

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

HER MAJESTY THE QUEEN

RESPONDENT

AND:

PATRICK HENRY FOX

APPELLANT

RESPONDENT'S BOOK OF AUTHORITIES
re: Summary Conviction Appeal (September 9, 2022)

UPDATED AND CORRECTED

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APPELLANT

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Tab 1:
R. v. R.P,
2012 SCC 22

Her Majesty The Queen *Appellant*

v.

R.P. *Respondent*

INDEXED AS: R. v. R.P.

2012 SCC 22

File No.: 34038.

2011: December 16; 2012: May 11.

Present: LeBel, Deschamps, Fish, Abella, Cromwell, Moldaver and Karakatsanis JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Criminal law — Appeals — Power of court of appeal — Unreasonable verdict — Credibility of witnesses — Trial judge holding that testimonial evidence as whole did not raise reasonable doubt that accused guilty on charge of indecent assault with regard to incidents that had occurred more than 30 years earlier — Whether verdict unreasonable — Criminal Code, R.S.C. 1985, c. C-46, s. 686(1)(a)(i).

R.P. was convicted of indecently assaulting M.L., his sister-in-law. The trial was held more than 30 years after the impugned acts. According to M.L., the abuse had occurred when she went to babysit the children of her sister G.L. and R.P., and it had taken place in their residence on some occasions and in their car at other times when R.P. drove her home. The trial judge did not believe R.P. and set out numerous reasons to explain why he considered M.L.'s testimony credible. He accepted the police officers' testimony and held that the prosecution had proved beyond a reasonable doubt that the offence had been committed. The majority of the Court of Appeal held that the verdict was unreasonable in light of the evidence and entered an acquittal. The dissenting judge found that the trial judge had made no palpable and overriding error in assessing the evidence and that the verdict was not unreasonable.

Held (LeBel and Fish JJ. dissenting): The appeal should be allowed and the conviction restored.

Per Deschamps, Abella, Cromwell, Moldaver and Karakatsanis JJ.: To decide whether a verdict

Sa Majesté la Reine *Appelante*

c.

R.P. *Intimé*

RÉPERTORIÉ : R. c. R.P.

2012 CSC 22

N^o du greffe : 34038.

2011 : 16 décembre; 2012 : 11 mai.

Présents : Les juges LeBel, Deschamps, Fish, Abella, Cromwell, Moldaver et Karakatsanis.

EN APPEL DE LA COUR D'APPEL DU QUÉBEC

Droit criminel — Appels — Pouvoir d'une cour d'appel — Verdict déraisonnable — Crédibilité des témoins — Juge du procès concluant que l'ensemble de la preuve testimoniale n'est pas de nature à soulever un doute raisonnable quant à la culpabilité de l'accusé relativement à une accusation d'attentat à la pudeur concernant des événements survenus plus de 30 ans auparavant — Le verdict est-il déraisonnable? — Code criminel, L.R.C. 1985, ch. C-46, art. 686(1)(a)(i).

R.P. a été déclaré coupable d'avoir attenté à la pudeur de M.L., sa belle-sœur. Le procès a été tenu plus de 30 ans après les actes reprochés. M.L. soutenait que les abus survenaient lorsqu'elle allait garder les enfants de sa sœur G.L. et de R.P., parfois dans la demeure de ces derniers, parfois dans leur voiture, lorsque R.P. la reconduisait chez elle. Le juge du procès n'a pas cru R.P. et a exposé de nombreuses raisons qui l'ont amené à conclure que le témoignage de M.L. était crédible. Il a retenu les témoignages des policiers. Il a été d'avis que la poursuite avait prouvé hors de tout doute raisonnable la commission de l'infraction. La Cour d'appel, à la majorité, a jugé que le verdict était déraisonnable à la lumière de la preuve et a prononcé un acquittement. La juge dissidente était d'avis que le juge du procès n'avait pas commis d'erreur manifeste et dominante dans l'appréciation de la preuve et que le verdict n'était pas déraisonnable.

Arrêt (les juges LeBel et Fish sont dissidents) : Le pourvoi est accueilli et la déclaration de culpabilité est rétablie.

Les juges Deschamps, Abella, Cromwell, Moldaver et Karakatsanis : Pour décider si un verdict est

is unreasonable, an appellate court must determine whether the verdict is one that a properly instructed jury or a judge could have rendered. A court of appeal that reviews a trial court's assessments of credibility in order to determine, for example, whether the verdict is reasonable cannot interfere with those assessments unless it is established that they cannot be supported on any reasonable view of the evidence.

In this case, the verdict was one a judge could reasonably render, and the trial judge did not draw an inference or make a finding of fact that was plainly contradicted by the evidence or was incompatible with evidence that was not otherwise contradicted or rejected. Furthermore, the trial judge's assessment of the witnesses' credibility was reasonable. The trial judge did not disregard the flaws in M.L.'s testimony, nor did he err either in taking into account her age and the time elapsed since the incidents in question or in assessing G.L.'s testimony.

Per LeBel and Fish JJ. (dissenting): Even when viewed through the mandatory lens of deference, the trial judge's reasons do not resist scrutiny. On the record, no trier of fact could reasonably conclude that R.P. is guilty beyond a reasonable doubt of the offence. The trial judge's finding that there was no inconsistency between the testimony of G.L. and M.L. was plainly incompatible with the Crown's case, with the record as a whole and with M.L.'s own evidence. In particular, an integral element of M.L.'s narrative was that R.P. sexually assaulted her while his wife was about to leave for the hospital to give birth and while she was in the hospital on those occasions. G.L. testified, however, that M.L. had in fact not babysat on either of those occasions and, confronted with this, M.L. did not contradict G.L. M.L. confirmed as well G.L.'s evidence that G.L., when home, had an unobstructed view of the site of the alleged abuses. Also, G.L.'s testimony that R.P. returned home before her very rarely was inconsistent with M.L.'s allegations of regular abuse. The judge also ignored M.L.'s own evidence confirming important aspects of G.L.'s testimony tending to show that R.P. could not have assaulted M.L. as the latter alleged. Finally, to the extent that the trial judge rejected or disregarded the testimony of G.L., he did so for unsustainable reasons. He appears to have given no weight to the testimony because G.L. was too general, which is unsupported by the record, and because she was too precise, which contradicts the first reason. While the judge found that G.L. had chosen to believe R.P. because he was her husband, he disregarded the fact that she was also closely related to M.L., her sister. It was unacceptable to reject, on that ground, the evidence of the only

déraisonnable, une cour d'appel doit déterminer s'il s'agit d'un verdict qu'un jury ayant reçu des directives appropriées ou qu'un juge aurait pu rendre. L'appréciation de la crédibilité faite en première instance, lorsqu'elle est revue par une cour d'appel afin notamment de déterminer si le verdict est raisonnable, ne peut être écartée que s'il est établi que celle-ci ne peut pas s'appuyer sur quelque interprétation raisonnable que ce soit de la preuve.

En l'espèce, il s'agit d'un verdict qu'un juge pouvait raisonnablement prononcer, le juge du procès n'a pas tiré une inférence ou une conclusion de fait qui soit clairement contraire à la preuve ou incompatible avec une preuve non contredite ou non rejetée. Par ailleurs, l'appréciation de la crédibilité des témoins faite en première instance est raisonnable. Le juge n'a ni omis de prendre en considération les failles dans le témoignage de M.L., ni fait erreur en tenant compte de son âge et du délai écoulé depuis les événements reprochés, ni erré dans l'appréciation du témoignage de G.L.

Les juges LeBel et Fish (dissidents) : Les motifs du juge de première instance ne résistent pas à un examen attentif, même lorsqu'ils sont évalués, comme il se doit, avec un regard empreint de la déférence voulue. Compte tenu de la teneur du dossier porté à notre connaissance, aucun juge des faits ne pouvait conclure raisonnablement que R.P. est coupable de l'infraction hors de tout doute raisonnable. La conclusion du juge du procès selon laquelle le témoignage de G.L. était compatible avec celui de M.L. n'est carrément pas étayée par la preuve à charge présentée par le ministère public, le dossier dans son ensemble et, plus particulièrement, le témoignage de M.L. lui-même. Tout particulièrement, un élément essentiel du récit de M.L. porte sur le fait que R.P. l'aurait agressée sexuellement pendant que son épouse était sur le point de se rendre à l'hôpital pour accoucher et pendant que cette dernière était à l'hôpital à l'occasion des naissances. Or, selon le témoignage de G.L., M.L. n'a en fait gardé à ni l'une ni l'autre de ces occasions et, confrontée à ce témoignage, elle n'a pas contredit les propos de G.L. M.L. a aussi confirmé le témoignage de G.L. qui a affirmé que, lorsqu'elle était à la maison, elle avait une vue non obstruée du lieu où les agressions se seraient produites. En outre, le témoignage de G.L. selon qui R.P. revenait très rarement à la maison avant elle est incompatible avec les allégations d'agressions fréquentes formulées par M.L. Le juge du procès a aussi fait abstraction du témoignage de M.L. qui confirmait d'importants aspects du témoignage de G.L. tendant à démontrer que R.P. n'a pas pu agresser M.L., comme elle le prétend. Enfin, dans la mesure où le juge du procès a rejeté le témoignage de G.L. ou n'en a pas tenu compte, il l'a fait pour des motifs intenable.

person who could — other than the complainant or the accused — testify to the layout of the homes where the assaults were alleged to have occurred, to R.P.'s daily schedules and routines, and to the circumstances surrounding G.L. giving birth.

In reviewing the evidence in great detail, the majority of the Court of Appeal committed no error, as it was required to articulate as precisely as possible what features of the case support its conclusion that the verdict was unreasonable.

Cases Cited

By Deschamps J.

Applied: *R. v. Yebes*, [1987] 2 S.C.R. 168; *R. v. Biniaris*, 2000 SCC 15, [2000] 1 S.C.R. 381; *R. v. Sinclair*, 2011 SCC 40, [2011] 3 S.C.R. 3; *R. v. Beaudry*, 2007 SCC 5, [2007] 1 S.C.R. 190; *R. v. Burke*, [1996] 1 S.C.R. 474; **referred to:** *R. v. A.G.*, 2000 SCC 17, [2000] 1 S.C.R. 439.

By Fish J. (dissenting)

R. v. Biniaris, 2000 SCC 15, [2000] 1 S.C.R. 381; *R. v. Yebes*, [1987] 2 S.C.R. 168; *R. v. W. (R.)*, [1992] 2 S.C.R. 122; *R. v. Sinclair*, 2011 SCC 40, [2011] 3 S.C.R. 3.

Statutes and Regulations Cited

Criminal Code, R.S.C. 1970, c. C-34, s. 149.
Criminal Code, R.S.C. 1985, c. C-46, s. 686(1)(a)(i).

APPEAL from a judgment of the Quebec Court of Appeal (Thibault, Pelletier and Gagnon JJ.A.), 2010 QCCA 2237, SOQUIJ AZ-50698321, [2010] Q.J. No. 13165 (QL), 2010 CarswellQue 13100, setting aside the accused's conviction for indecent assault. Appeal allowed, LeBel and Fish JJ. dissenting.

Sarah-Julie Chicoine and Jean Campeau, for the appellant.

Yves Savard and Claudia Langdeau, for the respondent.

Il semble n'avoir accordé aucun poids au témoignage de G.L. parce que cette dernière était à la fois trop vague, un motif qui n'est pas étayé par le dossier, et trop précise, ce qui contredit le premier motif. Bien que le juge du procès ait conclu que G.L. avait choisi de croire R.P. parce qu'il est son mari, il a négligé le fait qu'elle est aussi étroitement liée à M.L., sa sœur. Il était inacceptable de rejeter pour un tel motif le témoignage de la seule personne qui — outre la plaignante ou l'accusé — pouvait témoigner quant à la disposition des pièces dans les maisons où les agressions auraient eu lieu, quant aux routines et à l'horaire quotidien de R.P. et quant aux circonstances entourant les accouchements de G.L.

En examinant la preuve en détail, les juges majoritaires de la Cour d'appel n'ont commis aucune erreur, puisqu'ils étaient tenus de décrire aussi précisément que possible les éléments du dossier qui soutiennent leur conclusion selon laquelle le verdict est déraisonnable.

Jurisprudence

Citée par la juge Deschamps

Arrêts appliqués : *R. c. Yebes*, [1987] 2 R.C.S. 168; *R. c. Biniaris*, 2000 CSC 15, [2000] 1 R.C.S. 381; *R. c. Sinclair*, 2011 CSC 40, [2011] 3 R.C.S. 3; *R. c. Beaudry*, 2007 CSC 5, [2007] 1 R.C.S. 190; *R. c. Burke*, [1996] 1 R.C.S. 474; **arrêt mentionné :** *R. c. A.G.*, 2000 CSC 17, [2000] 1 R.C.S. 439.

Citée par le juge Fish (dissident)

R. c. Biniaris, 2000 CSC 15, [2000] 1 R.C.S. 381; *R. c. Yebes*, [1987] 2 R.C.S. 168; *R. c. W. (R.)*, [1992] 2 R.C.S. 122; *R. c. Sinclair*, 2011 CSC 40, [2011] 3 R.C.S. 3.

Lois et règlements cités

Code criminel, L.R.C. 1985, ch. C-46, art. 686(1)(a)(i).
Code criminel, S.R.C. 1970, ch. C-34, art. 149.

POURVOI contre un arrêt de la Cour d'appel du Québec (les juges Thibault, Pelletier et Gagnon), 2010 QCCA 2237, SOQUIJ AZ-50698321, [2010] J.Q. n° 13165 (QL), 2010 CarswellQue 13100, qui a annulé la déclaration de culpabilité d'attentat à la pudeur prononcée contre l'accusé. Pourvoi accueilli, les juges LeBel et Fish sont dissidents.

Sarah-Julie Chicoine et Jean Campeau, pour l'appelante.

Yves Savard et Claudia Langdeau, pour l'intimé.

English version of the judgment of Deschamps, Abella, Cromwell, Moldaver and Karakatsanis JJ. delivered by

Le jugement des juges Deschamps, Abella, Cromwell, Moldaver et Karakatsanis a été rendu par

[1] DESCHAMPS J. — The respondent was convicted of indecently assaulting the complainant. His trial was held more than 30 years after the impugned acts. When those acts first began, the complainant was 13 years old and the respondent, her brother-in-law, was 27. There was almost no physical evidence. The credibility of the witnesses was determinative.

[1] LA JUGE DESCHAMPS — L'intimé a été déclaré coupable d'avoir attenté à la pudeur de la plaignante. Le procès a été tenu plus de 30 ans après les actes reprochés. Au début des actes reprochés, la plaignante avait 13 ans, l'intimé 27. Il est son beau-frère. La preuve matérielle est pratiquement inexistante. La crédibilité des témoins est déterminante.

[2] According to the complainant, the abuse had occurred when she went to babysit the children of her sister and the respondent, and it had taken place in their residence on some occasions and in their car at other times when the respondent drove her home. The respondent denied this.

[2] La plaignante soutient que les abus survenaient lorsqu'elle allait garder les enfants de sa sœur et de l'intimé, parfois dans la demeure de ces derniers, parfois dans leur voiture, lorsque l'intimé la reconduisait chez elle. L'intimé nie.

[3] The trial judge analysed the evidence systematically. He did not believe the respondent. Neither the respondent's testimony nor that of his wife raised a reasonable doubt. The trial judge found that the testimony of the respondent's daughter had no impact on the verdict. He set out numerous reasons to explain why he considered the complainant's testimony credible. He accepted the police officers' testimony concerning an interrogation to which the respondent had submitted. The trial judge held that the evidence as a whole did not raise a reasonable doubt as to the respondent's guilt and that the prosecution had proved beyond a reasonable doubt that the offence had been committed.

[3] Le juge du procès analyse la preuve de façon systématique. Il ne croit pas l'intimé. Ni le témoignage de ce dernier ni celui de son épouse ne soulèvent de doute raisonnable. Quant au témoignage de la fille de l'intimé, il juge qu'il n'a pas d'impact sur le verdict. Il expose de nombreuses raisons qui l'amènent à conclure que le témoignage de la plaignante est crédible. Il retient les témoignages des policiers concernant un interrogatoire auquel l'intimé s'est soumis. Il est d'avis que l'ensemble de la preuve n'est pas de nature à soulever un doute raisonnable sur la culpabilité de l'intimé et que la poursuite a prouvé hors de tout doute raisonnable la commission de l'infraction.

[4] The majority of the Court of Appeal found that the trial judge had erred in assessing the credibility of the respondent's wife. They undertook their own analysis of the evidence, concluded that the verdict was unreasonable and entered an acquittal. One judge dissented, stating that the trial judge "did not commit any palpable and overriding error in his assessment of the evidence and that the verdict handed down was not unreasonable" (2010 QCCA 2237 (CanLII), at para. 178).

[4] Les juges majoritaires de la Cour d'appel estiment que le juge de première instance a fait erreur dans l'appréciation de la crédibilité de l'épouse de l'intimé. Ils se livrent à leur propre analyse de la preuve et concluent que le verdict est déraisonnable. Ils prononcent un acquittement. La juge dissidente est plutôt d'avis que le juge du procès « n'a pas commis d'erreur manifeste et dominante dans l'appréciation de la preuve et que le verdict prononcé n'est pas déraisonnable » (2010 QCCA 2237 (CanLII), par. 178).

[5] Whether a verdict is unreasonable is a question of law. Because of the dissent on this question, the appeal comes before this Court as of right.

[6] The appellant argues that the trial judge did not err in assessing the credibility of the witnesses and that the verdict was not unreasonable. She submits that the Court of Appeal should not have interfered.

[7] In the Court of Appeal, the respondent relied on s. 686(1)(a)(i) of the *Criminal Code*, R.S.C. 1985, c. C-46, which is also central to the appeal to this Court. It reads as follows:

686. (1) On the hearing of an appeal against a conviction or against a verdict that the appellant is unfit to stand trial or not criminally responsible on account of mental disorder, the court of appeal

(a) may allow the appeal where it is of the opinion that

(i) the verdict should be set aside on the ground that it is unreasonable or cannot be supported by the evidence,

[8] The issue here is whether the Court of Appeal correctly applied the relevant principles.

I. Applicable Principles

[9] To decide whether a verdict is unreasonable, an appellate court must, as this Court held in *R. v. Yebe*, [1987] 2 S.C.R. 168, and *R. v. Binias*, 2000 SCC 15, [2000] 1 S.C.R. 381, at para. 36, determine whether the verdict is one that a properly instructed jury or a judge could reasonably have rendered. The appellate court may also find a verdict unreasonable if the trial judge has drawn an inference or made a finding of fact essential to the verdict that (1) is plainly contradicted by the evidence relied on by the trial judge in support of that inference or finding, or (2) is shown to be incompatible with evidence that has not otherwise been contradicted or rejected by the trial judge (*R. v. Sinclair*, 2011 SCC 40, [2011] 3 S.C.R. 3, at paras. 4, 16 and 19-21; *R. v. Beaudry*, 2007 SCC 5, [2007] 1 S.C.R. 190).

