Case Name:

R. v. Zora

Between
Regina, Respondent, and
Chaycen Michael Zora, Appellant

[2019] B.C.J. No. 18

2019 BCCA 9

Docket: CA44946

British Columbia Court of Appeal
Vancouver, British Columbia

S. Stromberg-Stein, P.M. Willcock, J.E.D. Savage, L.A. Fenlon and B. Fisher JJ.A.

Heard: September 4, 2018.
Judgment: January 10, 2019.

(96 paras.)

Court Summary:

Appeal from convictions for breaching a recognizance by failing to present self at door for curfew compliance checks. The sole issue is whether s. 145(3) of the Criminal Code imports an objective standard of mens rea. Held: appeal dismissed. Stromberg-Stein, Willcock, Savage, Fisher JJ.A.: The duty-based nature of s. 145(3), combined with the risk-based nature of bail provisions, support Parliament's intention for the application of an objective fault standard having regard to the plain language, breadth, context and purpose of the offence. Fenlon J.A.: There is no basis in the context or language of s. 145(3) to displace the presumption of subjective intent. To prove the mental element of breach of a bail condition, the Crown must prove that the accused person knew their conduct would infringe a condition of release, was reckless, or was wilfully blind. However, the uncontested facts establish that Mr. Zora was reckless.

Appeal From:

On appeal from an order of the Supreme Court of British Columbia, dated November 15, 2017 (*R. v. Zora*, 2017 BCSC 2070 Courtenay Docket No. 38980).

Counsel:

Counsel for the Appellant: S. Runyon, G. Barriere.

Counsel for the Respondent: R.J. Carrier.

Reasons for Judgment

Reasons for judgment were delivered by S. Stromberg-Stein J.A., concurred in by P.M. Willcock, J.E.D. Savage and B. Fisher JJ.A. Separate concurring reasons were delivered by L.A. Fenlon J.A.

S. STROMBERG-STEIN J.A.:--

Overview

1 Chaycen Michael Zora appeals his convictions for breaching his recognizance by failing to present himself at his door for two curfew compliance checks contrary to s. 145(3) of the *Criminal Code*, R.S.C., 1985, c. C-46. The sole issue is whether s. 145(3) imports an objective standard of *mens rea*.

2 In my view, the duty-based nature of s. 145(3), combined with the risk-based nature of bail provisions, support Parliament's intention for the application of an objective fault standard. This is consistent with the plain language, context and purpose of the offence. An objective fault standard requires proof of a marked departure from what a reasonable person in the same situation would do. If there is a reasonable doubt that a reasonably prudent person would not have foreseen or appreciated the risk or could have done something to prevent the breach, an acquittal must follow. This is sufficient to ensure only the morally blameworthy will be convicted.

Facts

3 Mr. Zora was charged with a number of drug offences contrary to the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19. He was released on a recognizance with one surety. His release was conditional on obeying a curfew and presenting himself at his front door within five minutes of a police officer or bail supervisor attending to confirm his compliance with these conditions.

4 On October 9, 2015, Friday of the Thanksgiving long weekend, a police officer went to Mr.

Zora's residence at 10:30 p.m., two-and-a-half hours after the commencement of his curfew. The officer rang the doorbell three times and knocked loudly on the front door with his fist. There was no response. He waited for more than five minutes. There was no activity at the residence, no lights were on, and he heard no dogs barking.

5 On October 11, 2015, another police officer went to Mr. Zora's residence. He saw a sign on the door that read "use the doorbell," which he did. He waited for more than five minutes and observed no activity at the residence.

6 Both officers had previously attended at the residence for similar checks and Mr. Zora responded appropriately. They denied there was a hand-made sign that read: "I am home can't always hear you knock or door bell so please try all doors in garage if no answer at front door Thanks Chaycen Zora."

7 With respect to the October 9 and 11 police attendances, Mr. Zora was charged with two counts of breaching his curfew and two counts of failing to comply with the condition that he present himself at the door. Mr. Zora was informed of these charges around October 27, 2015.

8 Mr. Zora, his mother, and his girlfriend testified that they were at the residence over the Thanksgiving weekend and celebrated Thanksgiving together on October 11, 2015. They confirmed that two dogs were usually at the residence and would bark when someone rang the doorbell or approached the residence.

9 Mr. Zora explained that he may have been sleeping during the two police checks. He said it was difficult, if not impossible, to hear the doorbell from where he slept. He was undergoing methadone treatment and withdrawal from his heroin addiction, which made him sleepy, so he often went to bed earlier than usual.

10 After learning of the breaches, Mr. Zora set up an audio-visual system to help alert him to future police checks and he changed where he slept in his residence. He had no further problems complying with his bail conditions.

Provincial Court

11 The trial judge found no credibility issues with the evidence of the police witnesses, but he found credibility and reliability issues with respect to the evidence of Mr. Zora and his witnesses.

12 The judge likened compliance with the bail conditions to strict liability offences but effectively applied a standard of objective *mens rea*. He suggested it is not a defence to the charges to not answer the door because the accused person did not hear the doorbell, was passed out after drinking, or did not want to answer. The judge concluded that an accused person who wants the benefit of being released on bail ought to arrange their life in such a way as to comply with all bail conditions. He observed this was reflected in the additional steps Mr. Zora took after he breached

his bail conditions.

13 The judge acquitted Mr. Zora of the curfew violations on the basis that the circumstantial evidence of non-compliance was inconclusive because there was no direct evidence Mr. Zora was outside his residence during the compliance checks. However, the judge concluded that although Mr. Zora had provided a possible explanation for not appearing at the door, it was not a legal defence. He found Mr. Zora guilty of two breaches for failing to appear at the door for curfew compliance checks and sentenced him to pay fines of $400 for each breach.

Summary Conviction Appeal

14 Mr. Zora appealed his convictions arguing the trial judge erred in law by applying the wrong standard of fault to s. 145(3) of the *Criminal Code*. He did not challenge the judge's factual findings.

