SUPREME COURT OF CANADA

CITATION: R. *v.* Zora, 2020 SCC 14

APPEAL HEARD: December 4, 2019
JUDGMENT RENDERED: June 18, 2020
DOCKET: 38540

BETWEEN:

Chaycen Michael Zora
Appellant

and

Her Majesty The Queen
Respondent

- and -

Attorney General of Ontario, Attorney General of British Columbia, Criminal Lawyers' Association of Ontario, Vancouver Area Network of Drug Users, British Columbia Civil Liberties Association, Canadian Civil Liberties Association, Independent Criminal Defence Advocacy Society, Pivot Legal Society and Association québécoise des avocats et avocates de la défense
Interveners

CORAM: Wagner C.J. and Abella, Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin and Kasirer JJ.

REASONS FOR JUDGMENT: (paras. 1 to 127)
Martin J. (Wagner C.J. and Abella, Moldaver, Karakatsanis, Côté, Brown, Rowe and Kasirer JJ. concurring)

Chaycen Michael Zora *Appellant*

v.

Her Majesty The Queen *Respondent*

and

Attorney General of Ontario,
Attorney General of British Columbia,
Criminal Lawyers' Association of Ontario,
Vancouver Area Network of Drug Users,
British Columbia Civil Liberties Association,
Canadian Civil Liberties Association,
Independent Criminal Defence Advocacy Society,
Pivot Legal Society and
Association québécoise des avocats et avocates de la défense *Interveners*

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2019: December 4; 2020; June 18.

Present: Wagner C.J. and Abella, Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin and Kasirer JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Criminal law — Failure to comply with conditions of undertaking or recognizance — Elements of offence — Mens rea — Accused convicted of failure to comply with conditions of undertaking or recognizance after failing to answer door when police attended his residence — Whether mens rea for offence of failure to comply with conditions of undertaking or recognizance is to be assessed on subjective or objective standard — Criminal Code, R.S.C. 1985, c. C-46, s. 145(3).

Z was charged with drug offences and was granted bail with conditions, including a curfew and a requirement that he present himself at the door of his residence within five minutes of a peace officer or bail supervisor attending to confirm his compliance with his curfew. Z twice failed to present himself at his door when police attended, and was charged under s. 145(3) of the *Criminal Code* with two counts of breaching his curfew and two counts of breaching his condition to answer the door. Z led evidence that he was in his bedroom where it would have been difficult, if not impossible, to hear the doorbell or someone knocking on the door. The trial judge acquitted Z on the alleged curfew violations but convicted Z on the two counts of failing to appear at the door. A summary conviction appeal judge dismissed Z's appeal, concluding that objective *mens rea* is sufficient for a conviction under s. 145(3) and that Z's behaviour was a marked departure from what a reasonable person would do to ensure they complied with their bail conditions. The Court of

Appeal dismissed Z's appeal. A majority of the court concluded that s. 145(3) created a duty-based offence that only requires an objective *mens rea*.

Held: The appeal should be allowed, Z's convictions quashed and a new trial ordered on the two counts of failing to attend at the door.

Under s. 145(3) of the *Criminal Code*, the Crown is required to prove subjective *mens rea*. The Crown must establish that the accused breached a condition of an undertaking, recognizance or order knowingly or recklessly. Accordingly, a new trial is required on the two counts charging Z with failing to attend at the door of his residence, in light of the lower courts' error of applying an objective standard of fault.

The default form of bail for most crimes is release on an undertaking to attend trial, without any other conditions. Bail conditions can be imposed, but only if they are clearly articulated, minimal in number, necessary, reasonable, the least onerous in the circumstances, and sufficiently linked to the accused's risks regarding the statutory grounds for detention in s. 515(10): securing the accused's attendance in court, ensuring the protection or safety of the public, or maintaining confidence in the administration of justice. The setting of bail conditions must be consistent with the presumption of innocence and the right not to be denied reasonable bail without just cause under s. 11(*e*) of the *Canadian Charter of Rights and Freedoms*. In addition, s. 515 of the *Criminal Code* codifies the ladder principle, which requires that the form of release and the conditions of release imposed on an accused be no more onerous than necessary to address the risks listed in s. 515(10). Only conditions specifically

tailored to the individual circumstances of the accused can meet the required criteria. Bail conditions are intended to be particularized standards of behavior designed to curtail statutorily identified risks posed by a particular person and are to be imposed with restraint. Restraint is required because bail conditions limit the liberty of someone who is presumed innocent of the underlying offence and, through the offence in s. 145(3), create new sources of potential criminal liability personal to that individual accused.

Section 145(3) of the *Criminal Code* creates a hybrid offence that applies to breaches of conditions imposed on an accused by a court order when the accused person is released prior to trial, while awaiting sentencing, or during an appeal. It is a crime against the administration of justice and carries a maximum penalty of two years' imprisonment. Accused persons may therefore be subject to imprisonment under s. 145(3) if they breach a condition of their bail, even if they are never ultimately convicted of any crimes for which they were initially charged. In many cases, an accused person faces criminal sanctions for conduct which, but for the stipulated bail condition, would be a lawful exercise of personal freedom. Accordingly, the fault element under s. 145(3) has far-reaching implications for civil liberties and the fair and efficient functioning of bail in this country, and there is a direct link between what conditions may be imposed in a bail order and Parliament's intent in criminalizing their breach under s. 145(3).

Determining the *mens rea* of s. 145(3) involves discerning the fault standard intended by Parliament. The presumption is that Parliament intends crimes to have a subjective fault element unless there is a clear legislative intention to overturn the presumption. If the offence in the *Criminal Code* is ambiguous as to the *mens rea*, then the presumption has not been displaced. The text and context of s. 145(3) suggest that Parliament intended for subjective fault to apply. The wording in s. 145(3) is neutral insofar as it does not show a clear intention on the part of Parliament with regard to either the subjective or objective *mens rea*. The absence of express words indicating a subjective intent cannot on its own displace the presumption of subjective *mens rea*. Furthermore, nothing establishes a clear intention to create a duty-based offence which calls for an objective *mens rea*. Duty-based offences are directed at legal duties very different from the obligation to comply with the conditions of a judicial order. And, unlike these duty-based offences, bail conditions do not impose a minimum uniform standard of conduct having regard to societal interests rather than personal standards of conduct. Parliament legislated a bail system based upon an individualized process and the bail order is expected to list personalized and precise standards of behaviour. As a result, there is no need to resort to a uniform societal standard to make sense of what standard of care is expected of an accused in fulfilling their bail conditions and no need to consider what a reasonable person would have done in the circumstances to understand the obligation imposed by s. 145(3). In addition, the highly individualized nature of bail conditions excludes the possibility of a uniform societal standard of conduct applicable to all potential failure to comply offences. Bail conditions and the risks they address also

vary dramatically among individuals on release, so it is not intelligible to refer to the concepts of a "marked" or "mere" departure from the standard of a reasonable person. The offence under s. 145(3) is not comparable to other objective fault offences, and reasonable bail cannot be compared to a regulated activity that is entered into voluntarily. Further, the offence of failure to comply with bail conditions is similar to the offence of breach of probation for which a subjective *mens rea* is required.

A subjective fault requirement is consistent with the penalties and consequences which flow from conviction under s. 145(3). A conviction has profound implications for the liberty interests of the offender, including imprisonment even if the offender is acquitted of the underlying charge or further conditions imposed as part of a sentence. A conviction under s. 145(3) creates or adds to that person's criminal record. Being charged under s. 145(3) also places a reverse onus on accused persons to show why they should be released on bail again. Previous convictions under s. 145(3) inform bail hearings for future offences and may lead to the denial of bail or more stringent bail conditions for future unrelated offences. Breach charges often accumulate quickly, leading to a vicious cycle of increasingly numerous and onerous conditions, more breach charges and eventually pre-trial detention. These serious consequences presuppose that the person knowingly, rather than inadvertently, breached their bail condition.

Parliament's intention to require subjective fault is further demonstrated by the distinct purpose of s. 145(3), being to punish and deter those who knowingly

or recklessly breach their bail conditions. Parliament did not intend for criminal sanctions to be the primary means of managing any risks or concerns associated with individuals released with bail conditions. Such risks or concerns are to be managed through the setting of conditions that are minimal, reasonable, necessary, least onerous, and sufficiently linked to the accused's risk; variations to those conditions when necessary through bail reviews and vacating bail orders; and bail revocation when bail conditions are breached. Charges under s. 145(3) are not, and should not be, the principal means of mitigating risk. Bail review is the primary way to challenge or change bail conditions. Bail revocation under s. 524 of the *Criminal Code* and criminal charges under s. 145(3) work together to promote compliance with conditions of bail, but they serve distinct and different legislative purposes. Section 524 fulfills a risk management role; s. 145(3) exists to punish and deter. Section 145(3) is a means of last resort when other risk management tools have not served their purposes. Specific deterrence has little or no effect if an accused does not know they were doing anything wrong. An accused must know what standard of behaviour to meet and that their conduct is failing to meet that standard in order to be deterred from engaging in prohibited conduct.

The requirement that bail conditions must be tailored to the accused points to a subjective *mens rea* so that the individual characteristics of the accused will be considered when bail is set and if bail is breached. Requiring a subjective *mens rea* reinforces, mirrors, and respects the individualized approach mandated for the imposition of bail conditions. In practice, the number of unnecessary and

unreasonable bail conditions, and the rising number of breach charges, indicates insufficient individualization of bail conditions. The majority of bail orders include numerous conditions of release which often do not clearly address an individual accused's risks. A culture of risk aversion contributes to courts applying excessive conditions. The expeditious nature of bail hearings generates a culture of consent which aggravates the lack of restraint in imposing excessive bail conditions and encourages accused persons to agree to onerous terms of release rather than run the risk of detention. Onerous conditions disproportionately impact vulnerable and marginalized populations, including those living in poverty or with addictions or mental illnesses, and Indigenous people. The presence of too many unnecessary, excessive and onerous conditions provides legislative context for finding no clear intention of Parliament to displace the presumed subjective fault standard for s. 145(3) and illustrates the need for restraint and careful review of bail conditions.

The principle of restraint and the ladder principle require anyone proposing bail conditions to consider what risks might arise if the accused is released without conditions. Only conditions which target the accused's risk in relation to flight, public protection and safety, or maintaining confidence in the administration of justice are necessary. A bail condition must attenuate a risk that would otherwise prevent release without that condition. Conditions cannot be imposed for gratuitous or punitive purposes and should not be behaviourally-based. They must be sufficiently linked to the defined statutory risks, as narrowly defined as possible to meet their objective, and reasonable. They will only be reasonable if they realistically can and

will be met by the accused. They cannot contravene federal or provincial legislation or the *Charter*, and must be clear, minimally intrusive, and proportionate to any specific risk posed by the accused. The setting of bail is an individualized process and there is no place for standard, routine, or boilerplate conditions, whether bail is contested or the product of consent. Some specific non-enumerated conditions are commonly included in release orders, but must be scrutinized to ensure that each condition is necessary, reasonable, least onerous and sufficiently linked to a risk in s. 515(10). All persons involved in the bail system are required to act with restraint and to carefully review bail conditions they propose or impose. The Crown, defence, and the court all have obligations to respect the principles of restraint and review. Ultimately, the obligation to ensure appropriate bail orders lies with the judicial official. These obligations carry over to consent releases. Judicial officials should not routinely second-guess joint proposals by counsel, however, they have the discretion to reject overbroad proposals and must act with caution when reviewing and approving consent release orders.

Subjective *mens rea* under s. 145(3) can be satisfied where the Crown proves: (1) the accused had knowledge of the conditions of their bail order or were wilfully blind to those conditions; and (2) either the accused knowingly failed to act according to the bail conditions or they were wilfully blind to those circumstances and failed to comply despite that knowledge, or the accused recklessly failed to act according to the conditions, meaning they perceived a substantial and unjustified risk that their conduct would likely fail to comply with the conditions and persisted in this

conduct. Genuinely forgetting a condition could be a mistake of fact and would negate *mens rea*. The accused need not have knowledge of the legal consequences or scope of their condition, but they must know that they are bound by the condition. Knowledge in the second component of the *mens rea* means that the accused must be aware of, or be wilfully blind to, the factual circumstances requiring them to act or refrain from acting. The second component of the *mens rea* can also be met by showing that the accused was reckless. Knowledge of risk is key to recklessness — the accused must know of their bail conditions and the risk of factual circumstances arising that would require them to act (or refrain from acting) to comply with their bail conditions. Recklessness is a subjective standard and the accused must be aware that their conduct created a substantial risk of non-compliance with their bail conditions and aware of any factors that contributed to that risk being unjustified.

In the instant case, a new trial should be ordered in light of the error in law by the courts below in applying an objective rather than a subjective standard of fault for s. 145(3). This is not a case where the curative proviso under s. 686(1)(b)(iii) of the *Criminal Code* applies — identifying the wrong fault standard is not a harmless or trivial error. A subjective *mens rea* would have required the trial judge to consider Z's state of mind, which clearly could have had an impact on the verdict. The evidence is not so overwhelming that a conviction is inevitable. A new trial is therefore needed to address whether Z knowingly or recklessly breached his conditions.

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Yule, Carolyn, and Rachel Schumann. "Negotiating Release? Analysing Decision Making in Bail Court" (2019), 61 *Can. J. Crimin. & Crim. Just.* 45.

APPEAL from a judgment of the British Columbia Court of Appeal (Stromberg-Stein, Willcock, Savage, Fenlon and Fisher JJ.A.), 2019 BCCA 9, 370

C.C.C. (3d) 111, 53 C.R. (7th) 373, [2019] B.C.J. No. 18 (QL), 2019 CarswellBC 19 (WL Can.), affirming a decision of Thompson J., 2017 BSCS 2070, [2017] B.C.J No. 2298 (QL), 2017 CarswellBC 3175 (WL Can.), affirming the convictions of the accused for failure to comply with a condition of a recognizance. Appeal allowed.

Sarah Runyon, *Garth Barriere* and *Michael Sobkin*, for the appellant.

Éric Marcoux and *Ryan Carrier*, for the respondent.

Susan Reid, for the intervener the Attorney General of Ontario.

Susanne Elliott, for the intervener the Attorney General of British Columbia.

Christine Mainville, for the intervener the Criminal Lawyers' Association of Ontario.

Jason B. Gratl and *Toby Rauch-Davis*, for the intervener the Vancouver Area Network of Drug Users.

Alexandra Luchenko, *Roy W. Millen* and *Danny Urquhart*, for the intervener the British Columbia Civil Liberties Association.

Danielle Glatt, for the intervener the Canadian Civil Liberties Association.

Matthew Nathanson and *Chantelle van Wiltenburg*, for the intervener the Independent Criminal Defence Advocacy Society.

David N. Fai and *Caitlin Shane*, for the intervener the Pivot Legal Society.

Nicholas St-Jacques and *Pauline Lachance*, for the intervener Association québécoise des avocats et avocates de la défense.

