File Number: 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 BRITISH COLUMBIA, ATTORNEY GENERAL OF ONTARIO, 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, ASSOCIATION QUÉBÉCOISE DES AVOCATS ET AVOCATES DE LA DÉFENSE

INTERVENERS

FACTUM OF THE RESPONDENT, HER MAJESTY THE QUEEN

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

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PART I – STATEMENT OF FACTS

A. Overview

1. The main issue on this appeal is whether failure to comply with condition of undertaking or recognizance under s. 145(3) of the *Criminal Code* requires an objective or subjective *mens rea*. The answer lies in the application of the modern principle of statutory interpretation pursuant to which the s. 145(3) *mens rea* is objective. An objective *mens rea* reflects Parliament's intent which flows from the plain language of the provision, the scheme of the bail regime as well as the purpose and breadth of s. 145(3).

2. The majority of the Court of Appeal for British Columbia – the only appellate authority that conducted a thorough statutory analysis of this issue – concluded that Parliament intended that an objective *mens rea* applies. As stated by the majority, s. 145(3) imposes a duty-based criminal offence; compliance with release conditions is to be measured by reference to a minimum uniform standard because the court-ordered conditions are the least restrictive terms required to mitigate statutorily defined risks associated with judicial interim release.

3. It would be contrary to the proper administration of justice, and the protection of the public, if the enforceability of bail conditions depends on the variable whims, frailties and peculiarities affecting an individual's ability to comply with their release conditions. As illustrated by this case, the appellant initially did not structure his affairs to enable him to comply with his release conditions. Inappropriate conduct or measures to comply with judicial interim release orders should not thwart enforcement of that order. Otherwise, the administration of justice as well as the protection and safety of the public would be compromised. This may result in a loss of public confidence in the criminal justice system and, more particularly, the bail regime.

4. If this Court finds that the courts below erred in applying an objective *mens rea*, resort to the curative proviso pursuant to s. 686(1)(*b*)(iii) of the *Code* is warranted in this case because the verdict would have been the same, even in applying a subjective *mens rea*.

B. Facts

5. The appellant was charged with three counts of possession of drugs for the purpose of trafficking. He was released under a court-ordered recognizance in the amount of $2500, with one named surety. His release was conditional upon obeying a curfew, and presenting himself at the door of his residence within five minutes of a police officer or bail supervisor attending the residence to confirm compliance with that curfew.[1]

i. October 9th, 2015 Recognizance Compliance Check

6. On Friday October 9th, 2015, a member of the RCMP attended the appellant's residence at 10:30 p.m. to conduct a curfew check. It was the beginning of the Thanksgiving long weekend, and already two-and-half hours into the curfew imposed under the recognizance. The police officer attended the front door of the residence, rang the doorbell three times, and knocked loudly on the door with his fist. He received no response from inside the appellant's residence. The officer then waited at the residence for more than five minutes. During this curfew check, the officer observed no activity at the residence, no lights were on, and no dogs were heard barking. This police officer had conducted a curfew check at 10 p.m. the night before – and on that prior date the appellant had responded appropriately and without incident.[2]

ii. October 11th, 2015 Recognizance Compliance Check

7. On Thanksgiving Sunday, October 11th, 2015, a different member of the RCMP attended the appellant's residence at 10:25 p.m. to conduct a curfew check. Again, it was almost two-and-half hours into the curfew imposed under the recognizance. This police officer saw a handwritten note on the appellant's front door that read "use the doorbell", which he then did. The police officer waited there for more than five minutes. The officer received no response from inside the appellant's residence and observed no activity or signs of life. This police officer had also previously attended

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[1] *R v Zora*, 2019 BCCA 9 at para. 3 ("Court of Appeal") [Appellant's Record ("AR"), tab 5, pp. 19-20]; *R. v. Zora* (unreported 29 March 2017), Courtenay 83980-6-CAC/ 38980-7-CAC (BCPC) ("Trial Court") at paras. 1-2, 13 [AR, tab 1, pp. 2-3, 7-8].

[2] Court of Appeal at paras. 4, 6 [AR, tab 5, p. 20]; Trial Court at paras. 3-4, 7 [AR, tab 1, pp. 3-5].

the appellant's residence to conduct a curfew check and on that prior date the appellant had responded appropriately.[3]

8. As a result of the October 9th and 11th curfew checks, the appellant was charged under s. 145(3) of the *Code* with two counts of breaching his curfew and two counts of failing to comply with the terms of his recognizance by not presenting himself at the door of his residence within five minutes of police conducting a curfew check.[4] The Crown proceeded summarily on all counts.[5] The appellant did not know about these breach charges until he was arrested on October 28th, 2015.

C. The Appellant's Evidence Related to the Breaches

9. The appellant, his mother (who was also his surety) and his girlfriend testified that they had spent the entire Thanksgiving long weekend together at the residence – celebrating Thanksgiving dinner on October 11th, 2015. All three said that the two dogs inside the residence that weekend barked in response to anyone approaching the residence or ringing its doorbell.[6]

10. The appellant said he was inside his residence on October 9th and 11th, 2015, but that he may have been sleeping during the two curfew checks. The appellant was undergoing methadone treatment and withdrawal from his heroin addiction at the time, which he said made him sleepy and retire to bed earlier than usual. The appellant was admittedly sleeping in a bedroom at the relevant time from which it was difficult – if not impossible – to hear the residence's only doorbell.[7]

11. After the appellant learned of the breach charges, he changed where he slept and set up an audio-visual system to help alert him to future curfew checks. After making these changes, the appellant had no further problems complying with the conditions of his recognizance.[8]

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[3] Court of Appeal at paras. 5-6 [AR, tab 5, p. 20]; Trial Court at paras. 5-7 [AR, tab 1, pp. 4-5].
[4] Court of Appeal at para. 1 [AR, tab 5, p. 19]; *R v Zora*, 2017 BCSC 2070 ("Summary Conviction Appeal Court") at para. 1 [AR, tab 3, p. 14]; Trial Court at paras. 1-2 [AR, tab 1, pp. 2-3].
[5] Court of Appeal at para. 1 [AR, tab 5, p. 2].
[6] Court of Appeal at para. 8 [AR, tab 5, p. 20]; Trial Court at para. 7 [AR, tab 1, pp. 4-5].
[7] Court of Appeal at paras. 9, 95-95 [AR, tab 5, pp. 20, 46-48]; Trial Court at para. 8 [AR, tab 1, p. 5].
[8] Court of Appeal at paras. 10, 94-95 [AR, tab 5, pp. 21, 46-48]; Trial Court at para. 8 [AR, tab 1, p. 5].

D. The Trial Judge's Reasons for Judgment

12. The trial judge found no credibility issues regarding the evidence of the two police officers who conducted the compliance checks.[9] Although the trial judge did not reject the defence evidence outright, he did find that there were a number of credibility and reliability issues related to that evidence arising from drug addiction, drug withdrawal, financial interest, timing of disclosure of the breaches, as well as possible bias given their relationships with one another.[10]

13. On the curfew issue, not answering the door was found to be some circumstantial evidence of the appellant being absent from his residence, but the trial judge determined it was inconclusive upon consideration of all the evidence. The trial judge acquitted the appellant of the alleged curfew violations mainly because there was no direct evidence of him being outside his residence during the curfew checks.