15 The summary conviction appeal judge noted divergent authorities on the issue of *mens rea* for s. 145(3) but ultimately concluded he was bound by *R. v. Ludlow*, 1999 BCCA 365. He stated:

> [3] The subsection is not clear as to what *mens rea* is required for a conviction. There is a line of cases, led by *R. v. Legere* (1995), 95 C.C.C. (3d) 89 (Ont. C.A.), holding that s. 145(3) charges a true criminal offence and failure to take steps that a reasonable person would take to ensure that they are in a position to comply with the recognizance will not support a conviction. However, in *R. v. Ludlow* (1999), 136 C.C.C. (3d) 460 (B.C.C.A.), Hall J.A., writing for himself and Cumming J.A., thoroughly considered the question and expressed the opinion, albeit in *obiter*, that the *mens rea* requirement is largely objective. Esson J.A. dissented, but not on this point.
>
> ...
>
> [5] The appellant argues that the trial judge erred in law in applying the approach set out in *Ludlow*. The appellant did not put his case on the basis that the *Ludlow* holding was *obiter*. Rather, he argues that *Ludlow* ought not to be followed because:
>
> (1) In *Ludlow* the Court of Appeal did not refer to *R. v. Docherty*, [1989] 2 S.C.R. 941, which held that a similar *Code* provision (now 733.1(1)) dealing with non-compliance with probation orders constitutes a full *mens rea* offence;

(2) Jurisprudence on s. 733.1(1) since *Ludlow* continues to cast doubt on the *Ludlow* reasoning;

(3) There is ambiguity in the wording of s. 145(3) as evidenced by the various cases that interpret the *mens rea* requirement differently, and in these circumstances the principles of statutory interpretation obliged the trial judge to give the benefit of the doubt to the accused.

16 The judge concluded *Ludlow* should be followed unless reconsidered or overturned by this Court.

Leave to Appeal to the Court of Appeal

17 Mr. Zora applied for leave to appeal pursuant to s. 839(1) of the *Criminal Code*. On March 9, 2018, a division of this Court granted leave to appeal on the question of whether the summary conviction appeal judge erred in finding s. 145(3) of the *Criminal Code* imports an objective standard of *mens rea* and ordered that a five-member division hear the appeal.

Positions of the Parties

18 The parties agree that s. 145(3) is a truly criminal offence and not a strict liability offence.

19 Mr. Zora submits there is a presumption of subjective *mens rea* for true crimes and nothing in the wording of s. 145(3) supports the application of an objective fault standard for the following reasons:

1. The presence of a defence of lawful excuse has no impact on the *mens rea* analysis, as defences are distinct and separate from the elements of the offence;

2. Section 145(3) does not fit into any of the five types of objective *mens rea* offences identified in *R. v. A.D.H.*, 2013 SCC 28, which are dependent on a breach of a community standard of conduct that is not present in this case;

3. The individualized nature of bail conditions favours subjective *mens rea* and protects those with mental or physical challenges;

4. The consequences of a conviction, including both the penalty and the requirement to justify release in the future, suggest a subjective standard of

fault; and

5. Section 733.1, a probation provision similar to s. 145(3), has been interpreted by the Supreme Court of Canada as requiring subjective *mens rea*.

20 The Crown acknowledges there is a statutory presumption of subjective *mens rea* but submits the presumption is rebutted for the following reasons:

1. Section 145(3) is a duty-based offence similar to s. 215 (failure to provide the necessities of life) as indicated by the plain language of the section;

2. The availability of a defence of lawful excuse;

3. The purpose of the section is to ensure those released from custody do not cause any of the dangers set out in s. 515(10) of the *Criminal Code*;

4. The purpose of the section is to hold an accused person accountable when they do not abide by their conditions of release;

5. An objective standard ensures an accused person is held to a minimum community standard rather than setting an individual standard;

6. The customization of the bail conditions takes into account an accused person's circumstances; and

7. Section 145(3) is not analogous to s. 733.1 due to its different language, consequences, and purpose.

Analysis

21 Section 145(3) requires a two-stage analysis. A person commits an offence when they:

1. are subject to an undertaking, direction, or recognizance and breach its conditions by committing an act or omission (*actus reus*); and have the requisite fault element (*mens rea*); and

2. fail to provide a lawful excuse for the breach.

22 The second stage of the analysis arises only after the Crown proves all the required elements at the first stage.

23 The section is silent as to the requisite *mens rea*. Three appellate courts (and numerous lower courts) have commented on the *mens rea* required for ss. 145(2) and (3). These sections have been viewed as attracting the same fault element, but whether the fault element is subjective or objective has led to inconsistent answers in the case authorities.

24 In *R. v. Legere* (1995), 22 O.R. (3d) 89 (C.A.), Mr. Legere was released on the condition that he carry his bail papers with him and not communicate with any person under the age of 16. Soon after his release, two police officers observed him near two young boys and arrested him. He did not have his bail papers with him. The trial judge found Mr. Legere had "not taken proper or reasonable precautions" to ensure he had his papers with him and convicted him for breaching that condition: *Legere* at 95.

25 The Ontario Court of Appeal held that the judge erred in finding Mr. Legere guilty on the basis that he was negligent (at 100):

> The evidence in the present case does not support a finding that the appellant knowingly or recklessly failed to carry his bail papers or that he intentionally disposed of them. Accordingly, I would set aside the appellant's conviction on the charge of failing to carry and produce his bail papers on request of the police, and enter an acquittal.

26 The Court applied a subjective *mens rea* requirement, which the Crown had conceded was the correct standard of fault.

27 This Court decided *Ludlow* in 1999. Mr. Ludlow was accused of domestic violence. He was released on condition that he appear in court on a certain date for trial. Mr. Ludlow's partner, the alleged victim, decided she did not want to proceed with her complaint and told Mr. Ludlow she had contacted the police and the matter was "dropped". Mr. Ludlow understood this to mean that he no longer was required to attend court so he did not appear for trial. He was charged with failing to appear contrary to s. 145(2) of the *Criminal Code*.

28 At trial, Mr. Ludlow admitted he failed to appear and the focus was on whether he had a lawful excuse. The trial judge did not address the issue of *mens rea* and convicted Mr. Ludlow on the basis that he did not exercise due diligence in confirming that he was no longer required to appear: *Ludlow* at para. 16.

29 Mr. Ludlow's summary conviction appeal was dismissed on the basis that Mr. Ludlow's failure to confirm whether his court date was cancelled was unreasonable: at para. 17.

30 In the Court of Appeal, Mr. Ludlow argued the offence of failing to appear was a true *mens rea* offence and the summary conviction appeal judge erred in upholding his conviction "on the basis of lack of due diligence or the application of an objective test": at para. 18.

31 Mr. Justice Hall, writing for the majority, framed the question on appeal as whether Mr. Ludlow had a lawful excuse for not appearing or, more directly, whether he honestly and reasonably believed, based on the information from his partner, that the case would not proceed: at paras. 28-29.

32 Hall J.A. noted that ss. 145(2) and (3) had language that was "for all practical purposes indistinguishable" (at para. 31) and stated:

> [30] As I interpret *Code* section 145(2), it provides that when the Crown establishes non-attendance by an accused contrary to an undertaking or recognizance, the accused should be found guilty unless he can point to some evidentiary basis supportive of a lawful excuse for his failure to appear. The section speaks of "the proof of which lies upon him".