The judgment of the Court was delivered by

MARTIN J. —

I. Introduction

[1] When individuals are charged with a crime, they are presumed innocent and have the right not to be denied reasonable bail without just cause. Most accused are not held in custody between the date of the charge and the time of trial because the *Criminal Code*, R.S.C. 1985, c. C-46 ("*Code*") and the *Canadian Charter of Rights and Freedoms* ("*Charter*") typically require that accused be released on what

is known as "bail".[1] Accused who are not released from custody by the police will be brought before a justice of the peace or a judge ("judicial official")[2] for a bail hearing. For most crimes, the default form of bail is to release accused persons based on an undertaking to attend trial, without any conditions restricting their activities or actions (s. 515(1) of the *Code*). However, conditions of release can be imposed if the Crown satisfies the judicial official that particular restrictions are required to secure the accused's attendance in court, ensure the protection or safety of the public, or maintain confidence in the administration of justice (s. 515(10); *R. v. Antic*, 2017 SCC 27, [2017] 1 S.C.R. 509, at paras. 21, 34 and 67(j)).

[2] Parliament made it a separate criminal offence to breach bail conditions under s. 145(3) of the *Code*.[3] This is a crime against the administration of justice and carries a maximum penalty of two years' imprisonment. Accused persons may therefore be subject to imprisonment under s. 145(3) if they breach a condition of their bail, even if they are never ultimately convicted of any of the crimes for which

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[1] My use of the word "bail" encompasses all forms of judicial interim release or pre-trial release in the *Code.*

[2] I use "judicial official" to refer to both a justice and a judge. A "justice" in the *Code* refers to justices of the peace or provincial court judges (s. 2). A "judge" refers to a judge of a superior court in the jurisdiction, except in Nunavut where it refers to a judge of the unified Nunavut Court of Justice (s. 493).

[3] I will refer to the offence created by s. 145(3) as the "failure to comply" offence and will refer to "bail conditions" to include all conditions arising from the undertakings, recognizances, directions, and orders listed in s. 145(3), although I note that someone can also be subject to conditions arising from release from custody by the police. An accused can also be charged under s. 145(3) for breaching no-communication conditions in directions and orders imposed if the accused is detained prior to trial; however, for the sake of simplicity, I will refer to all of these conditions as "bail conditions" as they still refer to conditions imposed prior to conviction to manage the accused's risks. For the purposes of these reasons, I will refer to the relevant sections of the *Code* as they were when Mr. Zora was charged in October 2015, unless otherwise stated. The bail provisions of the *Code* were significantly revised as of December 18, 2019, and I will address the significance of these changes after reviewing the bail structure as it stood when Mr. Zora was charged and sentenced.

they were initially charged. In many cases, an accused person faces criminal sanctions for conduct which, but for the stipulated bail condition, would be a lawful exercise of personal freedom. As the gravamen of the offence is a failure to comply with a court order, there is often no victim, no violence, or no direct harm to the public or property.

[3] The appellant, Mr. Zora, appeals his convictions under s. 145(3) for twice failing to comply with his bail condition to answer the door when police went to his residence to check that he was complying with his bail conditions. He committed the guilty act, or the *actus reus*, by failing to answer the door when police attended. We are asked to determine what fault or mental element the Crown must prove to secure a conviction under s. 145(3): is the *mens rea* for this offence to be assessed on a subjective or objective standard?

[4] I conclude that the Crown is required to prove subjective *mens rea* and no lesser form of fault will suffice. Under s. 145(3), the Crown must establish that the accused committed the breach knowingly or recklessly. Nothing in the text or context of s. 145(3) displaces the presumption that Parliament intended to require a subjective *mens rea*. Further, this intention is supported by this Court's jurisprudence on the interpretation of the breach of probation offence, the consequences of charges and convictions under s. 145(3), the role of s. 145(3) within the constitutional and legislative scheme of bail, and the practical operation of the bail system. A subjective

mens rea standard for breach under s. 145(3), like Parliament's recent amendments to the bail scheme, keeps the focus on the individual accused, where it belongs.

[5] The parties and intervenors recognize that the question of the *mens rea* requirement for s. 145(3) raises broader considerations about the functioning of our complex bail system. The breach of a bail condition reaches back to, and is based upon, the conditions imposed at the beginning of the bail process. In *Antic*, this Court endorsed principles for reasonable bail based on documented concerns over how the bail system operates across Canada. Three years after *Antic*, and with the same goal of providing guidance, I address the imposition of non-monetary bail conditions and the criminal offences that result from their breach. A similarly wide-angle lens is required. Offences under s. 145(3) are very common, on the rise, and often involve questionable conditions imposed upon vulnerable and marginalized persons. Parliament has recently acted to address how numerous and onerous bail conditions interact with s. 145(3) to create a cycle of incarceration, especially among the most vulnerable in our population. This Court cannot ignore the current context in which the bail system operates, and in response provides guidance on both the interpretation of s. 145(3) and the imposition of the bail conditions that lead to these charges.

[6] All those involved in the bail system are to be guided by the principles of restraint and review when imposing or enforcing bail conditions. The principle of restraint requires any conditions of bail to be clearly articulated, minimal in number,

necessary, reasonable, least onerous in the circumstances, and sufficiently linked to the accused's risks regarding the statutory grounds for detention in s. 515(10). The principle of review requires everyone, and especially judicial officials, to carefully scrutinize bail conditions at the release stage whether the bail is contested or is on consent. Most bail conditions restrict the liberty of a person who is presumed innocent. Breach can lead to serious legal consequences for the accused and the large number of breach charges has important implications for the already over-burdened justice system. Before transforming bail conditions into personal sources of potential criminal liability, judicial officials should be alive to possible problems with the conditions. Requiring subjective *mens rea* to affix criminal liability under s. 145(3) reflects the principles of restraint and review and mirrors the individualized approach mandated for the imposition of bail conditions.

[7] I approach these reasons as follows. First, I outline the factual background and judicial history of this appeal. Second, I review the legislative and constitutional framework of bail, which provides necessary background for interpreting the failure to comply offence in s. 145(3). Third, I set out why my interpretation of s. 145(3) leads me to conclude that the offence requires subjective *mens rea*. Fourth, I provide broader guidance on what is required for a bail condition to be necessary, reasonable, least onerous, and sufficiently linked to the risks listed in s. 515(10). Fifth, I explain what will be required to prove subjective *mens rea* for the failure to comply offence. Lastly, I describe why I would order a new trial in this case.

II. Factual Background and Judicial History

[8] Mr. Zora was charged with three counts of possession for the purpose of trafficking contrary to the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19, and was granted bail on his own recognizance[4] with conditions and with his mother as surety.[5] His twelve bail conditions required that he "keep the peace and be of good behaviour", report to his bail supervisor as directed, remain in the province of British Columbia unless consent was granted by his bail supervisor, obey all rules and regulations of his residence, remain in his residence except during the day in the company of his mother or father or a person approved by his bail supervisor and with the consent of his bail supervisor (referred to as the curfew or house arrest condition), present himself at the door of his residence within five minutes of a peace officer or bail supervisor attending to confirm his compliance with his house arrest condition, not possess any non-prescribed controlled substances, not possess drug paraphernalia, not possess or have a cell phone, attend a residential treatment facility if he consented, and not possess any weapon (A.R., at p. 137).

[9] The police came almost every day, at different times in the evening, to check his compliance with the curfew in the approximately one month between his release from custody on September 17, 2015 and his alleged breaches in October 2015. The trial judge found that due to the nature of the charges, the RCMP "were

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[4] As defined in *Antic*, a recognizance "is the 'formal record of an acknowledgement of indebtedness to the Crown' that is usually nullified when the accused attends in court for trial" (fn 2).

[5] As also described in *Antic*, a "surety is an individual who supervises the accused and ensures that the accused remains faithful to his or her pledge to the court to appear for trial" (fn 1).

quite diligent in investigating any possible violation" of Mr. Zora's bail conditions (B.C. Prov. Ct., File Nos. 38980-6-CAC, 38980-7-CAC, March 29, 2017, at para. 2 ("Trial Judge Reasons"), reproduced in A.R., at p. 2).

[10] On two evenings on Thanksgiving weekend, October 9 and 11, 2015, Mr. Zora failed to present himself at his door when police attended his residence around 10:30 p.m. Mr. Zora did not know that he had missed the police at his door until two weeks later when informed that he was being charged with two counts of breaching his curfew condition and two counts of breaching his condition to answer the door. Following his breach charges, Mr. Zora was released on bail on a similar recognizance, but with the added condition that he personally and immediately answer the phone at his residence when any peace officer or bail supervisor called the residence. Mr. Zora testified that he subsequently set up an audio-visual system at his front door and moved his bedroom so that he would not miss future police checks.

[11] Mr. Zora, his mother, and his girlfriend testified that they were all at home during the Thanksgiving weekend. Mr. Zora said it would have been difficult, if not impossible, to hear the doorbell or someone knocking on the front door from his bedroom. His bedroom was downstairs on the far side of the residence, and he was tired and retiring early because he was withdrawing from heroin and in a methadone treatment program. The trial judge raised concerns with the credibility and reliability of the defence witnesses, but did not make clear findings of fact, however, on whether

Mr. Zora knew that he was unable to hear his doorbell from his room when police attended his door that weekend (Trial Judge Reasons, at paras. 11-14).

[12] The trial judge acquitted Mr. Zora on the alleged curfew violations as he was not satisfied beyond a reasonable doubt that Mr. Zora had been outside of his house at the time. He convicted Mr. Zora on the two counts of failing to appear at the door for curfew compliance checks. The trial judge analogized s. 145(3) offences to strict liability offences and therefore found that Mr. Zora was guilty of breach of his conditions as he had not "arrange[d his] life to comply with the terms of bail" (Trial Judge Reasons, at para. 16). Mr. Zora was fined a total of $920.

[13] The summary conviction appeal judge dismissed the appeal and concluded that objective *mens rea* was sufficient for a conviction under s. 145(3) because the British Columbia Court of Appeal decision in *R. v. Ludlow*, 1999 BCCA 365, 125 B.C.A.C. 194, adopted an objective fault standard for these types of offences (2017 BCSC 2070, at para. 7 (CanLII)). This meant that Mr. Zora's convictions were upheld because his behaviour was a marked departure from what a reasonable person would do to ensure they complied with their conditions.

[14] A five-judge panel of the British Columbia Court of Appeal dismissed the appeal (2019 BCCA 9, 53 C.R. (7th) 373). Stromberg-Stein J.A., writing for the majority of four, concluded that s. 145(3) only requires an objective *mens rea*. The majority found that the text, context, and purpose of s. 145(3) created a duty-based offence grounded in the specific legal duty to comply with bail conditions, which

demonstrated Parliament's intention to create an offence with an objective *mens rea* (paras. 53-58).

[15] Fenlon J.A., concurring in the result, found that s. 145(3) required subjective fault. In her view, this was not a duty-based offence and neither the words nor the scheme nor purpose of the offence supported a clear legislative intent to displace the presumptive subjective fault element. Fenlon J.A. nevertheless dismissed the appeal as she concluded that the Crown had established subjective fault by showing that Mr. Zora was reckless since he knew that there were parts of his house where he would not hear the doorbell and yet he made no effort to address the situation (paras. 95-96).

III. Legislative Background and the Context of Section 145(3)

[16] Section 145(3) is a hybrid offence that applies to breaches of conditions imposed on an accused by a court order prior to trial, while awaiting sentencing, or during an appeal. The offence falls under Part IV of the *Code*, which deals with offences against the administration of law and justice. There are similarly worded offences for accused persons who fail to attend court when required (s. 145(2), (4), and (5)) or fail to comply with conditions of undertakings issued by peace officers (s. 145(5.1)). Given these offences are substantively similar in text and context, I see no reason why these offences should carry a different fault standard from s. 145(3).

[17] The predecessor to s. 145(3), s. 133(3), was introduced in 1972 through the *Bail Reform Act*, S.C. 1970-71-72, c. 37. It created an offence where a person bound by conditions of an undertaking or recognizance on bail "fails, without lawful excuse, the proof of which lies upon him, to comply with that condition" (R.S.C. 1970, c. 2 (2nd Supp.), s. 4). Prior to this, there was no offence for failure to comply with bail conditions and the *Code* provided no guidance for imposing bail conditions (*Antic*, at para. 23).

[18] Section 145(3) was amended in 2018 to remove the reverse onus on the accused to prove lawful excuse (S.C. 2018, c. 29, s. 9(7)). On December 18, 2019, as part of larger amendments to the bail scheme, the offence under s. 145(3) was split into two subsections to separately address the failure to comply with an undertaking under s. 145(4) and a release order or a no-communication order under s. 145(5) (S.C. 2019, c. 25, s. 47(1)). While these changes do not really alter the failure to comply offence, Parliament also made significant changes to address mounting concerns about the imposition of excessive and unfair bail terms and the overuse of criminal sanctions for the failure to comply with conditions of bail (see *House of Commons Debates*, vol. 148, No. 300, 1st Sess., 42nd Parl., May 24, 2018, at pp. 19603 and 19606, Hon. Jody Wilson-Raybould, Minister of Justice and Attorney General).

[19] The parties and intervenors recognize that the particular question before the Court needs to be situated within the complex legal and factual context in which bail operates in Canada. Not only does the fault element under s. 145(3) have far-

reaching implications for civil liberties and the fair and efficient functioning of bail in this country, there is a direct link between what conditions may be imposed in a bail order and Parliament's intent in criminalizing their breach under s. 145(3). Before looking to how s. 145(3) should be interpreted, it is necessary to provide a brief overview of the factors and framework which structure how bail conditions are established. The release conditions to which s. 145(3) applies are imposed in a bail system bounded by the *Charter*, governed by the *Code*, and informed by the jurisprudence.

[20] From a constitutional perspective, most bail conditions restrict the liberty of persons who are presumed innocent and impose a risk of further criminal liability on those persons because of the failure to comply offence under s. 145(3). Therefore, the setting of bail conditions must be consistent with the presumption of innocence and the right not to be denied reasonable bail without just cause under s. 11(*e*) of the *Charter* (see *Antic*, at para. 67; *R. v. Tunney*, 2018 ONSC 961, 44 C.R. (7th) 221, at para. 36). Section 11(*e*) protects both the right not to be denied bail without "just cause" and the right to bail on reasonable terms and conditions (*R. v. Pearson*, [1992] 3 S.C.R. 665, at p. 689; *R. v. Morales*, [1992] 3 S.C.R. 711, at p. 735; *Antic*, at paras. 36-41). The s. 11(*e*) right is "an essential element of an enlightened criminal justice system" that "entrenches the effect of the presumption of innocence at the pre-trial stage of the criminal trial process and safeguards the liberty of accused persons"

(*Antic*, at para. 1).[6] The presumption of innocence is "a hallowed principle lying at the very heart of criminal law. . . . [that] confirms our faith in humankind" (*Antic*, at paras. 66-67(a), quoting *R. v. Oakes*, [1986] 1 S.C.R. 103, at pp. 119-20; see also *R. v. Myers*, 2019 SCC 18, at para. 1). The presumption of innocence is only satisfied in the bail process when the requirements of s. 11(*e*) are met (*Pearson*, at pp. 688-89; *Morales*, at p. 748). As described by Andrew Ashworth and Lucia Zedner, the presumption of innocence and the protection of liberty rights mean that "the state should presume each person to be harmless . . . therefore it is in principle wrong to take coercive measures against people for preventive reasons unless there are very strong justifications for doing so" (*Preventive Justice* (2014), at p. 53). The *Charter* therefore protects accused persons from unreasonable terms and conditions of bail.