14. The trial judge noted that compliance with bail conditions is analogous to strict liability offences but essentially applied an objective standard of *mens rea* to the s. 145(3) offences. He held that there is an element of practicality applicable to bail conditions, and that the relevant conditions imposed upon the appellant were enforceable. He found that it is incumbent upon accused who wish to be released on bail to make the necessary arrangements in order to comply with their bail conditions. He observed that the appellant was in fact able to make these necessary arrangements after he was charged with breaching his bail.[11]

15. The trial judge noted a number of scenarios that would not afford the appellant a defence for failing to comply in this case, including: deliberately not answering the door; self-induced intoxication that prevented compliance with answering the door; or doing something that resulted in the appellant being unable to hear the police attend at the door.[12] The trial judge held that while the defence evidence on the whole offered a "possible explanation" for why the appellant did not present himself at the door as required by the terms of his recognizance, it was insufficient to establish a legal defence for failing to do so. The appellant was consequently convicted of two counts of failing

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[9] Court of Appeal at para. 11 [AR, tab 5, p. 21]; Trial Court at para. 11 [AR, tab 1, p. 7].
[10] Court of Appeal at para. 11 [AR, tab 5, p. 21]; Trial Court at paras. 12-14 [AR, tab 1, pp. 7-8].
[11] Trial Court at paras. 15-16 [AR, tab 1, pp. 8-9].
[12] Court of Appeal at para. 12 [AR, tab 5, p. 21]; Trial Court at para. 16 [AR, tab 1, p. 9].

to comply by not answering to the door during the curfew checks under s. 145(3) of the *Code*, and sentenced to a $400 fine on each count.[13]

E. The Decision of the Summary Conviction Appeal Court

16. The appellant appealed his convictions to the summary conviction appeal court. He did not challenge the factual findings made by the trial judge. He advanced a single ground of appeal – whether the trial judge erred in law by finding that the fault element for a s. 145(3) offence is satisfied upon the objective test for *mens rea*.[14] The summary conviction appeal judge dismissed the appeal on the basis that the trial judge committed no error. He noted that s. 145(3) is not clear on the requisite *mens rea* and that there were divergent authorities on this issue. However, he felt bound by the opinion of the British Columbia Court of Appeal in *Ludlow* that the *mens rea* requirement is largely objective.[15]

F. Leave to Appeal to the Court of Appeal

17. The appellant applied for leave to appeal under s. 839(1) of the *Code* to the British Columbia Court of Appeal. The appellant was granted leave on the sole question of whether or not s. 145(3) imports an objective standard of *mens rea*. A five-member division of the Court of Appeal was convened to hear the appeal in order to reconsider its prior decision in *Ludlow*.[16]

G. The Decision of the Court of Appeal

18. A majority of four justices dismissed the appeal and concluded that s. 145(3) is a duty-based offence that attracts an objective *mens rea*.[17] The majority properly applied the well-established principles of statutory interpretation and determined that the duty-based nature of s. 145(3), combined with the risk-based nature of the *Code* bail provisions, demonstrated that Parliament intended that an objective *mens rea* be applied to breach of recognizance.

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[13] Court of Appeal at para. 13 [AR, tab 5, p. 21]; Trial Court at para. 18 [AR, tab 1, p. 10].
[14] Court of Appeal at paras. 14-15 [AR, tab 5, pp. 21-22]; Summary Conviction Appeal Court at paras. 1, 4 [AR, pp. 14-15].
[15] *R v Ludlow*, 1999 BCCA 365; Court of Appeal at paras. 15-16 [AR, tab 5, p. 22]; Summary Conviction Appeal Court at paras. 7-8 [AR, tab 3, pp. 15-16].
[16] Court of Appeal at paras. 1, 16-17 [AR, tab 5, pp. 19, 22].
[17] Court of Appeal at para. 66 [AR, tab 5, p. 36].

19. Writing for the majority, Stromberg-Stein J.A. began the analysis by identifying the two stages of proving an offence under s. 145(3). At the first stage, the Crown must prove the required elements of the breach (the *actus reus* and the requisite *mens rea*). Then, at the second stage, if the accused fails to provide a lawful excuse for the breach after the Crown proved all the elements of the first stage, the offence is made out.[18]

20. Next, Stromberg-Stein J.A. turned to the existing appellate and trial court decisions that considered the requisite *mens rea* for ss. 145(2) and (3) offences, and found that different courts had arrived at inconsistent conclusions on the issue.[19]

21. She observed that since s. 145(3) did not expressly set out the requisite fault element, the court's role was to discern Parliament's intent by applying the well-established modern principles of statutory interpretation.[20] Following *R v A.D.H.*, 2013 SCC 28, the starting point of statutory interpretation is the presumption that Parliament intends crimes to have a subjective *mens rea*. However, this presumption is a principle of statutory interpretation that gives way to "clear expressions of a different legislative intent".[21]

22. Turning to the interpretation of the text of the provision itself, Stromberg-Stein J.A. held that s. 145(3) is a "duty-based offence" – one of the five main types of objective fault offences identified in *A.D.H.* – because the offence relates to a specific legal duty to act a certain way imposed upon an accused by a court.[22] The words and phrases used in s. 145(3), understood in their grammatical and ordinary sense, demonstrated Parliament's intention to impose a uniform normative standard of behaviour, which is consistent with discharging an obligation (i.e. legal duty to comply) in objective terms.[23]

23. Turning next to the statutory context and purpose of s. 145(3), the majority considered the relationship between the offence in s. 145(3) and the law of bail under s. 515(10). According to *R v Antic*, 2017 SCC 2017, an accused person has the right to be released on reasonable bail on the least

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[18] Court of Appeal at paras. 21-22 [AR, tab 5, p. 24].
[19] Court of Appeal at paras. 24-41 [AR, tab 5, pp. 24-29].
[20] Court of Appeal at para. 47 [AR, tab 5, p. 30]; applying *A.D.H.* at paras. 19-20.
[21] Court of Appeal at para. 48 [AR, tab 5, p. 31]; applying *A.D.H.* at paras. 23-27.
[22] Court of Appeal at paras. 50-51 [AR, tab 5, p. 31]; applying *A.D.H.* at paras. 49, 55-56, 63-72.
[23] Court of Appeal at paras. 53-54 [AR, tab 5, pp. 32-33].

onerous conditions.[24] Within this context, s. 145(3) provides an enforcement mechanism aimed at mitigating the statutorily defined risks of releasing an accused person into the community by requiring a minimum uniform standard of conduct, which is consistent with applying an objective *mens rea* standard.[25]

24. In the final step of statutory interpretation, Stromberg-Stein J.A. considered the breadth of s. 145(3). She concluded that an objective *mens rea* would not render the scope of liability under s. 145(3) unduly broad since criminal liability would be restricted to minimal, reasonable, and necessary conditions, reduced to writing and tailored to and accepted by the accused.[26]

25. Stromberg-Stein J.A. remarked that an objective fault standard does not punish the morally innocent because it requires proof of a marked departure from an objectively reasonable standard of care. Although the objective fault does not incorporate individualized characteristics, the bail judge can take into account personal cognitive difficulties that could impact an accused's ability to comply in crafting the appropriate conditions of release.[27] Further, s. 145(3) is not an offence of sufficient social stigma or penalty to require a subjective *mens rea*.[28] Stromberg-Stein J.A. also distinguished s. 145(3) from the offence of breach of probation, under s. 733.1 of the *Code*.[29]

26. In conclusion, the majority determined that Parliament's intent was for s. 145(3) to impose a uniform - not a personal - standard of conduct, consistent with an objective *mens rea*.[30]

27. Justice Fenlon concurred in the result but took a different view of the law and concluded that s. 145(3) imports a subjective fault standard.[31] Her analysis started from the presumption that Parliament intends crimes to require subjective fault, absent evidence in the legislation of a contrary intention.[32] Justice Fenlon accepted that s. 145(3) was clearly duty-based,[33] but ultimately concluded

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[24] Court of Appeal at para. 56 [AR, tab 5, p. 33].
[25] Court of Appeal at paras. 57-59 [AR, tab 5, p. 34].
[26] Court of Appeal at para. 60 [AR, tab 5, pp. 34-35].
[27] Court of Appeal at paras. 61-62 [AR, tab 5, p. 35].
[28] Court of Appeal at para. 63 [AR, tab 5, p. 35].
[29] Court of Appeal at para. 65 [AR, tab 5, p. 35].
[30] Court of Appeal at paras. 66-67 [AR, tab 5, p. 36].
[31] Court of Appeal at paras. 70, 91, 93 [AR, tab 5, pp. 38, 46].
[32] Court of Appeal at para. 72 [AR, tab 5, p. 38].
[33] Court of Appeal at paras. 80, 83-85 [AR, tab 5, pp. 41-43].

that neither the words nor the design of the offence displaced the presumption of a subjective fault element.[34] She focused on the absence of specific words associated with objective *mens rea* offences, such as "careless," "reasonable", "ought to", and "duty".[35] Her analysis was also infused with an overarching concern that an objective standard of fault would not permit consideration of factors such as inexperience, lack of education, youth, and cultural experience, which would work an injustice.[36] She relied on *R v Josephie*, 2010 NUCJ 7, as an example of a case in which an objective *mens rea* would have resulted in an unjust outcome.[37]

28. Justice Fenlon determined that the appellant was clearly reckless on a subjective *mens rea* standard, and therefore guilty on either test.[38] She acknowledged that the application of either a subjective or objective standard of fault led inevitably to the same result in the appellant's case, but held that such a result would not occur in every case.[39]

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[34] Court of Appeal at para. 73 [AR, tab 5, p. 38].
[35] Court of Appeal at paras. 74, 76-80 [AR, tab 5, pp. 38-41].
[36] Court of Appeal at para. 87 [AR, tab 5, p. 44].
[37] Court of Appeal at para. 88 [AR, tab 5, pp. 44-45].
[38] Court of Appeal at paras. 94-95 [AR, tab 5, pp. 46-48].
[39] Court of Appeal at para. 96 [AR, tab 5, p. 48].