33 He considered *Legere* and suggested the authority of earlier cases that concluded negligent conduct was not a permissible basis for conviction "had been shaken by the trend of authorities in the Supreme Court of Canada and this court in the past decade": at para. 34. He referred to *R. v. Hundal*, [1993] 1 S.C.R. 867; *R. v. Finlay*, [1993] 3 S.C.R. 103; and *R. v. Creighton*, [1993] 3 S.C.R. 3, to demonstrate that objective *mens rea* offences based on negligent conduct are constitutionally permissible as long as exculpatory defences are available. He cited comments of McLachlin J. (as she then was) in *Creighton* with respect to objective *mens rea*:

> [35] ... In *R. v. Creighton*, [1993] 3 S.C.R. 3 (S.C.C.) at 58, 83 C.C.C. (3d) 346 (S.C.C.) at 382, McLachlin J. observed in upholding the constitutionality of unlawful act manslaughter observed as follows:
>
> > Objective *mens rea*, on the other hand, is not concerned with what the accused intended or knew. Rather, the mental fault lies in failure to direct the mind to a risk which the reasonable person would have appreciated. Objective *mens rea* is not concerned with what was actually in the accused's mind, but with what should have been there, had the accused proceeded reasonably.
> >
> > It is now established that a person may be held criminally responsible for negligent conduct on the objective test, and that this alone does not violate the principle of fundamental justice that the moral fault of the accused must be commensurate with the gravity of the offence and its penalty: *R. v.*

Hundal, [1993] 1 S.C.R. 867.

[Emphasis in original].

34 Hall J.A. concluded:

> [39] It seems to me that it would be impossible to envisage every situation that could amount to a lawful excuse for failure to attend court. Sudden illness, a breakdown of transport and the like would seem to be clear instances of situations that could amount to a lawful excuse for failure to appear. Of course, any such defence would have to be based on evidence that the trier of fact believed.
>
> [40] It must not be overlooked that an obligation is imposed by statute on a person bound by an undertaking or recognizance to attend at court as required or directed by the terms of the operative document. Forgetting to appear seems to me a very marked departure from the requirement imposed on an accused at liberty on an undertaking or recognizance to faithfully observe the requirement to attend. Most people would and should recognize that a serious obligation concerning the proper administration of justice is thereby imposed on an accused and a failure to attend, absent a compelling reason, or as in the instant case, an honest and reasonably based belief that no attendance is required, should usually result in a finding of a breach of the section. I would say the fault or *mens rea* requirement for this class of offence has a large element of the objective about it. Conviction can be avoided if an accused establishes a lawful excuse by a showing of due diligence to satisfy the obligation, including an honest and reasonable belief in a state of facts that would excuse non-attendance.
>
> [Emphasis added].

35 Hall J.A. found Mr. Ludlow established a lawful excuse for not appearing in court: a defence of mistake of fact that the proceedings had been discontinued. Thus, his comments regarding the *mens rea* of the offence could be considered *obiter*.

36 Mr. Justice Esson, dissenting on the legal application to the facts but not on the law, agreed with Hall J.A. that the fault element had "a large element of objective about it" and "[c]onviction can be avoided if an accused establishes lawful excuse by a showing of due diligence to satisfy the obligation, including an honest and reasonable belief in a state of facts that would excuse non-attendance": at para. 45.

37 *R. v. Custance,* 2005 MBCA 23, addressed the standard of fault for s. 145(3). Mr. Custance was released on conditions that he reside with his sponsor, maintain a curfew, and present himself for curfew checks: at para. 3. He discovered that his sponsor did not yet have keys to the apartment. Mr. Custance knew if he did not get into the apartment he would be in breach of his conditions. Instead of turning himself in, he elected to stay in his car in the parking lot for several days. When the police realized Mr. Custance was not at the apartment, he was arrested, charged, and convicted for breaching his conditions: at paras. 5-6.

38 On appeal, Mr. Custance argued that the trial judge did not properly consider the *mens rea* element of the offence. The Manitoba Court of Appeal described the elements of the offence as follows (at para. 10):

> (1) that the Crown must prove that the accused was bound by an undertaking or recognizance;
>
> (2) that the accused committed an act which was prohibited by that undertaking or recognizance or that the accused failed to perform an act required to be performed by that undertaking or recognizance; and
>
> (3) that the accused had the appropriate *mens rea*, which is to say that the accused knowingly and voluntarily performed or failed to perform the act or omission which constitutes the *actus reus* of the offence.

39 Relying on the commentary of Gary T. Trotter in his text *The Law of Bail in Canada*, 2d ed. (Scarborough, Ont: Carswell, 1999), the Court stated that the Crown need not prove that Mr. Custance intended to breach his recognizance but must prove he intended to commit the *actus reus*. While recklessness was sufficient, "mere carelessness or negligence" was not: *Custance* at para. 12.

40 The Court held the test for *mens rea* was "primarily subjective" and required the Court to look at "the facts as the accused believed them to be": at para. 13. Mr. Custance knew about his conditions and knew that failing to reside at the apartment would breach the conditions. The question was whether his mistaken belief that he could comply with the recognizance by staying in his car was sufficient to exculpate him. The Court concluded Mr. Custance made a mistake of law rather than a mistake of fact and upheld the conviction. The Court noted that generally lawful excuses would entail circumstances in which compliance is virtually impossible, such as severe illness, but added that, based on *Ludlow*, due diligence could potentially constitute a lawful excuse: at paras. 25-26.

41 In addition to the three appellate cases, many courts have commented on the requisite *mens rea* for ss. 145(2) and (3) offences. The inconsistent decisions with respect to s. 145 offences are summarized in *R. v. Loutitt,* 2011 ABQB 545, by Mr. Justice A.W. Germain:

[13] A number of other judgments interpret the *mens rea* requirement for s. 145(5) and related offenses [subjectively]:

* *Criminal Code*, s. 145(1): *R. v. Manuel* (2000), 182 N.S.R. (2d) 193 (N.S. S.C.) at para. 12, (2000), 74 C.R.R. (2d) 75 (N.S. S.C.);

* *Criminal Code*, s. 145(2): *R. v. Blazevic* (1997), 31 O.T.C. 10, 34 W.C.B. (2d) 282 (Ont. Gen. Div.); *R. v. Mullin*, 2003 YKTC 26 (Y.T. Terr. Ct.) at para. 22, (2003), 13 C.R. (6th) 54 (Y.T. Terr. Ct.);

* *Criminal Code*, s. 145(3): *R. v. Custance*, 2005 MBCA 23 (Man. C.A.) at para. 13, (2005), 192 Man. R. (2d) 69 (Man. C.A.), leave refused [2005] S.C.C.A. No. 156 (S.C.C.); *R. v. Legere* (1995), 22 O.R. (3d) 89, 77 O.A.C. 265 (Ont. C.A.); *R. v. Smith*, [2005] O.J. No. 1316 (Ont. S.C.J.) at para. 10, 64 W.C.B. (2d) 651 (Ont. S.C.J.)), reversed on other grounds 2008 ONCA 101, 233 O.A.C. 145 (Ont. C.A.);