[21] Section 515 of the *Code* governs how judicial officials are to exercise their discretion to grant bail, establishes the legal forms of bail, and requires that the conditions of bail are only as onerous as necessary to address the risks listed in s. 515(10): being, the risk of the accused not attending court, harm to public protection and safety, and loss of confidence in the administration of justice. Subsections 515(1) to (3) codify the "ladder principle", a principle premised on restraint, which "requires that the form of release imposed on an accused be no more onerous than necessary" (*Antic*, at para. 44). A judicial official is only permitted to impose a more onerous form of release "if the Crown shows why a less onerous form of release is inappropriate" (*Antic*, at para. 47). Therefore, the default form of release

[6] With the exception of bail conditions for bail following conviction, as is the case for bail between conviction and sentencing or bail on appeal (see *R. v. St-Cloud*, 2015 SCC 27, [2015] 2 S.C.R. 328, at para. 117; *R. v. Oland*, 2017 SCC 17, [2017] 1 S.C.R. 250, at para. 35).

for an accused charged with an offence, other than the very serious offences listed in s. 469, is release on an undertaking *without conditions* (s. 515(1)). Under s. 515(2)(a), if the Crown shows that an accused should not be released on an undertaking without conditions, the judicial official should consider releasing the accused on an undertaking with conditions.

[22] The *Code* provides for enumerated and non-enumerated conditions of bail. The enumerated conditions in s. 515(4) to (4.2) provide guidance regarding the individualized nature of conditions and the expected degree of connection between the condition and the risks listed in s. 515(10). Most discretionary conditions enumerated in s. 515(4) address an individual accused's flight risk or risk of not attending their court date: reporting to a peace officer (s. 515(4)(a)), remaining within a territorial jurisdiction (s. 515(4)(b)), notifying a peace officer of a change in address and employment (s. 515(4)(c)), and depositing a passport (s. 515(4)(e)) (see G. T. Trotter, *The Law of Bail in Canada* (3rd ed. (loose-leaf)), at pp. 6-27 to 6-32). Enumerated conditions related to no-communication orders (ss. 515(4)(d) and 515(4.2)), geographical restrictions (s. 515(4)(d)), and mandatory weapons prohibitions for specific offences (s. 515(4.1)) are directly linked to the second ground of detention: public safety and security. In fact, even mandatory weapons prohibitions give the judicial official some leeway to not impose the weapons prohibition if they consider that the condition is not necessary to protect the safety of the accused, or the safety and security of a victim or any other person (s. 515(4.1)).

[23] Under s. 515(4)(f),[7] judicial officials are also given flexibility to impose non-enumerated conditions, defined as: "such other reasonable conditions . . . as the justice considers desirable". As shown by Mr. Zora's twelve, and then thirteen, release conditions, non-enumerated bail conditions often cover a broad range of activities. It is common for conditions to range from requiring an accused to keep the peace and be of good behaviour, prohibiting cellphone use and internet access, controlling alcohol and drug consumption, imposing a curfew, limiting where an accused can go over large areas of a city, requiring compliance with random searches, and even restricting the accused's ability to exercise their rights to freedom of expression and peaceful assembly (see, e.g., Trotter, at p. 6-44.1).

[24] The jurisprudence mandates that judicial officials respect the ladder principle, meaning that they must consider release with fewer and less onerous conditions before release on more onerous ones (see *R. v. Schab*, 2016 YKTC 69, 35 C.R. (7th) 48, at para. 29; *R. v. Prychitko*, 2010 ABQB 563, 618 A.R. 146, at para. 14). The case law is clear that non-enumerated conditions imposed under s. 515(4)(f), like enumerated conditions, must be minimal, necessary, reasonable, the least onerous in the circumstances, and sufficiently connected to a risk listed in s. 515(10) (*Antic*, at para. 67(j); see also *R. v. Penunsi*, 2019 SCC 39, at paras. 78-80). The ladder principle applies to conditions of release just as it applies to forms of release. There is a link between the ladder principle and the number and content of bail conditions. Without a restrained approach to bail conditions, a less onerous form of

[7] This is now s. 515(4)(h) as of December 18, 2019. Although the other enumerated conditions have been numbered differently, their content has not changed.

bail, such as an undertaking with conditions, can become just as or more onerous than other steps up the bail ladder or, in some cases, even more restrictive than conditional sentence and probation orders issued after conviction (*R. v. McCormack*, 2014 ONSC 7123, at para. 23 (CanLII); *R. v. Burdon*, 2010 ABCA 171, 487 A.R. 220, at para. 8).

[25] Only conditions that are specifically tailored to the individual circumstances of the accused can meet these criteria. Bail conditions are thus intended to be particularized standards of behavior designed to curtail statutorily identified risks posed by a particular person. They are to be imposed with restraint not only because they limit the liberty of someone who is presumed innocent of the underlying offence, but because the effect of s. 145(3) is often to criminalize behaviour that would otherwise be lawful. In effect, each imposed bail condition creates a new source of potential criminal liability personal to that individual accused.

[26] Many intervenors drew attention to the widespread problems which continue to exist, even after this Court's decision in *Antic*, with the ongoing imposition of bail conditions which are unnecessary, unreasonable, unduly restrictive, too numerous, or which effectively set the accused up to fail. Any such practice offends the principle of restraint which has always been at the core of the law governing the setting of bail conditions. Restraint has a constitutional dimension, a legislative footing, and is not only recognized in case law, but was also recently expressly reinforced by the amendments that came into force on December 18, 2019. Section 493.1 now explicitly sets out a "principle of restraint" for any interim release

decisions, requiring a peace officer or judicial official to "give primary consideration" to imposing release on the "least onerous conditions that are appropriate in the circumstances, including conditions that are reasonably practicable for the accused to comply with." Section 493.2 requires judicial officials making bail decisions to give particular attention to the circumstances of accused persons who are Indigenous or who belong to a vulnerable population that is overrepresented in the criminal justice system and disadvantaged in obtaining release.

[27] Parliament also acted to address concerns regarding the over-criminalization of bail breaches, which is in part explained by the initial imposition of numerous and onerous bail conditions. Besides changes to bail revocation under s. 524, Parliament has enacted a new procedure for managing failure to comply charges under s. 145(3), called a "judicial referral hearing" (s. 523.1). If an accused has failed to comply with their conditions of release, and has not caused harm to a victim, property damage, or economic loss, the Crown can opt to direct the accused to a judicial referral hearing. If satisfied that the accused failed to comply with their court order or failed to attend court, a judicial official must review the accused's conditions of bail while taking special note of the accused's particular circumstances. The judicial official can then decide to take no action, release the accused on new conditions, or detain the accused. If the accused was charged with a failure to comply offence, the judicial official must dismiss the charge after making their decision (s. 523.1; *R. v. Rowan*, 2018 ABPC 208, at paras. 39-40 (CanLII)).

[28] Although these amendments occurred after Mr. Zora was charged, I note that my interpretation of the *mens rea* in s. 145(3), based on the relevant statutory context of the bail scheme, is consistent with the concerns acknowledged and addressed in Parliament's recent amendments.

IV. Interpretation of the *Mens Rea* of Section 145(3)

A. *Subjective and Objective Mens Rea*

[29] The main issue in this appeal is whether the *mens rea* for s. 145(3) is subjective or objective. A subjective fault standard would focus on what was in the accused's mind at the time they breached their bail condition. It directs a court to consider whether the accused "actually intended, knew or foresaw the consequence and/or circumstance as the case may be. Whether [they] 'could', 'ought' or 'should' have foreseen or whether a reasonable person would have foreseen is not the relevant criterion of liability" (*R. v. Hundal*, [1993] 1 S.C.R. 867, at pp. 882-883, quoting D. Stuart, *Canadian Criminal Law* (2nd ed. 1987), at pp. 123-24). In applying a subjective *mens rea*, courts can consider personal circumstances and challenges of the accused in a manner which mirrors the individualized manner in which bail conditions are to be imposed.

[30] Under objective *mens rea*, the question would be whether the accused's behaviour was a marked departure from the behaviour of a reasonable person subject to the accused's bail conditions (C.A. Reasons, at para. 68). The standard is based on

what the reasonable person would know or do or have foreseen in the circumstances and it does not matter if the accused does not know they were breaching their condition. Objective fault is premised on uniform societal standards of behavior and therefore does not permit consideration of the inexperience, lack of education, youth, cultural experience, or any other circumstance of the accused, short of an incapacity or virtual inability to comply (C.A. Reasons, at para. 87 (Fenlon J.A. concurring), citing *R. v. Creighton*, [1993] 3 S.C.R. 3, at pp. 58-74 (per McLachlin J.) and pp. 38-39 (per La Forest J.); *R. v. Naglik*, [1993] 3 S.C.R. 122, at p. 148 (per McLachlin J.) and p. 149 (per L'Heureux-Dubé J.)).

[31] This is the first time this Court has been asked to consider the *mens rea* for this offence. Courts across the country have divided on whether the mental element for the crime of breaching a bail condition, or similar offences under s. 145(2), (4), (5) and (5.1), are to be assessed subjectively or objectively. Courts in Manitoba, Ontario, Quebec, Saskatchewan, New Brunswick, and the territories usually require subjective *mens rea* for these offences (see, e.g., *R. v. Custance*, 2005 MBCA 23, 194 C.C.C. (3d) 225; *R. v. Legere* (1995), 22 O.R. (3d) 89 (C.A.); *R. v. Lemay*, 2018 QCCS 1956; *R. v. J.A.D.*, 1999 SKQB 262, 187 Sask. R. 95; *R. v. Howe*, 2014 NBQB 259, 430 N.B.R. (2d) 202; *R. v. Mullin*, 2003 YKTC 26, 13 C.R. (6th) 54; *R. v. Selamio*, 2002 NWTSC 15; *R. v. Josephie*, 2010 NUCJ 7). In contrast, as shown by this case, British Columbia appellate courts have adopted an objective *mens rea* (see also *Ludlow*). Courts in Alberta, Nova Scotia, and Newfoundland and Labrador have adopted varying and modified approaches to the *mens rea* for these

offences (subjective: e.g., *R. v. Ritter*, 2007 ABCA 395, 422 A.R. 1; *R. v. Loutitt*, 2011 ABQB 545, 527 A.R. 212; *R. v. Lofstrom*, 2016 ABPC 197, 39 Alta. L.R. (6th) 367; *R. v. Al Khatib*, 2014 NSPC 62, 350 N.S.R. (2d) 133; *R. v. A.M.Y.*, 2017 NSSC 99; *R. v. L.T.W.*, 2004 CanLII 2897 (N.L. Prov. Ct.); *R. v. Companion*, 2019 CanLII 119787 (N.L. Prov. Ct.); objective: e.g., *R. v. Hammoud*, 2012 ABQB 110, 534 A.R. 80; *R. v. Qadir*, 2016 ABPC 27; *R. v. Osmond*, 2006 NSPC 52, 248 N.S.R. (2d) 221; *R. v. Brown*, 2012 NSPC 64, 319 N.S.R. (2d) 128; *R. v. Foote*, 2018 CanLII 38297 (N.L. Prov. Ct.)).

B. *Statutory Interpretation and the Presumption of Subjective Fault*

[32] Determining the *mens rea* of s. 145(3) involves an exercise in statutory interpretation to discern the fault standard intended by Parliament. A key part of the context in interpreting s. 145(3) is the long-standing presumption that Parliament intends crimes to have a subjective fault element (*R. v. A.D.H.*, 2013 SCC 28, [2013] 2 S.C.R. 269, at para. 23, citing *R. v. Sault Ste. Marie*, [1978] 2 S.C.R. 1299, at pp. 1303 and 1309-10, per Dickson J.).

[33] As described by this Court in *A.D.H.*, this presumption of subjective fault reflects the underlying value in criminal law that the "morally innocent should not be punished" (*A.D.H.*, at para. 27). This starting point is not an absolute rule, but rather captures what was assumed to be present in the mind of Parliament when enacting the provision (para. 26). The presumption of subjective fault will only be overridden by "clear expressions of a different legislative intent" (paras. 27-29). Courts must read

the words of the statute in their entire context, in their grammatical and ordinary sense harmoniously with the scheme and objects of the statute to discern whether there is a clear legislative intention to overturn the presumption of subjective fault (at paras. 19-21, citing *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at p. 41 (quoting E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87)). If a criminal offence in the *Code* is ambiguous as to the *mens rea*, then the presumption of subjective fault has not been displaced.

[34] Subsection 145(3) is a criminal offence, as indicated by its enactment in the *Code*, its purposes of deterrence and punishment (as is further described below), and the serious criminal consequences that flow from conviction, including up to two years' imprisonment (see D. Stuart, *Canadian Criminal Law: A Treatise* (6th ed. 2011), at p. 202; *Hammoud*, at paras. 11-15). Accordingly, the presumption is that s. 145(3) requires subjective fault. The question then becomes whether the text, context, scheme and purpose of s. 145(3) evince a clear intention of Parliament to enact an objective *mens rea* standard.

[35] In my view, they do not. Not only is there no reason in the text or context of the offence to suggest that Parliament intended to depart from requiring subjective fault, I conclude that Parliament intended for subjective fault to apply to s. 145(3). The wording in s. 145(3) is neutral and does not create a duty-based offence with objective *mens rea* as defined in *A.D.H.* All the other relevant factors support a subjective fault element. This Court has previously decided that subjective intent is

required for the similar offence of breach of probation. Further, the legislative history, context, and purpose of s. 145(3) within the larger legislative scheme, as well as the significant consequences associated with a charge or conviction under s. 145(3), call for a subjective *mens rea* element. The realities of the bail system further support Parliament's intention to require subjective fault to ensure that the individual characteristics of the accused are considered throughout the bail process. Considering this social and practical context affirms that the consequences that would flow from requiring only an objective *mens rea* for the failure to comply offence would not uphold the intention of Parliament (R. Sullivan, *Sullivan on the Construction of Statutes* (6th ed. 2014), at pp. 643 and 648).