PART II – ISSUES

29. The appellant proposes the following two issues:

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

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

First, relying on the modern principle of statutory interpretation, the British Columbia Court of Appeal correctly concluded that the fault element for s. 145(3) failure to comply with judicial interim release conditions can be satisfied on the basis of objective *mens rea*. An objective fault element accords with Parliament's intention to require a minimum standard of care from accused bound by obligations imposed under an undertaking or recognizance given or entered into before a justice or judge.

Second, it is ultimately immaterial whether an objective or subjective *mens rea* governs s. 145(3), because there is no reasonable possibility that the verdict would have been different on the facts of this case. If the courts below erred, the curative proviso found in s. 686(1)(*b*)(iii) of the *Code* applies.

PART III – ARGUMENT

30. The appellant suggests that our position "embodies the scheme for strict liability offences".[40] Although it was open to Parliament to make the breach of bail a strict liability offence, this is not what Parliament did. On the contrary, s. 145(3) creates a true criminal offence that requires proof of a *mens rea*, but on an objective standard as opposed to a subjective one.

A. Subjective Versus Objective *Mens Rea*

31. The fault element required for *Code* offences is not limited to subjective *mens rea*. This Court has long recognized that a number of serious criminal offences are established by proof of an objective *mens rea*: unlawful act manslaughter,[41] dangerous driving causing death,[42] failure to provide the necessaries of life to a child,[43] criminal negligence,[44] and careless storage of a firearm.[45]

32. The criminal fault element can be assessed subjectively (*via* intention, recklessness, or willful blindness), according to what the accused actually knew, intended, or adverted to at the time of the offence.

33. The criminal fault element can also be assessed objectively (*via* penal or criminal negligence). This requires an assessment of whether a reasonable person, in the same circumstances as the accused, would have foreseen the attendant risks flowing from the act or omission of the accused, and whether the accused's conduct constituted a marked departure from what a reasonable person would have done in those circumstances.[46]

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[40] Appellant's Factum at para. 66.
[41] *R v Javanmardi*, 2019 SCC 54; *R v Creighton*, [1993] 3 SCR 3; *R v Gosset*, [1993] 3 SCR 76.
[42] *R v Hundal* [1993] 1 SCR 867; *R v Beatty*, 2008 SCC 5; *R v Roy*, 2012 SCC 26.
[43] *R v Naglik*, [1993] 3 SCR 122; *R v J.F.*, 2008 SCC 60.
[44] *R v Javanmardi*, 2019 SCC 54; *R v J.F.*, 2008 SCC 60.
[45] *R v Finlay*, [1993] 3 SCR 103.
[46] See *R v Javanmardi*, 2019 SCC 54 at paras. 20-22; *R v A.D.H.*, 2013 SCC 28 at paras. 3, 61, 77; *R v Creighton*, [1993] 3 SCR 3 at 58-59; *R v Beatty*, 2008 SCC 5 at para. 47; *R v Hundal* [1993] 1 SCR 867 at 882-883, 871-873; *R v Roy*, 2012 SCC 26 at paras. 1-2; *R v J.F.*, 2008 SCC 60 at paras. 7-9, 65-68; *R v Naglik*, [1993] 3 SCR 122 at 140-141, 144; Court of Appeal at paras. 44-46 [AR, tab 5, p. 30].

34. For offences involving penal negligence, Parliament is presumed to lay down a minimum standard of care and the criminal fault lies in the accused's marked departure from that standard.[47]

35. The rationale underlying the objective fault standard is that some conduct requires adherence to societal minimum standards of care in order to promote Canadian values and protect the public; for example, actions required to satisfy a legal duty (such as providing the necessaries of life to a child) or licensed activities that pose risks (such as driving or possession of firearms). In such circumstances, imposing a subjective *mens rea* potentially thwarts Parliament's objective in creating the criminal offence in the first place. Societal standards would be rendered meaningless in the absence of a uniform standard applicable to all engaged in the activity. This is explained by Lamer C.J.C. in *Naglik* in determining the *mens rea* of failure to provide the necessaries of life to a child proscribed by s. 215 of the *Code*:

> […] the language of s. 215 referring to the failure to perform a "duty" suggests that the accused's conduct in a particular circumstance is to be determined on an objective or community standard. The concept of a duty indicates a societal minimum which has been established for conduct: as in the law of civil negligence, a duty would be meaningless if every individual defined its content for him or herself according to his or her subjective beliefs and priorities.[48]

36. Pursuant to an objective *mens rea*, triers of fact must simply determine whether a reasonable person engaged in the activity in question, under the same circumstances, would have been aware of the risks and would have been able to avoid them.[49]

B. Objective *Mens Rea* Versus Civil Negligence

37. Objective *mens rea* is different from civil negligence: the former aims to punish morally blameworthy *criminal* conduct, while the latter is concerned with apportionment of loss.[50] The objective *mens rea* incorporates a reasonable person test and modifies the standard of civil negligence in two significant respects:

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[47] *R v Creighton*, [1993] 3 SCR 3 at 58, 66.
[48] *R v Naglik*, [1993] 3 SCR 122 at 141.
[49] *R v Javanmardi*, 2019 SCC 54 at paras. 20-22; *R v Creighton*, [1993] 3 SCR 3 at 41, 58-61, 63-68, 70-71; See also *R v Naglik*, [1993] 3 SCR 122 at 143-144; *R v Beatty*, 2008 SCC 5 at paras. 39-40; *R v Finlay*, [1993] 3 SCR 103 at 115; Court of Appeal at para. 62 [AR, tab 5, p. 35].
[50] *R v Beatty*, 2008 SCC 5 at para. 6.

1. The first modification relates to the degree of deviation from the norm. Mere deviation is insufficient. The Crown is required to establish a marked departure from the normal standard of care expected in the specific circumstances of the case. Mere failure to discharge the standard of care expected in the circumstances does not establish criminal liability. Objective *mens rea* requires a finding that the accused's conduct exhibited a significant departure from the normal standard of reasonable care expected in the specific circumstances of the case to warrant inferring that the accused's act or omission reflects a morally blameworthy state of mind.

2. The second modification requires the Crown to prove *mens rea* beyond a reasonable doubt. The mental fault element at issue is the accused's lack of due care required in the circumstances. This determination requires a contextualized analysis that considers: the surrounding circumstances, explanations offered for the failure and precautions taken. With an objective *mens rea*, any reasonable doubt as to whether a reasonable person in the accused's position would have appreciated the risks arising from the conduct or omission in question, or could or would have done anything to avoid that risk, will bring an acquittal because the requisite level of moral blameworthiness cannot be inferred.[51]

38. The moral blameworthiness inherent to objective *mens rea* offences flows from the premise that a reasonable person in the accused's position would have been aware of the manifest risks arising from the conduct or omission in question, and therefore would not have conducted themselves in the way the accused did. The fact that the accused failed to exhibit that same awareness is ultimately what is viewed as morally blameworthy. However, to ensure that blameworthiness rises to a sufficient degree, the objective *mens rea* requires a marked departure from what a reasonable person would have done in the circumstances.[52]

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[51] *R v Beatty*, 2008 SCC 5 at paras. 6-8, 18, 20, 22-23, 33-43; *R v A.D.H.*, 2013 SCC 28 at paras. 153-155; *R v Hundal* [1993] 1 SCR 867 at 874; *R v Creighton*, [1993] 3 SCR 3 at 59, 71-72; *R v Roy*, 2012 SCC 26 at paras. 1-2, 4, 32; *R v Hammoud*, 2012 ABQB 110 at paras. 7-22.
[52] *R v Beatty*, 2008 SCC 5 at paras. 6-8, 37-41, 43, 49; *R v Hundal* [1993] 1 SCR 867 at 874-876, 886-888.

