risk inflicting irreversible harm that strikes at the core of Canadian values;[21] and (3) there is a risk to public confidence in the bail system, without which the entire justice system may falter.[22] Permitting accused on bail to operate outside the bounds of reasonableness can have a chilling effect on the justice system because *vulnerable* victims and witnesses, or the general public, may experience a loss of confidence in a system that is unduly tailored to the idiosyncrasies of the accused over their own protection.

9. Conditions of bail often expressly require an accused to conduct themselves within the bounds of reasonableness: e.g. in BC, accused child-sex-offenders are commonly placed on a condition that mirrors the text of s.161 of the *Code* prohibiting attendance at specified locations where children are present or *can reasonably be expected to be present* or contact with any person who *reasonably appears to be under* a specified age.[23] Contrary to the submissions of

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[18] *Ibid*, ¶136
[19] *Ibid*, ¶136
[20] *Zora BCCA*, ¶86 [Appellant's Record, p.43]
[21] *See* Appellant's Factum, ¶30, fn50: "Project Inclusion", which explicitly excludes conditions oriented towards sexual offences and violence from its study (p.73)

[22] *St-Cloud, supra* fn12, ¶33

[23] The Provincial Court of British Columbia has distributed a "Picklist" of standardized bail conditions, conditions 1303 and 1304

the appellant, conditions that have a binary compliance quality, such as reporting as directed, are also amenable to an objective fault standard.[24] The ease with which the conduct can be measured against a standard of reasonableness is demonstrated by example cases overturned on appeal in a subjective *mens rea* jurisdiction because the court below effectively applied an objective standard to achieve common sense results.[25]

10. The predecessor section of 145(3) was the corollary of the 1972 bail reform initiatives to promote release: it is the attendant sanction when people on bail do not meet the conditions of their license to be in the community, i.e. do not discharge their duties to the court and do not respect their position of responsibility *vis-à-vis* other members of the public by effectively transferring the risks they personally generate onto the community at large.

B. <u>The public policy assumptions underpinning the appellant's arguments are unsupported</u>

11. Legitimate concerns exist surrounding disproportionate impact of breach of bail offences on disadvantaged and vulnerable accused. Those concerns are effectively addressed at the front-end of the judicial interim release process: by ensuring that unrealistic and unnecessary conditions are not imposed on people at the outset, thereby setting them up to fail; and removing from the system those prosecutions where the social benefit is outweighed by the cost, which includes deleterious impact on the marginalized accused. The BCPS has undertaken initiatives to achieve these objectives,[26] which have also been explicitly incorporated by Parliament through the introduction of Bill C-75:[27]

- **General principles when determining bail**: The primary consideration is the release of the accused at the earliest possible opportunity and on the least onerous conditions deemed necessary to advance one or more of the purposes enunciated in section 515(10). *Regard must be had to whether the conditions are reasonably practicable for*

[24] Appellant's Factum, ¶¶58-63
[25] Cases cited *infra*, fns42-43
[26] BCPS, *Crown Counsel Policy Manual*, Bail – Adult ("*BAI 1*")
[27] *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*")

the accused to comply with. The default position is release on an undertaking without conditions. For every step up the ladder, the Crown bears the onus of showing cause why a less restrictive release provision is not appropriate;[28]

- **Charge assessment of alleged breach**: Prosecution of breaches that occur as a result of the accused's changing or challenging life circumstances that can make strict compliance with conditions difficult, *which do not raise significant concerns about public or victim safety*, are not in the public interest.[29]

12. Focus on the fault element required to prove a breach of bail charge as a means to reduce disproportionate impact on marginalized offenders is misplaced for five main reasons.

13. First, there is no empirical data to support the contention that an objective fault standard results in more breach offences being charged or that more charges result in convictions. The rates of *breach of bail charges per capita* in BC and Ontario in 2012 were almost identical, with BC having a lower rate in the preceding years since 1999.[30] There was no appreciable difference between BC and Ontario in 2012 with respect to the percentage of *failure to comply charges* that resulted in a finding of guilt.[31] According to statistics capturing crime rates and rate of *offences against the administration of justice* in 2014, BC and Ontario are on par, whereas Manitoba is considerably higher.[32]

14. Statistics based on a monolithic category of "AJOs" composed of disparate offences must be approached with caution. That is to avoid sweeping away Parliamentary intent by

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[28] *BAI 1, supra* fn26, pp.1-5; *Bill C-75, supra* fn27, ss.210, 225

[29] *BAI 1, supra* fn26, pp.6-7; *Bill C-75, supra* fn27, ss.212, 234 creates a new Judicial Referral Hearing Process in circumstances where the failure to comply with the conditions of release did not cause a victim physical or emotional harm, property damage or economic loss