C. *The Text of Section 145(3) Is Neutral and Does Not Create a Duty-Based Offence*

[36] The text of s. 145(3) is neutral insofar as it does not show a clear intention on the part of Parliament with regard to either subjective or objective *mens rea*. When Mr. Zora was charged in 2015, the failure to comply offence read:

> 145 (3) Every person who is at large on an undertaking or recognizance given to or entered into before a justice or 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 subsection 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
>
> > (a) an indictable offence and is liable to imprisonment for a term not exceeding two years; or

(b) an offence punishable on summary conviction.

[37] I start by noting that the inclusion of the statutory defence of a "lawful excuse" in s. 145(3) plays no role in the interpretation of the *mens rea* of the offence. Lawful excuse provides an additional defence that would not otherwise be available to the accused (see *R. v. Holmes*, [1988] 1 S.C.R. 914, at pp. 948-49, see also interpretations of "reasonable excuse" in *R. v. Moser* (1992), 7 O.R. (3d) 737 (C.A.), at pp. 748-50, per Doherty J.A., concurring; *R. v. Goleski*, 2014 BCCA 80, 307 C.C.C. (3d) 1, aff'd 2015 SCC 6, [2015] 1 S.C.R. 399). It should not be confused with *mens rea* (M. Manning and P. Sankoff, *Manning, Mewett & Sankoff: Criminal Law* (5th ed. 2015), at p. 805; Trotter, at p. 12-16). The availability of the defence does not change the burden on the Crown to prove all elements of the offence, including *mens rea*, beyond a reasonable doubt (*Legere*, at pp. 99-100, citing *R. v. Santeramo* (1976), 32 C.C.C. (2d) 35 (Ont. C.A.), at p. 44; *Custance*, at para. 24; *Josephie*, at para. 28 (CanLII)). Therefore, it is not material to the issue of whether the *mens rea* element of the offence is subjective or objective.

[38] In evaluating whether there is an expression of legislative intent that displaces the presumption of subjective fault, courts look both to the words included in the provision as well as the words that were not (*A.D.H.*, at para. 42). It is true that s. 145(3) does not contain express words indicating a subjective intent, like "wilful" or "knowing". However, this absence cannot, on its own, displace the presumption. In fact, it is precisely when the words and context are neutral that the presumption of subjective *mens rea* operates with full effect.

[39] The majority of the Court of Appeal emphasized that the words "undertaking", "recognizance", "[b]ound to comply", and "[f]ails" indicate that the accused has a binding legal obligation to meet an objectively determined standard of conduct (para. 53). They looked to the five categories of objective *mens rea* offences outlined by this Court in *A.D.H.*, at paras. 57-63: dangerous conduct offences; careless conduct offences; predicate offences; criminal negligence offences; and duty-based offences. The majority, at para. 54, found that this language meant that s. 145(3) fell within the last category, namely duty-based offences. Duty-based offences, such as failing to provide the necessaries of life under s. 215, are offences based on a failure to perform specific "legal duties arising out of defined relationships" (*A.D.H.*, at para. 67, citing *Naglik*, at p. 141).

[40] The Crown also argues that the legislative history of s. 145(3) supports this interpretation, since when it was enacted, the then Minister of Justice referred to the "responsibility" or "duty" of a person on bail to attend court and comply with conditions to ensure that the bail system can rely on voluntary appearance rather than pre-trial custody (House of Commons, *Minutes of Proceedings and Evidence of the Standing Committee on Justice and Legal Affairs*, vol. 1, No. 8, 3rd Sess., 28th Parl., February 23, 1971, at pp. 12 and 29; *House of Commons Debates*, vol. 3, 3rd Sess., 28th Parl., February 5, 1971, at p. 3117 (Hon. John Turner)).

[41] With respect, I disagree that either the text of s. 145(3) or the Minister's comments establish a clear intention to create a duty-based offence which calls for the

uniform normative standard associated with objective *mens rea*. First, the text of s. 145(3) does not contain any of the language typically used by Parliament when it intends to create an offence involving objective fault (see *A.D.H.*, at para. 73). Unlike the duties in ss. 215, 216, 217 and 217.1 of the *Code*, s. 145(3) does not expressly include the word "duty", a word which may suggest objective fault (*A.D.H.*, at para. 71; *Naglik*, at p. 141). I agree with Fenlon J.A. that "the omission is a significant one" (C.A. Reasons, at para. 80) when we are looking for a clear intention of Parliament to rebut the presumption of subjective fault. I also accept that the word "fails" in this context is neutral:

> "Fails" can connote neglect, but as my colleague notes, also means acting contrary to the agreed legal duty or obligation and being unable to meet set standards or expectations: *The Oxford English Dictionary*, 11th ed, *sub verbo* "fail". That definition is equally compatible with intentional conduct or inadvertence.
>
> (C.A. Reasons, at para. 78)

Similarly, the word "omet" in the French version of s. 145(3) can refer to neglecting, but also refraining, from acting in accordance with a duty (H. Reid, with S. Reid, *Dictionnaire de droit québécois et canadien* (5th ed. 2015)), at pp. 446-47, "*omission*"). Neither the words "fails" or "*omet*" demonstrate a clear intention of Parliament to establish objective fault.

[42] Second, there is a danger in putting too much weight on the word choice of one Minister, especially when his statement does not clearly evince an intention of Parliament to create an objective *mens rea* offence. For example, contemporaneous

commentary described that the aim of these offences were to "ensure an accused [did] not disregard the new system with impunity", which seems to suggest a subjective *mens rea* (J. Scollin, Q.C., *The Bail Reform Act: An Analysis of Amendments to the Criminal Code Related to Bail and Arrest* (1972), at p. 19). There is no clear indication from the legislative history that Parliament intended to create an objective *mens rea* offence.

[43] The Minister saying that a provision that establishes a criminal offence imposes a responsibility or duty in a general sense does not make it the type of duty-based offence at issue in *Naglik*. The wording in s. 145(3) speaks only of being bound to comply and failing to do so. This wording does not displace the presumption of subjective intent. All criminal prohibitions impose obligations to act or not in particular ways and inflict sanctions when people fail to comply. If accepted, the Crown's argument and the Court of Appeal's conclusion would make all compliance obligations into "duties" and all crimes into duty-based offences. However, the duty-based offences discussed in *A.D.H.* are a far more limited category and are directed at legal duties very different from the obligation of an accused to comply with the conditions of a judicial order.

[44] Section 145(3) simply does not share the defining characteristics of those duty-based offences requiring objective fault that were at issue in *Naglik* and discussed in *A.D.H*. The points of distinction include the different nature of the relationships to which these legal duties attach, the varying levels of risk to the public

when duties are not met, whether the duty must be defined according to a uniform, societal standard of conduct, and whether applying such a uniform standard is possible and appropriate in the circumstances.

[45] Legal duties, like those in ss. 215 to 217.1, tend to impose a positive obligation to act in certain identifiable relationships, address a duty of a more powerful party towards a weaker party, and involve a direct risk to life or health if a uniform community standard of behaviour is not met (*A.D.H.*, at para. 67). An obligation to not breach a bail condition is not comparable to the power imbalance and risks to public health and safety addressed by the duties imposed by ss. 215 to 217.1: providing the necessaries of life to certain defined persons (s. 215), undertaking medical procedures that may endanger the life of another person (s. 216), or undertaking to do an act or direct work where there is a danger to life or risk of bodily harm (ss. 217 and 217.1).

[46] Further, the duty-based offence in *Naglik* and other types of objective *mens rea* offences involve legal standards that would be "meaningless if every individual defined its content for [themselves] according to [their] subjective beliefs and priorities" (p. 141). The majority of the Court of Appeal thought that bail conditions impose just such "a minimum uniform standard of conduct having regard to societal interests rather than personal standards of conduct" (para. 57). With respect, I disagree. Although societal interests can be at play when bail conditions are set, there is no uniform standard of care for abiding by bail conditions, as there is for

driving a car, storing a firearm, or providing the necessaries of life to a dependant. Parliament legislated a bail system based upon an individualized process, which only permits conditions which address risks specific to the accused to ensure their attendance in court, protect public safety, or maintain confidence in the administration of justice. The bail order is expected to list personalized and precise standards of behavior. As a result, there is no need to resort to a uniform societal standard to make sense of what standard of care is expected of an accused in fulfilling their bail conditions and no need to consider what a reasonable person would have done in the circumstances to understand the obligation imposed by s. 145(3).

[47] In addition, the lack of a uniform standard from which to assess the breach of these conditions means that it is also not obvious what degree of breach would attract criminal liability if an objective standard applied to s. 145(3). Only a marked departure from the conduct of a reasonable person would draw criminal liability under an objective standard of *mens rea*. However, unlike an activity like driving where there is a spectrum of conduct ranging from prudent to careless to criminal based on the foreseeable risks of the conduct to a reasonable person, the highly individualized nature of bail conditions excludes the possibility of a uniform societal standard of conduct applicable to all potential failure to comply offences. Bail conditions may restrict normal activities like travelling and communicating with other people and are specifically tailored to address the *individual* risks posed by each accused. Bail conditions and the risks they address vary dramatically among individuals on release, so that it is not intelligible to refer to

the concepts of a "marked" or "mere" departure from the standard of a reasonable person. In the absence of a bail condition, the regulated conduct would usually not be a departure from any uniform societal standard of behaviour. Without this ability to distinguish a marked departure from a mere departure, there is a risk that the objective fault standard slips into absolute liability for s. 145(3).

[48] Similarly, the offence in s. 145(3) is not comparable to other objective fault offences listed in *A.D.H.* Although a risk assessment is involved in the setting of bail conditions, this individualized risk will rarely be the same as the broad societal risks posed by objective fault offences like dangerous driving or careless firearms storage. As stated by the Standing Senate Committee on Legal and Constitutional Affairs, failure to comply offences, like many offences against the administration of justice, differ from other criminal offences because they rarely involve harm to a victim, they usually do not involve behaviour that would otherwise be considered criminal without a court order, and they are secondary offences that only arise after someone has been charged with an underlying offence (*Delaying Justice is Denying Justice: An Urgent Need to Address Lengthy Court Delays in Canada* (June 2017) (online), at p. 139 ("Senate Committee Report")). A departure from many bail conditions would not automatically lead to a threat to public health and safety.

[49] Finally, reasonable bail is a right under s. 11(*e*) of the *Charter* and cannot be compared to a regulated activity that is voluntarily entered into like driving or firearm ownership where an objective fault standard for related offences is further

justified (*Hundal*, at p. 884). An accused person who is presumed innocent has a right to regain their liberty following their arrest subject to the least onerous measures to address their individual risk of not attending their court date, risk to public protection and safety, and risk to the administration of justice. The fact that accused persons consent to bail conditions in order to be released does not mean that they have chosen to enter into a regulated activity comparable to driving or owning firearms.

D. *Subjective Mens Rea Is Required for Breaches of Probation*

[50] This Court's jurisprudence requiring subjective *mens rea* for the breach of probation offence further supports a subjective *mens rea* for the failure to comply offence. The offences of breach of probation (s. 733.1) and failure to comply with bail conditions (s. 145(3)) are similar offences, which both arise from an accused's breach of conditions set out in a court order. In *R. v. Docherty*, [1989] 2 S.C.R. 941, the Court determined that a subjective *mens rea* was required for the breach of probation offence. That offence used the words "wilfully" and "refuses", which reinforced the presumption of subjective fault, and are not in s. 145(3). However, even after the word "wilfully" was removed from the current breach of probation offence, most courts continue to interpret the offence to require subjective *mens rea*, based on this Court's reasoning in *Docherty* and the fact that the removal of the word "wilfully" does not on its own indicate an intent to create an objective *mens rea* offence (see, e.g., *R. v. Eby*, 2007 ABPC 81, 77 Alta. L.R. (4th) 149; *R. v. Bingley*, 2008 BCPC 245, at para. 18 (CanLII); *R. v. Laferrière*, 2013 QCCA 944, at paras. 82-

83; *R. v. John*, 2015 ONSC 2040, at para. 16 (CanLII); *contra*, *R. v. Bremmer*, 2006 ABPC 93, at paras. 3-7 (CanLII)).

[51] Beyond the text of s. 733.1, the Court in *Docherty* found that subjective *mens rea* was supported by the presumption of subjective fault, the possibility of imprisonment if an accused was convicted, and the purpose of the provision to deter people from breaching their probation orders (pp. 950-52). These factors similarly favour a subjective *mens rea* for s. 145(3). And the point of differentiation, that a probation order governs the behaviour of someone who has already been convicted of a crime while bail conditions primarily restrict the civil liberties of those who are presumed innocent of the underlying offence, further supports a subjective fault element for s. 145(3) (see, e.g., M. Manikis and J. De Santi, "Punishing while Presuming Innocence: A Study on Bail Conditions and Administration of Justice Offences" (2019), 60 *C. de D.* 873, at pp. 879-80).

E. *Section 145(3) in the Legislative Scheme*

[52] A subjective fault requirement for s. 145(3) is consistent with: (1) the penalties and consequences which flow from conviction under s. 145(3); (2) the role of s. 145(3) within the legislative framework for reviewing and enforcing bail conditions; and (3) the restrained and individualized approach to granting bail and imposing bail conditions.

(1) <u>The Consequences of Charges and Conviction of Failure to Comply</u>

[53] While in general the "range of punishments says little about the required fault element" for most offences (*A.D.H.*, at para. 72), s. 145(3) is different from other offences as it may criminalize otherwise lawful conduct, charges can accumulate quickly, and convictions, and even charges, impact the accused's ability to obtain bail in the future. Therefore, the multiple serious consequences which flow from a conviction, or even a charge under s. 145(3), demonstrate Parliament's acceptance of subjective fault for this crime.

[54] A conviction under s. 145(3) has profound implications for the liberty interests of the offender. Parliament has imposed up to a two-year term of imprisonment for conduct, which in many cases was not otherwise criminal, was without violence or a victim, and not only occurred when the accused was presumed innocent of the underlying offence, but may result in criminal liability even if the accused is acquitted of that underlying charge. In addition to possible imprisonment for up to two years for each offence, there is the real prospect of further conditions being imposed as part of the sentence. A conviction under s. 145(3) creates or adds to that person's criminal record, with the associated stigma and difficulties this can bring in respect of employment, housing, and family responsibilities.

[55] A charge under s. 145(3) also has serious negative consequences for the legal position of a person on further bail hearings prior to conviction. The mere fact of being charged under s. 145(3) places a reverse onus on accused persons to show why they should be released on bail again, whether prior to their hearing for their

s. 145(3) charge or the underlying charge (s. 515(6)(c)). As a result, the accused who fails to discharge the reverse onus may not receive bail on the breach charge, may lose their freedom, and await their trial(s) in detention.