C. Objective *Mens Rea* Offences: the Analytical Framework

39. Parliament is presumed to intend that crimes have a subjective fault element. But this presumption is part of the legislative context and is rebuttable; it is a principle of interpretation that yields to clear expressions of a different legislative intent.[53] However, where Parliament's intention is not made explicit, as is the case for s. 145(3),[54] this Court, in *R. v A.D.H.*, proposed an analytical framework to assist in discerning whether the requisite fault element for *Criminal Code* offences is subjective or objective.

40. In that case, Cromwell J., for the majority, listed five types of objective fault offences contained within the *Criminal Code*. He suggested that the nature and manner in which a provision is drafted assist in unearthing Parliament's intention with respect to the requisite fault element. The five offence types are not exhaustive or closed silos; rather, they serve to illustrate that the manner in which these enumerated objective fault offences are drafted support the inference that objective *mens rea* was intended. Where an offence exhibits attributes known to support an inference of objective *mens rea*, then as a matter of logic, comparable attributes in the provision under review will support similar inferences.

41. The prescribed analysis amounts essentially to an application of the modern principle of statutory interpretation which requires an analysis of the words of the statute in their entire context, in their grammatical and ordinary sense, harmoniously with the scheme of the statute, its objective, and the intention of Parliament.[55]

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[53] *R v A.D.H.*, 2013 SCC 28 at paras. 23, 27-29. The Honourable Justice Cromwell notes that the traditional use of such presumptions is hard to reconcile with the modern approach and recommends instead of treating presumptions "as principles of interpretation that form part of the broader context in which legislation is enacted", Cromwell, The Honourable Thomas A, *et al*., *Revisiting the Role of Presumptions of Legislative Intent in Statutory Interpretation* at para. 63 [Tab 5, Appellant's Book of Authorities].

[54] Court of Appeal at para. 23 [AR, tab 5, p. 24].

[55] *R v A.D.H.*, 2013 SCC 28 at paras. 19-20; See also Court of Appeal at paras. 47, 49 [AR, tab 5, pp. 30-31].

D. Section 145(3): a Duty-Based Offence Requiring an Objective *Mens Rea*

42. The provision's text and purpose within the scheme of the *Criminal Code* demonstrate that Parliament intended to require an objective *mens rea*.[56]

i. Statutory Evolution: No Change since the 1972 Bail Reform Act

43. Prior to the *Bail Reform Act* of 1972, breach of bail was narrowly focused on the failure to attend court as required.[57] As noted in *Antic*, the *Bail Reform Act* was implemented to overcome the inequities of an overreliance on cash bail, and ultimately codified the ladder principle – favouring release at the earliest reasonable opportunity on the least onerous terms appropriate in the circumstances.[58] One objective of the *Bail Reform Act* was to limit pretrial detention to certain statutory grounds where detention is deemed truly necessary, the corollary of which meant that most accused were presumed releasable on conditions pending trial.[59]

44. The *Bail Reform Act* created the offence of breach of a release condition:

133(3) Every one who, being at large on his undertaking or recognizance given to or entered into before a justice of a judge and being bound to comply with a condition of that undertaking or recognizance directed by a justice or a judge, fails, without lawful excuse, the proof of which lies upon him, to comply with that condition, is guilty of a) an indictable offence and is liable to imprisonment for two years; b) an offence punishable on summary conviction.[60]	133(3) Est coupable a) d'un acte criminel et passible d'un emprisonnement de deux ans, ou b) d'une infraction punissable sur déclaration sommaire de culpabilité, quiconque, étant en liberté sur sa promesse remise ou son engagement contracté devant un juge de paix ou un juge et étant tenu de se conformer à une condition de cette promesse ou de cet engagement fixée par un juge de paix ou un juge, omet, sans excuse légitime, dont la preuve lui incombe, de se conformer à cette condition.

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[56] Court of Appeal at paras. 2, 66-67 [AR, tab 5, pp. 19, 36].
[57] *An Act to amend the Criminal Code*, S.C. 1925, c. 38, s. 3; *An Act respecting the Criminal Law*, R.S.C. 1927, c. 36 s. 189; *An Act to amend the Criminal Code*, S.C. 1943-44, c. 23, s. 6; *An Act to amend the Criminal Code*, S.C. 1947 c.55, s.2; *An Act respecting the Criminal Law*, S.C. 1953-54 c. 51 s. 125; *An Act respecting Criminal Law*, R.C.S. 1970, c. 34, s. 133.
[58] *R v Antic*, 2017 SCC 27 at paras. 23-30.
[59] *R v Myers*, 2019 SCC 18 at paras. 21-22.
[60] *Bail Reform Act*, S.C. 1970-71-72, c. 37, s. 4.

45. The wording of that breach offence has remained virtually the same since its enactment in 1972. The essential elements of the offence and the penalty have not changed. The expression "the proof of which lies upon him" was recently removed by a 2018 amendment to the *Code*, subsequent to the facts in this case.[61]

46. During legislative debate on the bill that later became the *Bail Reform Act*, the Honourable John Turner, Minister of Justice, explained that the "proposals in the bill permitting a justice to impose reasonable conditions on the person are an additional encouragement to pretrial release". In this context, he later emphasized that corresponding "to the right of the citizen to receive fair treatment and respect in the legal process, it is his duty reciprocally to honour that same process".[62]

47. Those comments by the Minister of Justice responsible for the *Bail Reform Act* are the first indication that breach of a bail condition is a duty-based offence.

ii. The Plain Language of s. 145(3) Supports the Duty-Based Nature of the Offence

48. The text of the provision in force at the time read:[63]

145(3) Every person who is at large on an undertaking or recognizance given to or entered into before a justice or a judge and is bound to comply with a condition of that undertaking or recognizance, and every person who is bound to comply with a direction under subsection 515(12) or 522(2.1) or an order under 516(2), and who fails, without lawful excuse, the proof of which lies on them, to comply with the condition, direction or order is guilty of	145(3) Quiconque, étant en liberté sur sa promesse remise ou son engagement contracté devant un juge de paix ou un juge et étant tenu de se conformer à une condition de cette promesse ou de cet engagement, ou étant tenu de se conformer à une ordonnance prise en vertu des paragraphes 515(12), 516(2) ou 522(2.1), omet, sans excuse légitime, dont la preuve lui incombe, de se conformer à cette condition ou ordonnance est coupable :

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[61] *An Act to amend the Criminal Code and the Department of Justice Act and to make consequential amendments to another Act*, S.C. 2018, c. 29, s.9.

[62] *House debates*, 28th Parliament, 3rd session, vol 3, pp. 3116-3117. The Honourable John Turner also referred to this corresponding responsibility on the released person to appear when required to do so before the Justice Committee, 28th Parliament, 3rd Session, vol. 1, pp. 8:12.

[63] *Criminal Code*, R.S.C. 1985, c. C-46, s. 145(3) as it appeared in 2015.

(a) an indictable offence and is liable for imprisonment for a term not exceeding two years; or	a) soit d'un acte criminel passible d'un emprisonnement maximal de deux ans;
(b) an offence punishable on summary conviction.	b) soit d'une infraction punissable sur déclaration de culpabilité par procédure sommaire.

49. The operative language of s. 145(3) understood in its ordinary grammatical sense demonstrates the duty-based nature of this provision, and gives clear expression to Parliament's intention that the discharge of that duty is to be measured by reference to uniform normative standards:[64]

1. The phrase *at large* means to be at liberty or free,[65] as opposed to be imprisoned (in context, it means to have been released from custody).[66] The plain language of the French expression *étant en liberté* confirms that meaning.

2. A *recognizance* is a debt the accused person owes to the Crown that is acknowledged in court and places obligations on them the moment it is pronounced by a judge.[67] The French word *promesse* also refers to *un engagement d'accomplir un acte* ;[68]

3. An *undertaking* is a formal pledge or promise accepting responsibility to discharge an obligation (i.e. that imposes a binding legal duty)[69]. The French equivalent word *engagement* is to the same effect;[70]

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[64] Court of Appeal at para. 53 [AR, tab 5, p. 32]; See generally *R v A.D.H.*, 2013 SCC 28 at paras. 63-72.
[65] *Oxford English Dictionary*, definition of the phrase "*at large*" entries P1; See also *Black's Law Dictionary* (11th ed. 2019), definition of "at large".
[66] Court of Appeal at para. 53(a) [AR, tab 5, p. 32].
[67] Court of Appeal at para. 53(c) [AR, tab 5, p. 32]; *Oxford English Dictionary*, definition of "*recognizance*" entry 1 and P2; See also, *Black's Law Dictionary* (11th ed. 2019), definition of "*recognizance*".
[68] JuriBistro eDictionnaire (une adaptation numérique du *Dictionnaire de droit Québécois et Canadien*, Hubert Reid, 3e édition), definition of *« promesse ».*
[69] *Oxford English Dictionary*, definition of "*undertake*" entries 4-5, 9; See also, *Black's Law Dictionary* (11th ed. 2019), definition of "*undertaking*"; Court of Appeal at para. 53(b) [AR, tab 5, p. 32].
[70] « Manifestation de volonté par laquelle une personne s'impose une obligation. », JuriBistro eDictionnaire (une adaptation numérique du *Dictionnaire de droit Québécois et Canadien*, Hubert Reid, 3e édition), the definition of *« engagement »*.