* *Criminal Code*, s. 145(5) (and its pre-1985 equivalent s. 133(5)): *R. v. Bender* (1976), 30 C.C.C. (2d) 496 (B.C. S.C.); *R. v. Hutchinson* (1994), 160 A.R. 58, 25 W.C.B. (2d) 51 (Alta. Prov. Ct.); *R. v. Nedlin*, 2005 NWTTC 11 (N.W.T. Terr. Ct.) at para. 43, (2005), 32 C.R. (6th) 361 (N.W.T. Terr. Ct.); *R. v. Stuart* (1981), 58 C.C.C. (2d) 203, 5 W.C.B. 506 (B.C. S.C.); *R. v. Blazevic* (1997), 31 O.T.C. 10, 34 W.C.B. (2d) 282 (Ont. Gen. Div.); *R. v. Hurlbert*, 2003 ABPC 54 (Alta. Prov. Ct.) at para. 14, (2003), 340 A.R. 192 (Alta. Prov. Ct.); *R. v. Weishar*, [2003] O.T.C. 719, 13 C.R. (6th) 59 (Ont. S.C.J.); *R. v. Fitzgerald* (1995), 129 Nfld. & P.E.I.R. 174, 27 W.C.B. (2d) 82 (Nfld. T.D.); *R. v. Josephie* at para. 30;

* *Criminal Code*, s. 145(5.1): *R. v. Brown*, 2008 ABPC 128 (Alta. Prov. Ct.) at para. 30, (2008), 445 A.R. 211 (Alta. Prov. Ct.); and

* *Criminal Code*, s. 733.1(1): *R. v. Stanny*, 2004 ABPC 149 (Alta. Prov. Ct.) at paras. 26-28; *R. v. Eby*.

> [14] A separate set of cases has taken a more strict approach and conclude that negligence or the absence of 'due diligence' is a basis on which a court can convict:
>
> * *Criminal Code*, s. 145(2): *R. v. Ludlow*, 1999 BCCA 365 (B.C. C.A.) at paras. 37-38, (1999), 136 C.C.C. (3d) 460 (B.C. C.A.); *R. v. Osmond*, 2006 NSPC 52 (N.S. Prov. Ct.) at para. 40, (2006), 248 N.S.R. (2d) 221 (N.S. Prov. Ct.); *R. v. Parent-Quinn*, [1995] O.J. No. 4668 (Ont. Prov. Div.);
>
> * *Criminal Code*, s. 145(5) (and its pre-1985 equivalent s. 133(5)): *R. v. Preshaw* (1976), 31 C.C.C. (2d) 456, 35 C.R.N.S. 331 (Ont. Prov. Ct.); *R. v. Postama*, [1982] O.J. No. 682 (Ont. Prov. Ct.); and
>
> * *Criminal Code*, s. 732.1(5): *R. v. Bremmer*, 2006 ABPC 93 (Alta. Prov. Ct.) at paras. 6, 19, (2006), 79 W.C.B. (2d) 166 (Alta. Prov. Ct.).

42 Since *Loutitt*, I am aware that *R. v. Hammoud*, 2012 ABQB 110, applied objective *mens rea* to an offence contrary to s. 145(2): *Hammoud* at para. 21.

43 Ultimately the Supreme Court of Canada may have to settle the conflicting law across Canada, although I note that some of the above-mentioned cases appear to conflate *mens rea* with lawful excuse.

Principles of statutory interpretation

44 Criminal offences consist of proof of the *actus reus*, the prohibited conduct, and proof of *mens rea*, the required fault element. This appeal considers whether the *mens rea* for s. 145(3) should be assessed subjectively or objectively.

45 If the requisite *mens rea* is subjective (what is actually in the mind of the accused person, or subjective foreseeability of consequences), the accused person must have committed the prohibited act intentionally or recklessly with knowledge of the facts constituting the prohibited act or with wilful blindness: *R. v. Sault Ste. Marie*, [1978] 2 S.C.R. 1299 at 1309. In other words, for breach of a condition of a recognizance, the Crown must prove that the accused person knew their conduct would infringe a condition of release or was reckless or wilfully blind.

46 If the requisite *mens rea* is objective, sometimes referred to as penal negligence (the absence of due care in the mind of the accused person), the question is whether a reasonable person in the

circumstances would have seen the risk that the accused person's conduct would infringe a condition of release and whether the conduct is a marked departure from what a reasonable person would have done in the circumstances: *A.D.H.* at para. 3.

47 In my view, determining the requisite *mens rea* in this case turns on the application of the principles of statutory interpretation described in *A.D.H.*, a case where the Supreme Court of Canada inferred a subjective fault element for s. 218 of the *Criminal Code* (child abandonment) when the fault element was not expressly set out in the language of the section. Since s. 145(3) does not expressly set out the requisite fault element, this Court must "infer the fault element" to discern parliamentary intent: *A.D.H.* at para. 20.

48 The starting point is the presumption that Parliament intends crimes to have a subjective fault element: *A.D.H.* at para. 23, citing Dickson J. in *Sault Ste. Marie*. This ensures the morally innocent are not punished. However, the presumption is a principle of statutory interpretation and not a rule: *A.D.H.* at paras. 25, 27. The presumption is rebuttable where there are "clear expressions of a different legislative intent": at para 27.

49 Determining legislative intent requires "read[ing] the words of the statute in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the statute, its objective and the intention of Parliament":*A.D.H.* at para 19. Indicators of legislative intent include the statutory text, breadth, context and purpose, along with a good dose of "common sense": *A.D.H.* at paras. 39-72, 83.

A. Statutory Text

50 In *A.D.H.*, Cromwell J. described "five main types of objective fault offences in the *Code*": at para. 56. These are dangerous conduct (such as dangerous driving); careless conduct (such as careless storage of a firearm); predicate offences (such as unlawful act manslaughter); criminal negligence; and duty-based offences: at paras. 57-63. Moldaver J., in dissent, noted that Professor Roach described a duty based-offence as "a failure to act ... where an individual has a 'specific legal duty to act'". Likewise, Professor Roach described disobeying a court order as a duty-based offence: *A.D.H.* at para. 121 citing Kent Roach, *Criminal Law*, 5th ed (Toronto: Irwin Law, 2012) at 115-16.

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

52 Section 145(3) falls under Part IV of the *Criminal Code*, Offences Against the Administration of Law and Justice, and provides:

> 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 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.

[Emphasis added.]