[5] La question de savoir si le verdict est déraisonnable est une question de droit. Vu la dissidence sur cette question, le pourvoi est soumis de plein droit à notre Cour.

[6] L'appelante soutient que le juge de première instance n'a pas commis d'erreur en appréciant la crédibilité des témoins et que le verdict n'était pas déraisonnable. Selon elle, la Cour d'appel n'aurait pas dû intervenir.

[7] L'intimé a fondé son pourvoi devant la Cour d'appel sur le sous-al. 686(1)(a)(i) du *Code criminel*, L.R.C. 1985, ch. C-46. La même disposition est au centre du présent pourvoi. Elle est rédigée ainsi :

686. (1) Lors de l'audition d'un appel d'une déclaration de culpabilité ou d'un verdict d'incapacité à subir son procès ou de non-responsabilité criminelle pour cause de troubles mentaux, la cour d'appel :

a) peut admettre l'appel, si elle est d'avis, selon le cas :

(i) que le verdict devrait être rejeté pour le motif qu'il est déraisonnable ou ne peut pas s'appuyer sur la preuve,

[8] La question qui se pose consiste à déterminer si la Cour d'appel a correctement appliqué les principes pertinents.

I. Principes applicables

[9] Suivant les arrêts *R. c. Yebe*, [1987] 2 R.C.S. 168, et *R. c. Binias*, 2000 CSC 15, [2000] 1 R.C.S. 381, par. 36, pour décider si un verdict est déraisonnable, la cour d'appel doit déterminer s'il s'agit d'un verdict qu'un jury ayant reçu des directives appropriées ou un juge aurait pu raisonnablement rendre. La cour d'appel peut aussi conclure au caractère déraisonnable du verdict si le juge du procès tire une inférence ou une conclusion de fait essentielle au prononcé du verdict (1) qui est clairement contredite par la preuve qu'il invoque à l'appui de cette inférence ou conclusion ou (2) dont on démontre l'incompatibilité avec une preuve qui n'est ni contredite par d'autres éléments de preuve ni rejetée par le juge (*R. c. Sinclair*, 2011 CSC 40, [2011] 3 R.C.S. 3, par. 4, 16 et 19-21; *R. c. Beaudry*, 2007 CSC 5, [2007] 1 R.C.S. 190).

[10] Whereas the question whether a verdict is reasonable is one of law, whether a witness is credible is a question of fact. A court of appeal that reviews a trial court's assessments of credibility in order to determine, for example, whether the verdict is reasonable cannot interfere with those assessments unless it is established that they "cannot be supported on any reasonable view of the evidence" (*R. v. Burke*, [1996] 1 S.C.R. 474, at para. 7).

II. Application

[11] In the case at bar, the majority of the Court of Appeal reached their conclusions by substituting their own assessment of the credibility of the witnesses for that of the trial judge. They were not persuaded by the reasons the trial judge had given for not believing the respondent; they found that he had incorrectly assessed the significance of the testimony of the respondent's wife, and that the defence's theory of confabulation was not frivolous. In their view, the trial judge had erred in accepting the complainant's testimony. After undertaking their own assessment of the witnesses' credibility, they concluded that his verdict was unreasonable and entered an acquittal.

[12] However, that verdict was clearly one a judge could reasonably render (*Yebes, Biniaris*). Unlike my colleague Fish J., I do not find that the trial judge drew an inference or made a finding of fact that was plainly contradicted by the evidence or was incompatible with evidence that was not otherwise contradicted or rejected (*Sinclair*). Furthermore, the trial judge's assessment of the witnesses' credibility was reasonable (*Burke*). For all these reasons, I find that the intervention of the Court of Appeal cannot be justified in this case.

[13] In *R. v. A.G.*, 2000 SCC 17, [2000] 1 S.C.R. 439, Arbour J. made an observation that applies in the instant case (para. 29):

... where a judge gives detailed reasons for judgment and when, as in this case, the reasons reveal that he or she was alive to the recurrent problems in this field of

[10] Si le caractère raisonnable d'un verdict est une question de droit, l'appréciation de la crédibilité des témoins constitue elle une question de faits. L'appréciation de la crédibilité faite en première instance, lorsqu'elle est revue par une cour d'appel afin notamment de déterminer si le verdict est raisonnable, ne peut être écartée que s'il est établi que celle-ci « ne peut pas s'appuyer sur quelque interprétation raisonnable que ce soit de la preuve » (*R. c. Burke*, [1996] 1 R.C.S. 474, par. 7).

II. Application

[11] En l'espèce, les conclusions des juges majoritaires de la Cour d'appel reposent sur une substitution de leur opinion à celle du juge du procès en ce qui concerne l'appréciation de la crédibilité des témoins. Ils disent ne pas être convaincus par les motifs qu'a invoqués ce dernier pour refuser de croire l'intimé; ils estiment que le juge a mal mesuré la portée du témoignage de la conjointe de l'intimé et que la thèse de la fabulation avancée par la défense n'est pas frivole. Selon eux, le juge aurait commis une erreur en retenant le témoignage de la plaignante. Après avoir procédé à leur propre évaluation de la crédibilité des témoins, ils concluent que le verdict rendu en première instance est déraisonnable et prononcent l'acquittement.

[12] Pourtant nous sommes clairement en présence d'un verdict qu'un juge pouvait raisonnablement prononcer (*Yebes, Biniaris*). Contrairement à mon collègue le juge Fish, je ne crois pas que le juge du procès ait tiré une inférence ou une conclusion de fait qui soit clairement contraire à la preuve ou incompatible avec une preuve non contredite ou non rejetée (*Sinclair*). Par ailleurs, l'appréciation de la crédibilité des témoins faite en première instance est raisonnable (*Burke*). Pour toutes ces raisons, je suis d'avis que l'intervention de la Cour d'appel ne pouvait être justifiée en l'espèce.

[13] Dans l'arrêt *R. c. A.G.*, 2000 CSC 17, [2000] 1 R.C.S. 439, la juge Arbour fait une observation qui s'applique à la présente espèce (par. 29) :

... la cour d'appel n'apporte rien de particulier à l'évaluation de la preuve lorsque le juge expose des motifs de jugement détaillés qui, comme en l'espèce, révèlent

adjudication, the court of appeal brings no special insight to the assessment of the evidence. As this Court's s. 686(1)(a)(i) jurisprudence makes very clear, the fact that an appeal court judge would have had a doubt when the trial judge did not is insufficient to justify the conclusion that the trial judgment was unreasonable.

[14] The trial in the case at bar lasted five days. I will not review the evidence. Thibault J.A., the dissenting judge in the Court of Appeal, did so and I agree with her reasons. However, I will address certain comments made by Fish J., who, like the majority of the Court of Appeal, reassesses the testimonial evidence. He focusses on specific excerpts from that evidence and says that he is not convinced by the reasons the trial judge gave for accepting the complainant's version of the facts and rejecting the testimony of the respondent's wife.

[15] With respect, it is my view that the trial judge did not disregard the flaws in the complainant's testimony, nor did he err either in taking into account her age and the time elapsed since the incidents in question or in assessing the testimony of the respondent's wife. The trial judge was not required to accept all aspects of the prosecution's theory or to reject it in its entirety any more than this Court is. His role as the trier of fact was to assess and give due weight to the evidence.

[16] The trial judge was fully aware of the limitations of the complainant's testimony. He considered them, quite appropriately, in the analysis that led him to conclude that he believed the complainant:

[TRANSLATION] . . . the cross-examination of the complainant showed that she had been mistaken, contradicted herself or been inconsistent on, or had no recollection of, many details of secondary importance: times, places, duration, first disclosure, frequency, divulgation, context, her personal situation or those of other people. She readily recognized this. All these flaws relating to secondary matters cannot affect her general credibility in light of the whole of the evidence. Many of the incidents in question took place thirty-four (34) years before she testified, at a time when she was only thirteen (13) years old in traumatic circumstances.

qu'il était conscient des problèmes fréquents qui surgissent dans ce domaine décisionnel. Comme l'indique très clairement la jurisprudence de notre Cour relative au sous-al. 686(1)a(i), le fait qu'un juge d'une cour d'appel aurait eu un doute que le juge du procès n'a pas eu est insuffisant pour justifier la conclusion que le jugement de première instance était déraisonnable.

[14] Le procès dans la présente affaire a duré cinq jours. Je ne ferai pas la revue de la preuve. La juge Thibault, dissidente en Cour d'appel, l'a faite et je souscris à ses motifs. Je reviendrai cependant sur certains commentaires du juge Fish. Celui-ci, tout comme la majorité de la Cour d'appel, réévalue les témoignages. Il en cible certains passages et dit ne pas être convaincu par les motifs donnés par le juge de première instance pour retenir la version de la plaignante et rejeter le témoignage de l'épouse de l'intimé.

[15] Avec égards pour l'opinion exprimée par mon collègue, je suis d'avis que le juge du procès n'a ni omis de prendre en considération les failles dans le témoignage de la plaignante, ni fait erreur en tenant compte de son âge et du délai écoulé depuis les événements reprochés, ni erré dans l'appréciation du témoignage de l'épouse de l'intimé. Le juge de première instance n'était pas tenu d'accepter la théorie de la poursuite dans tous ses aspects ou bien de la rejeter en bloc — pas plus que ne l'est notre Cour d'ailleurs. Son rôle comme juge du procès était d'apprécier la preuve à sa juste valeur.

[16] Le juge de première instance était pleinement conscient des limites du témoignage de la plaignante. Il les a considérées, comme elles devaient l'être, dans l'analyse qui l'a amené à conclure qu'il croyait la plaignante :

. . . le contre-interrogatoire de la plaignante a fait ressortir des erreurs, des contradictions, des incohérences et des absences de souvenir sur bon nombre de détails d'ordre secondaire. Temps, lieu, durée, première révélation, fréquence, dévoilement, contexte, situation personnelle, pour elle-même ou celle d'une autre, elle n'a pas hésité à le reconnaître. Toutes ces failles portant sur des éléments secondaires ne sont pas de nature à affecter sa crédibilité générale dans le contexte de l'ensemble de la preuve. Dans bien des cas, les événements en cause sont survenus trente-quatre (34) ans avant son témoignage alors qu'elle n'était âgée que de treize (13)

The words of the Supreme Court that I quoted above are entirely relevant here. [A.R., vol. I, at pp. 77-78]

[17] It is clear from this quotation that the trial judge took into account the weaknesses of the complainant's testimony, including the passages referred to by Fish J., but found that this evidence was not determinative, especially given that the incidents in question had taken place 34 years before she testified, at a time when she was only 13 years old. It is up to the judge who sees and hears a witness to determine what effect the passage of time might have had and how vulnerable the witness was in light of his or her age and the factual context.

[18] As for the testimony of the respondent's wife, I will merely note that the trial judge did not, as my colleague states, fault this witness for being both too precise and too general. Nor did he find that there were no contradictions whatsoever in the complainant's testimony. Rather, he found it unlikely that the respondent's wife could remember details of daily life where there was no reason for them to have been [TRANSLATION] "fixed" in her memory. This very contrast between the fact that she testified about specific details while at the same time having recourse to general expressions supports the trial judge's finding that the witness did not really remember the specific details. In sum, the trial judge found that the respondent's wife had only a general recollection of what had happened to her 30 years earlier. His comments on the complainant's testimony and that of the respondent's wife explain his conclusion that the determinative aspects of their testimony could be reconciled. In his view, the testimony of the respondent's wife [TRANSLATION] "does not, having regard to the evidence as a whole, interfere with that of the complainant, since it also admits of occasions when she was alone with the accused" (A.R., vol. I, at p. 73). The trial judge also noted that the respondent had not denied being alone with the complainant in the house or in his car when he drove her home at night. The trial judge's approach was coherent and was also supported by the evidence.

ans, dans un contexte traumatisant. Les propos de la Cour suprême que j'ai relatés précédemment sont tout à fait applicables ici. [d.a., vol. I, p. 77-78]

[17] Cet extrait indique clairement que le juge du procès a tenu compte des faiblesses que comportait le témoignage de la plaignante, y compris les éléments figurant dans les extraits cités par le juge Fish. Le juge de première instance a cependant estimé qu'il ne s'agissait pas là d'éléments déterminants, surtout dans la mesure où les événements en cause étaient survenus 34 ans avant que la plaignante ne témoigne, alors que celle-ci n'avait que 13 ans. L'appréciation de l'effet de l'écoulement du temps et de la vulnérabilité d'un témoin en raison de son âge et du contexte factuel relève du juge qui voit et entend le témoin.

[18] Pour ce qui est du témoignage de l'épouse de l'intimé, je constate simplement que le juge du procès n'a pas, comme avance mon collègue, reproché à ce témoin d'avoir été à la fois trop précise et trop générale. Il n'a pas non plus conclu que le témoignage de la plaignante était dénué de toute contradiction. Le juge de première instance a plutôt estimé invraisemblable que l'épouse de l'intimé ait pu se souvenir de détails de la vie quotidienne, alors que rien ne justifiait que cela soit « figé » dans sa mémoire. C'est justement ce contraste entre le fait qu'elle témoigne de détails précis, tout en ayant par ailleurs recours à des expressions générales, qui soutient la conclusion du juge que le témoin ne se souvenait pas réellement des détails précis. En somme, le juge du procès estime que l'épouse de l'intimé n'a qu'un souvenir général de ce qu'elle a vécu 30 ans plus tôt. Les observations du juge relatives au témoignage de la plaignante et à celui de l'épouse de l'intimé expliquent qu'il puisse conclure que ces témoignages sont, dans leurs aspects déterminants, réconciliables. Selon lui, le témoignage de l'épouse de l'intimé « n'interfère pas dans celui de la plaignante, compte tenu de l'ensemble de la preuve, puisqu'il laisse place, au surplus, à des moments où elle était seule avec l'accusé » (d.a., vol. I, p. 73). Le juge note aussi que l'intimé ne nie pas s'être trouvé seul avec la plaignante à la maison ou dans son automobile lorsqu'il allait la reconduire en fin de soirée. L'approche du juge du procès

It did not justify the intervention of the Court of Appeal.

[19] I agree with Thibault J.A., for the reasons set out above and for the reasons she gave, that the trial judge did not err in assessing the evidence.

[20] For these reasons, I would allow the appeal and restore the trial judge's verdict.

The reasons of LeBel and Fish JJ. were delivered by

FISH J. (dissenting) —

I

[21] This appeal by the Crown comes to us as of right on the strength of a dissent in the Court of Appeal (2010 QCCA 2237 (CanLII)).

[22] Justice Deschamps would allow the appeal and restore the respondent's conviction at trial on the ground that the majority in the Court of Appeal impermissibly substituted its own findings of fact — including its own opinion as to the credibility of witnesses — for the findings and opinion of the trial judge.

[23] With respect, I am of a different view.

[24] I agree that Pelletier J.A., delivering the reasons of the majority, reviewed the evidence in detail. He committed no error in that regard. He was not only entitled *but indeed bound* to do so: It is well established that reviewing courts, in concluding that a verdict is unreasonable, must articulate as precisely as possible what features of the case support that conclusion.

est à la fois cohérente et soutenue par la preuve. Il n'y avait pas là matière à intervention par la Cour d'appel.

[19] À l'instar de la juge Thibault, pour les motifs qui précèdent et pour ceux exposés par cette dernière, je suis d'avis que le juge de première instance n'a pas commis d'erreur dans l'évaluation de la preuve.

[20] Pour ces motifs, je suis d'avis d'accueillir l'appel et de rétablir le verdict prononcé par le juge du procès.

Version française des motifs des juges LeBel et Fish rendus par

LE JUGE FISH (dissident) —

I

[21] Le présent pourvoi interjeté de plein droit par le ministère public émane de la dissidence d'un juge de la Cour d'appel (2010 QCCA 2237 (CanLII)).

[22] La juge Deschamps est d'avis d'accueillir le pourvoi et de rétablir les déclarations de culpabilité prononcées au procès contre l'intimé au motif que les juges majoritaires de la Cour d'appel ont, à tort selon elle, substitué leur propre appréciation des faits — y compris leur propre opinion quant à la crédibilité des témoins — aux conclusions de faits et à l'opinion du juge du procès.

[23] Avec égards, je ne suis pas d'accord.

[24] Le juge Pelletier de la Cour d'appel, qui a rédigé les motifs des juges majoritaires, a certes examiné la preuve en détail. Ce faisant, il n'a commis aucune erreur. Non seulement avait-il le droit de le faire, *mais il était bel et bien tenu* de procéder à cet examen. Il est bien établi que les tribunaux qui procèdent à des révisions et qui concluent qu'un verdict est déraisonnable doivent décrire aussi précisément que possible les éléments du dossier qui soutiennent leur conclusion.

[25] To this end, a reviewing court must re-examine the entire evidentiary record at trial, consider the effect of its salient elements, and *specifically identify* aspects of the evidence — or lack of evidence — that are of particular concern (*R. v. Biniaris*, 2000 SCC 15, [2000] 1 S.C.R. 381, at paras. 41-42; *R. v. Yeves*, [1987] 2 S.C.R. 168, at p. 186). As McLachlin J. (as she then was) stated in *R. v. W. (R.)*, [1992] 2 S.C.R. 122, at p. 131, “[i]t is thus clear that a court of appeal, in determining whether the trier of fact could reasonably have reached the conclusion that the accused is guilty beyond a reasonable doubt, must re-examine, and to some extent at least, reweigh and consider the effect of the evidence.”

[26] That is precisely what Justice Pelletier did in this case. He took care, repeatedly and expressly, to recognize his duty as an appellate judge to show due deference to the trial judge’s findings of fact. But due deference does not preclude detailed scrutiny of the trial judge’s findings, even as to the credibility of witnesses: “. . . as a matter of law it remains open to an appellate court to overturn a verdict based on findings of credibility where, after considering all the evidence and having due regard to the advantages afforded to the trial judge, it concludes that the verdict is unreasonable” (*W. (R.)*, at pp. 131-32).

[27] Here, the majority in the Court of Appeal did not set aside the respondent R.P.’s conviction because it found the complainant insincere or mendacious. Its decision rests instead on a meticulous demonstration that the trial judge ignored or disregarded critical features of the evidence — including evidence that the complainant herself either confirmed in substance, or did not in fact contradict.