4. A *condition* is something required as a prerequisite to the granting of something else (i.e. a stipulation). It requires that certain things exist before something else is possible. In context, it requires that the accused person be bound, and abide, by certain obligations in order to be released from custody and to maintain their release.[71] The French word *condition* conveys the same meaning;

5. The phrase *bound to comply* clearly expresses the fact that the accused is placed under a legal constraint or obligation (a duty) to do or abstain from a particular act – i.e. their conditions of release. In context, it means a legal or contractual obligation imposed to meet specific standards.[72] The use of the French terms *étant tenu de se conformer*[73] is equivalent to the English version meaning to be legally or morally obligated or bound to act a certain way;

6. The phrase *fail to comply* is the *actus reus*. Use of the word *fail*, in combination with the concept of *compliance*, clearly demonstrates that the delict at issue is an accused acting contrary to set expectations, or in not attaining the set standard required of him under the conditions of his release. In context, it means failing to discharge the duty imposed to the standard of care expected.[74] The use of the French expression "*omet de se conformer*"[75] is similar to the English expression and refers to the omission or failure to do something that is required by duty or law.

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[71] Court of Appeal at para. 53(e) [AR, tab 5, p. 32]; *Oxford English Dictionary*, definition of "*condition*" entry 1; See also, *Black's Law Dictionary* (11th ed. 2019), definition of "*condition*".
[72] Court of Appeal at para. 53(d) [AR, tab 5, p. 32]; *Oxford English Dictionary*, definitions of "*bind* " entries 15-18 and "*comply*" entries 1 and 5; See also, *Black's Law Dictionary* (11th ed. 2019), definitions of "*bind*" and "*compliance*".
[73] « Être tenu de, être légalement ou moralement obligé de : Vous êtes tenu de passer par la voie hiérarchique », Dictionnaire Larousse, « *être tenu* ».
[74] Court of Appeal at para. 53(f) [AR, tab 5, p. 32]; *Oxford English Dictionary*, definitions of "*fail*" entries 1, 5-6, 9 and "*comply*" entries 1 and 5; *Black's Law Dictionary* (11th ed. 2019), definitions of "*fail*" and "*compliance*"; See also Court of Appeal at para. 78, wherein Fenlon JA agrees with the majority's interpretation of the word "*fail*", and remarks that it also connotes neglect (the word *neglect* means lack of attention to what ought to be done – i.e. negligence, as per *Oxford English Dictionary* definition of "*neglect*" entry 2).
[75] « Comportement d'un individu qui consiste à s'abstenir ou négliger d'agir et qui constitue un manquement à un devoir légal pouvant entraîner sa responsabilité civile ou pénale », JuriBistro

50. The structure of the text of s. 145(3) clearly aligns with the established duty-based offence contained in s. 215 determined to import an objective fault standard in *Naglik*, as opposed to the subjective fault offence in s. 218 considered in *A.D.H.*

51. None of the words typically associated with Parliament's intention to import a subjective *mens rea* appear in s. 145(3). Section 218 incorporates the words "abandons", "exposes", "wilful omission to take charge" and "dealing with a child", collectively found to capture a broad range of situational intentional acts and requiring subjective intent.[76] In contrast, both s. 215 and s. 145(3) identify a specific legal duty imposed by statute where the offence is framed as "*fails without lawful excuse*" to discharge the obligation at issue, which is notably absent from s. 218.[77]

iii. The Scheme of the Judicial Interim Release Provisions Supports A Duty to Comply

52. An accused must reasonably comply with conditions designed to manage the individual risk factors associated with their release. The duty to comply with bail conditions exists in order to suppress s. 515(10) concerns from materializing.

53. The right to liberty and the presumption of innocence are fundamental tenets of the Canadian criminal justice system. Pretrial detention is the exception: pretrial release at the earliest opportunity on the least onerous terms is the default presumption.[78] The purpose of s. 145(3) is inextricably linked to the three grounds for detention under s. 515(10).

54. As a starting point, every accused has the right not to be denied reasonable bail without just cause. The judge releasing an accused must do so at the earliest opportunity and on the least onerous form of release, unless the Crown establishes just cause for why that should not be the case. "Just cause" in this context means that denial of bail (or a step up on the "ladder") accords with constitutional standards, and falls within one of the three grounds justifying pretrial detention under s. 515(10), namely:

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eDictionnaire (une adaptation numérique du *Dictionnaire de droit Québécois et Canadien*, Hubert Reid, 3e édition), definition of « *Omission* ».

[76] *R v A.D.H.*, 2013 SCC 28 at paras. 43-49.

[77] Court of Appeal at para. 54 [AR, tab 5, 33].

[78] *R v Myers*, 2019 SCC 18 at para. 1. Section 145(3) also applies after conviction; pending sentence or appeal.

1. flight risk (s. 515(10)(*a*));

2. public safety and protection (s. 515(10)(*b*)); or

3. maintaining public confidence in the administration of justice (s. 515(10)(*c*)).[79] In *St-Cloud*, this Court held that the application of s. 515(10)(*c*) requires judges to adopt the perspective of the public in determining whether pretrial detention is necessary. In this context, the "public" refers to reasonable, dispassionate and well-informed members of the community. Unlike the other two grounds for detention, s. 515(10)(*c*) is not strictly risk-based.[80] Any condition imposed to mitigate tertiary ground concerns that justify detention, by necessary implication, must incorporate the perspective of the public.[81]

55. The reasonableness of a judicial interim release condition is dependent upon it addressing at least one operative ground to justify detention under s. 515(10).[82] The conditions of release imposed must therefore be necessary to address concerns related to the statutory criteria for detention set out under s. 515(10), not to change an accused's behaviour, or to punish an accused.[83]

56. The decision whether to order pretrial release involves a delicate balancing of all the relevant circumstances.[84] In *St-Cloud*, this Court noted that to assess whether detention is necessary under s. 515(10)(c), the "personal circumstances of the accused (age, criminal record, physical or mental condition, membership in a criminal organization, etc.) may also be relevant".[85] Judges must

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[79] *R v Antic*, 2017 SCC 27 at paras. 1, 3-4, 7, 21, 29-42, 44-47, 67; *R v Patko*, 2005 BCCA 183 at para. 18; Court of Appeal at paras. 56-58 [AR, tab 5, pp. 33-34]; *R v St-Cloud*, 2015 SCC 27 at para. 70; *R v Myers*, 2019 SCC 18 at para. 25.
[80] *R v St-Cloud*, 2015 SCC 27 at paras. 4-5, 33-35, 72-80, 87.
[81] *R v St-Cloud*, 2015 SCC 27 at paras. 86-87.
[82] *R v Antic*, 2017 SCC 27 at paras. 36-42, 67; *R v Patko*, 2005 BCCA 183 at paras. 18-19, 23; *R v Prychitko*, 2010 ABQB 563 at paras. 5, 13; *R v Major*, 1990 CarswellOnt 88 at para. 27; *Re Keenan*, (1979) 57 CCC (2d) 267 at 274-278.
[83] *R v Antic*, 2017 SCC 27 at paras. 48, 56, 67(j); Court of Appeal at para. 56 [AR, tab 5, pp. 33-34].
[84] *R v St-Cloud*, 2015 SCC 27 at paras. 6, 68-70.
[85] *R v St-Cloud*, 2015 SCC 27 at para. 71 (although this comment was made in the context of s. 515 (10)(c), there is every reason to think that such factors might also be relevant under the other two s. 515(10) grounds for detention).

ultimately decide on the appropriate form of release, and exercise their discretion in imposing reasonable conditions specific to the circumstances of the accused before them.[86]

57. There is no presumption of parity for judicial interim release conditions, such as where similar offenders are alleged to have committed similar offences under similar circumstances. Accused need to be assessed in advance of their release according to their unique capacity to comply in light of their personal circumstances, community supports, resources and release plan options available.[87]

58. To the extent that accused have cognitive difficulties that could impact their ability to comply, the ladder principle can be used to accommodate such deficiencies in order to fashion an appropriate release; for example, a surety may prove necessary to supervise the accused to ensure compliance with the release conditions.[88]

59. Section 515(4) lists the authorized conditions that a justice can impose on an accused. It is telling that that provision uses the words "*the accused shall*" in relation to every condition ordered to be imposed which makes them imperative obligations.[89] Use of the word "shall" in legislation imposes a duty to do something lawful and creates imperative prohibitions or obligations.[90] The plain meaning of the French expression *le juge de paix peut ordonner…que le prévenu fasse* also supports the imperative imposition of an obligation on the accused.