53 The operative language of s. 145(3) in its ordinary and grammatical sense demonstrates Parliament's intention to discharge the duties imposed with reference to uniform normative standards. For example:

a) *At large* is to have escaped, which in practice means the accused is not imprisoned: *The Oxford English Dictionary*, 11th ed, *sub verbo* "large".

b) An *undertaking* is a formal pledge or promise that imposes a binding legal duty: *The Oxford English Dictionary*, 11th ed, *sub verbo* "undertaking".

c) A *recognizance* is a debt the accused person owes to the Crown that is acknowledged in court and places obligations on them the moment it is pronounced by a judge.

d) *Bound to comply* is to impose a legal or contractual obligation to meet specific standards: *The Oxford English Dictionary*, 11th ed, *sub verbo* "bind", "comply".

e) A *condition* requires that certain things exist before something else is possible (*i.e.* being released): *The Oxford English Dictionary*, 11th ed, *sub verbo* "condition".

f) *Fails* indicates 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".

g) *Without lawful excuse* defines the defence available to the accused person. The availability of the defence prevents punishing the morally innocent.

54 The offence is not framed with language identified in *A.D.H.* as requiring subjective intent, which is indicated by the use of language such as "willful", "expose", or "abandon" (for s. 218 of the *Criminal Code*). Rather, the language of s. 145(3) addresses discharging an obligation in objective terms similar to s. 215 of the *Criminal Code* (duty to provide necessaries of life) considered in *R. v. Naglik*, [1993] 3 S.C.R. 122: *A.D.H.* at paras. 43-49. Both ss. 215 and 145(3) identify a specific legal duty -- it is expressed in s. 215 as "a legal duty" to provide necessaries of life and in s. 145(3) as being "bound to comply" with a condition of an undertaking or recognizance -- and both sections frame the offence as "fails without lawful excuse, the proof of which lies on them" to discharge the obligation at issue. The Supreme Court of Canada has confirmed s. 215 is a duty-based offence attracting an objective fault standard: *A.D.H.* at paras. 63-72. Lamer C.J.C. commented in *Naglik* about the language in s. 215 of the *Criminal Code*:

> [42] ... the failure to perform a "duty" suggests that the accused's conduct in a particular circumstance is to be determined on an objective, or community, standard. The concept of a duty indicates a societal minimum which has been established for conduct: as in the law of civil negligence, a duty would be meaningless if every individual defined its content for him or herself according to his or her subjective beliefs and priorities. Therefore, the conduct of the accused should be measured against an objective, societal standard to give effect to the concept of "duty" employed by Parliament.

55 The plain meaning of the words in the text of s. 145(3) and the specific legal duty to act a certain way support the duty-based nature of the provision.

B. Statutory Context and Purpose

56 *R. v. Antic*, 2017 SCC 27, establishes that every accused person has the right to reasonable bail and to be released on the least onerous conditions unless the Crown shows cause for detention or more onerous bail conditions. Terms and conditions of release are imposed only to the extent necessary to satisfy s. 515(10) of the *Criminal Code*, which sets out the primary, secondary, and tertiary grounds for detention: flight risk, public safety, and public confidence in the administration of justice. Having regard to the criteria in s. 515(10) and to the specific circumstances of the offence and offender, the bail judge is tasked with considering reasonable bail in each case. "The bail system is based on the promises to attend court made by accused persons and on their belief in the consequences that will follow if such promises are broken": *Antic* at para. 54. Otherwise the bail system would be ineffective.

57 Section 145(3) is inherently linked to s. 515(10). It is duty-based and risk- based. It promotes

the proper functioning of the bail system by providing an enforcement mechanism. At interest is not only protection of the public and maintaining confidence in the administration of justice but also enabling a court to control its own process thereby maintaining dignity, respect, and integrity of the justice system: *R. v. Patko*, 2005 BCCA 183 at para. 23. The purpose of the section is to mitigate the risks of releasing an accused person into the community by imposing a minimum uniform standard of conduct having regard to societal interests rather than personal standards of conduct. A failure to comply with court-imposed conditions of release, which under s. 515 (10) must be minimal, reasonable, and necessary, thwarts or defeats the bail system and public confidence in the administration of justice.

58 *Ludlow* recognized that conditions imposed on an accused person under a recognizance are "serious obligations concerning the proper administration of justice": *Ludlow* at para. 40. In exchange for liberty, an accused person agrees to, and is expected to, fulfil the court-imposed obligations.

59 The statutory purpose of s. 145(3) supports the duty-based nature of the provision.

C. Statutory Breadth

60 Applying an objective standard of *mens rea* does not render the scope of potential liability under s. 145(3) unduly broad, as criminal liability is restricted to the accused person named in the undertaking or recognizance who has secured their release by agreeing to abide by conditions a judge deemed as minimal, reasonable, and necessary with regard to s. 515(10). The obligations are limited in number, reduced to writing, and made explicitly known to and accepted by the accused person as a condition of their release. This can be contrasted with the wide range of persons and conduct falling within the scope of s. 218: *A.D.H.* at paras. 40-41.

61 An objective fault standard does not punish the morally blameless. It does not punish acts of simple negligence. It requires proof of a marked departure from the standard of care that a reasonable person would observe in the circumstances.

62 McLachlin J. (as she then was) confirmed that objective fault requires a uniform standard that does not incorporate individualized characteristics such as age and experience: *Creighton* at 41, 60-74. To the extent that an accused person may have cognitive difficulties that could potentially impact their ability to comply with conditions of release, the bail judge would account for these in assessing the appropriate form of release. The ladder principle can accommodate such deficiencies by, for example, requiring a surety to supervise the accused to ensure compliance with the conditions of release: *Antic* at paras. 2, 4, *Patko* at para. 22.

63 Section 145(3) does not give rise to sufficient social stigma or penalty to require a subjective *mens rea* as evidenced by the maximum sentence of two years.

64 The statutory breadth of s. 145(3) supports the duty-based nature of the provision.

The fault element of s. 733.1 of the *Criminal Code*

65 Mr. Zora submits that the fault element for s. 733.1 of the *Criminal Code* (breach of a probation order) is instructive in determining the fault element for s. 145(3). Mr. Zora relies on *R. v. Docherty*, [1989] 2 S.C.R. 941, which held that the *mens rea* for s. 733.1 is subjective. However, a probation order is not the functional equivalent of a recognizance or undertaking. The two are different offences, in different sections of the *Criminal Code*, with distinct language, legislative history, and consequences. Furthermore, I would question whether *Docherty* has been overtaken by changes in the legislation and subsequent decisions, but that is not an issue before this Court.

Conclusion

66 In my view, the indicators of Parliament's intent regarding the fault element demonstrate that s. 145(3) is a duty-based offence that attracts an objective standard of *mens rea*. Section 145(3) recognizes that persons who have been released are under a legal duty to comply with the conditions of their release; it therefore creates legal duties respecting particular persons in particular circumstances and is aimed at establishing a uniform minimum level of care undertaken by those to whom it applies. The duty imposed is a societal, and not a personal, standard of conduct. The section ensures that those granted judicial interim release by means of an undertaking or recognizance made to court will comply with the terms and conditions. This ensures proper functioning of the criminal justice system generally and the bail system specifically.