[56] Previous convictions under s. 145 may also inform bail hearings for any future offences (see s. 518(1)(c)(iii)). Convictions for failure to comply under s. 145(3) are treated by Parliament and the courts as often indicating that an accused has a history of intentionally disobeying court orders, and therefore is more likely to breach their court orders again. A failure to comply conviction can result in assumptions that an accused has a "lack of respect . . . for court orders and for the law", which may affect future sentencing and release decisions (*R. v. Lacasse*, 2015 SCC 64, [2015] 3 S.C.R. 1089, at para. 118; see also *Schab*, at para. 24; *R. v. Omeasoo*, 2013 ABPC 328, 94 Alta. L.R. (5th) 244, at para. 47). A Department of Justice study of closed cases from 2008 found that 43.9 percent of accused persons with a prior history of convictions for s. 145 offences were denied bail, which is a remand rate significantly higher than accused persons with no such history, and even slightly higher than the remand rate for accused persons who were previously convicted of violent offences (39.9 percent) or sexual offences (39.5 percent): K. Beattie, A. Solecki and K. E. Morton Bourgon, *Police and Judicial Detention and Release Characteristics: Data from the Justice Effectiveness Study* (2013), at pp. 17-18). Thus, conviction under s. 145(3) may lead to the denial of bail or the increased likelihood of more stringent bail conditions for future unrelated offences.

[57] This is problematic because breach charges often accumulate quickly: Mr. Zora's failure to answer a door twice on one weekend resulted in four separate charges under s. 145(3). People with addictions, disabilities, or insecure housing may have criminal records with breach convictions in the double digits. Convictions for failure to comply offences can therefore lead to a vicious cycle where increasingly numerous and onerous conditions of bail are imposed upon conviction, which will be harder to comply with, leading to the accused accumulating more breach charges, and ever more restrictive conditions of bail or, eventually, pre-trial detention (C.M. Webster, *"Broken Bail" in Canada: How We Might Go About Fixing It* (June 2015), at p. 8 ("Webster Report"); Canadian Civil Liberties Association and Education Trust, *Set Up to Fail: Bail and the Revolving Door of Pre-trial Detention*, by A. Deshman and N. Myers (2014) (online), at pp. 49 and 66 ("CCLA Report"); M.E. Sylvestre, N. K. Blomley and C. Bellot, *Red Zones: Criminal Law and the Territorial Governance of Marginalized People* (2019), at p. 132; Pivot Legal Society, *Project Inclusion: Confronting Anti-Homelessness & Anti-Substance User Stigma in British Columbia*, by D. Bennett and D.J. Larkin (2019) (online), at p. 101 ("Pivot Report")).

[58] The significant and long-lasting legal consequences of a charge or conviction under s. 145(3) support the existence of a subjective *mens rea* requirement. If a subjectively guilty mind was not required for a conviction under s. 145(3), there would be considerably less logic in Parliament's choice to deem someone who failed to comply with certain bail conditions as having "a lack of

respect . . . for court orders and the law" and as being less likely to comply again with different bail conditions (*Lacasse*, at para. 118; *Code*, s. 518(1)(c)(iii)). The fact that a charge of breach of bail creates serious consequences for the accused by reversing the onus of proof on release and making bail for other offences more difficult to obtain presupposes that the person knowingly, rather than inadvertently, breached their bail condition.

(2) The Role of Section 145(3) Within the Legislative Framework

[59] Parliament's intention to require subjective fault for s. 145(3) is further demonstrated by examining the role of this offence in the *Code.* Parliament understood that bail takes place as part of an expedited process and is often based on limited information and so it created many mechanisms to review and enforce bail conditions once imposed. When it appears that an accused should not be bound by a condition or is not complying with a bail condition, there may be applications by the Crown or the accused to review or vacate the bail order, or a decision by the Crown to seek bail revocation or lay a criminal charge under s. 145(3). Considering the availability of these other mechanisms that manage risk from an accused's inability or failure to comply with conditions of bail, it is clear that s. 145(3) serves a distinct purpose: to punish and deter those who knowingly or recklessly breach their bail conditions.

[60] The respondent argued that s. 145(3) has become "a prime means of enforcing release conditions in order to mitigate the risks and concerns that would

otherwise have justified detaining a person" (R.F., at paras. 63-67). Criminal charges under s. 145(3) are common, increasing, and often result in the loss of liberty. Statistics Canada reports that the charging and prosecuting of breaches of court orders, including bail conditions, has risen since 2004, and in 2008/2009 it was estimated that one in five people in pre-trial detention were there because they failed to comply with conditions in a court order or probation order (*Trends in the Use of Remand in Canada* (May 2011); *Trends in offences against administration of justice* (October 2015), at p. 13 ("Statistics Canada Report"); *Table 35-10-0177-01 Incident-based crime statistics, by detailed violations, Canada, provinces, territories and Census Metropolitan Areas* (online)).

[61] Offences relating to the administration of justice represented about 1 in 10 police reported crimes in 2014 (Statistics Canada Report, at p. 6). Offences for failure to comply with a court order, including the offence under s. 145(3),[8] represented 57 percent of those administration of justice offences reported in 2014 (Statistics Canada Report, at p. 7). In 2016/2017, failure to comply with an order was the most serious offence charged in 9 percent of all completed adult criminal cases (Statistics Canada, *Adult criminal and youth court statistics in Canada, 2016/2017* (January 2019)). The rate of all persons charged for failure to comply with an order continued to increase between 2017 and 2018 (*Table 35-10-0177-01*).While rates of failure to comply charges also vary across the country, between 2005/2006 and 2013/2014, most provinces reported an increase in the proportion of completed adult

[8] Failure to comply offences in the Statistics Canada Report include s. 145(3) to (5.1), but also offences related to failure to comply with conditional sentences or probation orders (s. 161(1) to (4)), or peace bonds (s. 811(a) and (b)).

criminal cases that included at least one offence against the administration of justice (Statistics Canada Report, at pp. 13-14).

[62] Professor Friedland, whose study *Detention Before Trial* contributed to significant reform of the bail system in the 1970s, has suggested that the growth in failure to comply charges has likely contributed to the increase in people held in pre-trial custody (M. L. Friedland, "Reflections on Criminal Justice Reform in Canada" (2017), 64 *Crim. L.Q.* 274; M. L. Friedland, "The Bail Reform Act Revisited" (2012), 16 *Can. Crim. L.R.* 315, at p. 321; M. L. Friedland, *Detention before Trial: A Study of Criminal Cases Tried in the Toronto Magistrates' Courts* (1965)). Pre-trial detention can result in negative impacts on accused persons' employment and income, housing, health and access to medication, relationships, personal possessions, and ability to fulfill parental obligations (Canadian Committee on Corrections, *Report of the Canadian Committee on Corrections* (1969), at pp. 101-2 ("Ouimet Report"); CCLA Report, at pp. 8-10; Pivot Report, at p. 81). The Standing Senate Committee on Legal and Constitutional Affairs also found that failure to comply offences were clogging the courts despite being offences that are not "strictly indictable" and "involve no harm to a victim" (Senate Committee Report, at pp. 138-40).

[63] In my view, despite high rates of criminal charges for failure to comply, Parliament did not intend for criminal sanctions to be the primary means of managing any risks or concerns associated with individuals released with bail conditions. The scheme of the *Code* illustrates that such concerns are to be managed through the

setting of conditions that are minimal, reasonable, necessary, least onerous, and sufficiently linked to the accused's risk; variations to those conditions when necessary through bail reviews and vacating bail orders; and bail revocation when bail conditions are breached, which may result in release on the same conditions with altered behaviour expected of the accused, changed conditions, or detention. Charges under s. 145(3) are not, and should not be, the principal means of mitigating risk.

[64] A bail review under ss. 520 and 521 is the primary way to challenge or change bail conditions which are not, or which are no longer, minimal, reasonable, necessary, least onerous, and sufficiently linked to risks posed by the accused (except for accused charged with very serious offences under s. 469).[9] Conditions set in the bustle of a busy bail court with limited information can, and when necessary should, be fine-tuned through bail review. A bail review involves a hybrid process, rather than a *de novo* proceeding (*St-Cloud*, at paras. 92 and 118). A reviewing judge may intervene if the judicial official has erred in law, if the impugned decision was clearly inappropriate, or if new evidence shows a material and relevant change in the circumstances (para. 121). In addition, s. 523(2) allows for the judicial official, in certain circumstances, to vacate a previous release order and make a different order, including when the accused and the Crown consent to vacating the order (s. 523(2)(c)).

[9] Offences listed under s. 469 have a different mechanism of bail review under ss. 522(4) and 680 of the *Code*.

[65] Parliament also enacted two tools to address breaches of bail conditions: bail revocation under s. 524 and criminal charges under s. 145(3). These two provisions work together to promote compliance with conditions of bail, along with forfeiture provisions for monetary amounts set out in a recognizance (see Part XXV of the *Code*). However, these two mechanisms serve distinct and different legislative purposes. Whereas revocation under s. 524 fulfills a risk management role, criminal liability under s. 145(3) exists to punish and deter.

[66] Revocation of bail occurs under s. 524. An accused may be arrested where there are reasonable grounds to believe that the accused has contravened or is about to contravene any summons, appearance notice, promise to appear, undertaking, or recognizance issued to them or has committed an indictable offence after being released (s. 524(1) and (2)). The Crown can then decide whether to proceed with a revocation hearing before a judicial official (Trotter, at pp. 11-9 to 11-10). Where the judicial official finds, on a balance of probabilities, that the accused contravened or was about to contravene the relevant order or that there are reasonable grounds to believe that the accused committed another indictable offence while on bail, the judicial official must cancel the order and detain the accused (s. 524(4) and (8); see *R. v. Parsons* (1997), 161 Nfld. & P.E.I.R. 145 (N.L.C.A.), at para. 21; *R. v. Morris*, 2013 ONCA 223, 305 O.A.C. 47, at para. 18). The accused then has the onus to show why their detention is not justified. If the accused establishes that the detention is not justified, the judicial official can order release with any of the options available under s. 515, including changing the conditions of the undertaking or

recognizance (s. 524(4) to (9)). This means that the judicial official has the ability to consider the appropriateness of the original release order and may remove or narrow conditions from the release order where the accused shows that they are no longer necessary, reasonable, least onerous, or sufficiently linked to the statutory criteria in s. 515(10) (Trotter, at p. 11-1).

[67] Revocation under s. 524 ensures that those who do not follow bail conditions can be arrested to re-assess whether, and on what conditions, they should be released into the community, where it becomes apparent that the accused will not or cannot abide by the conditions originally set. Revocation provides the court with greater flexibility in determining whether, despite a contravention of bail, the accused has shown cause that they should be released again either on the same conditions or different conditions (see, e.g., *R. v. Badgerow*, 2010 ONCA 236, 260 O.A.C. 273, at para. 36; *R. v. T.J.J.*, 2011 BCPC 155, at paras. 57-59 (CanLII); *R. v. Mehan*, 2016 BCCA 129, 386 B.C.A.C. 1). Conditions can be revised to address the risk of further breach while ensuring the accused can reasonably comply.

[68] If detention is the proportionate result for the accused's breach of bail then revocation under s. 524 is the appropriate avenue. Bail revocation was the process designed for determining whether a person's risk factors are such that their failure to abide by bail conditions means they ought to be detained rather than released on different conditions. Revocation can therefore address negligent and careless breaches of bail conditions without creating additional criminal liability.

While revocation carries the threat of detention and should be sought only when the negative impacts that can arise from detention are justified, it can address risks arising from breaches of bail conditions without adding offences against the administration of justice to the criminal record of the accused.

[69] In addition to revocation, Parliament enacted s. 145(3) of the *Code*, making it a separate crime against the administration of justice to breach bail conditions, which carries a maximum penalty of two years' imprisonment and has other important consequences for the accused (as discussed above). It is a criminal offence which requires the Crown to prove all constituent elements of the offence beyond a reasonable doubt. Charges for breach of bail conditions under s. 145(3) can be brought in addition to an application for bail revocation (*Parsons*, at paras. 28 and 37). Section 145(3) adds criminal liability on top of the possibility of an accused losing their ability to be out on bail prior to trial. Therefore criminal charges are intended as a means of last resort to punish harmful behaviors when other risk management tools have not served their purposes.

[70] This legislative framework indicates that Parliament intended for the Crown to primarily use bail review and revocation, rather than criminal charges, to manage accused persons who cannot or will not comply with their bail conditions, especially when those bail conditions address conduct that would not otherwise be criminal. Of course, different considerations apply for a breach of condition that involves conduct that is otherwise criminal or which harms or threatens people, for

example, where an accused breaches a no-communication condition by threatening or intimidating a victim. In those circumstances, criminal charges may be justified. Parliament has now created a judicial referral hearing process under s. 523.1 to allow prosecutors to divert charges under s. 145(3) that involve no physical or emotional harm to a victim, property damage, or economic loss. This further emphasizes that prosecutions and conviction under s. 145(3) should be a last resort measure to primarily address harmful intentional breaches of bail conditions where the remedies available through bail review and revocation would not be sufficient.

[71] Even with this new process, a bail variation or revocation application should be among the responses seriously considered by the Crown when faced with certain types of alleged breaches in an effort to reduce the number of criminal breach charges burdening the courts. Where the accused's failure to comply with a condition might justify detention, revocation may be appropriate. The benefits of this option can be seen by examining Mr. Zora's charges for allegedly breaching his curfew and failing to answer his door — charges that resulted in no harm to anyone else and relate to conduct that would not have been criminal but for his bail conditions. If the Crown had sought bail revocation instead of bringing charges, Mr. Zora would have been arrested and he would have had to show cause why he should be released again despite his breach. (He was in a comparable position to show cause why he should be released when he was charged under s. 145(3).) The bail revocation procedure, however, expressly permits the judicial official to release him on modified conditions. These modified conditions might have managed the same risk in a more focussed and

feasible way, without Mr. Zora facing the serious consequences of additional criminal convictions for failing to answer his door.

[72] Given this, the primary purpose of s. 145(3) is not to manage future risk, but to sanction past behaviour and deter further breaches. As noted by Wilson J. in *Docherty*, at pp. 951-52, regarding breach of probation conditions, specific deterrence has little or no effect if an accused does not know they were doing anything wrong. An accused must know what standard of behaviour to meet and that their conduct is failing to meet that standard in order to be deterred from engaging in prohibited conduct. If the purpose of s. 145(3) is to deter and punish those who breach bail conditions, the same logic in *Docherty* supports a subjective *mens rea* element for s. 145(3).

(3) Setting Bail Conditions and Their Breach Under Section 145(3)

[73] There is a strong, indeed inexorable, connection between the setting of bail conditions and the operation of s. 145(3), including its *mens rea* element. In this section, I address the argument that because bail conditions are tailored to the individual, Parliament intended an objective *mens rea* for breaches under s. 145(3). In my view, this argument lacks a sound conceptual basis and fails to take into account the manner in which bail conditions continue to be imposed despite the principles articulated in the *Charter*, the *Code*, and by this Court in *Antic*. I conclude that the opposite is true: the requirement that bail conditions must be tailored to the accused

points to a subjective *mens rea* so that the individual characteristics of the accused are considered both when bail is set and if bail is breached.