[28] It is now well established that where a trial judge draws inferences or makes findings of fact that are contrary to the evidence, he or she engages

[25] Pour ce faire, un tribunal de révision doit réexaminer l’ensemble de la preuve portée à la connaissance du juge du procès, juger de l’effet de ses principaux éléments et *repérer spécifiquement* les aspects de la preuve — ou l’absence d’éléments de preuve — qui posent particulièrement problème (*R. c. Biniaris*, 2000 CSC 15, [2000] 1 R.C.S. 381, par. 41-42; *R. c. Yeves*, [1987] 2 R.C.S. 168, p. 186). Comme la juge McLachlin (maintenant Juge en chef) l’a affirmé dans *R. c. W. (R.)*, [1992] 2 R.C.S. 122, p. 131, « [i]l est donc clair que, pour déterminer si le juge des faits aurait pu raisonnablement conclure à la culpabilité de l’accusé hors de tout doute raisonnable, la cour d’appel doit réexaminer et, du moins dans une certaine mesure, réévaluer l’effet de la preuve. »

[26] C’est précisément ce qu’a fait le juge Pelletier en l’espèce. Il a pris soin de reconnaître expressément et à plusieurs reprises son devoir en tant que juge d’appel de faire preuve de déférence à l’endroit des conclusions de fait du juge du procès. Cela étant dit, faire preuve de la déférence voulue n’empêche pas de procéder à un examen méticuleux des conclusions en question, même en ce qui a trait à la crédibilité des témoins : « . . . en droit, la cour d’appel conserve le pouvoir d’écarter un verdict fondé sur des conclusions relatives à la crédibilité dans les cas où, après avoir étudié l’ensemble de la preuve et tenu compte des avantages du juge de première instance, elle conclut que le verdict est déraisonnable » (*W. (R.)*, p. 131-132).

[27] Dans la présente affaire, les juges majoritaires de la Cour d’appel ont annulé la déclaration de culpabilité prononcée contre l’intimé R.P. non pas parce qu’ils ont jugé que la plaignante manquait de sincérité ou avait tenu des propos mensongers. Leur décision a plutôt reposé sur une démonstration scrupuleuse du fait que le juge du procès n’a pas tenu compte d’éléments cruciaux de la preuve ou en a fait abstraction — y compris des éléments de preuve que la plaignante elle-même a confirmés en substance ou n’a pas contredits.

[28] Il est maintenant bien établi que lorsqu’un juge de première instance tire des inférences ou des conclusions de fait qui sont contraires à la preuve,

in an “illogical or irrational reasoning process” that invites appellate intervention (*R. v. Sinclair*, 2011 SCC 40, [2011] 3 S.C.R. 3, at paras. 15-16).

[29] In this regard, Pelletier J.A. characterized as central to the trial judge’s reasoning — and therefore decisive — the trial judge’s findings of fact related to the evidence of the complainant M.L. and that of her sister G.L., the respondent’s wife, who testified for the defendant. In particular, Pelletier J.A. considered unreasonable, because it was contrary to the evidence, the trial judge’s finding that there was no inconsistency between the testimony of G.L. and M.L. (A.R., vol. I, at p. 73; C.A. judgment, at paras. 112-17).

[30] The trial judge appears to have excused this inconsistency, at least in part, on the strength of jurisprudence which holds that child witnesses, or those testifying to events that occurred while they were children, are not held to the same standard as other witnesses (A.R., vol. I, at pp. 67-69). Yet, the complainant in this case falls into neither category. An adult witness at the time of trial, she was a teenager and not a child of tender years at the time of the alleged offences. Moreover, childhood and the passage of time may well excuse memory gaps or hazy recollection, but not precise allegations that are directly contradicted — as in this case.

[31] As we shall presently see, the trial judge erred as well in rejecting G.L.’s evidence for unsustainable reasons. He also ignored M.L.’s own evidence confirming important aspects of G.L.’s testimony tending to show that R.P. could not have assaulted M.L. as the latter alleged.

[32] In short, I agree with the majority in the Court of Appeal that the trial judge’s reasons do not resist scrutiny, even when viewed through the mandatory lens of deference. I agree as well that, on the record before us, no trier of fact could reasonably

il ou elle tient « un raisonnement illogique ou irrationnel » qui appelle l’intervention du tribunal d’instance supérieure (*R. c. Sinclair*, 2011 CSC 40, [2011] 3 R.C.S. 3, par. 15-16).

[29] À cet égard, le juge Pelletier de la Cour d’appel a jugé que les conclusions de fait du juge du procès relatives aux témoignages de la plaignante M.L. et de sa sœur G.L. — l’épouse de l’intimé, qui a témoigné en faveur de ce dernier — étaient cruciales dans son raisonnement et, par conséquent, décisives. Plus particulièrement, pour le juge Pelletier, la conclusion du juge du procès selon laquelle le témoignage de G.L. était compatible avec celui de M.L. était déraisonnable parce qu’elle était contraire à la preuve (d.a., vol. I, p. 73; jugement de la C.A., par. 112-117).

[30] Le juge du procès semble avoir excusé ces contradictions, du moins en partie, en se fondant sur une jurisprudence selon laquelle les témoins enfants ou les témoins qui relatent des événements survenus lorsqu’ils étaient enfants ne sont pas assujettis à la même norme que les autres témoins (d.a., vol. I, p. 67-69). Or, la plaignante en l’espèce n’appartient à ni l’une ni l’autre de ces catégories. Un témoin adulte au moment du procès, elle était une adolescente et non une enfant en bas âge au moment où les crimes présumés auraient été commis. En outre, si l’enfance et le passage du temps peuvent excuser certains trous de mémoire ou le flou de certains souvenirs, ils ne peuvent pas excuser les allégations précises directement contredites — comme celles entendues en l’espèce.

[31] Comme nous le verrons, le juge du procès a aussi commis une erreur en rejetant le témoignage de G.L. pour des motifs intenable. Qui plus est, il n’a pas tenu compte du témoignage de M.L. qui, lui-même, confirmait d’importants aspects du témoignage de G.L. tendant à démontrer que R.P. n’a pas pu agresser M.L., comme elle le prétend.

[32] Bref, je souscris à l’opinion des juges majoritaires de la Cour d’appel selon laquelle les motifs du juge de première instance ne résistent pas à un examen attentif, même lorsqu’ils sont évalués, comme il se doit, avec un regard empreint de la

conclude that R.P. is guilty beyond a reasonable doubt of the offence with which he was charged.

[33] In the result, I would dismiss the Crown's appeal.

II

[34] R.P. was convicted of indecent assault under what was s. 149 of the *Criminal Code* at the time of the alleged offences (R.S.C. 1970, c. C-34). The complainant, M.L., testified that R.P. had sexually abused her on regular and frequent occasions between 1974 and 1979, when she was between 13 and 17 and he was between 27 and 32.

[35] The Crown called four witnesses: M.L., the police officer who took her complaint, and the two officers who interrogated R.P. R.P., his wife G.L. — the complainant's sister — and their daughter C.P. testified for the defence. As Justice Deschamps mentions, the evidence in the case was entirely testimonial — the Crown adduced no material evidence. This is hardly surprising, since the offences were said to have been committed many years earlier.

[36] The complainant testified that the abuses occurred in four different situations, all involving her visits to the home of R.P. and his wife G.L. to babysit their children.

[37] First, M.L. alleged that R.P. assaulted her sexually during the two occasions when G.L. was in the hospital giving birth to her second and third children. As we shall see, this was a critical feature of her narrative. And, as we shall see as well, M.L. later conceded that she could not remember whether she — or someone else — had in fact babysat when her sister went to the hospital to give birth.

déférence voulue. Je suis aussi d'accord avec eux pour dire que, compte tenu de la teneur du dossier porté à notre connaissance, aucun juge des faits ne pouvait conclure raisonnablement que R.P. est coupable hors de tout doute raisonnable de l'infraction dont il a été accusé.

[33] En conséquence, je suis d'avis de rejeter le pourvoi du ministère public.

II

[34] R.P. a été déclaré coupable d'attentat à la pudeur, un crime visé par l'ancien art. 149 du *Code criminel*, S.R.C. 1970, ch. C-34, en vigueur au moment où les infractions auraient été commises. La plaignante, M.L., a affirmé que R.P. l'avait agressée sexuellement régulièrement et à de nombreuses reprises entre 1974 et 1979, lorsqu'elle était âgée de 13 à 17 ans, et l'accusé de 27 à 32 ans.

[35] Le ministère public a fait entendre quatre témoins : M.L., le policier qui a reçu sa plainte et les deux policiers qui ont interrogé R.P. Ce dernier, son épouse G.L. — la sœur de la plaignante — et leur fille C.P. ont témoigné pour la défense. Comme le mentionne la juge Deschamps, tous les éléments de preuve du présent dossier sont de nature testimoniale — le ministère public n'ayant fourni aucun élément de preuve matérielle. Cela n'est guère surprenant puisque les infractions auraient été commises il y a de nombreuses années.

[36] Selon la plaignante, les agressions se seraient produites dans quatre types de situations différentes ayant toutes à voir avec ses présences chez R.P. et son épouse G.L. pour garder leurs enfants.

[37] Premièrement, M.L. a prétendu que R.P. l'avait agressée sexuellement les deux fois où G.L. était à l'hôpital pour donner naissance à ses deuxième et troisième enfants. Comme nous le verrons, il s'agit d'un élément crucial de son récit. De plus, comme nous le verrons aussi, M.L. a concédé plus tard qu'elle ne se souvenait pas si elle — ou quelqu'un d'autre — avait bel et bien gardé pendant que sa sœur était à l'hôpital pour accoucher.

[38] Second, M.L. testified that R.P. assaulted her regularly while his wife was home as well, with an unobstructed view from their adjacent bedroom and with the door open. As we shall see, M.L. confirmed the evidence of G.L. regarding the layout of the apartment. Moreover, M.L. could not recall the bedroom door *ever being closed*.

[39] Third, M.L. testified that R.P. often assaulted her sexually when he returned home before his wife while M.L. was babysitting their children. During that period, said M.L., she normally came over to babysit [TRANSLATION] “around twice a week”. Here again, we shall see, the uncontradicted evidence — *largely confirmed by M.L.* — is that R.P. *rarely* came home before his wife.

[40] Finally, M.L. testified that R.P. would sometimes assault her in his car while driving her home after babysitting. As we shall see, for much of the period covered by the indictment, M.L. lived nearby and generally walked home on her own.

III

[41] I turn now to a closer look at each of the four “scenarios” alleged by the Crown.

[42] An integral element of the complainant’s narrative is that R.P. sexually assaulted her while his wife G.L. was about to leave for the hospital to give birth to their second child, while G.L. was in fact in the hospital on that occasion, and again when G.L. was in the hospital giving birth to their third child.

[43] The central importance of this branch of M.L.’s complaint is evident for several reasons.

[38] Deuxièmement, M.L. a affirmé que R.P. l’avait aussi agressée régulièrement pendant que son épouse était à la maison, et ce dans une pièce visible de leur chambre adjacente dont la porte restait ouverte. Comme nous le verrons, M.L. a confirmé le témoignage de G.L. quant à la disposition des pièces de l’appartement. En outre, M.L. a affirmé ne pas se souvenir *d’avoir jamais vu la porte de la chambre à coucher fermée*.

[39] Troisièmement, M.L. a affirmé que R.P. l’avait souvent agressée sexuellement lorsqu’il revenait à la maison avant son épouse pendant que M.L. gardait leurs enfants. Selon elle, durant cette période, elle allait garder les enfants chez sa sœur régulièrement, soit « environ deux fois par semaine ». Ici encore, nous verrons que selon les éléments de preuve non contredits — *et confirmés en grande partie par M.L.* — R.P. revenait *rarement* à la maison avant son épouse.

[40] Finalement, selon le témoignage de M.L., R.P. l’aurait parfois agressée dans sa voiture lorsqu’il allait la reconduire à la maison après qu’elle eut gardé chez lui. Comme nous le verrons, pour une grande partie de la période couverte par l’acte d’accusation, M.L. vivait à proximité du domicile de R.P. et retournait chez elle à pied la plupart du temps.

III

[41] Je me penche maintenant plus attentivement sur chacun des quatre « scénarios » allégués par le ministère public.

[42] Un élément essentiel du récit de la plaignante porte sur le fait que R.P. l’aurait agressée sexuellement pendant que son épouse G.L. était sur le point de se rendre à l’hôpital pour accoucher de leur deuxième enfant, pendant que G.L. était à l’hôpital à l’occasion de cette naissance et, à nouveau, pendant que G.L. était à l’hôpital pour accoucher de leur troisième enfant.

[43] La grande importance de ce volet de la plainte de M.L. est manifeste pour plusieurs raisons. En

According to M.L., the very first incident of abuse occurred on the night just prior to G.L. entering the hospital to give birth to her second child. M.L. testified that she was asked to stay over that night because G.L. was scheduled to go to the hospital early the next morning and someone had to look after the first child. She highlighted this element of her narrative not only in her evidence at trial but also in two letters she wrote to G.L. before going to the police:

[TRANSLATION] Like I said, it all started when I was babysitting, until what Age? And when I say that it happened when you were going to the hospital to have a baby, I remember very Well, because I was sleeping on the SOFA on [. . .] Street. I don't give a DAMN whether you BELIEVE me or not, because it's the TRUTH.

And again:

Like I said, it started on [. . .] Street. I know this will be painful for you. You had [C.] and you were ABOUT to have your 2nd baby. You had me COME OVER that NIGHT to sleep there, because you were going to the hospital the next day to have the baby, and to babysit the kid. This will hurt you, because he TOOK ADVANTAGE while you were SLEEPING and each time you went to the hospital to have a baby.

[44] G.L. testified, however, that *M.L. had in fact not babysat on either of the occasions she mentioned*. On the eve of her entering the hospital to give birth to her second child, said G.L., she brought her first child to stay with her mother. During the birth of her third child, it was both her mother and her brother who cared for the other two.

[45] Confronted with this evidence on cross-examination, M.L. *did not contradict G.L.* She could only say, repeatedly, [TRANSLATION] “I have no idea. I don't know”:

[TRANSLATION]

Q. And when the second child, [D.], was born . . .

A. Yes.

effet, selon cette dernière, le tout premier incident d'abus s'est déroulé la veille de l'entrée à l'hôpital de G.L. qui s'y est rendue pour accoucher de son deuxième enfant. M.L. a affirmé qu'on lui avait demandé de rester pour la nuit parce qu'il était prévu que G.L. se rende à l'hôpital tôt le lendemain matin et qu'il fallait que quelqu'un soit présent pour prendre soin du premier enfant du couple. Elle a insisté sur cet élément de son récit non seulement lors de son témoignage durant le procès, mais également dans deux lettres qu'elle a écrites à G.L. avant de porter plainte à la police et dont je reproduis ici textuellement deux extraits :

Comme j'ai dit tout cela a commencé quand je gardait, jusqu'à quel Âge? Et quand je dit que cela c'est produit quand tu allais à l'hôpital pour accoucher, je me souviens très Bien parce que je couchait sur le DIVAN sur la Rue [. . .] Que tu me CROIS où pas je m'en CHRIST car cela est la VÉRITÉ.

Et encore :

Comme je disais cela a commencé sur la Rue [. . .]. Je sais que cela va être pénible pour toi. Tu avais [C.] et tu était sur le BORD d'accoucher du 2^e. Tu m'avait fait VENIR le SOIR pour coucher parce que le lendemain tu entrerait à l'hôpital pour accoucher, et garder le petit. Ça va te faire mal parce que pendant que tu DORMAIS, il en PROFITAIT et à chaque fois que tu entrerait à l'hôpital pour accoucher.

[44] Or, selon le témoignage de G.L., *M.L. n'a en fait gardé ni à l'une ni à l'autre des occasions auxquelles elle a fait allusion*. La veille de son entrée à l'hôpital pour donner naissance à son deuxième enfant, G.L. soutient qu'elle a emmené son premier enfant chez sa mère et que lors de l'accouchement de son troisième enfant, c'est sa mère et son frère qui ont pris soin de ses deux aînés.

[45] Confrontée à ce témoignage durant son contre-interrogatoire, M.L. *n'a pas contredit les propos de G.L.* Elle ne faisait que répéter : « Aucune idée, je m'en souviens pas » :

Q. Et lors de l'accouchement du deuxième enfant, soit [D.]. . .

R. Oui.

Q. . . . who sat [C.]?

A. While she was in hospital to have the baby, you mean?

Q. Yes.

A. Well I did.

Q. If I suggested that it was your mother, that [C.] was left with your parents when [D.] was born, wouldn't that be more accurate?

A. . . . I have no idea. I don't remember.

Q. When the second child, [K.], was born . . .

A. She was the third.

Q. The third. I'm sorry; you're right. Excuse me. When the third child, [K.], was born, do you remember who babysat [C.] and [D.]?

A. . . . No, I don't remember.

Q. If I suggested that your brother [P.] babysat [C.] . . . I'm sorry, that your brother [P.] babysat [D.] and your mother babysat [C.] when [K.] was born, would that be right?

A. I have no idea. I don't remember.

Q. You don't remember?

A. No.

[A.R., vol. II-A, at pp. 177-78]

In his reasons for judgment, the trial judge did not mention at all M.L.'s admission that she had "no idea" and "did not remember" who had babysat on those occasions.

[46] But for M.L.'s repeated concession that she could not remember who babysat on either occasion when G.L. went to the hospital to give birth, it was perhaps open to the trial judge to reject the evidence of G.L. and to accept the earlier evidence of M.L. In my respectful view, however, the judge could not rationally have rejected or disregarded G.L.'s evidence for the reasons he gave — a matter to which I shall later return. Nor could he have reasonably concluded, as he did, that G.L.'s evidence — uncontradicted in light of M.L.'s evidence that she did not remember — was consistent with

Q. . . . qui gardait [C.]?

R. Pendant qu'elle accouchait à l'hôpital, c'est ça?

Q. Oui.

R. Bien c'est moi qui le gardais.

Q. Si je vous suggère que c'est votre mère, c'est chez vos parents qu'avait été confié [C.] lors de l'accouchement de [D.], ce ne serait pas plutôt exact?

R. . . . Aucune idée, je ne me souviens pas.

Q. Lors de la naissance du deuxième enfant, [K.]. . .

R. C'est la troisième.

Q. Troisième, excusez-moi, vous avez raison. Excusez-moi. Lors de la naissance du troisième enfant, [K.], qui gardait [C.] et [D.], vous souvenez-vous?

R. . . . Non, là je ne me souviens pas.

Q. Si je vous suggère que votre frère [P.] a gardé [C.]. . . Excusez-moi. Que [D.] a été gardé par votre frère [P.] et que [C.] a été gardé par votre mère lors de l'accouchement de la naissance de [K.], est-ce que ce serait exact?

R. Aucune idée, je m'en souviens pas.

Q. Vous ne vous en souvenez pas?

R. Non.

[d.a., vol. II-A, p. 177-178]

Dans ses motifs de jugement, le juge du procès n'a pas du tout mentionné l'admission de M.L. selon laquelle elle n'avait « aucune idée » et « ne [s]e souv[enait] pas » de l'identité de celui ou de celle qui avait gardé les enfants à ces occasions.