67 A review of the language, breadth, context and purpose of s. 145(3), as well as the gravity of the crime and social stigma attached, confirms the offence is duty-based, requiring objective *mens rea* to establish the fault element of the offence.

68 In my view, the trial judge's findings of fact, which are not disputed, support the convictions in this case because Mr. Zora's failure to present himself at his door for two curfew compliance checks demonstrates a marked departure from what a reasonable person would have done in the circumstances. A reasonably prudent person in the circumstances would have foreseen or appreciated the risk or could have done something to prevent the breach. His explanation does not amount to a lawful excuse for the breaches.

69 I would dismiss the appeal.

S. STROMBERG-STEIN J.A.
P.M. WILLCOCK J.A.:-- I agree.
J.E.D. SAVAGE J.A.:-- I agree.
B. FISHER J.A.:-- I agree.

Reasons for Judgment

70 L.A. FENLON J.A. (concurring):-- I have had the benefit of reading the draft judgment of my

colleague, Madam Justice Stromberg-Stein. I agree that Mr. Zora's appeal from conviction should be dismissed, but respectfully disagree as to the mental element of the offence created by s. 145(3) of the *Criminal Code*. In my view, that section imports a subjective fault standard. My reasons for that conclusion follow.

71 Like my colleague, I begin with the presumption that Parliament intends crimes to have a subjective fault element. In *Sault Ste. Marie,* Dickson J. described the presumption this way (at 1303, 1309-10):

> In the case of true crimes there is a presumption that a person should not be held liable for the wrongfulness of his act if that act is without *mens rea* ... .
>
> ...
>
> ... Where the offence is criminal, the Crown must establish a mental element, namely, that the accused who committed the prohibited act did so intentionally or recklessly, with knowledge of the facts constituting the offence, or with wilful blindness toward them. Mere negligence is excluded from the concept of the mental element required for conviction. Within the context of a criminal prosecution a person who fails to make such enquiries as a reasonable and prudent person would make, or who fails to know facts he should have known, is innocent in the eyes of the law.
>
> [Emphasis added; citations omitted.]

72 Although the presumption must "give way to clear expressions of a different legislative intent" as Cromwell J. stated in *A.D.H.* (at para. 27), "Parliament must be understood to know that this presumption will likely be applied unless some contrary intention is evident in the legislation" (at para. 26).

73 In my view, neither the words used in s. 145(3), nor the design of the offence supports a clear legislative intent to displace the subjective fault element that is the foundational principle of our criminal law.

74 Many judges, including Mr. Justice Thompson in the court immediately below, have noted that s. 145 is not clear as to the *mens rea* required for conviction. That lack of clarity is evident in the conflicting views on the issue expressed in the cases cited by my colleague at paras. 41 and 42 of her judgment. In my view, the lack of clarity in s. 145 regarding the *mens rea* required for conviction weighs heavily in favour of giving effect to the presumption of subjective intent. As Cromwell J. observed in *A.D.H.* "to the extent that Parliament's intent is unclear, the presumption of

subjective fault ought to have its full operation...".

75 There is nothing startling in the notion that Parliament would incorporate this standard of mental fault into the offence of breach of bail conditions. The offences created by s.145 carry a maximum two-year period of incarceration and therefore directly threaten the liberty interest of the accused. Further, as Trotter J.A. (writing extra-judicially) notes in the *Law of Bail* (at 12-2):

> Along with the possibility of imprisonment, an accused who is charged with one of these offences must discharge the onus of proof in respect of further release. [s. 515(6) (c).] Moreover, an accused person with one or more convictions for this type of offence will have a more difficult time obtaining release in the future.

76 Section 145(3) does not contain any of the language typically used by Parliament when it intends to create an offence involving objective or penal fault. That language was thoroughly reviewed by Cromwell J. in the following paragraphs of *A.D.H.* from which I quote at length:

> [57] We come first to offences defined in terms of dangerous conduct. In *R. v. Hundal*, [1993] 1 S.C.R. 867, the Court found that the fault element of the offence of dangerous driving was a manner of driving which constituted a "marked departure" from that expected of a reasonable person in the same circumstances. (See also, more recently, *Beatty* and *R. v. Roy*, 2012 SCC 26, [2012] 2 S.C.R. 60.) Several factors justified adopting an objective rather than a subjective fault requirement: driving is a regulated activity in which people choose to engage; driving is automatic and reflexive in nature; and the text of the offence focuses on the manner of driving, all of which suggest that the offence seeks to impose a minimum uniform standard of care. Cory J. noted, for example, that "[l]icensed drivers choose to engage in the regulated activity of driving. They place themselves in a position of responsibility to other members of the public who use the roads": *Hundal*, at p. 884 (emphasis added). With respect to the text of the provision, Cory J. observed that it creates an offence of driving "in a manner that is dangerous to the public, having regard to all the circumstances" and this suggests an objective standard: "The 'manner of driving' can only be compared to a standard of reasonable conduct" (p. 885). So in the case of dangerous driving both the text and nature of the provision, as well as other factors, provided strong support for an objective fault element. None of those factors is present in the s. 218 offence.
>
> [58] Next, there are offences which are expressed in terms of careless conduct, such as the careless storage of firearms. In *R. v. Finlay*, [1993] 3 S.C.R. 103, the Court concluded that the carelessness targeted by the offence is not consistent with subjective fault. The provision required the Crown to establish that a firearm

> was used, carried, handled, shipped or stored "in a careless manner or without reasonable precautions for the safety of other persons". The use of the word "careless" and the reference to "reasonable precautions" were clear markers of objectively assessed fault (pp. 114-15). There is no similar language in s. 218.
>
> [59] A third category relates to so-called predicate offences. These are offences such as unlawful act manslaughter and unlawfully causing bodily harm which require the commission of an underlying unlawful act. They have been found to require the mental element for the underlying offence but only objective foresight of harm flowing from it: see, e.g., *R. v. DeSousa*, [1992] 2 S.C.R. 944 (unlawfully causing bodily harm); *R. v. Creighton*, [1993] 3 S.C.R. 3 (unlawful act manslaughter). Without reiterating the detailed reasons given in those cases, I simply underline that these offences are ones in which the commission of the predicate or underlying offence has actual and serious consequences. As Sopinka J. said in *DeSousa* (at p. 967) and McLachlin J. repeated in *Creighton* (at p. 55): "The implicit rationale of the law in this area is that it is acceptable to distinguish between criminal responsibility for equally reprehensible acts on the basis of the harm that is actually caused." This rationale has no application to s. 218; there is neither a predicate offence nor any need to show that actual harm resulted from the conduct in the child abandonment offence.
>
> ...
>
> [61] ... [Fourth] ... criminal negligence requires a marked and substantial departure from the conduct of a reasonably prudent person in circumstances in which the accused either recognized and ran an obvious and serious risk or, alternatively, gave no thought to that risk: *R. v. J.F.*, 2008 SCC 60, [2008] 3 S.C.R. 215, at paras. 7-11.
>
> [Emphasis added.]