[30] Canadian Civil Liberties and Education Trust, "Set Up to Fail: Bail and the Revolving Door of Pre-Trial Detention," July 2014, at p.64, Figure 8

[31] *Ibid.* at p.65, Figure 9

[32] Statistics Canada, Trends in Offences Against the Administration of Justice (Ottawa, 2015), p.10, Chart4, pp.22-24, Table 2; *Custance, supra* fn7, ¶12

application of judge-made policy based on an artificial grouping that does not reflect legislative history and the actual scheme of the *Code,* e.g:

- Section 145(3) falls under "Part IV – Offences Against the Administration of Law and Justice". It predecessor section was first introduced in the *Bail Reform Act* of 1972;[33] it has never incorporated a requirement for willful conduct; *versus*

- Section 733.1 falls under "Part XXIII – Sentencing". Its predecessor section included a requirement that the accused "willfully" breach the court order.[34] It has a different purpose than bail; it governs the breach of an order that is primarily rehabilitative.[35]

15. However, even accepting these limitations of the available data, it does not support the appellant's contention that an objective fault standard correlates to more breach offences being charged or a greater number of marginalized offenders being convicted.

16. Second, it makes sense that the fault standard would not result in different charge rates. It is not feasible for the charging authority to get inside the mind of a person and/or practicable for the Crown/police to evaluate their credibility,[36] as opposed to evaluating the objective circumstances of an accused and the risk posed by their conduct to their victims and the public. The latter function, which is guided by prosecution service policies noted above, is a long-standing function of Crown counsel in the administration of the bail scheme of the *Code,* and is subject to judicial oversight.[37]

17. To the extent that the mere charging of a s.145(3) offence risks adverse impact on an accused, reliance *must* be placed on prosecutorial discretion to conduct the risk-based analysis having regard to the accused's life circumstances. Prosecutorial discretion is not a substitute for

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[33] *An Act to amend the provisions of the Criminal Code relating to the release from custody of accused persons before trial or pending appeal,* R.S.C. 1970, c.2 (2nd Supp.), s.4 (s.133(3))*; Antic, supra* fn12, ¶¶23-30

[34] *R. v. Docherty,* [1989] 2 S.C.R. 941; 1989 CanLII 45, ¶¶13-15

[35] *Contra* Appellant's Factum, ¶33, judicial interim release conditions are not imposed in pursuit of rehabilitative objectives: *R. v. Proulx,* 2000 SCC 5, ¶¶31-33; *see also St. Cloud, supra* fn12, ¶¶107-112

[36] Appellant's Factum, ¶¶48, 79

[37] e.g., a justice has discretion to issue a warrant for the arrest of the accused (s.524(1)) and the full sentencing options available on conviction, including an absolute discharge (s.730).

a subjective fault element; it is the *only effective way* to tackle indiscriminate charging that results in overly stringent enforcement contrary to the aims of the *Code*. Parliament recently recognized this: it explicitly vested *discretion* in police and Crown counsel to employ a new Judicial Referral Hearing Process.[38]

18. Third, there is no logical reason why the social policy considerations raised by the appellant are better served by a subjective fault standard. For example: the addicted accused who breaches an abstinence clause or the homeless accused who breaches a residency clause (e.g., *Custance*) will possess subjective intent. It is not the fault element that criminalizes the accused's life circumstances – it is the imposition of the condition in the first place and the decision to prosecute its breach.

19. Fourth, the appellant does not point to examples of "injustice" resulting from an objective fault standard despite the fact that this standard has been employed in BC for over 20 years. The only case he cites exemplifies the problematic conflation of "strict liability" and "mere negligence" on the one hand, versus "penal negligence" on the other.[39] Nobody is advocating for the "objective standard of due diligence" rejected in that case. The modified objective standard, in stark contrast, expressly requires consideration of the *circumstances* of the accused, which would include profound personal tragedy.

20. Fifth, the appellant's approach would upset the deliberate balance adopted by Parliament between promoting the release of accused at the earliest possible opportunity and on the least onerous conditions deemed necessary, as against protection of the public and maintenance of confidence in the administration of justice. When the breach poses a significant risk of harm or results in demonstrated harm, it promotes the aims of the *Code* to hold a person who markedly departs from a reasonable standard of care accountable, even where that breach occurred as a consequence of personal attributes. That is because the attendant harm

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[38] *Bill C-75*, *supra* fn27, ss.212, 234
[39] Appellant's Factum, ¶36; *R. v. Josephie,* 2010 NUCJ 7, ¶¶23-25

materializes regardless of whether the person in breach turned their mind to the risks they generated.[40]