[46] En ne tenant pas compte des admissions répétées de M.L. selon lesquelles elle ne se souvenait pas de l'identité de celui ou de celle qui avait gardé les enfants les deux fois où G.L. s'est rendue à l'hôpital pour accoucher, le juge de première instance pouvait à bon droit rejeter le témoignage de G.L. et accepter le témoignage antérieur de M.L. Avec égards, je suis toutefois d'avis que le juge ne pouvait rationnellement rejeter le témoignage de G.L. ou ne pas en tenir compte pour les motifs qu'il a exposés — une question sur laquelle je vais revenir ultérieurement. Il ne peut pas non plus avoir

M.L.'s earlier allegations of abuse on both occasions.

[47] Regarding the second situation — the abuses that occurred at the house when G.L. was asleep — the trial judge himself specified that this scenario occurred [TRANSLATION] “regularly” (A.R., vol. I, at p. 56). However, G.L. testified that R.P. almost always went to bed before her because he started work early and she, a housewife, was a late-to-bed type, generally turning in between 11:30 p.m. and 1:00 a.m.

[48] Moreover, G.L. testified that she always kept her bedroom door open in order to hear if the children woke up. M.L. confirmed G.L.'s evidence in this regard and could not recall the bedroom door *ever being closed* while she was there. Consider also that M.L. testified that, save for one exception she could remember, the abuses *always* occurred on the couch in the living room. In their home from 1974-1977, the bedroom faced directly on the living room and, lying in her bed, G.L. said she *could actually see the living room couch*. M.L. also testified that when R.P. would ejaculate on her, she would walk to the bathroom to wash herself, still disrobed. In the couple's next home, where they lived from 1977-1978, the evidence of G.L. indicated that one had to pass directly in front of the bedroom in order to get to the bathroom, a fact M.L. did not deny when cross-examined in this regard.

[49] One would expect that G.L., a light sleeper suffering from insomnia, would at some point have heard or seen what M.L. alleged was happening, regularly and frequently, a few feet away, within her direct view. But M.L. confirmed that this had never occurred. Nor, according to M.L., were the frequent abuses over a period of almost five years

raisonnablement conclu, comme il l'a fait, que le témoignage de G.L. — non contredit compte tenu du témoignage de M.L. selon lequel elle ne se souvenait pas — était compatible avec les allégations formulées antérieurement par M.L. selon lesquelles elle a été agressée à ces deux occasions.

[47] Quant au deuxième type de situations — les agressions qui se seraient déroulées à la maison pendant que G.L. dormait —, le juge du procès lui-même a précisé que ce scénario survenait « régulièrement » (d.a., vol. I, p. 56). Toutefois, G.L. a affirmé que R.P. allait pratiquement toujours se coucher avant elle parce qu'il travaillait tôt et qu'elle, une femme au foyer, était une couche-tard et allait généralement se coucher entre 23 h 30 et 1 h.

[48] En outre, selon son témoignage, G.L. gardait toujours la porte de sa chambre ouverte pour pouvoir entendre les enfants s'ils se réveillaient. M.L. a confirmé le témoignage de G.L. à cet égard et ne pouvait se souvenir *d'une seule fois où la porte de la chambre a été fermée* pendant qu'elle était sur place. Il ne faut pas oublier non plus que selon le témoignage de M.L., sauf à une occasion dont elle se souvient, les agressions se seraient *toujours* produites sur le canapé du séjour. Or, dans la maison que R.P. et son épouse ont habitée de 1974 à 1977, la chambre à coucher était située directement en face du séjour et, couchée dans son lit, G.L. soutient qu'elle *pouvait de fait voir le canapé qui s'y trouvait*. M.L. a aussi affirmé que quand R.P. éjaculait sur elle, elle se rendait jusqu'à la salle de bain pour se laver, toujours dévêtue. Dans la maison qu'a ensuite occupée le couple, soit en 1977 et 1978, il fallait, selon le témoignage de G.L., passer directement devant la chambre pour se rendre dans la salle de bain, ce que n'a pas nié M.L. lorsqu'elle a été contre-interrogée à ce sujet.

[49] Dans les circonstances, on s'attendrait à ce que G.L., une personne au sommeil léger et souffrant d'insomnie, ait à un certain moment entendu ou vu ce que M.L. prétend qu'il se déroulait régulièrement et fréquemment, à quelques pieds de distance, à sa vue. Or, M.L. a confirmé que cela ne s'était jamais produit. Toujours selon elle, jamais

ever once suddenly interrupted because of apprehended discovery.

[50] The third circumstance in which the abuses were alleged to have occurred was on babysitting nights when R.P. would return home before G.L. G.L.'s testimony is inconsistent with M.L.'s allegations of regular abuse in this circumstance because R.P. returned home before G.L. very rarely.

[51] M.L. corroborated G.L.'s assertion that the only two reasons for which M.L. was called upon to babysit (unless G.L. and R.P. went out together, in which case the abuse would fall under the second circumstance) was when G.L. was playing bingo or seeing her mother. On these evenings, a babysitter was necessary when R.P. was also out, working as an usher — which M.L. confirmed. G.L. testified that R.P. worked late, usually until 10:45-11:00 p.m. Regarding the nights when G.L. was seeing her mother, M.L. confirmed G.L.'s evidence that their mother always went to bed early, around 9:30-10:00 p.m. To this extent, M.L. again lent support to G.L.'s evidence that she was likely to get home before R.P. on those nights. Bingo nights, according to G.L., always ended around 10:30 p.m. and it took her 15 minutes to walk home.

[52] In general, G.L. was adamant that only rarely did R.P. arrive home before her. Her evidence, once again, stands uncontradicted.

[53] Finally, we are left with the fourth circumstance — sexual assaults alleged by M.L. to have occurred in the car when R.P. drove her home. According to both G.L. and M.L., for the first five years covered by the indictment, 1974-1978, M.L. *almost always walked home* because the distance was very short. From 1978-1979, the couple lived in a home that was a 20-minute drive from M.L.'s

les fréquentes agressions qui sont survenues durant une période de près de cinq ans n'ont été soudainement interrompues par crainte qu'elles ne soient découvertes.

[50] Troisièmement, des agressions se seraient produites lorsque M.L. gardait les enfants et que R.P. était de retour à la maison avant G.L. Or, le témoignage de cette dernière est incompatible avec les allégations formulées par M.L. — selon lesquelles les agressions étaient fréquentes dans ces circonstances — parce que R.P. revenait très rarement à la maison avant G.L.

[51] M.L. a corroboré l'affirmation de G.L. selon laquelle elle n'a été appelée à garder que pour deux raisons (sauf si G.L. et R.P. sortaient ensemble auquel cas les agressions se seraient déroulées selon le deuxième type de circonstances) : si G.L. allait jouer au bingo ou si elle allait voir sa mère. Ces soirs-là, il fallait une gardienne si R.P. sortait lui aussi pour travailler comme placier — ce qu'a confirmé M.L. G.L. a précisé que R.P. travaillait tard, habituellement jusqu'à 22 h 45, 23 h. Quant aux soirs où G.L. rendait visite à sa mère, M.L. a confirmé le témoignage de G.L. selon lequel leur mère se couchait toujours tôt, soit vers 21 h 30, 22 h. Dans cette mesure, M.L. a encore soutenu le témoignage de G.L. quand elle a précisé qu'il était fort probable qu'elle rentre à la maison avant R.P. ces soirs-là. Selon G.L., les soirées de bingo se terminaient toujours vers 22 h 30 et il lui fallait 15 minutes pour retourner chez elle à pied.

[52] En règle générale, G.L. a soutenu avec force que ce n'était que rarement que R.P. arrivait à la maison avant elle. Encore une fois, son témoignage n'a pas été contredit.

[53] Finalement, il ne nous reste que le quatrième type de circonstances à examiner — soit lorsque les agressions sexuelles présumées se seraient déroulées, selon M.L., dans la voiture lorsque R.P. la reconduisait chez elle. Tant selon G.L. que selon M.L., durant les cinq premières années visées par l'acte d'accusation, soit de 1974 à 1978, M.L. *retournait pratiquement toujours chez elle à pied* compte tenu

residence. During that period, however, M.L. testified that she babysat relatively infrequently.

[54] To the extent that the trial judge rejected or disregarded the testimony of G.L., he did so for unsustainable reasons.

[55] First, the trial judge faulted G.L. for being suspiciously precise in her recollection of dates and times. It was, he said, [TRANSLATION] “unlikely that she could remember, thirty (30) years later, so many specific details about the comings and goings of the accused and herself and the times at which they got home” (A.R., vol. I, at p. 73). In fact, *nowhere in her evidence* does G.L. purport to recall the “specific details” imputed to her by the trial judge. In fact, as the trial judge himself recognized, G.L. repeatedly used terms like “generally, almost always, most of the time, maybe, I don’t remember and approximately” (A.R., vol. I, at p. 73). In short, the trial judge appears to have given no weight to G.L.’s testimony for one reason unsupported by the record, and a second reason that contradicts the first: That she was too general — and too precise.

[56] Second, the trial judge found that G.L. had chosen to believe R.P. because she is [TRANSLATION] “related” to her husband (A.R., vol. I, at p. 73), disregarding the fact that she was also closely related to the complainant, her sister. It seems to me unacceptable as well to reject on the ground of relationship the evidence of *the only person* who could — other than the complainant or the accused — testify to the layout of their previous homes, to R.P.’s daily schedules and routines, and to the circumstances surrounding her giving birth. And I recall here once again that the *complainant confirmed much of G.L.’s evidence in each of these regards*.

[57] The final reason the trial judge gave for disregarding G.L.’s testimony was that it was not inconsistent with M.L.’s. This conclusion, as we have

de la courte distance à parcourir. En 1978 et 1979, le couple vivait dans une maison située à 20 minutes en voiture de la résidence de M.L. Or, de l’aveu même de M.L., durant cette période, elle a gardé relativement peu souvent.

[54] Dans la mesure où le juge du procès a rejeté le témoignage de G.L. ou n’en a pas tenu compte, il l’a fait pour des motifs intenable.

[55] Premièrement, le juge du procès a tenu rigueur à G.L. pour avoir eu des souvenirs des dates et des heures si précis que cela, selon lui, en était suspect. Il était, a-t-il dit, « invraisemblable qu’elle puisse se souvenir, trente (30) ans plus tard, d’autant de détails précis sur les allées et venues et d’heures d’entrée de l’accusé et d’elle-même » (d.a., vol. I, p. 73). En fait, *nulle part dans son témoignage* G.L. ne prétend-elle se souvenir des « détails précis » que le juge du procès lui attribue. En fait, comme ce dernier l’a lui-même reconnu, G.L. a utilisé à répétition des expressions telles « généralement, pas mal tous les jours, la plupart du temps, peut-être, pas souvenir et environ » (d.a., vol. I, p. 73). Bref, le juge du procès semble n’avoir accordé aucun poids au témoignage de G.L. d’abord pour un motif qui n’est pas étayé par le dossier et ensuite pour un autre qui contredit le premier, soit qu’elle était à la fois trop précise et trop vague.

[56] Deuxièmement, le juge du procès a conclu que G.L. avait choisi de croire R.P. parce qu’elle est « une personne liée » à son mari (d.a., vol. I, p. 73), négligeant le fait qu’elle était aussi étroitement liée à la plaignante, sa sœur. Il me paraît également inacceptable de rejeter, sur la foi des liens entre les personnes en cause, le témoignage de *la seule personne* qui — outre la plaignante ou l’accusé — pouvait témoigner quant à la disposition des pièces dans leurs maisons précédentes, quant aux routines et à l’horaire quotidien de R.P. et quant aux circonstances entourant ses accouchements. Je le rappelle ici, encore une fois, la *plaignante a confirmé de larges pans du témoignage de G.L. quant à chacun de ces éléments de faits*.

[57] Le dernier motif sur lequel le juge du procès a fondé sa décision de ne pas tenir compte du témoignage de G.L. tenait à l’absence d’incompatibilité

seen, is plainly incompatible with the Crown's case against the accused, with the record as a whole and, more particularly, with M.L.'s own evidence. In arriving at a different conclusion, Justice Deschamps writes:

In [the trial judge's] view, the testimony of the respondent's wife [TRANSLATION] "does not, having regard to the evidence as a whole, interfere with that of the complainant, since it also admits of occasions when she was alone with the accused" The trial judge also noted that the respondent had not denied being alone with the complainant in the house or in his car when he drove her home at night. [para. 18]

[58] But this was not the Crown's case against the respondent at trial. Nor is it the Crown's position in this Court. On the contrary, the Crown insists that [TRANSLATION] "the instances of abuse were numerous and occurred routinely" (transcript, at p. 16) and were not isolated "occasions when she was alone with the accused", either in the respondent's home or in his car.

[59] The complainant herself testified that she babysat the children of G.L. and R.P. twice a week during most of the relevant period. Asked whether the abuse [TRANSLATION] "was repeated practically every time", she replied: "That's right" (A.R., vol. II-A, at p. 159).

[60] In short, the complainant testified that she was abused by R.P. while babysitting when G.L. was in the hospital giving birth to their second and third children. G.L. testified that the complainant *did not babysit on either occasion*. The complainant's evidence was that R.P. again abused her [TRANSLATION] "practically every time" she babysat during the five years covered by the indictment. G.L. testified that R.P. was rarely home without her and that, when home, she had an unobstructed view of the scene of the alleged abuse during much of the relevant period.

entre ce dernier et celui de M.L. Comme nous l'avons vu, cette conclusion est carrément incompatible avec la preuve à charge présentée par le ministère public, avec le dossier dans son ensemble et, plus particulièrement, avec le témoignage de M.L. lui-même. La juge Deschamps qui conclut autrement écrit que :

Selon [le juge du procès], le témoignage de l'épouse de l'intimé « n'interfère pas dans celui de la plaignante, compte tenu de l'ensemble de la preuve, puisqu'il laisse place, au surplus, à des moments où elle était seule avec l'accusé » [. . .]. Le juge note aussi que l'intimé ne nie pas s'être trouvé seul avec la plaignante à la maison ou dans son automobile lorsqu'il allait la reconduire en fin de soirée. [par. 18]

[58] Or, cela ne correspond ni à la thèse du ministère public ni à la preuve à charge présentée contre l'intimé au procès. Cela n'est pas non plus la position qu'a défendue le ministère public devant la Cour. Au contraire, ce dernier a insisté pour dire que « les abus ont été nombreux et routiniers » (transcription, p. 16) — et non pas des événements isolés « à des moments où elle était seule avec l'accusé », soit dans la maison de l'intimé, soit dans sa voiture.

[59] La plaignante elle-même a affirmé qu'elle a gardé les enfants de G.L. et de R.P. deux fois par semaine durant la majorité de la période pertinente. Lorsqu'on lui a demandé si les agressions « se répétaient pratiquement à chaque fois », elle a répondu : « Exact » (d.a., vol. II-A, p. 159).

[60] Bref, la plaignante a affirmé qu'elle a été agressée par R.P. lorsqu'elle gardait pendant que G.L. était à l'hôpital pour donner naissance à leurs deuxième et troisième enfants. Or, selon le témoignage de cette dernière, la plaignante *n'a gardé à ni l'une ni l'autre de ces occasions*. D'après le témoignage de la plaignante, R.P. l'aurait agressée « pratiquement à chaque fois » qu'elle gardait durant les cinq ans visés par l'acte d'accusation. G.L. a affirmé, pour sa part, que R.P. était rarement à la maison sans qu'elle y soit et que, lorsqu'elle était présente, elle avait une vue non obstruée du lieu où les agressions se seraient produites durant une grande partie de la période pertinente.

[61] It thus seems to me unreasonable, if I may say so with respect, to find that G.L.'s testimony does not [TRANSLATION] "interfere with" — or tend to contradict or render implausible — the evidence of the complainant, M.L.

IV

[62] For all of these reasons, as stated at the outset, I would dismiss the Crown's appeal and affirm the respondent's acquittal by the Court of Appeal.

Appeal allowed, LEBEL and FISH JJ. dissenting.

Solicitor for the appellant: Poursuites criminelles et pénales du Québec, Québec.

Solicitors for the respondent: Savard, Pigeon, Lévis.

[61] En conséquence, cela étant dit avec égards, il me semble déraisonnable de conclure que le témoignage de G.L. « n'interfère pas » avec celui de la plaignante M.L. — ou ne tend pas à le contredire ou à le rendre peu plausible.

IV

[62] Pour tous ces motifs, comme je l'ai exprimé dès le départ, je suis d'avis de rejeter le pourvoi du ministère public et de confirmer l'acquiescement de l'intimé prononcé par la Cour d'appel.

Pourvoi accueilli, les juges LEBEL et FISH sont dissidents.

Procureur de l'appelante : Poursuites criminelles et pénales du Québec, Québec.

Procureurs de l'intimé : Savard, Pigeon, Lévis.

Tab 2:
R. v. Goleski,
2014 BCCA 80,
aff'd 2015 SCC 6

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *R. v. Goleski*,
2014 BCCA 80

Date: 20140303
Docket: CA039155

Between:

Regina

Appellant

And

Grant Anthony Goleski

Respondent

Corrected Judgment: The text of the judgment was corrected at paragraph 35 on
February 16, 2015.

Before: The Honourable Madam Justice Newbury
The Honourable Mr. Justice Frankel
The Honourable Madam Justice Garson

On appeal from: An order of the Supreme Court of British Columbia, dated
July 7, 2011 (*R. v. Goleski*, 2011 BCSC 911, Williams Lake Docket No. 27224).

Counsel for the Appellant:

M.T. Ainslie, Q.C.
and J.R.W. Caldwell

Counsel for the Respondent:

A.S. Jaswal

Place and Date of Hearing:

Vancouver, British Columbia
December 13, 2013

Place and Date of Judgment:

Vancouver, British Columbia
March 3, 2014

Written Reasons by:

The Honourable Mr. Justice Frankel

Concurred in by:

The Honourable Madam Justice Newbury
The Honourable Madam Justice Garson

Summary:

By virtue of s. 794(2) of the Criminal Code, an accused who asserts a “reasonable excuse” for failing or refusing to comply with a breathalyzer demand bears the burden of proving the factual foundation for that excuse on a balance of probabilities.

Reasons for Judgment of the Honourable Mr. Justice Frankel:**Introduction**

[1] This appeal concerns where the onus lies when an accused asserts that he or she had a reasonable excuse for failing or refusing to comply with a breathalyzer demand. Must the Crown prove the accused did not have a reasonable excuse beyond a reasonable doubt, or must the accused prove on a balance of probabilities the facts asserted as giving rise to a reasonable excuse? The answer to that question rests on the interpretation of s. 794(2) of the *Criminal Code*, R.S.C. 1985, c. C-46.