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[86] *R v Antic*, 2017 SCC 27 at paras. 41-42, 67-68; Court of Appeal at para. 56 [AR, tab 5, pp. 33-34]; *R v Major*, 1990 CarswellOnt 88 at para. 27; *Re Keenan*, (1979) 57 CCC (2d) 267 at 274-278.
[87] *R v E.(D.)*, 2000 ABQB 786 at paras. 36-41; *R v Bowden*, 2008 MBQB 279 at paras. 5-6; *R v Dang*, 2015 ONSC 4254 at para. 29; See also *R v Matteo*, 2016 QCCA 2046 at paras. 3-5 in the context of bail pending appeal.
[88] See *R v Antic*, 2017 SCC 27 at para. 2 (see footnote 1); *R v Patko*, 2005 BCCA 183 at para. 22; Court of Appeal at para. 62 [AR, tab 5, p. 35]
[89] *R v Johnson*, 2003 SCC 46 at paras. 15-18; See also s. 11 of the *Interpretation Act* RSC, 1985, c. I-21.
[90] Sullivan, Ruth, *Sullivan on the Construction of Statutes* 6th ed. (Markham: LexisNexis, 2014), Ch 4, Part 4, at 4.56-4.69.

60. All five judges in the court below found that judicial interim release conditions imposed under s. 515 of the *Code* constitute duties that must be discharged by the accused.[91] The majority held that:

> A court order imposes upon the accused a specific legal duty to act and falls within the description of a duty-based offence. Similarly, in my view, s. 145(3) fits within an objective fault duty-based offence as Parliament based s. 145(3) on a violation of a duty.[92]

61. Legal duties arise whenever an accused person acknowledges the preconditions of their release in court. Release is granted on the basis of that acknowledgement, and maintaining it depends on compliance. This supports that the discharge of those legal duties be assessed on an objective or community standard: "A duty would be meaningless if every individual defined its content for him or herself according to his or her subjective beliefs and priorities."[93]

62. An objective *mens rea* directly dovetails with the purpose of s. 145(3), which is to mitigate the statutory risks identified in ss. 515(10)(*a*) and (*b*) associated with releasing an accused back into the community pending resolution of their criminal matter. The interests of securing an accused's attendance in court, ensuring public safety, and protection of victims and witnesses all militate in favour of imposing a uniform minimum standard of compliance with judicial interim release conditions. Section 515(10) grounds can be truly mitigated only if an accused is held to a uniform minimum, rather than a personal, standard of conduct while on bail.[94] Consequently, the fault element required under the s. 145(3) enforcement provision must be objective.

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[91] Court of Appeal at paras. 50-55 [AR, tab 5, pp. 31-33]. At para. 80 [AR, tab 5, p. 41] Fenlon J.A. concedes that accused released on bail have a duty to comply with the conditions of their release, and that defining an offence in terms of failure to perform specified legal duties has been found by this Court to attract the objective *mens rea* standard.

[92] Court of Appeal at para. 51 [AR, tab 5, p. 31].

[93] *R v Naglik*, [1993] 3 SCR 122 at 141.

[94] *R v Naglik*, [1993] 3 SCR 122 at 141.

iv. The Purpose and Breadth of s. 145 Support the Duty-Based Nature of the Offence

63. The statutory purpose and potential breadth of liability are indicators of parliamentary intent regarding *mens rea*.[95]

64. Courts grant judicial interim release to accused who enter into a recognizance or undertaking on the basis that their court-ordered conditions of release will be fulfilled.[96] The bail system is premised on promises made by accused to perform certain obligations and on their belief in the consequences that will follow if such promises are broken.[97] Section 145 is a prime means of enforcing release conditions in order to mitigate the risks and concerns that would otherwise have justified detaining a person pending resolution of their criminal matter. Accused on judicial interim release are expected to observe the conditions of their release.[98]

65. The *actus reus* of s. 145(3) is framed as "*fails, without lawful excuse…to comply with the conditions*" of judicial interim release. In *A.D.H.*, Cromwell J. held that application of an objective fault element makes sense in the context of offences that may be committed by mere failure to discharge certain obligations; for example, where an offence can only be committed by a certain defined subset of individuals under narrowly specified statutorily created legal duties.[99] Section 145(3) is such an offence:

1. judicial interim release conditions are narrow and *in personam*;
2. only one person is bound by the court ordered duty;
3. only one person can fail to comply with their pre-existing conditions of release which means that criminal liability is not aimed at the general population; and
4. an omission alone is sufficient to constitute a failure to comply with a number of the routine obligations imposed under s. 515.[100]

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[95] *R v A.D.H.*, 2013 SCC 28 at paras. 39-41.
[96] Court of Appeal at para. 58 [AR, tab 5, p. 34].
[97] *R v Antic*, 2017 SCC 27 at para. 54; Court of Appeal at para 58 [AR, tab 5, p. 34].
[98] *R v Ludlow*, 1999 BCCA 365 at paras. 10, 40; *R v Hammoud*, 2012 ABQB 110 at para. 21; Court of Appeal at para 58 [AR, tab 5, p. 34].
[99] *R v A.D.H.*, 2013 SCC 28 paras. 49, 66-68; Roach, Kent, *Criminal Law and Procedure: Cases and Materials*, 11th ed. (Toronto: Emonde, 2015), pp. 340-342.
[100] Court of Appeal at para. 54 [AR, tab 5, p. 33].

66. This entails that the scope of potential liability under s. 145(3) is narrow irrespective of the requisite *mens rea* standard.

67. Moreover, the conditions imposed under ss. 515(4) to (4.3) are aimed at not only establishing the minimum and least onerous terms necessary to mitigate the s. 515(10) grounds for detention, they are also limited in number, are reduced to writing, and are made explicitly known to accused prior to their release.[101]

68. The imposition of an objective fault standard does not punish the morally blameless because it does not criminalize mere negligence: "If every departure from the civil norm is to be criminalized, regardless of the degree, we risk casting the net too widely and branding as criminals persons who are in reality not morally blameworthy."[102] It is for that reason that an objective test "requires proof of a *marked departure* from the standard of care that a reasonable person would observe in all the circumstances".[103]

69. The offence of breaching a condition of release under s. 145(3) is thus not the mere failure to meet the standard of care expected or the mere failure to comply with a condition of release. The offence is committed only where accused fail to act reasonably, and that failure amounts to a marked departure from what a reasonable person would have done in the circumstances. For instance, an accused who takes the subway home well in advance of her or his imposed curfew but unexpectedly ends up stuck in a subway tunnel on a broken-down train – may in fact breach the curfew, but will nevertheless not be held criminally responsible under the objective fault test.