77 Other language indicative of an objective standard was reviewed by Professor Stuart in *Canadian Criminal Law: A Treatise*, 6th ed (Scarborough: Carswell, 2011) at 274:

> ...The *Criminal Code* has long contained a wide variety of offences which expressly adopt an objective standard such as "ought to", "reasonable care", "good reason", "reasonable ground", "reasonably expected" or "reasonable steps".

78 What of the word "fails" used in s. 145(3)? In my view it is a neutral one. "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.

79 My colleague places considerable emphasis on the duty-based nature of s. 145(3) and the risk-based nature of bail provisions, relying on the "fifth category" of objective fault offence described at para. 63 of *A.D.H.* In my respectful view, however, s. 145(3) does not fit that category of offence for the following reasons.

80 First, the duty-based offences discussed in *A.D.H.*----ss. 215, 216, 217, and 217.1---expressly include the word "duty". Section 145(3) does not, and the omission is a significant one. In *A.D.H.* the majority concluded that s. 218 (child abandonment) imported a subjective standard and was distinguishable from the other objective fault offences noted above because s. 218 was not defined in terms of failure to perform specified legal duties: at paras. 66, 68. That was found to be so despite the nature of the offence which could be described as imposing a duty on caregivers to behave in a particular way -- just as persons released on bail have a duty to comply with the conditions of their release.

81 More importantly, the objective fault offences addressed in *A.D.H.* impose duties that have to be given content by reference to an objective societal standard. Section 215 imposes a duty on persons in various relationships to provide necessaries of life, such as the duty owed by parents to their children. Section 216 imposes a duty on persons undertaking acts dangerous to the life of another person, such as medical procedures, to possess and use reasonable knowledge, skill and care in doing so. Section 217 imposes a general duty on persons to follow through with an act that they have undertaken to complete if omitting to do so would be dangerous to life; and section 217.1 imposes a duty on persons who undertake or have the authority to direct how others complete work or perform tasks in the workplace to take reasonable steps to prevent bodily harm arising from the work or task.

82 As Chief Justice Lamer observed in *Naglik* at 141:

> With respect to the wording of s. 215, while there is no language in s. 215 such as "ought to have known" indicating that Parliament intended an objective standard of fault, the language of s. 215 referring to the failure to perform a "duty" suggests that the accused's conduct in a particular circumstance is to be determined on an objective, or community, standard. The concept of a duty indicates a societal minimum which has been established for conduct: as in the law of civil negligence, a duty would be meaningless if every individual defined its content for him or herself according to his or her subjective beliefs and priorities. Therefore, the conduct of the accused should be measured against an objective, societal standard to give effect to the concept of "duty" employed by

> Parliament.
>
> [Emphasis added.]

83 In contradistinction, when an accused is released on bail there is no need to import a societal minimum to define the content of expected conduct. Rather, as in the present case, detailed and particular expectations of conduct are imposed, such as being at a particular address between fixed hours, abstaining from illicit drugs, refraining from contacting identified persons, reporting to a bail supervisor, and so on. Even the more general requirement to keep the peace and be of good behaviour has a defined content: *R. v. W. (L.T.)*, 2004 N.J. No. 260. There is thus no need to import a societal standard against which the accused's conduct should be objectively measured in order to give effect to the obligation imposed by s. 145(3).

84 Second, unlike my colleague, I do not view Professor Roach's inclusion of "disobeying a court order" on his list of duty-based offences as supportive of the argument that s. 145(3) falls into the fifth category of duty-based offences described in *A.D.H.* The passage from Professor Roach's text quoted by Moldaver J. in dissent addresses the distinction in law between acts of commission and acts of omission. Most penal provisions are directed at acts of commission -- i.e., "Don't do X". Generally, an act of omission -- doing nothing -- will not constitute the *actus reus* of an offence. Thus it is necessary to impose a legal duty to act before a failure to act can be considered an offence. In the passage relied on by my colleague, Justice Moldaver provides that context, saying:

> [121] Likewise, Professor Roach, at pp. 115-16 of his text, explains that although an omission will not generally constitute the *actus reus* of an offence, a failure to act will suffice where an individual has a "specific legal duty to act". He then includes child abandonment in his list of duty-based offences:
>
> > There is a duty to use reasonable care when providing medical treatment or other lawful acts that may endanger the life of others. This duty was breached by a person who donated blood that he knew was infected with HIV. It is also an offence not to use reasonable care in handling explosives; to disobey a court order; to fail to assist a peace officer when requested; to abandon a child; not to obtain assistance in child-birth; to fail to stop when your vehicle is involved in an accident; to neglect animals; and to fail to take steps to protect holes in ice or open excavations. [Footnotes omitted; emphasis in original omitted; p. 116.]

It is in this particular context that compliance with a court order is described as a duty-based offence.

85 Further, I note that Professor Roach includes s. 218 in the list of duty-based offences---the

duty not to abandon a child---which the majority in *Naglik* found to be a subjective fault offence. In other words, the fact that an offence may be described as duty-based does not lead to the inexorable conclusion that it imports an objective standard of fault.

86 Third, an objective standard of fault is often used to penalize conduct which, even though inadvertent, may have appalling consequences for others, such as dangerous driving or careless use or storage of a firearm. The duty-based offences described in the fifth category of *A.D.H.* are found in the *Criminal Code* under the heading "Duties tending to preservation of life". In relation to conduct of this kind, Parliament has seen fit to impose a minimum uniform standard of care and to punish departures from that standard even in the absence of intentional conduct. In my view, bail conditions are not of that ilk. They are intended to minimize flight risk, maintain public confidence in the administration of justice, and protect the public, but a breach will not generally give rise to the same level of risk of direct and significant harm to persons or property.

87 In my view, there is much to recommend a subjective standard of fault in relation to breach of bail conditions. An objective standard of fault does not permit consideration of the inexperience, lack of education, youth, cultural experience, or any other circumstance of the accused: *Creighton* at 58-74 (*per* McLachlin J.), 38-39 (*per* La Forest J.); *Naglik* at 148 (*per* McLachlin J.), 149 (*per* L'Heureux-Dubé J.). Under an objective fault standard, only incapacity or virtual inability to comply with a bail condition -- such as a severe illness or severe weather preventing travel -- would prevent conviction. Some have argued that "[j]udging everyone by an inflexible standard of a monolithic reasonable person, where an accused could not have measured up" may in effect amount to absolute liability: see Stuart, *Canadian Criminal Law* at 280; see also *Creighton* at 26 (*per* Lamer C.J.). Further, the addition of a defence of "lawful excuse" does not address all of the circumstances in which an objective standard could work an injustice -- which in part explains, in my view, the reluctance of trial judges to adopt it.