[74] The respondent and the intervener Attorney General of British Columbia ("AGBC") submit that the *mens rea* for s. 145(3) can be satisfied on proof of an objective fault standard. They argue that bail conditions, set at the beginning of the bail process, are carefully tailored to the accused and would lead to only minimal criminal liability for the accused. The AGBC links the various phases of the bail system, but claims that the "[l]egitimate concern about marginalized people whose breach of bail pose an attenuated risk is effectively tackled at the front-end of the process" (I.F. (AGBC), at para. 3). In other words, concerns about the treatment of marginalized individuals are factored into the conditions themselves, which obviates the need for a subjective fault standard if those conditions are breached.

[75] I do not accept this line of reasoning. This proposition is premised on a false dichotomy which assumes that a focus on the individual accused may occur only at one stage or the other. Conceptually, there is no reason why the rights and interests of the accused should be bargained away in an either/or formulation. Nothing prevents an individualized focus both at the time when the conditions are imposed and at the time of breach. The ethos of *Antic* favours a consistent and complementary approach under which the relevant rights in the *Charter* and the salient protections in the *Code* animate all aspects of the bail system: from imposition to breach. Requiring

a subjective *mens rea* reinforces, mirrors, and respects the individualized approach mandated for the impositions of any bail conditions.

[76] I would also reject the position put forward by the AGBC because of the prevalence of bail conditions that fail to reflect the requirements for bail under the *Charter*, the *Code*, and this Court's principles in *Antic*. In practice, the number of unnecessary and unreasonable bail conditions, and the rising number of breach charges, undercut the claim that there is sufficient individualization of bail conditions. Many intervenors described how, despite the fact that the default form of release should be an undertaking without conditions under s. 515(1), studies across the country have shown that the majority of bail orders include numerous conditions of release, which often do not clearly address an individual accused's risks in relation to failing to attend their court date, public safety, or confidence in the administration of justice (see Sylvestre, Blomley and Bellot, at pp. 67-68; N. M. Myers, "Eroding the Presumption of Innocence: Pre-Trial Detention and the Use of Conditional Release on Bail" (2017), 57 *Brit. J. Criminol.* 664, at p. 677; Webster Report, at p. 7; John Howard Society of Ontario, *Reasonable Bail?* (September 2013) (online), at p. 11; CCLA Report, at pp. 48-49; Department of Justice, Research and Statistics Division, *Research in Brief: Assessments and Analyses of Canada's Bail System* (2018)). Research into bail conditions in Vancouver and Montreal suggests that the likelihood of an accused person being charged with breaching their bail conditions increases when they are subject to a greater number of conditions and a longer court order (Sylvestre, Blomley and Bellot, at pp. 67-68).

[77] Several factors contribute to the imposition of numerous and onerous bail conditions. Courts and commentators have consistently described a culture of risk aversion that contributes to courts applying excessive conditions (*Tunney*, at para. 29; see also pp. 223-24 (Comment by T. Quigley); *Schab*, at para. 15; Friedland (2017); B. L. Berger and J. Stribopoulos, "Risk and the Role of the Judge: Lessons from Bail", in B. L. Berger, E. Cunliffe and J. Stribopolous, eds., *To Ensure that Justice is Done: Essays in Memory of Marc Rosenberg* (2017), at pp. 308 and 323-24). In *Tunney*, Di Luca J. emphasized that this culture continues despite the directions of *Antic*. He rightly noted, in my view, that "the culture of risk aversion must be tempered by the constitutional principles that animate the right to reasonable bail" (para. 29).

[78] The expeditious nature of bail hearings also generates a culture of consent, which aggravates the lack of restraint in imposing excessive bail conditions. This is the practical reality of bail courts, which must work efficiently to minimize the time accused persons spend unnecessarily in pre-trial detention. As this Court has previously recognized, the timing and speed of bail hearings impacts accused persons by making it difficult to find counsel, resulting in many accused who are self-represented or reliant on duty counsel who are often given little time to prepare (*St-Cloud*, at para. 109). This process encourages accused persons to agree to onerous terms of release rather than run the risk of detention both before and after a contested bail hearing (see CCLA Report, at pp. 46-47; Pivot Report, at p. 79; Myers, at pp. 667 and 676-77; Sylvestre, Blomley and Bellot, at p. 118; Berger and

Stribopolous, at p. 319; *R. v. Birtchnell*, 2019 ONCJ 198, [2019] O.J. No. 1757, at para. 29 (QL)). Where joint submissions are made, some observers have gone so far as to suggest that the Crown is rarely asked to justify the proposed conditions of release, which is "arguably a key contributing factor to the higher number of conditions imposed in consent release cases than would be expected based on the law" (C. Yule and R. Schumann, "Negotiating Release? Analysing Decision Making in Bail Court" (2019), 61 *Can. J. Crimin. & Crim. Just*. 45, at pp. 57-60).

[79] A third reality of bail is that onerous conditions disproportionately impact vulnerable and marginalized populations (CCLA Report at pp. 72-79). Those living in poverty or with addictions or mental illnesses often struggle to meet conditions by which they cannot reasonably abide (see, e.g., *Schab*, at paras. 24-5; *Omeasoo*, at paras. 33 and 37; *R. v. Coombs*, 2004 ABQB 621, 369 A.R. 215, at para. 8; M. B. Rankin, "Using Court Orders to Manage, Supervise and Control Mentally Disordered Offenders: A Rights-Based Approach" (2018), 65 *C.L.Q.* 280). Indigenous people, overrepresented in the criminal justice system, are also disproportionately affected by unnecessary and unreasonable bail conditions and resulting breach charges (see, e.g., *R. v. Murphy*, 2017 YKSC 34, at paras. 31-34 (CanLII); *Omeasoo*, at para. 44; CCLA Report, at pp. 75-79; J. Rogin, "Gladue and Bail: The Pre-Trial Sentencing of Aboriginal People in Canada" (2017), 95 *Can. Bar. Rev.* 325; *Ewert v. Canada*, 2018 SCC 30, [2018] 2 S.C.R. 165, at paras. 57-60; also s. 493.2, as of December 18, 2019). The oft-cited CCLA Report provides the following trenchant summary:

> Canadian bail courts regularly impose abstinence requirements on those addicted to alcohol or drugs, residency conditions on the homeless, strict check-in requirements in difficult to access locations, no-contact conditions between family members, and rigid curfews that interfere with employment and daily life. Numerous and restrictive conditions, imposed for considerable periods of time, are setting people up to fail — and failing to comply with a bail condition is a criminal offence, even if the underlying behaviour is not otherwise a crime. [p. 1]

[80] The presence of too many unnecessary conditions and the prevalence of breach charges resulting from the imposition of excessive and onerous conditions is part of the relevant legislative context in interpreting s. 145(3) (Sullivan, at pp. 648-49). It is the same context to which Parliament has recently responded by amending the bail scheme. Bail conditions cannot be assumed to be sufficiently individualized and the Court will not pretend that the bail scheme is functioning perfectly, when it clearly is not. There is no basis in theory or practice to accept that an individualized imposition of bail conditions at the front end shows a clear intent to displace the presumed subjective fault standard. Indeed, the consistent and convincing studies presented to the Court illustrate the need to articulate, with greater precision and increased urgency, how Parliament's intent to punish those who intentionally breach their bail conditions under s. 145(3), while ensuring their right to reasonable bail on the least onerous terms necessary, requires those in the bail system to exercise restraint and carefully review conditions for compliance with the *Charter*, the *Code*, and *Antic*. It is to that task that I now turn.

V. Restraint and Review: Necessary and Reasonable Bail Conditions and Section 145(3)

[81] In *Antic*, this Court set out the proper approach to the *Code*'s bail provisions when it addressed the overuse of cash bail and sureties. As issues concerning bail are particularly evasive of review (see *Penunsi*, at para. 11), it has become necessary to build upon the *Antic* framework and provide guidance on non-monetary conditions of bail and the serious consequences which flow from their breach.

[82] We can learn a great deal about how to set bail conditions upon seeing how they become criminal offences under s. 145(3). Each condition added onto a release order not only limits the freedom of someone presumed to be innocent, it creates a new risk of criminal liability, particular to the accused, and may result in the loss of liberty, whether through bail revocation or imprisonment. The direct connection between the behaviour addressed in bail conditions and the conduct which is criminalized under s. 145(3) flows both ways. The individualized process of setting bail conditions moves forward into and informs the subjective fault standard for breach. Conversely, understanding how s. 145(3) gives rise to potential criminal liability reinforces that the principles of restraint and review must guide the initial decision to impose bail conditions in practice. Section 145(3) therefore provides an essential perspective through which we can consider the general bail principles; concerns over specific conditions; and how all those involved in the bail system have responsibilities in respect of restraint and review.

A. *General Principles Governing Bail Conditions*

[83] All those involved in setting bail terms must turn their minds to the general principles for setting bail, which restrain how bail conditions are set. As the default position in the *Code* is bail without conditions, the first issue is whether a need for any condition has been demonstrated. Restraint and the ladder principle require anyone proposing to add bail conditions to consider if any of the risks in s. 515(10) are at issue and understand which specific risks might arise if the accused is released without conditions: is this person a flight risk, will their release pose a risk to public protection and safety, or is their release likely to result in a public loss of confidence in the administration of justice?

[84] Only conditions which target those specific s. 515(10) risk(s) are necessary. If an accused is a flight risk, but poses no other risks, only those conditions that minimize their risk of absconding should be imposed. Similarly, if an accused poses a risk to public safety and protection, only the least onerous conditions to address that specific threat should be imposed (*R. v. S.K.*, 1998 CanLII 13344 (Sask. Prov. Ct.), at paras. 16-19). Further, such conditions will not be necessary for public protection and safety merely because an accused poses a risk of committing another offence while on bail, unless they pose a "substantial likelihood" of committing an offence that endangers public protection and safety (*Morales*, at pp. 736-37; s. 515(10)(b)). Any condition imposed to maintain confidence in the administration of justice must be based on a consideration of the combined effect of all the relevant circumstances from the perspective of a reasonable member of the public, especially the four factors set out in s. 515(10)(c): the apparent strength of the prosecution's

case, the gravity of the offence, the circumstances surrounding the commission of the offence, and whether the accused is liable for a potential lengthy term of imprisonment (*St-Cloud*, at paras. 55-71 and 79).

[85] The requirement of necessity also means that the particular condition must attenuate risks that would otherwise prevent the accused's release without that condition. Conditions cannot be imposed for gratuitous or punitive purposes (*Antic*, at para. 67(j); *Birtchnell*, at paras. 27-28; *R. v. McDonald*, 2010 ABQB 770, at paras. 34-36 (CanLII)). A condition that may be suitable for a sentencing purpose, like rehabilitation, will not be appropriate unless it is directed towards the risks in s. 515(10) (*Omeasoo*, at para. 31). Conditions should not be behaviourally-based (*R. v. K. (R.)*, 2014 ONCJ 566, at paras. 14-19; *J.A.D.*, at paras. 9 and 11 (CanLII)). A condition that merely seems "good to have", but is not necessary for the accused's release, is not appropriate (*Birtchnell*, at para. 40). Even if some condition is thought to be therapeutic, intended to help, or "couldn't hurt," the prospect of additional criminal liability under s. 145(3) means any such limits on otherwise lawful behavior may also attract criminal penalties. Restraint was emphasized by the Court in *Antic*, at para. 67(j):

> Terms of release imposed under s. 515(4) may "only be imposed to the extent that they are necessary" to address concerns related to the statutory criteria for detention and to ensure that the accused can be released. They must not be imposed to change an accused person's behaviour or to punish an accused person. [Footnote omitted.]

[86] Moreover, bail conditions must be sufficiently linked to the defined statutory risks. They should be as narrowly defined as possible to meet their objective of addressing the risks under s. 515(10) (*R. v. D.A.*, 2014 ONSC 2166, [2014] O.J. No. 2059, at paras. 14-17 (QL); *R. v. Pammett*, 2014 ONSC 5597, at paras. 10-12 (CanLII); *R. v. Clarke*, [2000] O.J. No. 5738 (Sup. Ct.), at paras. 9 and 12 (QL); *K. (R.)*, at paras. 14-19; *J.A.D.*, at paras. 9 and 11). As with the setting of probation conditions, the level of connection between a non-enumerated condition and a risk under s. 515(10) should be comparable to the clear linkages between the enumerated conditions in s. 515(4) and the risks under s. 515(10) (*R. v. Shoker*, 2006 SCC 44, [2006] 2 S.C.R. 39, at paras. 13-14). This Court in *Penunsi* recently emphasized this in relation to conditions on peace bonds:

> Where the condition is not demonstrably connected to the alleged fear, it may merely set the defendant up for breach . . . Any condition should not be so onerous as effectively to constitute a detention order by setting the defendant up to fail. [Citations omitted; para. 80.]

[87] A bail condition must be reasonable. As with probation conditions, bail conditions cannot contravene federal or provincial legislation or the *Charter* (*Shoker*, at para. 14). The enumerated bail conditions in s. 515(4) to (4.2) help inform the extent of discretion a judicial official has in imposing other reasonable non-enumerated bail conditions (*Shoker*, at para. 14). Conditions must be clear, minimally intrusive, and proportionate to any risk. Conditions will also only be reasonable if they realistically can and will be met by the accused, as "[r]equiring the accused to perform the impossible is simply another means of denying judicial interim release"

by setting them up to fail, as well as adding the risk that the accused will be criminally charged for failing to comply (*Omeasoo*, at paras. 33 and 37-38; see also *Penunsi*, at para. 80). As noted by Rosborough J. in *Omeasoo*, removing an unreasonable condition will not cause any more risk to the community than imposing a condition that is impossible for the accused to respect (para. 39). Reasonable conditions also must not limit the *Charter* rights of an accused, such as their freedom of expression or association, unless that condition is reasonably connected and necessary to address the accused's risk of absconding, harming public safety, or causing loss of confidence in the administration of justice (*R. v. Manseau*, [1997] AZ-51286266 (Que. Sup. Ct.); *Clarke*).

[88] Bail conditions are to be tailored to the individual risks posed by the accused. There should not be a list of conditions inserted by rote. The only bail condition that should be routinely added is the condition to attend court (*Birtchnell*, at para. 6), as well as those conditions that must be considered for certain offences under s. 515(4.1) to (4.3). There is no problem with referring to checklists to canvass available conditions. The problem arises if conditions are simply added, not because they are strictly necessary, but merely out of habit, because the accused agreed to it, or because some behavior modification is viewed as desirable. Bail conditions may be easy to list, but hard to live.

[89] In summary, to ensure the principles of restraint and review are firmly grounded in how people think about appropriate bail conditions, these questions may help structure the analysis:

- If released without conditions, would the accused pose any specific statutory risks that justify imposing any bail conditions? If the accused is released without conditions, are they at risk of failing to attend their court date, harming public safety and protection, or reducing confidence in the administration of justice?