[2] Grant Anthony Goleski was tried and convicted by Judge Bayliff of the Provincial Court of British Columbia. The Crown proceeded summarily. Mr. Goleski testified he deliberately refused to comply with a breathalyzer demand because he believed the investigating officer would not accurately report the results. That belief was premised on the officer having lied to Mr. Goleski about why he stopped the vehicle Mr. Goleski was driving. The trial judge held that the persuasive burden was on Mr. Goleski to establish a reasonable excuse on a balance of probabilities. Being of the view that both Mr. Goleski and the officer were believable witnesses, the trial judge found Mr. Goleski had failed to meet that burden.

[3] Mr. Goleski appealed his conviction to the Supreme Court of British Columbia. Mr. Justice Leask held that the trial judge erred in placing the burden on Mr. Goleski. He concluded Mr. Goleski was only required to meet an evidentiary burden and that the persuasive burden was on the Crown to prove the lack of a reasonable excuse beyond a reasonable doubt. The appeal judge set Mr. Goleski's conviction aside and entered an acquittal.

[4] The Crown now appeals to this Court, pursuant to leave having been granted by a judge in chambers.

[5] For the reasons that follow, I would allow this appeal. As I will explain, when s. 794(2) of the *Code* is engaged, the persuasive burden rests with the accused.

Factual Background

[6] During the late evening hours of February 1, 2006, Mr. Goleski was driving a pickup truck in Williams Lake, British Columbia. That truck was pulled over by Constable Dustin Meikle of the Royal Canadian Mounted Police.

[7] Constable Meikle testified that before pulling the truck over he had seen it fail to stop at two stop signs. He also testified he followed the truck and determined it was travelling at approximately 85 kilometres per hour, i.e., 25 kilometres per hour over the posted speed limit.

[8] When Mr. Goleski asked Constable Meikle why he pulled the truck over, the officer replied it was because the truck had failed to stop at two stop signs and had been speeding.

[9] Constable Meikle detected the odour of alcohol on Mr. Goleski's breath. When the officer asked Mr. Goleski whether he had been drinking that evening, Mr. Goleski said "he had had a few drinks". Constable Meikle then made a demand of Mr. Goleski to provide a breath sample into an approved (roadside) screening device. Mr. Goleski complied with that demand. The screening device registered a "fail", indicating a blood alcohol concentration of at least 100 milligrams of alcohol per 100 millilitres of blood (i.e., a reading in excess of the legal limit of 80 milligrams of alcohol per 100 millilitres of blood).

[10] Constable Meikle read Mr. Goleski the breathalyzer demand and advised him of his right to counsel. Mr. Goleski said he would comply with the demand and that he did not want to speak with a lawyer. Constable Meikle handcuffed Mr. Goleski and drove him to the police detachment.

[11] Constable Thomas William Erickson, the breathalyzer operator, dealt with Mr. Goleski at the detachment. Mr. Goleski twice refused Constable Erickson's request that he provide samples of his breath.

[12] At trial, Mr. Goleski testified in-chief that he had stopped at both stop signs. He said he was "shocked" and "surprised" when Constable Meikle told him he had not stopped. He said he felt he "was being targeted" and that the officer was being "untruthful", "couldn't be trusted", and "wasn't going to be honest". Mr. Goleski further testified that he was concerned Constable Meikle would "falsify information" in his report of the incident. He explained his reasons for refusing to comply with the demand as follows:

Q Okay. And so why did you refuse at the end of the day?

A That was the reason that I -- that I refused, because he kept on telling me that he saw me run two stop signs, when I know that I didn't, that anything that I told him or anything that he did would be unfair and dishonest.

Q Were you concerned about anything in particular in relation to the breath samples?

A Well, yeah, that he's got to fill out the report for the --

Q The prosecutor?

A No, not for the prosecutor. He had to fill out the paperwork, the results of the breathalyzer samples.

Q Right.

A And I didn't feel that he would do so fairly.

Q Okay. I take it that your concern was not with the breathalyzer operator himself?

A No, not at all.

Q Okay. Did you know, when you were dealing with the breathalyzer operator, who was responsible for filling out the results of the analysis?

A No, I had no idea --

Q Okay.

A -- what the procedure is.

Q And what was your understanding about whether Constable Meikle would be required to submit a report of some kind or not?

A Well, I'm sure he was. He was the arresting officer, so I'm sure he had to fill the paperwork out.

In cross-examination, Mr. Goleski said that “quite possibly” he had been speeding before being stopped by Constable Meikle.

[13] Karen Evelyn Chamberlain, a passenger in the truck, testified Mr. Goleski had stopped at the two stop signs.

Criminal Code Provisions

[14] The following provisions are relevant to this appeal:

253.(1) Every one commits an offence who operates a motor vehicle or vessel or operates or assists in the operation of an aircraft or of railway equipment or has the care or control of a motor vehicle, vessel, aircraft or railway equipment, whether it is in motion or not,

- (a) while the person's ability to operate the vehicle, vessel, aircraft or railway equipment is impaired by alcohol or a drug; or
- (b) having consumed alcohol in such a quantity that the concentration in the person's blood exceeds eighty milligrams of alcohol in one hundred millilitres of blood.

254.(3) If a peace officer has reasonable grounds to believe that a person is committing, or at any time within the preceding three hours has committed, an offence under section 253 as a result of the consumption of alcohol, the peace officer may, by demand made as soon as practicable, require the person

- (a) to provide, as soon as practicable,
 - (i) samples of breath that, in a qualified technician's opinion, will enable a proper analysis to be made to determine the concentration, if any, of alcohol in the person's blood, or
 - (ii) if the peace officer has reasonable grounds to believe that, because of their physical condition, the person may be incapable of providing a sample of breath or it would be impracticable to obtain a sample of breath, samples of blood that, in the opinion of the qualified medical practitioner or qualified technician taking the samples, will enable a proper analysis to be made to determine the concentration, if any, of alcohol in the person's blood; and
- (b) if necessary, to accompany the peace officer for that purpose.

254.(5) Everyone commits an offence who, without reasonable excuse, fails or refuses to comply with a demand made under this section.

794.(1) No exception, exemption, proviso, excuse or qualification prescribed by law is required to be set out or negated, as the case may be, in an information.

(2) The burden of proving that an exception, exemption, proviso, excuse or qualification prescribed by law operates in favour of the defendant is on the defendant, and the prosecutor is not required, except by way of rebuttal, to prove that the exception, exemption, proviso, excuse or qualification does not operate in favour of the defendant, whether or not it is set out in the information.

Trial Decision

[15] At trial, Mr. Goleski argued that, on the basis of the interpretation given to s. 794(2) of the *Criminal Code* in *R. v. Lewko*, 2002 SKCA 121, 169 C.C.C. (3d) 359, he need only raise a reasonable doubt as to whether he had a reasonable excuse. The trial judge declined to follow *Lewko*. In holding that the burden rested on Mr. Goleski to establish a reasonable excuse on a balance of probabilities, she stated:

[23] ..., I do not believe *R. v. Lewko* is the law in British Columbia on this issue. In my view the law in this province is set out in *R. v. Gray* (1986), 30 C.C.C. (3d) 234 a decision of Justice McKinnon, then of the County Court. Although the central issue in *Gray* concerned the Charter right to be presumed innocent until proven guilty (s. 11(d)), a fundamental finding of the court was that the burden of proving “reasonable excuse” is on the accused and the standard of proof is “a preponderance of evidence or a balance of probabilities” (see p. 243).

[24] Not only is this a correct analysis, in my view, of the burden of proof on a defendant who seeks to raise the defence of “reasonable excuse”, but it is also the law that is binding upon me. Accordingly, I conclude that the burden of proof on Mr. Goleski is to establish on a balance of probabilities that he had a “reasonable excuse” for refusing to comply with the breathalyzer demand.

[16] The trial judge accepted that if Constable Meikle had lied to Mr. Goleski about having seen him fail to stop at two stop signs, then it would have been objectively reasonable for Mr. Goleski to believe the officer could not be trusted to accurately record the breathalyzer results. In the judge’s view, such an objective belief would provide a reasonable excuse for refusing the demand. However, the judge found Mr. Goleski had failed to prove the officer had lied. In this regard, she stated:

[29] What is the evidence about whether or not the officer lied about the stop signs? The evidence is conflicting. The officer is adamant that Goleski did not stop. Mr. Goleski and his sober passenger, Ms. Chamberlain, are

equally adamant that he did stop. This is a case where I find both versions believable – put another way, I cannot decide who to believe.

[30] It is at this point that the burden of proof concerning “reasonable excuse” becomes critically important. If, as the defence has argued, the burden of proof on Mr. Goleski is simply the evidentiary burden of raising a reasonable doubt that he had a “reasonable excuse” for refusing, then I would find that Mr. Goleski had met that burden or standard as I am unable to reject his evidence and that of his passenger outright. Their evidence leaves me with at least a reasonable doubt on the question of whether the officer was telling the truth when he said Goleski failed to stop at the stop signs.

[31] However, as noted earlier, it is my view that in British Columbia, at least, the law is that the defendant must establish “reasonable excuse” on the balance of probabilities. In my view Mr. Goleski has not met that burden. I found all of the witnesses credible. Therefore the evidence fails to establish that it is more probable than not that the officer was lying and therefore it fails to establish that Goleski had a “reasonable excuse” for refusing to trust the officer to accurately report the analysis of his breath samples.

[17] In the result, Mr. Goleski was convicted.

Summary Conviction Appeal Decision

(2011 BCSC 911, 18 M.V.R. (6th) 31)

[18] The appeal judge reviewed the case law dealing with the burden of proving a reasonable excuse for failing to comply with a demand in some detail. He noted that the case relied on by the trial judge—*R. v. Gray* (1986), 30 C.C.C. (3d) 234 (B.C. Co. Ct.)—was not binding on him. In *Gray*, Judge McKinnon, as he then was, held, with reference to a number of authorities, that by reason of s. 794(2)—then s. 730(2)—the onus of proving a reasonable excuse was on an accused.

[19] The appeal judge found the reasoning in *Lewko* “persuasive”. As there was no authority to the contrary binding on him, he chose to follow *Lewko*. In the result, he set aside Mr. Goleski’s conviction and entered an acquittal.

Lewko Decision

[20] Mr. Lewko, who was driving a motorcycle, was stopped by a police officer who made a demand that he provide a breath sample into a roadside screening device. While Mr. Lewko was seated in the back of a police vehicle, the officer gave him three opportunities to provide a sample; each time Mr. Lewko failed to provide

an adequate sample. At trial—the Crown proceeded by way of summary conviction—Mr. Lewko asserted that he had a reasonable excuse for not providing adequate samples. He testified he was unable to provide an adequate sample because he was in a cramped position in the back of the police vehicle and was anxious and under stress. In addition, Mr. Lewko called a witness who was qualified to give opinion evidence on the mechanics of breathing and on the effects of stress on a person's ability to breathe.

[21] Without discussing where the onus lies with respect to a reasonable excuse, the trial judge convicted Mr. Lewko stating, in part:

The defence contends that Mr. Lewko has a reasonable excuse inasmuch as his cramped position in the back seat of the motor vehicle. Leaning forward caused him to be positioned in such a way that he possibly could not provide a full breath sample. That also was -- his position in the vehicle was complicated by the fact that he was anxious and under stress, and as Dr. Richardson pointed out, that when one is under stress, their breathing can become shallow and rapid. However, that notwithstanding, there's no evidence whatsoever that he brought to the attention of Sergeant Carlson his inability to blow because of his position or because of his nervous condition.

As the Court pointed out to Dr. Richardson, we all can control our breathing to some extent, even in a stressful situation, and certainly Mr. Lewko was well aware of the fact that he had to provide a breath sample. He was told why the first and indeed why the second test was not adequate, and yet he took no steps to remedy the situation. And, indeed, if anything, his third attempt was even more pathetic than his first two attempts.

On that -- on that basis, I find him guilty of the charge. I find that he did fail without reasonable excuse to provide an appropriate breath sample.

[22] Mr. Lewko appealed his conviction. That appeal was allowed and a new trial ordered on the basis that the trial judge had failed to turn his mind to the issue of *mens rea*: 2001 SKQB 580, 214 Sask. R. 274. In that regard, the appeal judge stated:

[10] While it is for the accused to establish "reasonable excuse" on a balance of probability, it is for the Crown to prove "mens rea" beyond a reasonable doubt. Since the learned trial judge clearly assumed that the defence was one of reasonable excuse, it would appear that he did not turn his mind to the question of whether he was left with a reasonable doubt on the issue of "mens rea". This is a question that he had an obligation to address, particularly in light of the evidence of the expert witness that a combination of stress and cramped position would have (not merely could

have, as the trial judge persisted in saying) made it extremely difficult to maintain both force and duration of expiration, the evidence of both the police officer and the accused of the cramped position of the accused during the attempts, and the evidence of the accused that he was doing his best, despite his failure to provide an adequate sample, and that he was shaking like a leaf.

[Emphasis in original.]

[23] On a further appeal by the Crown, Chief Justice Bayda expressed the view that s. 794(2) places only an evidentiary burden on an accused and that the persuasive burden rests on the Crown. In other words, he held that, on a charge of failing or refusing to comply with a demand for a breath sample, an accused need “only raise the question of the possibility of a reasonable excuse” ... by “produc[ing] sufficient evidence of something that is capable of being a reasonable excuse”: para. 20. Once the issue of reasonable excuse is raised, the Crown must prove beyond a reasonable doubt that the accused did not have a reasonable excuse.

[24] In reaching this conclusion, Bayda C.J.S. agreed with the statement in *McWilliams’ Canadian Criminal Evidence*, 3d ed., loose-leaf (Aurora: Canada Law Book, 2002) at § 25:10120, that the words “except by way of rebuttal” in s. 794(2) “implies” that the ultimate persuasive burden is on the Crown: para. 16.

[25] In explaining how, in his view, s. 794(2) operates, Bayda C.J.S. stated:

[17] The second branch of this subsection in effect provides that the prosecutor is “not required to prove that an . . . excuse . . . does not operate in favour of the defendant . . .”, but when put into a “rebuttal” situation “the prosecutor . . . is required . . . to prove that the excuse . . . does not operate in favour of the defendant.” [Emphasis [by Bayda C.J.S.]] When put in that situation, the prosecutor bears a persuasive burden and the extent of that burden, as it always is when the Crown bears it, is proof beyond a reasonable doubt. The pertinent question then becomes: when does a rebuttal situation arise? If the first branch of the subsection is interpreted in a way that imposes a persuasive burden on the defendant, then no rebuttal situation can ever arise: If the defendant satisfies the burden of proof on the balance of probabilities, that is the end of the matter, and there is nothing to rebut. That interpretation of the first branch renders the second branch redundant and meaningless. On the other hand, if the first branch is interpreted in a way that imposes an evidential burden on the defendant, then a rebuttal situation can arise and does arise if the defendant meets that burden. That interpretation renders the second branch meaningful. Another way of looking

at the matter is simply that you cannot have two contradictory persuasive burdens in relation to the same set of facts.

[18] To interpret s. 794(2) in a manner that imposes an evidential rather than a persuasive burden on the defendant in relation to the defence of reasonable excuse – a defence that admits of excuses not otherwise recognized by law – accords with the way the law treats those defences that are ordinarily recognized by law (e.g. honest but mistaken belief in consent in sexual assault cases; intoxication; necessity, duress, provocation and self-defence). In the latter case, the air of reality test is invoked. And as stated by McLachlin C.J.C. and Bastarache J., writing for the majority in *R. v. Cinous* (2002), 162 C.C.C. (3d) 129 (S.C.C.) at para. 52: “It is trite law that the air of reality test imposes a burden on the accused that is merely evidential, rather than persuasive.” They go on to say that “[t]he air of reality test is concerned only with whether or not a putative defence should be ‘put in play’. . .”. Those are the words used by Dickson C.J.C. in [*R. v. Schwartz*, [1988] 2 S.C.R. 443], to describe an evidential burden. For our purposes, the application of an air of reality test and the imposition of an evidential burden mean the same thing. It is my opinion that, generally speaking, there is no reason in logic or in policy to treat the defence of reasonable excuse differently from the defences ordinarily recognized by law. Situations however will occur where Parliament deems it in the public interest to impose a persuasive burden on a defendant. It did so in respect of the burden of rebutting the presumption contained in s. 224A(1)(a) of the *Criminal Code*, 1953-54 (Can.), c. 51, later s. 237(1)(a) of the *Criminal Code*, R.S.C. 1970, c. C-34 (see [*The Queen v. Appleby*, [1972] S.C.R. 303]; and *R. v. Whyte*, [1988] 2 S.C.R. 3, 42 C.C.C. (3d) 97). Both of these cases are distinguishable from the present case in that not only is the wording of the statutory provision there under consideration different from that in the present case, but the cases involve the rebuttal of a statutory presumption, a circumstance not existent in the present case.

[Emphasis added.]

[26] Chief Justice Bayda went on to disagree with appellate decisions in which it had been held that the predecessors to s. 794(2) placed the burden on the accused to establish a reasonable excuse on a balance of probabilities: paras. 37-39.

[27] With respect to the disposition of the appeal, Bayda C.J.S. held it was implicit in the trial judge’s reasons that he had found that Mr. Lewko had intentionally failed to provide an adequate sample: para. 31. The Chief Justice further held that the reason advanced by Mr. Lewko for not providing an adequate sample—his cramped position coupled with anxiety—was not, as a matter of law, capable of constituting a reasonable excuse: para. 42. In the result, the Crown’s appeal was allowed and Mr. Lewko’s conviction was reinstated.

Issue on Appeal

[28] The single question raised on this appeal concerns the allocation of the persuasive burden when an accused claims to have had a “reasonable excuse” for failing or refusing to provide a breath sample. Both the Crown and Mr. Goleski agree that s. 794(2) of the *Criminal Code* applies to a charge under s. 254(5), i.e., that the “reasonable excuse” in s. 254(5) is an “excuse” under s. 794(2). They further agree that the disposition of this appeal turns on the interpretation of s. 794(2).

[29] What is not in issue is whether Mr. Goleski’s explanation for his refusal is capable of supporting a reasonable excuse. The Crown accepts that if this Court agrees with the reasoning in *Lewko*, then the acquittal entered by the appeal judge must stand.

[30] Last, it should be noted that neither party made submissions based on the provisions of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

History of Section 794 and Similar Provisions

[31] A statute’s history can sometimes provide insight into how its current version should be interpreted: *R. v. Ulybel Enterprises Ltd.*, 2001 SCC 56 at para. 33, [2001] 2 S.C.R. 867; *Chieu v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 3 at para. 34, [2002] 1 S.C.R. 84; *Montréal (City) v. 2952-1366 Québec Inc.*, 2005 SCC 62 at para. 17, [2005] 3 S.C.R. 141; *McDiarmid Lumber Ltd. v. God’s Lake First Nation*, 2006 SCC 58 at para. 46, [2006] 2 S.C.R. 846. Accordingly, what follows is a review of the earlier versions of what is today s. 794 of the *Criminal Code*. In addition, as similar provisions continue to be found in other federal, provincial, and territorial statutes, some of those will be discussed.