88 *R. v. Josephie*, 2010 NUCJ 7, is one such example. In that case, Mr. Josephie was charged with failing to appear. He had forgotten to attend court. Kilpatrick J. described the circumstances of the offence as follows:

> [2] Mr. Josephie was released by the RCMP Kimmirut detachment on a promise to appear dated May 15th, 2009. This document compelled him to attend court in Kimmirut on October 13th, 2009.
>
> [3] In July, Mr. Josephie's daughter became ill with the H1N1 virus. She was in the prime of her life and eight months pregnant when she passed away. The unborn child died with her.
>
> [4] Mr. Josephie travelled from Kimmirut to Arviat for the funeral. On the return trip, he decided to relocate to Iqaluit. He did not go back to Kimmirut to pick up

> his belongings. The promise to appear was among the personal effects left behind in Kimmirut.
>
> [5] Mr. Josephie was devastated by the loss of his daughter. He struggled to come to terms with the awful finality, and cruel circumstances of this untimely death. In the weeks following the funeral, he thought of little else. Mr. Josephie slumped into a depression.
>
> [6] Mr. Josephie says that while he grieved he did not direct his mind to his coming court appearance. He says that he did not remember that he had court until he was told by the RCMP in January 2010 that a warrant had issued for his arrest. After being told that he had missed court, Mr. Josephie promptly attended the Court house in Iqaluit to clear the warrant.
>
> [7] Mr. Josephie concedes that after leaving Kimmirut for the funeral he took no special steps to help him remember his court date.

89 The Crown argued in that case that once it had proved beyond a reasonable doubt that Mr. Josephie had failed to appear in court as required by law, the onus of proof shifted to him to establish a lawful excuse. Crown counsel argued that Mr. Josephie was objectively negligent because he took no steps to remind himself of his court date and there was no lawful excuse he could advance to explain his failure to appear. Kilpatrick J. observed that:

> [24] The introduction of an objective fault standard might make for a more efficient criminal justice system, but such a system would not necessarily achieve greater justice. Such efficiency would undermine the philosophical underpinnings upon which the criminal justice system is built. It would confuse society's rationale for the punishment of crime.
>
> [25] An objective *mens rea* requirement would criminalize the behaviour of a wide range of citizens who are challenged by mental disabilities and psychological and psychiatric disorders. The objective standard of reasonable diligence would cast its net broadly. Many disadvantaged individuals, including those afflicted by Fetal Alcohol Spectrum disorder, would not likely measure up to such a standard.
>
> [Emphasis added.]

Ultimately he acquitted the accused saying:

> [29] Mr. Josephie may have been negligent in not taking reasonable steps to remember his court date. However, this is not the test for criminal liability. His stated reasons for failing to attend court are not seriously challenged by the Crown. Mr. Josephie was not shaken in cross examination. The only evidence before me is that he did not address his mind to his court obligations at all in the wake of a profound personal tragedy.

90 To the extent that it might be argued that an objective standard makes for the more orderly administration of justice, that could be said of all *Criminal Code* offences, and yet the subjective standard remains presumptively and firmly in place. The fear that an accused will be able to avoid conviction for breach of a bail condition by simply asserting "I forgot the date"; or "I did not hear the police knocking" is in my opinion overstated. That fear underestimates the intelligence and common sense of triers of fact. As the Alberta Court of Queen's bench observed in *R. v. Loutitt* at para. 17, "The sky will not fall if the Crown has to prove a mental element."

91 In summary, I see no basis in the context or language of s. 145(3) to displace the presumption of subjective intent. It would follow that, to prove the mental element of breach of a bail condition, the Crown must prove that the accused person knew their conduct would infringe a condition of release, was reckless, or was wilfully blind.

92 I turn now to the application of that standard to the circumstances of the present case.

93 As noted above, subjective fault may be established where the accused intentionally commits the prohibited act, or does so recklessly with knowledge of the facts constituting the prohibited conduct, or is wilfully blind: *Sault St. Marie* at 1309.

94 In my view the uncontested facts establish that Mr. Zora was reckless. Mr. Zora testified that he often went to bed early, about 8 or 8:30 pm and slept heavily. He said he was aware that when in his bedroom he could not hear someone at the front door. In cross-examination, after acknowledging that the police had been checking in on him almost every day to ensure compliance with his curfew, this exchange took place:

> Q Okay. And -- and where was your bedroom located at that time?
>
> A At that time it was downstairs in the far side of the house in the -- basically we have a two-level house and it was in the bottom -- if you're looking at the house from the street, it was the very bottom right side.

Q Okay.

A There's actually an outside door that leads to the garage from there.

Q So it was at the -- the front of the house that's facing the street?

A Very front, yeah, front on the right side of the street.

Q Could you hear the doorbell from that bedroom?

A No.

Q So how is that you attended at the door on those earlier occasions?

A Well, I don't sit in my room all day, I was just out a bit -- we have a TV in the living room.

Q But the police were coming later at night.

A Well, they --

Q To check on you.

A -- they've been coming at random times.

Q Okay. Was there ...

A He was just there at an earlier time, I just wasn't in my room at that point.

...

Q And when did you move upstairs?

A I moved upstairs after I found out I had the first breach after I got out of CDRC, I moved all my stuff upstairs and put cameras up and everything just to try to make sure I didn't get any more breaches.

Q So when did you put the cameras up?

A When I got out of CDRC.

Q When was that? Like what month?

A I -- I went in October, so November probably.

Q Okay. So after -- after these alleged offence dates you put the camera up?

A When he told me I had a breach and he said he was here and we got -- you know, I was

like, "I've been here" and whatnot, I put cameras up to see -- so I could -- with video and audio so I can know when somebody is at the door when I'm upstairs just so I don't miss the door and I also now, like I said, sleep downstairs on the couch so I really don't miss the door.

Q And does that -- does that camera record --

A No.

Q -- movement?

A It's a baby monitor basically.

Q Okay.

A It's a video baby monitor so I can hear everything that's going on outside the front door and see.

95 In my view, an accused who is required by his bail conditions to appear at the door when police attend, knows that he will not hear them ring or knock if he is in certain parts of his residence, and makes no effort to address that situation, displays recklessness consistent with a guilty mind. The problem Mr. Zora ignored was readily solved after he was charged with breach of the terms of his release: he began sleeping in a different bedroom and used a commonplace baby monitor.

96 In this case, the application of either a subjective or objective standard of fault leads to the same result, but that will not always be so. With great respect to those whose views may differ, I conclude that s. 145(3) requires the Crown to prove a subjective standard of mental fault.

L.A. FENLON J.A.