- Is this condition necessary? If this condition was not imposed, would that create a risk of the accused absconding, harm to public protection and safety, or loss of confidence in the administration of justice which would prevent the court from releasing the accused on an undertaking without conditions?

- Is this condition reasonable? Is the condition clear and proportional to the risk posed by the accused? Can the accused be expected to meet this condition safely and reasonably? Based on what is known of the accused, is it likely that their living situation, addiction, disability, or illness will make them unable to fulfill this condition?

- Is this condition sufficiently linked to the grounds of detention under s. 515(10)(c)? Is it narrowly focussed on addressing that specific risk posed by the accused's release?

- What is the cumulative effect of all the conditions? Taken together, are they the fewest and least onerous conditions required in the circumstances?

These questions are inter-related and they do not have to be addressed in any particular order, nor do they have to be asked and answered about every condition in every case. The practicalities of a busy bail court do not make it realistic or desirable to require that the judicial official inquire into conditions which do not raise red flags. What is important is that all those involved in the setting of bail use these types of organizing questions to guide policy and to assess which bail conditions should be sought and imposed.

[90] When considering the appropriateness of bail conditions, the criminal offence created by s. 145(3) not only counsels restraint and review, but provides an additional frame of reference which incorporates considerations of proportionality into the assessment. Given the direct relationship between imposition and breach, the assessments of necessity and reasonableness discussed in *Antic* should also take into account that failures to comply with imposed conditions become separate crimes against the administration of justice. Accordingly, the question becomes: is it necessary and reasonable to impose this condition as a personal source of potential

criminal liability knowing that a breach may result in a deprivation of liberty because of a charge or conviction under s. 145(3)? In short, when considering whether a proposed condition meets a demonstrated and specific risk, is it proportionate that a breach of this condition would be a criminal offence or become a reason to revoke the bail?

B. *Specific Conditions*

[91] I now address some specific non-enumerated conditions commonly included in release orders. Many of these types of conditions were in Mr. Zora's release order. As stated above, the criminalization of non-compliance with conditions under s. 145(3) means the principles of restraint and review call for increased scrutiny to determine if a particular type of condition is necessary, reasonable, least onerous, and sufficiently linked to a risk listed in s. 515(10). The discussion of specific conditions below demonstrates how these common types of conditions must be scrutinized.

[92] First, judicial officials should be wary of conditions that may be directed to symptoms of mental illness. This includes alcohol and drug abstinence conditions for an accused with an alcohol or drug addiction. If an accused cannot possibly abide by such a condition, then it will not be reasonable (*Penunsi*, at para. 80; *Omeasoo*, at para. 37-38). In addition, rehabilitating or treating an accused's addiction or other illness is not an appropriate purpose for a bail condition — a condition will only be appropriate if it is necessary to address the accused's specific risks. Subjecting

individuals who are presumed innocent to abstention conditions may effectively punish them for what are recognized health concerns, "if that individual is suffering from an alcohol addiction, an absolute abstention may present substantial risk to the health and well-being of that person" and even "give rise to potentially lethal withdrawal effects" (*R. v. Denny*, 2015 NSPC 49, 364 N.S.R. (2d) 49, at paras. 14-15; see also John Howard Society of Ontario, at pp. 12-13). If an abstinence condition is necessary, the condition must be fine-tuned to target the actual risk to public safety, for example, by prohibiting the accused from drinking alcohol outside of their home if their alleged offences occurred when they were drunk outside of their house (*Omeasoo*, at para. 42). Those seeking and imposing bail conditions should also be aware that an accused's substance use disorder, or any other mental illness, may yet be undiagnosed. And, where necessary, liberal use should be made of the bail review and variation provisions under ss. 520, 521 and 523 to accommodate these circumstances. Bail is a dynamic, ongoing assessment, a joint enterprise among all parties involved to craft the most reasonable and least onerous set of conditions, even as circumstances evolve.

[93] Second, other behavioural conditions that are intended to rehabilitate or help an accused person will not be appropriate unless the conditions are necessary to address the risks posed by the accused. As described by Cheryl Webster in her report for the Department of Justice, "conditions such as 'attend school' or 'attend counselling/treatment' may serve broader social welfare objectives but are [usually] unrelated to the actual offence alleged to have been committed" (Webster Report, at

p. 7). There may be exceptions, such as in *S.K.*, where the judge found that an "attend school" condition was sufficiently linked to the accused's risks. However, even if a condition seems sufficiently linked to an accused's risks, the question is also whether the condition is proportional: imposing such conditions means that the accused could be convicted of a criminal offence for skipping a day of school.

[94] Third, the condition to "keep the peace and be of good behaviour" is a required condition in probation orders, conditional sentence orders, and peace bonds, but is not a required condition for bail (*S.K.*, at para. 39). It should be rigorously reviewed when proposed as a condition of bail. This generic condition is usually understood as prohibiting the accused from breaching the peace or violating any federal, provincial, or municipal statute (*R. v. Grey* (1993), 19 C.R. (4th) 363 (Ont. C.J.); *R. v. D.R.* (1999), 178 Nfld. & P.E.I.R. 200 (Nfld. C.A.); *R. v. Gosai*, [2002] O.J. No. 359 (Sup. Ct.), at paras. 18-28 (QL)). Because a breach of a bail condition is a criminal offence, this condition "adds a new layer of sanction, not just to criminal behavior, but to everything from violation of speed limit regulations on federal lands, such as airports, to violation of dog leashing by-laws of a municipality" and "is not in harmony with the presumption of innocence" that usually applies when an accused is on bail (*R. v. Doncaster*, 2013 NSSC 328, 335 N.S.R. (2d) 331, at paras. 16-17; see also *R. v. A.D.B.*, 2009 SKPC 120, 345 Sask. R. 134, at paras. 17 and 20; Trotter at pp. 6-41 to 6-44). Given the breadth of the condition, it is difficult to see how imposing an additional prohibition on the accused for violating any substantive law, whether a traffic ticket or failure to licence a dog, could be reasonable, necessary,

least onerous, and sufficiently linked to an accused's flight risk, risk to public safety and protection, or risk to maintaining confidence in the administration of justice (see *S.K.*, at para. 39).

[95] Fourth, broad conditions requiring an accused to follow or be amenable to the rules of the house or follow the lawful instructions of staff at a residence may be problematic, especially for accused youth. In *J.A.D.*, the Court of Queen's Bench for Saskatchewan found that such a condition was void for vagueness and an improper delegation of the judicial function (para. 11). These types of conditions prevent the accused from understanding what they must do to avoid violating their condition, as the rules of the house can change based on the whims of the person who sets them (*K. (R.)*, at paras. 19-22). Imposing a condition that delegates the creation of bail rules to a surety or anyone else bypasses the judicial official's obligation to uphold the principles of restraint and review and assess whether the rules of the house truly address any of the risks posed by the accused.

[96] Fifth, certain conditions may cause perverse consequences or unintended negative impacts on the safety of the accused or the public. These unintended effects underscore the need for careful and rigorous review of each bail condition. For example, a condition that prevents an accused person from using a cellphone may prevent them from calling for help in the event of an emergency or inhibit their ability to work or care for dependents (*Prychitko*, at paras. 19-25; Trotter, at pp. 6-44 to 6-45). Other conditions may hinder the administration of justice by punishing accused

persons who are otherwise the victims of crime. In *Omeasoo*, police responded to a complaint of domestic assault where Ms. Omeasoo was the victim. However, she was arrested and charged for failure to comply because she had consumed alcohol contrary to her bail condition (para. 6). She was therefore charged for the offence of being intoxicated while being the victim of an assault. While one hopes that prosecutorial discretion would help prevent these types of unintended consequences, such conditions may become a disincentive to reporting serious crime and significantly increase the vulnerability of certain people.

[97] Further examples of conditions with perverse consequences include "red zone" conditions which prevent an accused from entering a certain geographical area and "no drug paraphernalia" conditions. These conditions may have especially significant impacts on marginalized accused persons. "Red zone" conditions can isolate people from essential services and their support systems (Sylvestre, Blomley and Bellot). Paraphernalia prohibitions can encourage the sharing of needles if accused persons are not able to carry their own clean needles (Pivot Report, at pp. 89-95). In fact, a guideline for bail conditions for accused persons with substance use disorders released in 2019 by the Public Prosecution Service of Canada has acknowledged that these types of conditions "should generally not be imposed" (*Public Prosecution Service of Canada Deskbook*, Part. III, c. 19, "Bail Conditions to Address Opioid Overdoses" (updated April 1, 2019) (online)). Overall, the impacts of these conditions emphasize that any proposed bail condition needs to be carefully considered and limited to addressing flight risk, public safety, or confidence in the

administration of justice, otherwise the condition may have negative unintended consequences on the accused and the public.

[98] Finally, I note that some bail conditions may impact additional *Charter* rights of the accused, beyond their right to be presumed innocent, liberty rights (s. 7), and right to reasonable bail (s. 11(*e*)). Principles of restraint and review require that judicial officials rigorously examine these conditions and determine whether they do infringe the *Charter*. For example, some accused are subject to bail conditions that require them to submit to searches of their person, vehicle, phone, or residence on demand without a warrant (see, e.g., *R. v. Delacruz*, 2015 MBQB 32; *R. v. Tithi*, 2019 SKQB 299, [2019] S.J. No. 299, at para. 14 (QL); *R. v. Sabados*, 2015 SKCA 74, 327 C.C.C. (3d) 107). As noted by this Court in *Shoker*, in the context of probation conditions, a judge does not have jurisdiction to impose a condition that subjects an accused to a lower standard for a search than would otherwise be required, unless Parliament creates a *Charter*-compliant statutory scheme for the search or the accused consents to the search (paras. 22 and 25; see also *R. v. Goddard*, 2019 BCCA 164, 377 C.C.C. (3d) 44, at para. 53; *R. v. Nowazek*, 2018 YKCA 12, 366 C.C.C. (3d) 389, at para. 128). These types of conditions are effectively enforcement mechanisms that "facilitate the gathering of evidence", "do not simply monitor the [accused's] behaviour", and are not linked to an accused's risk under s. 515(10) (*Shoker*, at para. 22). As such conditions are not supported by the enumerated conditions for bail in s. 515, nor is there a scheme set by Parliament for the searches, they are constitutionally suspect.

[99] Other conditions can also affect an accused's freedom of expression or freedom of association (see, e.g., *R. v. Singh*, 2011 ONSC 717, [2011] O.J. No. 6389, at paras. 41-47 (QL); see *Manseau*, at p. 10; *Clarke*). Such conditions that restrict additional *Charter* rights must be rigorously assessed to determine whether such a restriction is justified and proportional to the risk posed by the accused. It must always be remembered that by making such a condition on bail, the judicial official is criminalizing the accused's exercise of their *Charter* rights at a time when they are presumed innocent prior to trial.

C. *Responsibilities*

[100] All persons involved in the bail system are required to act with restraint and to carefully review what bail conditions they either propose or impose. Restraint is required by law, is at the core of the ladder principle, and is reinforced by the requirement that any bail condition must be necessary, reasonable, least onerous in the circumstances, and sufficiently linked to the specific statutory risk factors under s. 515(10) of risk of failing to attend a court date, risk to public protection and safety, or risk of loss of confidence in the administration of justice (Trotter, at p. 1-59; *Antic*, at para. 67(j); see also s. 493.1 of the *Code* as of December 18, 2019). The setting of bail is an individualized process and there is no place for standard, routine, or boilerplate conditions, whether the bail is contested or is the product of consent. The principle of review means everyone involved in the crafting of conditions of bail

should stop to consider whether the relevant condition meets all constitutional, legislative, and jurisprudential requirements.

[101] All participants in the bail system also have a duty to uphold the presumption of innocence and the right to reasonable bail (see Berger and Stribopolous, at pp. 323-24). This is because the "automatic imposition of bail conditions that cannot be connected rationally to a bail-related need is not in harmony with the presumption of innocence" (*R. v. A.D.M.*, 2017 NSPC 77, at para. 29 (CanLII), citing *Antic*). The Crown, defence, and the court all have obligations to respect the principles of restraint and review. Other than in reverse onus situations, the Crown should understand, and if asked, be able to explain why proposed bail conditions are necessary, reasonable, least onerous, and sufficiently linked to the risks in s. 515(10). This prosecutorial responsibility of restraint when considering bail conditions is reflected in both Crown counsel policy documents put before us by interveners (Ontario, Ministry of the Attorney General, *Ontario Prosecution Directive*, "Judicial Interim Release (Bail)" (November 2017) (online); and British Columbia, Prosecution Service, *Crown Counsel Policy Manual*, "Bail — Adult" (April 2019) (online)). Defence counsel also should be alive to bail conditions that are not minimal, necessary, reasonable, least onerous, and sufficiently linked to an accused's risk for both contested and consent release, especially when a client may simply be prepared to agree to excessive and overbroad conditions to gain release. That said, it is not uncommon for counsel to agree to a condition that may seem somewhat onerous but does not warrant turning the matter into a contested hearing,

which could result in the accused having to stay in custody for a few more days. In such cases, counsel can also seek a review of the condition after a reasonable length of time and ask that it be altered.

[102] Ultimately, the obligation to ensure that accused persons are released on appropriate bail orders lies with the judicial official. As with the setting of cash deposits in *Antic*, if a judicial official does not understand how a condition is appropriate, "a justice or a judge setting bail is under a positive obligation" to make inquiries into whether the suspect bail condition is necessary, reasonable, least onerous, and sufficiently linked to the accused's risks (paras. 56 and 67(i)). Before transforming bail conditions into personal sources of potential criminal liability, judicial officials are asked to use their discretion with care and review the proposed conditions to make sure they are focussed, narrow, and tightly-framed to address the accused's risks.

[103] Judicial officials have adequate tools to ensure that bail orders are generally appropriate while conserving judicial resources. They can and should question conditions that seem unusual or excessive. They should also be alert for any pattern that might suggest that conditions are being imposed routinely or unduly.

[104] These obligations carry over to consent releases, where special considerations apply. There are many compelling reasons a person in custody would "accept" suggested restrictions to secure release, even if such restrictions were overbroad. In addition to the universal human impulse towards freedom, individuals

are concerned with the effects continued detention would have on their families, their income, their employment, their ability to keep their home, and their ability to access medication and necessary services, as described above. When presented with a promise of release on what may appear to be "take it or leave it conditions" many accused simply acquiesce to avoid continued detention and/or a contested bail hearing. This is why alcohol-addicted persons would agree to a bail term which prohibits them from drinking alcohol, knowing full well that they have previously been unable to overcome their addiction. These factors, and others, exert pressure and have contributed to a culture of consent in which accused persons, who often represent themselves at bail hearings, frequently agree to be bound by conditions which are unnecessary, unreasonable, and even potentially unconstitutional.