Criminal Code and its Predecessors

[32] Section 794 traces its roots back to 1848 in England and the enactment of *An Act to facilitate the Performance of the Duties of Justices of the Peace out of Sessions, within England and Wales, with respect to summary Convictions and Orders*, 11 & 12 Vict, c. 43. Section 14 of that statute, which set out various rules with respect to the hearing of complaints and informations by justices of the peace, concluded as follows:

Provided always, that if the Information or Complaint in any such Case shall negative any Exemption, Exception, Proviso, or Condition in the Statute on which the same shall be framed, it shall not be necessary for the Prosecutor or Complainant in that Behalf to prove such Negative, but the Defendant may prove the Affirmative thereof in his Defence, if he would have Advantage of the same.

[Emphasis added.]

[33] The Parliament of Canada enacted an equivalent provision in 1869, with the passage of *An Act respecting the duties of Justices of the Peace out of Sessions, in relation to summary convictions and orders*, S.C. 1869, c. 31. Section 44 of that statute provided:

If the information or complaint in any case negatives any exemption, exception, proviso, or condition in the Statute on which the same is framed, it shall not be necessary for the Prosecutor or Complainant to prove such negative, but the Defendant may prove the affirmative thereof in his defence, if he would have advantage of the same.

[Emphasis added.]

[34] With some minor changes, this provision became s. 47 of the *Summary Convictions Act*, R.S.C. 1886, c. 178:

If the information or complaint in any case negatives any exemption, exception, proviso or condition in the statute on which the same is founded, it shall not be necessary for the prosecutor or complainant to prove such negative, but the defendant may prove the affirmative thereof in his defence, if he wishes to avail himself of the same.

[Emphasis added.]

[35] On July 1, 1893, *The Criminal Code of Canada, 1892*, S.C. 1892, c. 29, came into force. Section 852 of that statute, found in Part LVIII, “Summary Convictions”, provided:

If the information or complaint in any case negatives any exemption, exception, proviso or condition in the statute on which the same is founded it shall not be necessary for the prosecutor or complainant to prove such negative, but the defendant may prove the affirmative thereof in his defence if he wishes to avail himself of the same.

[Emphasis added.]

Section 852 became s. 717 of the *Criminal Code*, R.S.C. 1906, c. 146.

[36] Section 717 was amended by *An Act to amend the Criminal Code*, S.C. 1909, c. 9, s. 2, to read:

Any exception, exemption, proviso, excuse or qualification, whether it does or does not accompany in the same section the description of the offence in the Act, order, by-law, regulation or other document creating the offence, may be proved by the defendant, but need not be specified or negated in the information or complaint, and whether it is or is not so specified or negated, no proof in relation to the matter so specified or negated shall be required on the part of the informant or complainant.

[Emphasis added.]

This wording was continued in s. 717 of the *Criminal Code*, R.S.C. 1927, c. 36.

[37] The criminal law underwent major changes in the mid-1950s with the coming into force of the *Criminal Code*, S.C. 1953-54, c. 51, on April 1, 1955. This is when the words “except by way of rebuttal” first appeared. Part XXIV of that statute—“Summary Convictions”—contained s. 702, which provided:

(1) No exception, exemption, proviso, excuse or qualification prescribed by law is required to be set out or negated, as the case may be, in an information.

(2) The burden of proving that an exception, exemption, proviso, excuse or qualification prescribed by law operates in favour of the defendant is on the defendant, and the prosecutor is not required, except by way of rebuttal, to prove that the exception, exemption, proviso, excuse or qualification does not operate in favour of the defendant, whether or not it is set out in the information.

[Emphasis added.]

Section 702 became s. 730 of the *Criminal Code*, R.S.C. 1970, c. C-34, and is now s. 794.

Other Federal Enactments

[38] Provisions similar to s. 794 have long been found in Canada's drug laws, starting with s. 10 of *The Opium and Drug Act*, S.C. 1911, c. 17:

If any person charged with an offence against this Act pleads or alleges that he imported, manufactured, sold or offered for sale, or had in his possession, any drug in respect of which the offence is charged, for scientific or medicinal purposes, the burden of proof thereof shall be upon the person so charged.

[Emphasis added.]

In 1920, this statute was renamed *The Opium and Narcotic Drug Act*: see S.C. 1920, c. 31, s. 1.

[39] The *Opium and Narcotic Drug Act*, 1923, S.C. 1923, c. 22, contained the following provisions:

14. Where any person is charged with an offence under paragraphs (a), (d) or (e) of section four of this Act, it shall not be necessary for the prosecuting authority to establish that the accused had not a license from the Minister or was not otherwise authorized to commit the act complained of, and if the accused pleads or alleges that he had such license or other authority the burden of proof thereof shall be upon the person so charged.

15. If any person charged with an offence under section six of this Act pleads or alleges that the drug in question was required for medicinal purposes, or was prescribed for the medical treatment of a person under professional treatment by the accused, or was required for medicinal purposes in connection with his practice as a dentist or veterinary surgeon, as the case may be, the burden of proof thereof shall be upon the person so charged.

[Emphasis added.]

[40] That Act was further amended by adding another offence to the list in s. 14 and by renumbering s. 15 to subs. 15(1) and adding subs. 15(2): see S.C. 1925, c. 20, s. 7. Those provisions became ss. 13 and 14 of the *Opium and Narcotic Drugs Act*, R.S.C. 1927, c. 144. In the following years they underwent some further renumbering and minor changes in wording including the addition of another offence in 1946: see S.C. 1946, c. 11, s. 6.

[41] In the *Opium and Narcotic Drug Act*, R.S.C. 1952, c. 201, those provisions read:

15. Where any person is charged with an offence under paragraph (a), (d), (e), (f), or (g) of subsection (1) of section 4, it is not necessary for the prosecuting authority to establish that the accused had not a licence from the Minister or was not otherwise authorized to commit the act complained of, and if the accused pleads or alleges that he had such licence or other authority the burden of proof thereof shall be upon the person so charged.

16.(1) If any person charged with an offence under section 6 pleads or alleges that the drug in question was required for medicinal purposes, or was prescribed for the medical treatment of a person under professional treatment by the accused, or was required for medicinal purposes in connection with his practice as a dentist or veterinary surgeon, as the case may be, the burden of proof thereof shall be upon the person so charged.

[Emphasis added.]

[42] Section 15 was amended by S.C. 1953-54, c. 38, s. 7, to read:

In any prosecution for an offence under section 4, it is not necessary for the prosecuting authority to establish that the accused did not have a licence under section 3 or was not otherwise authorized to do the act complained of, and if the accused pleads or alleges that he had such licence or other authority the proof thereof lies upon the accused.

[Emphasis added.]

[43] The *Opium and Narcotic Drug Act* was renamed and restructured as the *Narcotic Control Act*, S.C. 1960-61, c. 35. That new statute contained the following provisions:

7.(1) No exception, exemption, excuse or qualification prescribed by law is required to be set out or negated, as the case may be, in an information or indictment for an offence under this Act or under section 406, 407 or 408 of the *Criminal Code* in respect of an offence under this Act.

(2) In any prosecution under this Act the burden of proving that an exception, exemption, excuse or qualification prescribed by law operates in favour of the accused is on the accused, and the prosecutor is not required, except by way of rebuttal, to prove that the exception, exemption, excuse or qualification does not operate in favour of the accused, whether or not it is set out in the information or indictment.

[Emphasis added.]

[44] Other than the renumbering of the sections of the *Criminal Code* referred to in subs. (1), this provision remained the same in the *Narcotic Control Act*, R.S.C. 1970,

c. N-1 and R.S.C. 1985, c. N-1. The *Narcotic Control Act* was repealed effective May 14, 1997, with the coming into force of the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19 (para. 47 below).

[45] In 1961, Part III, “Controlled Drugs”, was added to the *Food and Drugs Act*, S.C. 1952-52, c. 38: see S.C. 1960-61, c. 37. That Part contained the following provision:

34.(1) No exception, exemption, excuse or qualification prescribed by law is required to be set out or negated, as the case may be, in an information or indictment for an offence under section 32 or under section 406, 407 or 408 of the *Criminal Code* in respect of an offence under section 32.

(2) In any prosecution under this Part the burden of proving that an exception, exemption, excuse or qualification prescribed by law operates in favour of the accused is on the accused, and the prosecutor is not required, except by way of rebuttal, to prove that the exception, exemption, excuse or qualification does not operate in favour of the accused, whether or not it is set out in the information or indictment.

[Emphasis added.]

[46] The *Food and Drugs Act* was later amended to add Part IV, “Restricted Drugs”: see S.C. 1968-69, c. 41. That Part contained s. 43, which was worded the same as s. 34. Those sections were later renumbered as ss. 36 and 44, with changes made to the section numbers referred to in them: see R.S.C. 1970, c. F-27. They were further renumbered as ss. 41 and 50, again with some changes to the section numbers referred to in them: see R.S.C. 1985, c. F-27.

[47] Parts III and IV of the *Food and Drugs Act* were repealed by the coming into force of the *Controlled Drugs and Substances Act* in 1997. The latter statute contains the following provision:

48.(1) No exception, exemption, excuse or qualification prescribed by law is required to be set out or negated, as the case may be, in an information or indictment for an offence under this Act or the regulations or under section 463, 464 or 465 of the *Criminal Code* in respect of such an offence.

(2) In any prosecution under this Act, the prosecutor is not required, except by way of rebuttal, to prove that a certificate, licence, permit or other qualification does not operate in favour of the accused, whether or not the qualification is set out in the information or indictment.

[Emphasis added.]

[48] Presently, s. 29 of the *Hazardous Products Act*, R.S.C. 1985, c. H-3, and s. 53 of the *Tobacco Act*, S.C. 1997, c. 13, contain language equivalent to s. 794 of the *Criminal Code* and s. 48 of the *Controlled Drugs and Substances Act*. The “except by way of rebuttal” wording has been in those statutes since they were first enacted: see *Hazardous Products Act*, S.C. 1968-69, c. 42, s. 11; *Tobacco Products Control Act*, R.S.C. 1985, c. 14, s. 19 (4th Supp.).

[49] However, the “except by way of rebuttal” wording is not found in s. 27(3) of the *Trade Unions Act*, R.S.C. 1985, c. T-14, which provides:

Any exception, exemption, proviso, excuse or qualification, whether it accompanies or does not accompany the description of any offence charged under this Act, may be proved by the defendant, but need not be specified in the information, and if it is specified and negated in the information, no proof in relation to the matters specified and negated shall be required on the part of the informant or prosecutor.

[Emphasis added.]

Although the wording of this provision has undergone some minor changes over the years it is, in substance, the same as when first enacted: see *The Trade Unions Act*, S.C. 1872 (35 Vict.), c. 30, s. 19.

Provincial and Territorial Enactments

[50] The “except by way of rebuttal” wording is found in a number of provincial and territorial statutes, including s. 98(2) of the *Offence Act*, R.S.B.C. 1996, c. 338, the history of which I will review shortly. I do not intend to review the history of the other enactments which presently use that wording. To the best of my knowledge, they are:

- *Provincial Offences Procedure Act*, S.N.B. 1987, c. P-22.1, s. 104
- *Species at Risk (NWT) Act*, S.N.W.T. 2009, c. 16, s. 137(1)
- *Provincial Offences Act*, R.S.O. 1990, c. P.33, s. 47(3)
- *Highway Signage Act*, R.S.P.E.I. 1988, c. H-4.1, s. 15
- *Liquor Control Act*, R.S.P.E.I. 1988, c. L-14, s. 65(3)

- *Wildlife Conservation Act*, R.S.P.E.I. 1988, c. W-4.1, s. 30(6)
- *Forest Resources Act*, S.Y. 2008, c. 15, s. 88
- *Wildlife Act*, R.S.Y. 2002, c. 229, s. 180

[51] In addition, s. 794 of the *Criminal Code* applies in a number of jurisdictions by virtue of the following enactments which adopt the summary conviction provisions of the *Criminal Code*:

- *Summary Convictions Act*, R.S.Y. 2002, c. 210, s. 7(1)
- *Summary Conviction Procedures Act*, R.S.N.W.T. 1988, c. S-15, s. 2(1)
- *Provincial Offences Act*, S.N.L. 1995, P-31.1, s. 6(1)
- *Summary Proceedings Act*, R.S.N.S. 1989, c. 450, s. 7(1)
- *The Summary Offences Procedure Act, 1990*, S.S. 1990-91, c. S-63.1, s. 4(4)

[52] However, the “except by way of rebuttal” wording is not found in s. 64 of the *Code of Penal Procedure*, R.S.Q., c. C-25.1, which provides:

The prosecutor is not required to allege in the statement of offence that the defendant does not have, with respect to the offence, the benefit of an exception, exemption, excuse or justification provided for by law.

It is incumbent upon the defendant to establish that he has the benefit of an exception, exemption, excuse or justification provided for by law.

[Emphasis added.]

[53] Returning to the *Offence Act* (B.C.), that statute was first enacted as the *Summary Convictions Act, 1889*, S.B.C. 1889, c. 26, s. 46, which provided:

If the information or complaint in any case negatives any exemption, exception, proviso or condition in the Statute on which the same is founded, it shall not be necessary for the prosecutor or complainant to prove such negative, but the defendant may prove the affirmative thereof in his defence, if he wishes to avail himself of the same.

[Emphasis added.]

[54] Section 46 was amended by the *Summary Convictions Act Amendment Act*, 1899, S.B.C. 1899, c. 69, s. 2, to read:

Any exception, exemption, proviso, excuse or qualification, whether it does or does not accompany in the same section the description of the offence in the Act, order, by-law, regulation or other document creating the offence, may be proved by the defendant, but need not be specified or negatived in the Information or Complaint, and if so specified or negatived, no proof in relation to the matter so specified or negatived shall be required on the part of the informant or complainant.

[Emphasis added.]

[55] This provision became s. 46 of the *Summary Convictions Act*, R.S.B.C. 1911, c. 218. It then became a subsection of s. 30 (see S.B.C. 1915, c. 59):

30.(1) Any exception, exemption, proviso, excuse or qualification, whether it does or does not accompany in the same section the description of the offence in the Act, order, by-law, regulation, or other document creating the offence, may be proved by the defendant, but need not be specified or negatived in the information or complaint, and, whether it is or is not so specified or negatived, no proof in relation to the matter so specified or negatived shall be required on the part of the informant or complainant.

(2) Whenever it appears that the defendant has done any act or been guilty of any omission in respect of which, were he not duly licensed, he would be liable to some penalty, it shall be incumbent upon the defendant to prove that he is duly licenced.

[Emphasis added.]

This provision remained s. 30 of the *Summary Convictions Act*, R.S.B.C. 1924, c. 245.

[56] In the *Summary Convictions Act*, R.S.B.C. 1936, c. 271, s. 30(1) was unchanged but s. 30(2) read:

Whenever it appears that the defendant has done any act or been guilty of any omission in respect of which, were he not duly licenced or registered, or duly authorized by a consent, permit, certificate, or otherwise, he would be liable to some penalty, it shall be incumbent upon the defendant to prove that he is duly licenced or registered, or duly authorized by a consent, permit, certificate, or otherwise, as the case may be.

The wording of ss. 30(1) and (2) was repeated in the *Summary Convictions Act*, R.S.B.C. 1948, c. 317.

[57] A new Act came into force in 1955: *Summary Convictions Act*, 1955, S.B.C. 1955, c. 71. Exceptions, etc., were dealt with as follows, in s. 67:

- (1) No exception, exemption, proviso, excuse, or qualification prescribed by law is required to be set out or negated, as the case may be, in an information.
- (2) The burden of proving that an exception, exemption, proviso, excuse, or qualification prescribed by law operates in favour of the defendant is on the defendant, and the prosecutor is not required, except by way of rebuttal, to prove that the exception, exemption, proviso, excuse, or qualification does not operate in favour of the defendant, whether or not it is set out in the information.
- (3) Whenever it appears that the defendant has done any act or been guilty of any omission in respect of which, were he not duly licensed or registered or duly authorized by a consent, permit, certificate, or otherwise, he would be liable to some penalty, it shall be incumbent upon the defendant to prove that he is duly licensed or registered or duly authorized by a consent, permit, certificate, or otherwise, as the case may be.

[Emphasis added.]

[58] Section 67 became s. 68 of the *Summary Convictions Act*, R.S.B.C. 1960, c. 373. With some minor changes it became s. 88 of the *Offence Act*, R.S.B.C. 1979, c. 305, which today is s. 98 of the *Offence Act*, R.S.B.C. 1996, c. 338. Section 98 reads:

- (1) No exception, exemption, proviso, excuse or qualification prescribed by law is required to be set out or negated in an information.
- (2) The burden of proving that an exception, exemption, proviso, excuse or qualification prescribed by law operates in favour of the defendant is on the defendant, and the prosecutor is not required, except by way of rebuttal, to prove that the exception, exemption, proviso, excuse or qualification does not operate in favour of the defendant, whether or not it is set out in the information.
- (3) If it appears that the defendant has done any act or been guilty of any omission for which, were the defendant not licensed or registered or authorized by a consent, permit, certificate or otherwise, he or she would be liable to a penalty, the defendant must prove that he or she is licensed or registered or authorized by a consent, permit, certificate or otherwise.

[Emphasis added.]

Analysis

[59] Mr. Goleski submits, correctly in my view, that “[t]he phrase, ‘except by way of rebuttal’, is central to understanding the burden imposed by s. 794(2) and is at the heart of the reasoning in *Lewko*.” Those words first appeared in what was s. 702(2) of the 1955 *Criminal Code* (para. 37 above). As the evolution of a statute can shed light on legislative purpose I will first discuss the purpose and effect of the prior enactments. I will then discuss what change, if any, was brought about by the addition of those words.

Purpose and Effect of the Pre-1955 Versions

[60] It cannot be doubted that in enacting the earliest versions of what is today s. 794(2), Parliament intended to place the persuasive burden on an accused to establish that he or she was entitled to the benefit of “any exemption, exception, proviso or condition”, provided by statute. If the provision applied—which was sometimes in issue—then while the burden was on the Crown to prove the elements of an offence beyond a reasonable doubt, it was for the accused to establish, on a balance of probabilities, that by reason of a statutory exceptions, etc. he or she had not committed the offence charged. Apt in this regard is *R. v. Edwards*, [1975] 1 Q.B. 27 at 36 (C.A.), where Lord Justice Lawton, in discussing the 1848 English statute on which the first (1869) version of s. 794 was based, stated:

In 1848, by the Summary Jurisdiction Act 1848 (Jervis’s Act), 11 & 12 Vict. c. 43, Parliament consolidated, amended and extended various statutes which had conferred summary jurisdiction on justices. The modern courts of summary jurisdiction came into being. The Act provided a statutory framework for the conduct of proceedings in those courts at all stages. Section 14 of the Act dealt with proceedings at the trial stage. It is clear that what Parliament was trying to do by this section was to adapt proceedings on indictment to the new type of court. The section had a proviso to the effect that if the information or complaint should negative “any exception, proviso or condition” the prosecutor or complainant need not prove such negative, but the defendant might prove the affirmative. In our judgment the object of the proviso to section 14 was to apply the common law relating to exceptions and provisos to the new courts.