C. The appellant's *in terrorem* arguments are unfounded

21. Without compromising cogent reasoning and robust application of the law, the subjective *mens rea* framework is ill equipped to deliver *consistent* common sense results. What we see in *some* subjective *mens rea* cases (and it is only a narrow band of cases where the fault element is determinative) is either a distorted legal analysis to achieve a common sense result *or* a result that erodes the repute of the administration of justice when the subjective standard is properly applied:

- **Compromised reasoning:** e.g., in *Selamio,* the summary conviction appeal court applied a subjective *mens rea* test for failing to attend court contrary to s.145(5), and held that the trial judge did not err in his treatment of the appellant's testimony to honest and unintentional forgetfulness on his part as to the trial date (*emphasis added*):

  > [19] … It seems to me that if one wishes to plead honest forgetfulness there should be some evidence indicating at least some diligence on his or her part to satisfy the legal obligation to attend court.[41]

- **Absurd result**: e.g., in *Ly,* the summary conviction appeal judge overturned the conviction and entered an acquittal on the basis of the appellant's testimony, which was not rejected by the trial judge, that he lost his bail papers and forgot about the conditions because he was smoking crack cocaine non-stop;[42] *see also Smith*, where the ONCA entered an acquittal where the accused misheard the conditions of his release and did not bother ever reading his recognizance of bail.[43]

22. These cases demonstrate that reliance on the "intelligence and common sense of triers of fact"[44] is not helpful when that trier of fact is bound to apply a mental fault element that is

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[40] *Naglik, supra* fn3, ¶141
[41] *R. v. Selamio,* 2002 NWTSC 15, ¶¶16-19; *see also R. v. Nedlin*, 2005 NWTTC 11, ¶¶58-60; *R. v. Syblis*, 2015 ONCJ 73, ¶¶18-19, 27-28
[42] *R. v. Ly,* 2006 CanLII 10746 (ONSC)
[43] *R. v. Smith,* 2008 ONCA 101, ¶¶5-6
[44] *Zora BCCA*, ¶90 [Appellant's Record, p.46]

fundamentally at odds with the provision's text and purpose. Where the *result* accords with common sense, it may come at a cost to legal reasoning that faithfully adheres to basic legal principles: *"[t]he difference between recklessness and negligence is the difference between advertence and inadvertence; they are opposed and it is a logical fallacy to suggest that recklessness is a degree of negligence."*[45] Where the *analysis* accords with the law, the result may offend common sense. Presumptively, Parliament "*does not intend to produce absurd consequences*".[46]

23. Neither the majority of the BCCA, nor the AGBC, suggest catastrophic fall-out to the criminal justice system by virtue of the application of a subjective *mens rea* test for breach of bail. That would be contrary to the Ontario and Manitoba experience where appellate courts have endorsed the subjective approach without collapse of the administration of justice in those provinces. It is the appellant who invokes *in terrorem* arguments by embracing a "sky-fall" test. The AGBC says such hyperbole is not pertinent to statutory interpretation. The real question is: what fault standard best accords with the language, scheme and object of the judicial interim release provisions of the *Code*? The answer is modified objective fault.

PART IV: SUBMISSIONS ON COSTS

28. The AGBC makes no submissions on costs.

PART V: ORDER SOUGHT

29. The AGBC has been granted permission to present oral argument at the hearing of the appeal in accordance with the Court Order made on November 1, 2019, by Justice Brown. The AGBC takes no position on the disposition of the appeal.

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[45] *O'Grady v. Sparling*, [1960] SCR 804, p.808, 1960 CanLII 70 (SCC); *R. v. Sansregret*, [1985] 1 S.C.R. 570, 1985 CanLII 79, ¶¶16, 22 (re: wilful blindness)
[46] *Rizzo & Rizzo ShoesLtd. (Re)*, 1998 CanLII 837 (SCC) at ¶27; *see also Interpretation Act*, RSC 1985, c.I-21, s.12

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

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PART VI – TABLE OF AUTHORITIES & LEGISLATION

CASES	PARAGRAPH
O'Grady v. Sparling, [1960] SCR 804, 1960 CanLII 70	22
R. v. A.D.H., 2013 SCC 28	2, 7
R. v. Antic, 2017 SCC 27	22
R. v. Creighton, [1993] 3 SCR 3, 1993 CanLII 61	1, 7
R. v. Custance, 2005 MBCA 23	1, 18
R. v. Docherty, [1989] 2 S.C.R. 941; 1989 CanLII 45	14
R. v. Finlay, [1993] 3 SCR 103, 1993 CanLII 63	1
R. v. Gosset, [1993] 3 SCR 76, 1993 CanLII 62	1
R. v. Hammoud, 2012 ABQB 110	7
R. v. Hundal, [1993] 1 SCR 867, 1993 CanLII 120	1, 7
R. v. Josephie, 2010 NUCJ 7	19
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LEGISLATION

SECONDARY SOURCES