[105] The ladder principle and the rigorous assessment of bail conditions will be more strictly applicable when bail is contested, but joint proposals must still be premised on the criteria for bail conditions established by the guarantees in the *Charter*, the provisions of the *Code*, and this Court's jurisprudence (*Antic*, at para. 44). Judicial officials "should not routinely second-guess joint proposals" given that consent release remains an efficient method of release in busy bail courts (*Antic*, at para. 68). However, everyone should also be aware that judicial officials have the discretion to reject overbroad proposals, and judicial officials must keep top of mind the identified concerns with consent releases. In *R. v. Singh*, 2018 ONSC 5336, [2018] O.J. No. 4757, Hill J. noted that, even post-*Antic*, counsel sometimes do not appear aware of this judicial discretion:

> Too often, as is evident from some transcripts of show cause hearings coming before this court, counsel conduct themselves as though a "consent" bail governs the release/detention result with all that is required of the court is a signature. At times, outright hostility is exhibited toward a presiding justice of the peace who dares to make inquiries, to require more information, or to reasonably challenge the soundness of the submission. This is fundamentally wrong. [para. 24 (QL)]

[106] I agree. Although bail courts are busy places, where consent releases can encourage efficiency, little efficiency is achieved if an accused person is released on conditions by which they cannot realistically abide, which will inevitably lead to greater use of court time and resources through applications for bail review, bail revocation, or breach charges. Judicial officials must therefore act with caution, with their eyes wide open to the consequences of imposing bail conditions, when reviewing and approving consent release orders.

D. *Conclusion on How Section 145(3) Informs the Imposition of Bail Conditions*

[107] In conclusion, the s. 145(3) offence requires subjective *mens rea*. Not only is this conclusion consistent with the presumption of subjective fault for crimes like s. 145(3), it is supported by its place and purpose in the overall bail system, the serious consequences which flow from its breach, and how the consideration of individual circumstances is the proper focus both for setting conditions and determining the mental element for their breach. Understanding that s. 145(3) is designed to criminalize the risk-based conduct proscribed in bail conditions provides guidance on how much the fair and efficient functioning of our bail system depends

upon restraint and review to ensure that only suitable conditions are imposed and only intentional failures to comply are prosecuted.

VI. Components of Subjective *Mens Rea* for Section 145(3)

[108] Having concluded that subjective *mens rea* is required for the failure to comply offence, I now describe what the Crown must establish to prove the subjective *mens rea* for s. 145(3).

[109] Subjective *mens rea* generally must be proven with respect to all circumstances and consequences that form part of the *actus reus* of the offence (*Sault Ste. Marie*, at pp. 1309-10; *Pappajohn v. The Queen*, [1980] 2 S.C.R. 120, at p. 139, per Dickson J., dissenting, but not on this point). Therefore, subjective *mens rea* under s. 145(3) can be satisfied where the following elements are proven by the Crown:

1. The accused had knowledge of the conditions of their bail order, or they were wilfully blind to those conditions; and

2. The accused knowingly failed to act according to their bail conditions, meaning that they knew of the circumstances requiring them to comply with the conditions of their order, or they were wilfully blind to those circumstances, and failed to comply with their conditions despite that knowledge; or

> The accused recklessly failed to act according to their bail conditions, meaning that the accused perceived a substantial and unjustified risk that their conduct would likely fail to comply with their bail conditions and persisted in this conduct.

[110] These elements accord with the *mens rea* required in jurisdictions recognizing a subjective *mens rea* for failure to comply offences by requiring that the Crown show beyond a reasonable doubt that the accused knowingly or recklessly breached the condition (*Legere*, at para. 100; *Custance*, at para. 10).

[111] However, the jurisprudence divides somewhat on the first element: the extent to which the accused must know the terms of their bail conditions, and therefore know that they are breaching a condition. Some cases follow the Manitoba Court of Appeal in *Custance*, which simply required that the accused "knowingly and voluntarily performed or failed to perform the act or omission which constitutes the [*actus reus*] of the offence", which appears to mean the Crown only needs to prove that the accused intentionally committed the act or omission, but does not need to show that the accused knew their conditions while committing that act or omission (paras. 10 and 12; see, e.g., *Al Khatib*, at para. 27; *Companion*, at para. 48; *R. v. Edgar*, 2019 QCCQ 1328, at para. 109 (CanLII); *L.T.W.*, at para. 22).

[112] I prefer the alternative approach. An accused must know or be wilfully blind to their conditions in order to be convicted, although the accused does not need to know the legal consequences or the scope of the condition: see, e.g., *R. v. Smith*,

2008 ONCA 101, 233 O.A.C. 145 (Doherty, Borins, Lang JJ.A., per curiam); *R. v. Brown*, 2008 ABPC 128, 445 A.R. 211; *R. v. Chen*, 2006 MBQB 250, 209 Man. R. (2d) 181, at para. 36; *Ritter*, at para. 11; *R. v. Withworth*, 2013 ONSC 7413, 59 M.V.R. (6th) 160, at paras. 13 and 16; *R. v. Syblis*, 2015 ONCJ 73, at paras. 18 and 25 (CanLII)). A number of failure to appear cases also require that the accused know of their court date such that an accused's genuine forgetfulness can negate *mens rea* (*Josephie*, at paras. 30-31; *Loutitt*, at paras. 15 and 22-23; *R. v. Blazevic* (1997), 31 O.T.C. 10 (Ont. C.J.); *Mullin*, at para. 6; *R. v. Hutchinson* (1994), 160 A.R. 58; *R. v. Nedlin*, 2005 NWTTC 11, 32 C.R. (6th) 361, at para. 62). I accept the position of the Court of Appeal for Ontario in *Smith*, which held that the fact that the accused misheard the terms of his recognizance and failed to review those terms meant that he did not knowingly breach his condition, nor was he wilfully blind. The accused must know the conditions of their release in order to possess the *mens rea* for the failure to comply offence.

[113] Wilful blindness is a substitute for the accused's knowledge of the facts whenever knowledge is a component of *mens rea* and where the accused is deliberately ignorant (*R. v. Briscoe*, 2010 SCC 13, [2010] 1 S.C.R. 411, at paras. 21 and 24). For a court to find that an accused was wilfully blind in the context of a failure to comply offence, the accused has to know there was a need for inquiry, and deliberately decline to make the inquiries necessary to confirm their exact bail condition (*Smith*, at para. 5; *Withworth*, at para. 13).

[114] Requiring that an accused person has knowledge of, or is wilfully blind to, their conditions of bail does not mean that the accused must have knowledge of the law, which would be contrary to the rule that ignorance of the law is no excuse (s. 19 of the *Code*). While subjective *mens rea* for s. 145(3) means that an accused person who has an honest but mistaken belief about the conditions of their bail order cannot be found liable, this does not mean that an accused must know and understand their legal obligations to fulfill those conditions. Genuinely forgetting a condition could be a mistake of fact and would negate *mens rea*, whereas a mistake regarding the legal scope or effect of a condition is a mistake of law and would not be an excuse for non-compliance with the condition (see *Withworth*, at paras. 16-19, per Trotter J.). In *Custance*, for example, the accused knew he had to stay at a certain apartment, but when he could not get into that apartment he chose to sleep in his car as he thought this would meet his condition. The accused was aware of his bail condition, but made a mistake as to what the law required to meet that condition. This was a mistake of law that did not negate *mens rea.*

[115] The conclusion that an accused must have knowledge of their conditions of bail, or be wilfully blind to their conditions, in order to have the requisite *mens rea* under s. 145(3), also accords with Wilson J.'s reasoning in *Docherty*, which emphasized the importance of knowledge in finding that an accused breached a condition. In that case, she found that proof of breach of a probation order requires evidence that an accused knew they were bound by the probation order, knew there was a term that would be breached by their proposed conduct, and went ahead and

engaged in the conduct anyway (pp. 957-58). The reasoning is still helpful even though the condition breached in *Docherty* required that the accused knew he was committing a criminal offence, which meant the accused had to know of the legal consequences of his actions (pp. 960-61). In contrast, s. 145(3) does not require that the accused must have knowledge of the legal consequences or scope of their condition, but they must know that they are bound by the condition. The purpose of s. 145(3), like the breach of probation offence, is to punish and deter failures to comply with bail conditions. As previously mentioned, knowledge and deterrence are linked: an accused will only be deterred from breaching their conditions if they know they are doing something wrong, meaning they must know that they are bound by a particular bail condition (*Docherty*, at pp. 951-52).

[116] The second component of the *mens rea* for s. 145(3) can be met by showing that the accused acted knowingly or recklessly in breaching their condition. Knowledge in this second component means that the accused must be aware of, or be wilfully blind to, the factual circumstances requiring them to act (or refrain from acting) to comply with their conditions at the time of breach (e.g., in Mr. Zora's case, knowing that the police were at his door).

[117] This second component can also be met by showing that the accused was reckless. Where, as here, a higher requirement of "wilfulness" or "intent" is not indicated by the text or nature of an offence, recklessness is generally included in subjective *mens rea* (see *Sault Ste. Marie*, at pp. 1309-10; *R. v. Buzzanga* (1979), 25

O.R. (2d) 705 (C.A.), at p. 71). Recklessness requires that accused persons be aware of the risk of not complying with their condition and proceed in the face of that risk (*Josephie*, at para. 30; *Sansregret v. The Queen*, [1985] 1 S.C.R. 570, at p. 584). Knowledge of risk is key to recklessness. Therefore, the accused must still know of their bail conditions in order to be aware of any risk of non-compliance. The accused must also be aware of the risk that the factual circumstances requiring them to act (or refrain from acting) to comply with their bail conditions could arise and continue with their course of conduct despite the risk. Recklessness is not, and should not through misapplication, become the same as negligence. Recklessness has nothing to do with whether the accused *ought* to have seen the risk in question, but whether they subjectively saw the risk and continued to act with disregard to the risk.

[118] Given that s. 145(3) can operate to criminalize otherwise lawful day-to-day behaviour, I would conclude that knowledge of *any* risk of non-compliance is not sufficient to establish that an accused was reckless. Instead, the accused must be aware that their continued conduct creates a *substantial and unjustified risk* of non-compliance with their bail conditions. This Court has previously adopted this standard of risk in describing recklessness for certain offences (see *R. v. Hamilton*, 2005 SCC 47, [2005] 2 S.C.R. 432, at paras. 27-29; *Leary v. The Queen*, [1978] 1 S.C.R. 29, at p. 35 (per Dickson J. dissenting, but not on this point)). The risk cannot be far-fetched, trivial, or *de minimis*. The extent of the risk, as well as the nature of harm, the social value in the risk, and the ease with which the risk could be avoided, are all relevant considerations (Manning and Sankoff, at p. 229). Although the trial judge

will assess whether a risk is unjustified based on the above considerations, because recklessness is a subjective standard, the focus must be on whether the accused was aware of the substantial risk they took and any of the factors that contribute to the risk being unjustified.

[119] Requiring this standard of risk for recklessness is warranted because the offence may criminalize everyday activities and have unforeseen consequences on people's everyday lives. For example, in the context of a condition requiring an accused to answer the door to police during their curfew, an accused would not be reckless if they took the minimal and justified risk of taking a short shower during their curfew whereas they could be reckless if they disconnected their doorbell or wore earplugs around their house. As with this Court's decision in *Hamilton*, at paras. 32-33, these reasons should not be interpreted as changing the general principles of recklessness as a fault element set out in *Sansregret*, as my description of recklessness is specific to the offence under s. 145(3).

[120] Finally, I do not accept that a subjective fault requirement would make it too difficult for the Crown to prove an accused's knowing or reckless failure to comply with bail conditions. If the Crown chooses to lay a criminal charge under s. 145(3), when the possibility of a bail variation and bail revocation also exist, it will do so only when it has a reasonable prospect of conviction based on a full appreciation of all constituent elements of the offence. Many crimes have a subjective fault standard and there are recognized ways to marshal sufficient evidence to

convince a judge beyond a reasonable doubt that the accused acted knowingly or recklessly. Courts may infer subjective fault for failure to comply charges, whether or not the accused decides to testify. After considering all the evidence, the trier of fact may be able to conclude beyond a reasonable doubt that the accused had the state of mind required for conviction based on the common sense inference that individuals "intend the natural and probable consequences of their actions" (*R. v. Seymour*, [1996] 2 S.C.R. 252, at paras. 19 and 23; *Docherty*, at p. 958; *Loutitt*, at para. 18). As noted by the intervener Attorney General of Ontario a subjective fault requirement has not prevented convictions on s. 145(3) charges in Ontario.

[121] The Crown's concern that accused persons may simply say they forgot about their bail conditions to escape criminal liability for breaching their bail is addressed because judges "will no doubt act sensibly in assessing the authenticity of claims of forgotten court dates and overlooked bail conditions. Effect need not be given to forgetfulness merely because it has been asserted" (*Withworth*, at para. 14).

[122] In conclusion, as accepted by the respondent and the AGBC, "[t]he sky will not fall if the Crown has to prove a mental element" (*Loutitt*, at para. 17; Transcript, at p. 64; I.F. (AGBC), at para. 23".

VII. A New Trial Should Be Ordered

[123] I agree with Mr. Zora that a new trial should be ordered in light of the error in law by the courts below in applying an objective rather than a subjective standard of fault for s. 145(3).

[124] This is not a case where the curative proviso allows this Court to dismiss an appeal under s. 686(1)(b)(iii) because there was "no substantial wrong or miscarriage of justice" despite an error of law. The curative proviso is only appropriate where the "error is harmless or trivial" or "where the evidence is so overwhelming that, notwithstanding that the error is not minor, the trier of fact would inevitably convict" (*R. v. Sekhon*, 2014 SCC 15, [2014] 1 S.C.R. 272, at para. 53). *Mens rea* is an essential element of a criminal offence and identifying the wrong fault standard is not a "harmless or trivial" error. A subjective *mens rea* would have required the trial judge to consider Mr. Zora's state of mind, which clearly could have had an impact on the verdict.

[125] The evidence is also not so overwhelming that a conviction is inevitable. As the trial judge was focussed on what a reasonable person would do in the circumstances, he did not need to make clear factual findings or definitive findings of credibility that would allow this Court to assess or infer Mr. Zora's knowledge and state of mind. If established at trial, Mr. Zora's personal circumstances, including whether he was sleeping deeply due to heroin withdrawal and methadone treatment, would be relevant to determining his state of mind. As described above, recklessness requires knowledge of the substantial and unjustified risk of circumstances leading to

a prohibited breach. Without a clear finding that Mr. Zora was aware of the risk that he could not hear the police at his door, as well as other findings of fact necessary to determine whether that risk was substantial and unjustified, the Court cannot find that he was reckless in failing to answer the door.

[126] The trial judge's negative statements concerning the credibility of the defence witnesses mean that an acquittal would also not be appropriate. A new trial is needed to address whether Mr. Zora knowingly or recklessly breached his conditions.

VIII. Conclusion

[127] Therefore, subjective fault is required for a conviction under s. 145(3) of the *Code*. I would allow this appeal, quash Mr. Zora's convictions, and order a new trial on the two counts of failing to attend at his door.

Appeal allowed.

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