[Emphasis added.]

See also: *R. v. Hunt*, [1987] A.C. 352 at 373 (H.L.); *R. v. Lee's Poultry Ltd.* (1985), 17 C.C.C. (3d) 539 at 542 (Ont. C.A.).

[61] *R. v. Staviss* (1943), 79 C.C.C. 105 (N.S.S.C., *en banc*), is an example of the effect of the pre-1955 version of the present s. 794. Mr. Staviss was charged with selling used tires at a price higher than permitted by an order “without a permit in writing”. A magistrate dismissed the charge because the Crown had failed to prove the absence of a permit. In allowing an appeal by the Crown, the Court held that the absence of a permit was not an essential element of the charge and that, by virtue of what was then s. 717 of the *Criminal Code* (para. 36 above), there was no obligation on the prosecution to prove that exception.

Post-1955 Decisions

[62] Prior to *Lewko*, decisions subsequent to the addition of the words “except by way of rebuttal” to the *Criminal Code* and other statutes continued to place the burden on the accused to prove, on a balance of probabilities, a statutory exception, etc. However, it must be acknowledged that specific consideration was not given to those words.

[63] In *R. v. Perka*, [1984] 2 S.C.R. 232, the Supreme Court of Canada recognized the common-law defence of necessity. With respect to the onus of proof, it held that an accused bears only an evidentiary burden with respect to necessity and that the persuasive burden is on the Crown. In rejecting the Crown’s submission that s. 7(2) of the then *Narcotic Control Act* (para. 43 above) placed the persuasive burden on the accused, Mr. Justice Dickson, as he then was, stated (at 258-59):

The *Narcotic Control Act* provides for several statutory exceptions to its broad prohibitions against importation, sale, manufacture, and possession. The offences created by the Act are generally subject to the proviso that the accused not have been acting under the authority of the Act or the regulations thereunder. See sections 3(1) (possession), 5(1) (importation), 6(1) (cultivation). Section 12 of the Act implements this scheme by providing for a set of regulations governing the issuance of licences for, *inter alia*, the importation, sale, manufacture, or possession of narcotics. One who sells, imports, manufactures or possesses narcotics pursuant to such authority does not commit an offence.

It seems clear that it is to these statutory exceptions that s. 7(2) refers, and not to common law defences such as necessity. One who wishes to plead the possession of a licence or other lawful authority in response to a charge of importation bears, under s. 7(2), the burden of persuading the trier of fact that such licence exists. One who pleads necessity bears no such burden. Section 7(2) does not place a persuasive burden as to the defence of necessity on the accused.

[Emphasis added.]

[64] The *Criminal Code* was amended to include the offence of failing or refusing to comply with a breathalyzer demand without reasonable excuse by s. 16 of the *Criminal Law Amendment Act, 1968-69*, S.C. 1968-69, c. 38. Since then, several appellate courts have opined that an accused carries the burden of establishing such an excuse on a balance of probabilities: *R. v. Hogue* (1970), 1 C.C.C. (2d) 549 at 559 (N.B.C.A.); *R. v. Childs* (1982), 39 Nfld. & P.E.I.R. 200 at para. 7 (Nfld. C.A.); *R. v. Aubut*, [1992] J.Q. No. 501 (C.A.); *R. v. Peck* (1994), 128 N.S.R. (2d) 206 at para. 18 (N.S.C.A.). The only pronouncement by this Court appears in *R. v. Ferron* (1989), 49 C.C.C. (3d) 432 at 442 (B.C.C.A.), wherein Mr. Justice Taggart (in concurring reasons allowing a Crown appeal and restoring a conviction set aside by a summary conviction appeal judge) stated:

[I]n my opinion, the trial judge correctly decided the respondent had not proved on a balance of probabilities that he had a reasonable excuse for refusing to comply with the demand for samples of his breath.

[65] In other contexts, appellate courts have held that s. 794(2) or provisions containing equivalent language place the burden of proof on an accused. For example, in *R. v. House of Stein Ltd.* (1965), 53 W.W.R. 648 (B.C.C.A.), this Court held that by virtue of s. 68(2) of the *Summary Convictions Act* (paras. 57, 58 above), the onus was on the accused company to prove it had the approval required under a bylaw to engage in an activity that was generally prohibited. In *R. v. Daniels* (1990), 60 C.C.C. (3d) 392 (B.C.C.A.), this Court stated, albeit in *obiter*, that s. 730(2) of the *Criminal Code* placed the onus on an accused to prove a licence. In *Lee's Poultry Ltd.*, the company was charged with operating a meat plant without a licence. In allowing a Crown appeal, the Court of Appeal for Ontario held that s. 48(3) of the then *Provincial Offences Act*, R.S.O. 1980, c. 400, placed the onus on the company

to prove it had a licence and that such an onus is not unconstitutional by reason of the *Charter*. Similarly, in *R. v. T.G.* (1998), 123 C.C.C. (3d) 211 (N.S.C.A.), the Court held that by reason of the incorporation of s. 794 into provincial legislation, the onus was on a youth charged with possession of alcohol to prove that his possession was authorized. That Court went on to hold that such a reverse onus is not unconstitutional by reason of the *Charter*.

Addition of “Except by way of Rebuttal”

[66] The *Criminal Code* underwent extensive study in the 1950s. On April 7, 1952, the report of the Criminal Code Revisions Committee and a draft bill were tabled in the House of Commons. In May 1952, a bill to revise the *Code* was introduced in the Senate (Bill H-8), but did not proceed through the legislative process because Parliament adjourned.

[67] On November 24, 1952, Bill O, “An Act respecting The Criminal Law” was introduced in the Senate. Clause 702 of that Bill read:

- (1) No exception, exemption, proviso, excuse or qualification prescribed by law is required to be set out or negated, as the case may be, in an information.
- (2) The burden of proving that an exception, exemption, proviso, excuse or qualification prescribed by law operates in favour of the defendant is on the defendant, and the prosecutor is not required to prove that the exception, exemption, proviso, excuse or qualification does not operate in favour of the defendant, whether or not it is set out in the information.

[68] Bill O was referred to the Senate’s Standing Committee on Banking and Commerce for review. In turn, the Committee referred the Bill to a sub-committee. In its report, the sub-committee recommended that the words “except by way of rebuttal” be inserted after the word “required” in clause 702(2). That report was presented to the full Committee by its chairman:

The Chairman: Clause 702, on page 241, we amended line 14 by adding, after—

The burden of proving that an exception, exemption, proviso, excuse or qualification prescribed [*sic*] by law operates in favour of the defendant is on the defendant, and the prosecutor is not required—

the words:

except by way of rebuttal.

Because in the first instance the accused person might offer enough evidence to satisfy and meet the presumption, and then we did not want to shut out the prosecutor; the prosecutor would be free then to adduce evidence by rebuttal.

Hon. Senators: Carried.

(Canada, Senate Standing Committee on Banking and Commerce, *Minutes of Evidence*, 21st Parl., 7th Sess., (16 December 1952) (Hon. Salter Hayden).)

[69] In January 1953, Bill O was introduced in the House of Commons as Bill No. 93. A special committee of the House recommended a number of amendments, but none with respect to Clause 702 as proposed by the Senate. Bill No. 93 did not proceed further than the tabling of the special committee's report, as Parliament was prorogued. There was a general election in the summer of 1953.

[70] On November 16, 1953, Bill No. 7 (formerly Bill No. 93) received first reading in the House of Commons. On March 11, 1954, during second reading, the House agreed to Clause 702 (as proposed by the Senate) without debate. Bill No. 7 was passed by the House on April 8, 1954, and by the Senate on June 10, 1954. It received Royal Assent on June 26, 1954. On October 2, 1954, the Coming into Force date was set as April 1, 1955.

Elements of Failure/Refusal

[71] As discussed in *Lewko* at para. 9, the elements of the offence that the Crown must prove are: (i) a proper demand; (ii) a failure or refusal to provide the required breath sample; and (iii) an intention to fail or refuse to provide the required sample. In *R. v. Moser* (1992), 71 C.C.C. (3d) 165 at 176 (Ont. C.A.), Mr. Justice Doherty said this:

The essential elements of the offence described in s. 254(5) consist of a proper demand and a refusal or failure to comply with that demand. The defence of "reasonable excuse" is not a denial of either of those essential elements but refers to "matters which stand outside the requirements which must be met . . . before a charge can be supported": *per* Laskin J. in *Taraschuk v. The Queen* (1975), 25 C.C.C. (2d) 108 at p. 110, 62 D.L.R. (3d)

84, [1975] 1 S.C.R. 385. The defence of “reasonable excuse” is engaged only after the Crown has proved a proper demand and a failure or refusal to comply with that demand.

[72] Also germane is the following from the reasons of Judge Gorman in *R. v. Sheehan* (2003), 35 M.V.R. (4th) 61 (N.L. Prov. Ct.):

[42] In my view, the *actus reus* of this offence is the failure or refusal to comply with the demand. The *mens rea* element requires that the failure or refusal to comply be intentional. Therefore, a person who fails to provide an appropriate sample despite genuinely attempting to do so, will not have committed the *mens rea* of this offence. It is important to keep in mind that this has nothing to do with whether or not the accused had a reasonable excuse.

Interpretation of Section 794(2)

[73] The modern approach to statutory interpretation is well known, namely that “the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament”: Elmer A. Driedger, *Construction of Statutes*, 2nd ed. (Toronto: Butterworths, 1983) at 87, cited in *Rizzo and Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at para. 21.

[74] As discussed above, when Parliament first enacted a provision dealing with exceptions, etc. in the context of summary conviction proceedings, it did so in a way that affirmed the common-law principle which placed the burden of proving such matters on an accused on a balance of probabilities. Prior to the addition of the words “except by way of rebuttal”, if the provision were engaged, then it was beyond question that the persuasive burden fell on the accused. The question, therefore, is what, if any, change in the law Parliament intended when it added those words.

[75] I accept that s. 794(2) can be seen as ambiguous, in that it begins by placing the positive burden on an accused to prove an exception, etc., and then appears to place a negative burden on the prosecution to disprove that very thing. However, I am of the view that when examined through a historical lens it is evident that

Parliament did not intend to effect a sea change to a provision grounded in the common law and which had been in force for close to 85 years.

[76] The Parliamentary record relating to the additional words is sparse. It appears they originated in the Senate, not for the purpose of shifting the persuasive burden to the prosecution, but to ensure that if an accused advanced an exception, etc. during the defence case, then the prosecution would have a right to call evidence in rebuttal. As evinced by the decision of the Supreme Court of Canada in *Hilewitz v. Canada*, 2005 SCC 57 at paras. 51-53, 97, [2005] 2 S.C.R. 706, committee proceedings—in that case the House of Commons Standing Committee on Labour, Manpower and Immigration—can provide an indication of legislative intent. See also: *Kerr v. Danier Leather Inc.* (2005), 77 O.R. (3d) 321 at para. 119 (C.A.), aff'd 2007 SCC 44, [2007] 3 S.C.R. 331.

[77] Also militating against an interpretation of s. 794(2) that would result in a significant change in the law is the presumption that legislation respects the common law and should not be interpreted as having changed established legal principles unless such an interpretation is clearly required. This principle is stated in *Sullivan on the Construction of Statutes*, 5th ed. (Markham: LexisNexis Canada, 2008) at 431:

Presumption against changing the common law. Although legislation is paramount, it is presumed that legislatures respect the common law. It is also presumed that legislatures do not intend to interfere with common law rights, to oust the jurisdiction of common law courts, or generally to change the policy of the common law. As explained in *Halsbury* [36 Hals., 3rd ed., § 625], in a formulation adopted by many Canadian courts:

Except in so far as they are clearly and unambiguously intended to do so, statutes should not be construed so as to make any alteration in the common law or to change any established principle of law.

[78] In coming to the conclusion in *Lewko* that the words “except by way of rebuttal” did effect a change in the law, Bayda C.J.S. placed the “reasonable excuse” provided for in s. 254(3) of the *Criminal Code* in the same category as such common-law defences as necessity, duress, and self-defence: para. 18. As a

result, he concluded that s. 794(2) does no more than require an accused to meet the “air of reality” test applicable to those defences. With respect, I cannot agree with this reasoning. As Dickson J. stated in *Perka* at 258-59, the statutory exceptions referred to in what was then s. 7(2) of the *Narcotic Control Act* (para. 43 above), are distinct from the common law defences. I note that *Perka* is not referred to in *Lewko*.

[79] Section 794(2) applies not just to a “reasonable excuse” in the breathalyzer context, but to a broad range of statutory exceptions. By virtue of s. 34(2) of the *Interpretation Act*, R.S.C. 1985, c. I-21, s. 794(2) applies to summary conviction offences under other federal enactments “except to the extent that the enactment otherwise provides”. For example, it applies to offences under the *Excise Act*, R.S.C. 1985, c. E-14. Based on the interpretation of s. 794(2) in *Lewko*, a person charged under that *Act* by way of summary conviction with manufacturing tobacco without a licence (s. 226(a)) would not have to prove the existence of a licence, but only tender some evidence in that regard. Similarly, interpreting s. 48(2) of the *Controlled Drugs and Substances Act* (para. 47 above) in accordance with *Lewko* would mean that a person charged with importing a prohibited drug “except as authorized under the regulations” (s. 6(1)), would only have to tender some evidence that he or she was authorized to bring that drug into Canada. In my view, it would require much clearer language in a provision such as s. 794(2) to ascribe to Parliament an intention to require the prosecution to carry the burden of proving that an accused did not have authority to engage in activities that are generally prohibited.

[80] With respect to the flaw in the reasoning in *Lewko*, the following from *Sheehan* is apposite:

[13] ... The equating of a reasonable excuse within section 254(5) of the *Criminal Code* with other defences known to law (see paragraph 18 of *Lewko*) is in my view incorrect. Subsection 254(5) of the *Criminal Code* does not provide the accused with a “defence.” What it does, is to provide the accused with the opportunity to escape liability by raising a reasonable excuse. It has been held for instance, to be “different” and “wider” than the defence of honest mistake (see *R. v. Mosher* (1992), 71 C.C.C. (3d) 165

(Ont. C.A.), at page 172). In my view, the error in *Lewko* involves a failure to appreciate the distinctive nature of the manner in which Parliament has drafted subsection 254(5). It provides the accused with an opportunity to escape liability in a manner particularized to that subsection. A subsection which it should be recalled, requires the accused to provide potentially incriminating evidence. Subsection 254(5) does not limit the application of defences which would otherwise be available to that offence or those “general defences” which are available to all offences. What it does, is that it allows the accused to raise as a reasonable excuse for refusing or failing to comply with a demand, issues that would never constitute a defence to any other charge. Interestingly, when an accused person raises the issue (or defence if you prefer) of reasonable excuse, he or she is conceding that the Crown has proven beyond a reasonable doubt the existence of the requisite *mens rea* and *actus reus* for the offence. Since the excuse must be objectively reasonable, since it only applies if the Crown has proven beyond a reasonable doubt that the accused has committed both the *actus reus* and *mens rea* of the offence and since it does not limit resort to other defences, then the onus of establishing the proffered excuse should rest with the accused.

[81] For all of these reasons, I am of the view that the appeal judge erred in law in holding that Mr. Goleski was not required to establish the factual foundation for his asserted reasonable excuse on a balance of probabilities.

Disposition

[82] I would allow this appeal, set aside the order of the appeal judge, and reinstate Mr. Goleski’s conviction.

“The Honourable Mr. Justice Frankel”

I AGREE:

“The Honourable Madam Justice Newbury”

I AGREE:

“The Honourable Madam Justice Garson”

Tab 3:
Criminal Code,
R.S.C. c. C-46, s. 794
(in force 12-12-1988 to 12-12-2018)



Criminal Code

Canada Statutes

R.S.C. 1985, c. C-46, s. 794 | [L.R.C. 1985, ch. C-46, art. 794](#)

Canada Statutes > Criminal Code, R.S.C. 1985, c. C-46 > PART XXVII SUMMARY CONVICTIONS > Defects and Objections > **SECTION 794.**

Notice



Past Version: Effective 12-12-1988 to 12-12-2018

Defects and Objections

SECTION 794.

No need to negative exception, etc.

794. (1) No exception, exemption, proviso, excuse or qualification prescribed by law is required to be set out or negated, as the case may be, in an information.

Burden of proving exception, etc.

(2) The burden of proving that an exception, exemption, proviso, excuse or qualification prescribed by law operates in favour of the defendant is on the defendant, and the prosecutor is not required, except by way of rebuttal, to prove that the exception, exemption, proviso, excuse or qualification does not operate in favour of the defendant, whether or not it is set out in the information.

Tab 4:
R. v. Goleski,
2015 SCC 6

Grant Anthony Goleski *Appellant*

v.

Her Majesty The Queen *Respondent*

and

**Attorney General of Ontario and
Attorney General of Alberta** *Interveners*

INDEXED AS: R. v. GOLESKI

2015 SCC 6

File No.: 35862.

2015: February 11.

Present: Abella, Rothstein, Cromwell, Moldaver,
Karakatsanis, Wagner and Gascon JJ.

**ON APPEAL FROM THE COURT OF APPEAL FOR
BRITISH COLUMBIA**

*Criminal law — Motor vehicles — Failure to provide
breath sample — Burden of proof applicable to dem-
onstration of “reasonable excuse” for refusal to provide
breath sample — Accused bears persuasive burden of
proving excuse — Criminal Code, R.S.C. 1985, c. C-46,
s. 794(2).*

Statutes and Regulations Cited

Criminal Code, R.S.C. 1985, c. C-46, s. 794(2).

APPEAL from a judgment of the British Colum-
bia Court of Appeal (Newbury, Frankel and Garson
JJ.A.), 2014 BCCA 80, 307 C.C.C. (3d) 1, 64 M.V.R.
(6th) 254, 10 C.R. (7th) 188, [2014] B.C.J. No. 347
(QL), 2014 CarswellBC 490 (WL Can.), setting aside
the accused’s acquittal and reinstating his convic-
tion. Appeal dismissed.

Amandeep Jaswal, for the appellant.

Mary T. Ainslie, Q.C., and *John Caldwell*, for the
respondent.

Grant Anthony Goleski *Appelant*

c.

Sa Majesté la Reine *Intimée*

et

**Procureur général de l’Ontario et
procureur général de l’Alberta** *Intervenants*

RÉPERTORIÉ : R. c. GOLESKI

2015 CSC 6

N° du greffe : 35862.

2015 : 11 février.

Présents : Les juges Abella, Rothstein, Cromwell,
Moldaver, Karakatsanis, Wagner et Gascon.