70. The "lawful excuse" defence also prevents punishment of the morally innocent.[104] It only becomes available once all the elements of the offence have been proved beyond a reasonable doubt. Once established, the Crown needs to disprove the lawful excuse beyond a reasonable doubt; otherwise, the accused will be acquitted if the excuse was a good enough reason to commit the offence. This defence affords the courts with some flexibility where the elements of the offence have

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[101] Court of Appeal at para. 60 [AR, tab 5, pp. 34-35]; Form 32 & 12 of the *Code*; See generally *Prychitko*; *contra R v A.D.H.*, 2013 SCC 28 at para. 40-41.
[102] *R v Beatty*, 2008 SCC 5 at para. 34.
[103] Moldaver J. (dissenting) in *R v. A.D.H.*, 2013 SCC 28 at paras. 153-155, citing *R v Beatty*, 2008 SCC 5 at para. 36 [italics in the original].
[104] Court of Appeal at para. 53; *R v Naglik*, [1993] 3 SCR 122 at 145.

been proved, but where the accused should not be convicted in the circumstances. In addition, all common law defences, justifications and excuses are available for any *Criminal Code* offence pursuant to s. 8(3) of the *Code*.[105]

v. Insufficient Gravity of s. 145(3) to Require Subjective Fault

71. Some crimes require subjective *mens rea* to be proved in order to properly reflect the gravity of the crime – often measured in terms of the social stigma and penalties that flow from conviction. This Court has recognized that there are very few offences where the associated stigma merits imposing subjective *mens rea*.[106] The court below found that s. 145 offences do not give rise to the types of stigma or penalties that justify a subjective *mens rea*.[107] Failure to comply with bail conditions hardly carries the stigma attendant upon being convicted of failing to provide necessaries of life to a child or driving dangerously and killing someone.[108]

E. Application of a Subjective *Mens Rea* is Inimical to s. 145's Overall Purpose

72. The appellant's contention that the Crown needs to prove that "the accused knew that the police had attended at his residence in order to determine his compliance with the house arrest condition"[109] gives rise to absurd results. If the accused was outside his residence during curfew hours and curfew check, he may never know that police had attended. In such a scenario, the accused could simply decline to testify and claim that a reasonable doubt exists on the basis of the Crown having failed to prove that he intended to ignore the police at the door, because evidence that he did not in fact answer the door is equally consistent with him having been out, indisposed, or sleeping.

73. Justice Fenlon in the court below similarly dismissed the concern that an accused might avoid conviction by simply asserting: "I forgot the date"; or "I did not hear the police knocking."

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[105] *R v Chartrand*, [1994] 2 SCR 864 at 884.
[106] *R v Creighton*, [1993] 3 SCR 3 at 45-49; *R v Naglik*, [1993] 3 SCR 122 at 144-145; *R v Finlay*, [1993] 3 SCR at 113; *R v A.D.H.*, 2013 SCC 28 at para. 72.
[107] Court of Appeal at para. 63 [AR, tab 5, p. 35]; *R v Ludlow*, 1999 BCCA 365 at para. 38; See also *R v Hammoud*, 2012 ABQB 110 at para. 21; *R v Creighton*, [1993] 3 SCR 3 at 48-49, 59, 70-71.
[108] See above heading "A. Subjective Versus Objective *Mens Rea*" at p. 10.
[109] Appellant's Factum at para. 40.

Justice Fenlon found that concern to be overstated, and to underestimate the intelligence and common sense of triers of fact.[110]

74. Justice Fenlon's opinion in this regard presumes that an accused will testify or call evidence that would be subject to a credibility assessment by the trier of fact. In practice, however, the presumption of innocence entails that an accused is not required to provide any such explanation. Where the Crown's case relies on circumstantial evidence, an accused is entitled to rely on plausible theories or reasonable possibilities inconsistent with guilt, and those theories do not have to arise from proven facts in the case.[111]

75. Section 145(3) charges routinely encompass an accused's failure to comply by omission; for example, by failing to report. In such a case, the Crown typically will not be in a position to call direct evidence of the accused's subjective intent – and there likely will be no contemporaneous observations of the accused at the time of the alleged breach. The circumstances surrounding breach offences are often quite sparse, for example, where an accused reports to a bail supervisor one day and then fails to report for the subsequent scheduled meeting.

76. Unwarranted acquittals will result should this Court accept the appellant's assertion that a large cross-section of people subject to judicial interim release are incapable of risk appreciation and judicial interim release compliance within the bounds of the marked departure standard, such that subjective *mens rea* is required. Applying a subjective *mens rea*, any accused could invoke, without testifying, a multitude of reasonable inferences other than intentional failure to comply. For instance, it would be open to a trier of fact to infer that an accused may have just slept in,[112] simply forgot,[113] or was wholly and unreasonably disinterested in compliance[114] – such that their judicial interim release conditions were never adverted to at the time of the breach.

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[110] Court of Appeal at para. 90 [AR, tab 5, pp. 45-46].
[111] *R v Villaroman*, 2016 SCC 33 at paras. 35-37.
[112] *R v Garnier*, 2017 NSSC 102.
[113] *R v Blazevic*, [1997] OJ No 1356; *R v Loutitt*, 2011 ABQB 545.
[114] *R v Ly*, [2006] OJ No 1367.

F. Inability to Comply with Bail Conditions

i. Impermissible Collateral Attack

77. The proposition that an accused's unique cognitive ability should be factored into an assessment of breach of bail should be rejected as being tantamount to a collateral attack on a court order. The general rule against launching a collateral attack on a court order is well established:

> […] an order issued by a court must be obeyed unless it is set aside in a proceeding taken for that purpose. The rule has been consistently applied to prevent a person from attacking the validity of a court order when defending against a criminal charge stemming from its breach.[115]

78. The rationale for this general rule is to maintain the rule of law and to preserve the repute of the administration of justice, recognizing that the orderly and functional administration of justice requires that court orders be considered final and binding unless they are set aside. To allow a person to govern their affairs according to their own personal perceptions of the court order's validity, or worse yet disregard the order completely, would lead to uncertainty and potential anarchy.[116]

79. The collateral attack rule applies to court ordered judicial interim release conditions.[117] To launch into an *ex post facto* inquiry into whether or not the accused ever possessed the moral agency or risk appreciation to comply with the conditions of their release in the first place is redundant in the face of the accused having acknowledged the preconditions of their release in court, and acceded to them upon their release. Release is premised on a promise to discharge a duty to the court. The basic capacity to comply within the bounds of penal negligence standards is presumed on the basis of the accused walking out of custody under specific court ordered duties.

ii. Proper Alternative Avenues to Address Inability to Comply

80. No injustice is visited upon an accused released on a recognizance or undertaking who later discovers that compliance becomes impossible or foreseeably challenging. In such circumstances,

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[115] *R v Bird*, 2019 SCC 7 at para. 1.
[116] *R v Bird*, 2019 SCC 7 at paras. 1, 21-24; *R v Custance*, 2005 MBCA 23 at para. 31, leave to appeal dismissed [2005] 2 SCR vii.
[117] *R v Lofstrom*, 2018 ABCA 5 at paras. 17, 47-48. In the bail context, see also *R v Lee*, [1997] OJ No 5320 cited with approval in Trotter's *The Law of Bail in Canada*, 3d ed., Ch 12 (2)(d) (Toronto: Carswell, updated 2019) and to court-ordered conditions more generally see *R v Domm*, [1996] OJ No 4300 per Doherty J.A.

the bail regime provides legitimate means to review the release order in order to accommodate their new personal circumstances:

1. At the pretrial stage, s. 520 of the *Code* allows a reviewing judge to consider admissible new evidence, to correct errors of law, to remedy issues related to the accused's conditions of release, including altering or vacating imposed conditions;
2. At the end of the preliminary inquiry, s. 523(2)(*b*) allows the presiding judge to change or vacate the release conditions;
3. At trial, s. 523(2)(*a*) allows the trial judge to change or vacate the release conditions;
4. At any time during the criminal process under s. 515.1, and in specific circumstances under s. 523(2)(*c*), the prosecutor can consent to the modification of release conditions.

81. As this court made clear in *St-Cloud*, *Myers* and *Antic* – the entire process for evaluating pretrial detention would begin anew to evaluate where on the "ladder" the accused now stood in order to detain or release the accused on the least onerous terms to mitigate the s. 515(10) grounds.[118]

G. Response to the Appellant's Arguments

i. Policy Choices: Better Left with Parliament

82. The appellant complains that courts are saturated by "Administration of Justice Offences" and of the impact of such offences on marginalized people.[119] The appellant's position amounts to a general criticism of the bail regime. He provides no support that the mental fault element for a breach of s. 145(3) correlates to any of the public policy concerns he raises.[120] He relies on statistics that include other breaches of court orders, such as breach of probation and youth offences that are

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[118] *R v St-Cloud*, 2015 SCC 27; *R v Myers*, 2019 SCC 18; *R v Antic*, 2017 SCC 2017.
[119] Appellant's Factum at paras. 2, 31-33.
[120] As pointed out by the Attorney General for Ontario and the Attorney General of British Columbia, the available data does not support the contention that an objective *mens rea* is responsible for higher rates of breach offences or convictions. Attorney General of Ontario's Intervener Factum at para. 12 and Attorney General of British Columbia's Intervener Factum at paras. 13-15.

governed by different provisions. [121] His arguments surrounding the proliferation and consequences of such offences in Canada invoke policy determinations that are better left to Parliament. [122]

83. It is Parliament's duty to legislate according to its objectives; that includes however it chooses to balance the protection of the public and confidence in the administration of justice, on the one hand, and reducing socio-economic inequality, on the other.[123] The fact that Parliament made amendments to the judicial interim release regime in Bill C-75 underscores this role.[124]

ii. Appellate Authority Supporting Subjective Men Rea: a Deficient Analysis

84. In Ontario, s. 145(3) requires proof of a subjective *mens rea* since the 1995 decision of the Court of Appeal in *Legere.*[125] The Ontario Court of Appeal did not conduct any statutory analysis to draw its conclusion on the fault element under s. 145(3); it was based on a Crown concession.[126] The Court of Appeal held that "mere carelessness" did not suffice and that the trial judge erred by applying a "negligence" standard. The Court of Appeal determined that s. 145(3) requires the Crown to prove that the accused knowingly or recklessly breached a condition of judicial interim release.[127] The Court of Appeal did not consider the application of an objective *mens rea* to s. 145(3), as distinct from civil negligence, and did not refer to this Court's jurisprudence on the availability of an

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[121] While s. 145 falls within Part IV – Offences Against Administration of Law and Justice: breach of probation offences are governed by Part XXIII – Sentencing; and youth bail is governed by the *Youth Criminal Justice Act*, S.C. 2002, c. 1. The point being that while prosecuting agencies, representatives of accused, and scholars have defined "AJOs" to include some or all of the above, it is not a category that emanates from Parliament.

[122] *65302 British Columbia Ltd. v Canada*, [1999] 3 SCR 804 at paras. 17, 62.
[123] Appellant's Factum at para. 33.
[124] *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").
[125] *R v Legere*, 1995 CanLII 1551.
[126] Counsel who made this concession was Gary T. Trotter, now Justice at the ONCA and author of *The Law of Bail in Canada*. In the most recent update (2019) of that text, Justice Trotter acknowledges that there is currently some debate about what the fault requirement should be, and refers at length to the *Zora* decision from the BCCA.
[127] *R v Legere*, 1995 CanLII 1551.

objective *mens rea*. Therefore, *Legere* is not a persuasive authority on the applicable *mens rea* in this case.

85. The decision from the Court of Appeal of Manitoba in *Custance* is also not persuasive for similar reasons.[128] The Court of Appeal held that the requisite *mens rea* for s. 145(3) is primarily subjective and that "[w]hile recklessness (the conduct of one who sees the risk and nonetheless who takes the chance) will fulfill the *mens rea* requirement, mere carelessness or negligence will not".[129] The Court did not perform any statutory interpretation to reach that conclusion but relied on the comments made by Gary T. Trotter in the 2nd edition of *The Law of Bail in Canada* and the *Legere* decision from the Ontario Court of Appeal. The Court also did not consider whether an objective *mens rea* would be appropriate.

H. Application to the Facts

86. Section 145(3) on an objective fault standard requires the Crown to prove three elements beyond a reasonable doubt:

a. The accused was at large on, and bound to comply with, judicial interim release conditions at the relevant time;

b. The accused failed to comply with a condition of their judicial interim release by act or omission (the degree of noncompliance is irrelevant here but will be addressed at the next stage);[130] and

c. The accused's failure to comply amounted to a marked departure from what a reasonable person would have done in the same circumstances – in that a reasonably prudent person would have foreseen the risk of noncompliance flowing from the accused's conduct, and could and would have taken steps to avoid it. At the heart of this contextualized assessment of objective *mens rea* is measuring the degree of deviation from the norm exhibited by the accused in order to determine whether they should have reasonably foreseen that their act/omission would create a manifest risk of contravening the terms

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[128] *R v Custance*, 2005 MBCA 23, leave to appeal dismissed [2005] 2 SCR vii.
[129] *R v Custance*, 2005 MBCA 23 at paras. 12-13, leave to appeal dismissed [2005] 2 SCR vii.
[130] See *R v Beatty*, 2008 SCC 5 at para. 43; *R v J.F.*, 2008 SCC 60 at para 65.

> of their release. It is the degree of departure from the standard of due reasonable care in the circumstances that establishes the accused's moral blameworthiness, and therefore their *mens rea*. [131]

87. All levels of court in British Columbia found the appellant's failure to comply with the "report at the door" condition of his recognizance to constitute an objectively unreasonable marked departure in the circumstances. Any reasonably prudent person in the appellant's circumstances would have been aware of the manifest risk of failing to comply with the "report at the door" condition because the appellant himself testified to knowing the following information and risks of noncompliance:

1. He was bound by the terms of his recognizance at the relevant time. [132]
2. He understood the conditions that had been imposed upon him, including the house arrest and "report at the door" conditions;[133]
3. The police were conducting compliance checks at his residence at different times of the day on an almost daily basis - sometimes twice a day;[134]
4. He was taking methadone, which he assumed helped him sleep;[135]
5. He tried to stay awake for the compliance checks, but he was retiring to his bedroom early;[136]
6. He was a "heavy sleeper", as were the other occupants of his residence;[137]

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[131] *R v J.F.*, 2008 SCC 60 at paras. 8, 15-18; See also *R v Beatty*, 2008 SCC 5 at paras. 41, 43.
[132]Supplemental Transcript (Provincial Court Trial) [AR, tab 11, pp. 60-61]; Recognizance of Bail re Chaycen Zora dated September 17, 2015 [AR, tab 12, pp. 126-133]
[133] Supplemental Transcript (Provincial Court Trial) [AR, tab 11, pp. 79-81]; See conditions 6 and 8 of Recognizance of Bail re Chaycen Zora dated September 17, 2015 [AR, tab 12, p. 130].
[134] Supplemental Transcript (Provincial Court Trial) [AR, tab 11, pp. 81-82, 90]. Also see Supplemental Transcript (Provincial Court Trial) [AR, tab 11, p. 112].
[135] Supplemental Transcript (Provincial Court Trial) [AR, tab 11, pp. 80-81, 91-93].
[136] Supplemental Transcript (Provincial Court Trial) [AR, tab 11, p. 93].
[137] Supplemental Transcript (Provincial Court Trial) [AR, tab 11, pp. 96-97].

7. He slept in a bedroom that was located downstairs at the far side of his residence and could not hear the doorbell from that room; [138]

8. The bedroom occupied by the other people in the house was "way" upstairs at the back corner of the residence, inside of which the doorbell could not be heard.[139]

88. On the appellant's own evidence, his conduct in the face of the above-noted circumstances made noncompliance with the "report at the door" condition of his recognizance inevitable.

I. The Application of the Curative Proviso: Guilty on Objective or Subjective *Mens Rea*

89. The law regarding the curative proviso is well settled. This Court has repeatedly asserted the limited application of the curative proviso, as set out in *R v Sekhon,*[140] and most recently reiterated in *R v R.V.*[141]

90. A new trial should not be ordered if the application of an objective *mens rea* standard in the courts below was a legal error because there is no reasonable possibility that the verdict would have been different using a subjective *mens rea*. This error would be of no moment since the appellant would also be found guilty on the basis of his overt recklessness. The appellant admitted to sleeping inside a bedroom from where he could not hear anyone attend at his front door during his curfew. As such, it is immaterial whether an objective or subjective *mens rea* applied to the facts of this case. Fenlon J.A. came to the same conclusion when she determined that on either fault standard the appellant was properly convicted under s. 145(3) on the uncontested facts of the case.[142]

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[138] Supplemental Transcript (Provincial Court Trial) [AR, tab 11, pp. 78, 84, 91, 95-96].
[139] Supplemental Transcript (Provincial Court Trial) [AR, tab 11, pp. 96-97].
[140] 2014 SCC 15, para. 53, 56-57; See also *R v Khan*, 2001 SCC 86, paras. 26-31.
[141] 2019 SCC 41, paras. 83-85, 99.
[142] Court of Appeal, paras. 70, 91-96 [AR, tab 5, pp. 38, 46-48]. Of note, the Crown specifically relied on the curative proviso before the Court of Appeal.

PART IV – COSTS

91. In accordance with the usual practice in criminal matters, no costs should be ordered.

PART V – NATURE OF ORDER SOUGHT

92. The respondent requests that the appeal be dismissed, without costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated at the City of Ottawa, in the province of Ontario, this 18th day of November 2019.

Éric Marcoux
Counsel for the Respondent

Ryan J. Carrier
Counsel for the Respondent

PART VI – TABLE OF AUTHORITIES

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