**EN APPEL DE LA COUR D’APPEL DE LA
COLOMBIE-BRITANNIQUE**

*Droit criminel — Véhicules automobiles — Omission
de fournir un échantillon d’haleine — Fardeau de preuve
applicable à la démonstration de l’existence d’une « ex-
cuse raisonnable » pour refuser de fournir un échantillon
d’haleine — Imposition à l’accusé du fardeau de persua-
sion relativement à la preuve de l’existence d’une excuse
— Code criminel, L.R.C. 1985, c. C-46, art. 794(2).*

Lois et règlements cités

Code criminel, L.R.C. 1985, c. C-46, art. 794(2).

POURVOI contre un arrêt de la Cour d’appel
de la Colombie-Britannique (les juges Newbury,
Frankel et Garson), 2014 BCCA 80, 307 C.C.C. (3d)
1, 64 M.V.R. (6th) 254, 10 C.R. (7th) 188, [2014]
B.C.J. No. 347 (QL), 2014 CarswellBC 490 (WL
Can.), qui a annulé l’acquittement de l’accusé et ré-
tabli la déclaration de culpabilité prononcée contre
lui. Pourvoi rejeté.

Amandeep Jaswal, pour l’appelant.

Mary T. Ainslie, c.r., et *John Caldwell*, pour l’in-
timée.

Philip Perlmutter and Karen Papadopoulos, for the intervener the Attorney General of Ontario.

Matthew David Dalidowicz, for the intervener the Attorney General of Alberta.

The following is the judgment delivered orally by

[1] THE COURT — In our view, the British Columbia Court of Appeal correctly concluded that s. 794(2) of the *Criminal Code*, R.S.C. 1985, c. C-46, properly interpreted, imposes a persuasive burden on the accused to prove an “exception, exemption, proviso, excuse or qualification prescribed by law”. We do not think it appropriate to deal with the new issues raised by the interveners.

[2] The appeal is dismissed.

Judgment accordingly.

Solicitor for the appellant: Vincent Michaels Law Corporation, Vancouver.

Solicitor for the respondent: Attorney General of British Columbia, Vancouver.

Solicitor for the intervener the Attorney General of Ontario: Attorney General of Ontario, Toronto.

Solicitor for the intervener the Attorney General of Alberta: Attorney General of Alberta, Calgary.

Philip Perlmutter et Karen Papadopoulos, pour l'intervenant le procureur général de l'Ontario.

Matthew David Dalidowicz, pour l'intervenant le procureur général de l'Alberta.

Version française du jugement rendu oralement par

[1] LA COUR — À notre avis, la Cour d'appel de la Colombie-Britannique a eu raison de conclure que, suivant l'interprétation qu'il convient de lui donner, le par. 794(2) du *Code criminel*, L.R.C. 1985, c. C-46, impose à l'accusé le fardeau de persuader le tribunal de l'existence d'une « exception, exemption, limitation, excuse ou réserve, prévue par le droit ». Nous n'estimons pas opportun d'examiner les nouveaux points soulevés par les intervenants.

[2] L'appel est rejeté.

Jugement en conséquence.

Procureur de l'appelant : Vincent Michaels Law Corporation, Vancouver.

Procureur de l'intimée : Procureur général de la Colombie-Britannique, Vancouver.

Procureur de l'intervenant le procureur général de l'Ontario : Procureur général de l'Ontario, Toronto.

Procureur de l'intervenant le procureur général de l'Alberta : Procureur général de l'Alberta, Calgary.

Tab 5:
R. v. Dionne,
2022 BCSC 959

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *R. v. Dionne*,
2022 BCSC 959

Date: 20220309
Docket: X083415
Registry: New Westminster

Between:

Regina

v.

Roger Gerald Joseph Dionne

Before: The Honourable Justice Shergill

Oral Reasons for Judgment

Counsel for the Crown:

S. Currie-Roberts

Counsel for the Accused:

D.M. Turko, Q.C.
Z. Zwanenburg

Place and Date of Trial:

New Westminster, B.C.
February 14-16 and 18, 2022

Place and Date of Judgment:

New Westminster, B.C.
March 9, 2022

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I. OVERVIEW

[1] The accused, Roger Gerald Joseph Dionne, is charged with failing to remain at the scene of an accident where death resulted, contrary to s. 320.16(3) of the *Criminal Code*, R.S.C. 1985, c. C-46. [Code]. The charges arise from a collision that occurred on May 10, 2019, in Surrey, British Columbia, involving Mr. Dionne's vehicle and Perbinderjit Rana. Mr. Rana was operating a motorcycle at the time, and died shortly after the collision.

[2] There is no suggestion that Mr. Dionne was at fault for the accident. Rather, the question before me is whether Mr. Dionne violated the requirements of s. 320.16 of the *Code*, by failing to provide his name and address, or offering assistance to Mr. Rana.

[3] It is a fundamental principle of our criminal justice system, that an accused is considered innocent until proven guilty. The burden therefore lies with the Crown to prove Mr. Dionne's guilt beyond a reasonable doubt.

II. ISSUES

[4] There is no dispute that Mr. Dionne stopped at the scene of the accident. There is also no dispute that he left the scene without giving his name and address, or rendering assistance to Mr. Rana.

[5] The matters in dispute are:

- a) Whether Mr. Dionne knew, or was reckless as to whether, his vehicle had been involved in an accident;
- b) Whether Mr. Dionne knew, or was reckless as to whether, death or bodily harm ensued from the accident; and if so,
- c) Whether Mr. Dionne had a reasonable excuse not to provide his name and address, or offer assistance to Mr. Rana.

[6] I first turn to the Agreed facts.

III. AGREED FACTS

[7] The following facts are admitted pursuant to s. 655 of the *Code*.

[8] On the evening of May 10, 2019, the accused, Roger Gerald Dionne, was driving his white 2002 GMC Sierra pickup truck (the "Truck") southbound in the 7300 block of King George Boulevard in Surrey, British Columbia.

[9] At approximately 9:21 p.m., Mr. Dionne turned left from a dedicated left-hand turn lane on the southbound side of King George Boulevard into the Centre of Newton plaza (the "Plaza"), a shopping plaza on the east side of King George Boulevard.

[10] As Mr. Dionne was turning across the northbound lanes of King George Boulevard, the Truck and Perbinderjit Rana collided. Mr. Rana was driving a black 2007 Suzuki motorcycle (the "Motorcycle") northbound on King George Boulevard in the left northbound lane of King George Boulevard at the time of the collision.

[11] Mr. Rana applied the brakes on the Motorcycle immediately before the collision, the Motorcycle fell down on its right side, and Mr. Rana became separated from the motorcycle. Mr. Rana's helmeted head struck the right rear tire of the Truck while the Motorcycle slid past the Truck.

[12] As a result of colliding with the Truck, Mr. Rana died shortly after the collision.

[13] At the time of the collision the Truck was moving at approximately 18 to 20 kilometres per hour.

[14] Corporal Gordon Parsons is employed by the RCMP Integrated Collision Analysis and Reconstruction Services as a Forensic Collision Reconstructionist and examined the collision. Cpl. Parsons has expertise in collision reconstruction, and formed the opinion that Mr. Rana was travelling at a speed range of approximately 66.7 to 75 kilometers per hour immediately before he applied the brakes to his Motorcycle.

[15] The speed limit on King George Boulevard where the collision took place is 60 kilometres per hour.

[16] The Motorcycle and the Truck were in good mechanical and physical condition at the time of the collision. A mechanical inspection of both vehicles conducted following the collision concluded there was no evidence of a sudden mechanical failure or malfunction on either vehicle that may have contributed to the collision.

[17] At approximately 23:54 on May 10, 2019, photographs were taken at the scene of the collision.

[18] On May 11, 2019, at approximately 8:30 a.m., Mr. Dionne arrived at the Surrey RCMP detachment at 14355 57 Ave in Surrey, B.C. (the "Detachment"), with his brother. Mr. Dionne spoke to Cst. Alex Byrnes and informed him that he had been involved in the collision with Mr. Rana the previous evening. Cst. Byrnes arrested Mr. Dionne and he was placed in a cell at the Detachment.

[19] From approximately 15:56 to 17:27 on May 11, 2019, Mr. Dionne gave an audio and video-recorded statement to Cpl. Lucy Shorey in an interview room at the Detachment. This statement was transcribed to writing.

[20] The voluntariness of all statements made by Mr. Dionne to the police on May 11, 2019 is admitted.

[21] At the time of the Collision, Mr. Dionne was prescribed the following medications (the "Medications"):

- a) Ciprofloxacin 500 mg - one tablet twice daily;
- b) Atorvastatin 20 mg - one tablet twice daily;
- c) Ramipril 2.5 mg - one capsule once daily;
- d) Rivaroxaban 20 mg - one tablet once daily;
- e) Bisoprolol 5 mg - ½ tablet daily;

- f) Trazodone 100 mg - one tablet at bedtime; and
- g) Metformin 500 mg - one tablet twice daily.

[22] At the time of the Collision, Mr. Dionne had an Implantable Cardioverter Defibrillator (“ICD”).

IV. LEGAL FRAMEWORK

[23] Section 320.16(1) and (3) provide as follows:

320.16 (1) Everyone commits an offence who operates a conveyance and who at the time of operating the conveyance knows that, or is reckless as to whether, the conveyance has been involved in an accident with a person or another conveyance and who fails, without reasonable excuse, to stop the conveyance, give their name and address and, if any person has been injured or appears to require assistance, offer assistance.

(...)

(3) Everyone commits an offence who commits an offence under subsection (1) and who at the time of committing the offence knows that, or is reckless as to whether, the accident resulted in the death of another person or in bodily harm to another person whose death ensues.

[24] The phrase “bodily harm” is defined in section 2 of the *Code* as “any hurt or injury to a person that interferes with the health or comfort of the person and that is more than merely transient or trifling in nature”.

[25] The Crown must prove each of the elements of the offence with which Mr. Dionne is charged, beyond a reasonable doubt.

A. Actus Reus

[26] Section 320.16(1) imposes a positive obligation on a driver involved in an accident to do the following three things:

- a) stop;
- b) give their name and address; and
- c) offer assistance if a person has been injured or appears to require assistance.

[27] The actus reus of the offence is met if the accused fails to do any one of these three things.

B. Mens Rea

[28] The mens rea for an offence under s. 320.16(1) and (3) is knowledge or recklessness that they were involved in an accident, and knowledge or recklessness as to whether death or bodily harm ensued.

[29] Knowledge can be proven by either actual knowledge or imputed knowledge based on wilful blindness: *R. v. Edwards*, 2020 BCCA 253 at para. 95.

[30] In *R. v. Farmer*, 2014 ONCA 823 at para. 26, the court explained wilful blindness as occurring when an accused becomes aware of the need for some inquiry, but declines to make the inquiry because the accused does not “wish to know the truth”. Put another way, an accused is wilfully blind if they shut their eyes because they know or strongly suspect that “looking would fix [them] with knowledge”.

[31] The deliberate nature of wilful blindness was expressed by Justice Moldaver in *R. v. Morrison*, 2019 SCC 15 at follows:

[98] Wilful blindness exists where an accused’s “suspicion is aroused to the point where he or she sees the need for further inquiries, but *deliberately chooses* not to make those inquiries...Wilful blindness has been characterized as “deliberate ignorance” because it connotes “an actual process of suppressing a suspicion”.

[citations and references omitted]

[32] Recklessness occurs where an accused is aware of a risk, but proceeds despite that risk: *Edwards* at para. 99, and *R. v. Alekozai*, 2021 ONCA 633 at para. 42.

[33] In *R. v. Sansregret*, [1985] 1 S.C.R. 570, 1985 CanLII 79 (SCC) at p. 582, Justice McIntyre explained recklessness as follows:

In accordance with the well-established principles for the determination of criminal liability, recklessness, must have an element of the subjective. It is

found in the attitude of one who, aware that there is a danger that his conduct could bring about the result prohibited by the criminal law, nevertheless persists, despite the risk. It is, in other words, the conduct of one who sees the risk and takes the chance.

[34] Recklessness has been described as a less stringent standard than wilful blindness: *R. v. Sandhu*, [1989] OJ No 1647, 1989 CanLII 7102 (O.N.C.A.) at para. 19.

[35] In *Sansregret* at p. 582, the court distinguished between recklessness and wilful blindness, as follows:

Wilful blindness is distinct from recklessness because, while recklessness involves knowledge of a danger or risk and persistence in a course of conduct which creates a risk that the prohibited result will occur, wilful blindness arises where a person who has become aware of the need for some inquiry declines to make the inquiry because he does not wish to know the truth. He would prefer to remain ignorant. The culpability in recklessness is justified by the consciousness of the risk and by proceeding in the face of it, while in wilful blindness it is justified by the accused's fault in deliberately failing to inquire when he knows there is a reason for inquiry.

[36] I turn now to the legal principles that apply with respect to assessment of credibility and reliability of a witness' testimony.

C. Credibility and Reliability

[37] Reliability has to do with the accuracy of a witness's evidence, such as whether they have a good memory, if they are able to recount the details of the event, and whether the witness is an accurate historian: *R. v. Nyznik*, 2017 ONSC 4392 at para. 15.

[38] Credibility relates to the witness's veracity. A witness who is not telling the truth is not providing reliable evidence. However, the reverse is not the case. Sometimes, an honest witness will be trying their best to tell the truth and will believe the truth of what they are relating, but nevertheless be proven to be mistaken in their recollection. Although honest, their evidence is not reliable: *Nyznik* at para. 15.

[39] Determining the credibility of a witness requires the court to consider a number of factors. These include the internal and external consistency of the

witness's evidence, motive to fabricate, the inherent plausibility of the evidence in the context of the case as a whole, and demeanour: *R. v. Swain*, 2019 BCSC 1300 at para. 48.

[40] Trial judges are cautioned against making credibility assessments based on demeanour alone: *R. v. N.S.*, 2012 SCC 72 at paras. 99–107. This is because the manner in which a witness testifies is a notoriously unreliable measure of credibility. A witness's physical health, personality, cultural and social upbringing, and comfort level with testifying in a courtroom setting are but some of the things that may affect their demeanour, thereby making it difficult to interpret: *R. v. Tom*, 2014 BCSC 2660 at para. 6.

[41] Before I turn to the evidence, I wish to address the accused's police statement, which factors heavily in his credibility assessment. It is an established legal principle that, absent an exception, an accused's silence in a police statement cannot be used as proof of their guilt: *R. v. Poirier*, [2000] OJ No 2292, 2000 CanLII 3294 (C.A.) at para. 21.

[42] However, omissions from an accused's police statement when compared to the accused's testimony at trial, may be integral to determining credibility. For example, an account of an event which leaves out important details may be viewed as inconsistent with a subsequent account that does include those details: *R. v. Hill*, 2015 ONCA 616 at para. 45.

V. EVIDENCE

A. Crown Witnesses

[43] The following witnesses testified for the Crown: Mohammed Allehewi, Gurdeep Kaila, and Cst. Michael LeNoble. Cst. Lenoble introduced video evidence which was otherwise admitted. Mr. Allehewi and Mr. Kaila were both present at the scene of the accident and provided helpful evidence with respect to the scene immediately following the collision.

[44] Mr. Allehewi testified that he was parked in his vehicle in the Plaza, near the Shoppers Drug Mart. He did not see the collision, but was alerted to it when he heard a loud boom. He turned and saw a white truck turn into the Plaza, and someone lying on the ground on King George Boulevard. Mr. Allehewi believed that the driver of the white truck was involved in the collision. Mr. Allehewi went and attended to the man, Mr. Rana, who was motionless and bleeding. Mr. Rana's motorcycle was on King George Boulevard, approximately 100 feet away from Mr. Rana's body. While with Mr. Rana, Mr. Allehewi saw the driver of the white truck come out of the truck, and assist someone with standing up the motorcycle. The driver of the truck then went back to his truck, and drove off, without attending to Mr. Rana. Mr. Allehewi ran after the white truck but was not able to catch up to it or obtain the licence of the vehicle as it left the scene.

[45] Mr. Allehewi's evidence was not challenged by the defence, and I found him to be a credible and reliable witness.

[46] Mr. Kaila was also near the scene of the accident when it occurred. He testified that he was driving with a friend, heading northbound on King George Boulevard near Kelly's Pub. He heard a loud noise, and saw a person riding a motorcycle falling onto the bumper of a white truck and hitting the ground. Mr. Kaila saw the white truck pull into the Plaza near Shoppers Drug Mart. Mr. Kaila ran to the scene, while his friend parked his vehicle. Mr. Kaila attended to Mr. Rana, who was lying motionless and bleeding on the ground. Mr. Kaila saw a person lifting the bike up to stand it upright. A short while later, Mr. Kaila saw the white truck leaving. He told someone to go after the truck. Mr. Kaila remained with Mr. Rana for a few minutes until the ambulance arrived.

[47] Mr. Kaila was a credible witness, but some aspects of his evidence raise concerns about his reliability. For example, in contrast to Mr. Allehewi's evidence, Mr. Kaila only saw one person lifting the motorcycle. Further, Mr. Kaila's evidence that Mr. Rana hit the bumper of the Truck is in conflict with the Agreed Statement of Facts. These discrepancies in Mr. Kaila's evidence can be explained by the fact that

Mr. Kaila was preoccupied with Mr. Rana, and as such, his evidence on these two points is not reliable.

B. The Accused

[48] Mr. Dionne testified in his own defence, and provided the following evidence at trial.

[49] On the day in question, he was driving to the Shoppers Drug Mart. Before he turned left into the Plaza, Mr. Dionne saw a motorcyclist and an SUV driving toward him. Mr. Dionne felt it was safe and proceeded to make his left turn. While he was turning he saw his ABS light go on. He glanced down at the light and glanced back up again. He heard the sound of the motorcycle accelerating, and some kind of scraping noise behind him. The scraping noise was “really terrible” and he could not identify it. It lasted for a few seconds and sounded like a snow plow, or when metal hits a rough surface.

[50] At the same time that he heard the scraping noise, Mr. Dionne also heard a thud and felt a bump on his vehicle. He attributed the bump coming from behind his seat to a computer desk or other items that were in the back of his truck.

[51] Mr. Dionne proceeded into the Plaza and took the first left hand turn into a parking space facing King George Boulevard. It took him about 25 seconds to go from the collision to the parking spot. Just as he was parking, Mr. Dionne saw a motorcycle lying on the road, about 30-35 feet away from his truck. Once he had parked his truck, he saw someone lying on the ground about 75-80 feet away from him. He exited his vehicle amidst a flurry of activity on the road. The man lying on the ground was being attended to by unknown persons.

[52] Mr. Dionne was beckoned over by a young man to help him lift the motorcycle. Realizing an accident had just occurred, Mr. Dionne’s stress levels started to increase and he started to have breathing difficulties. Nevertheless, Mr. Dionne assisted in lifting the motorcycle. The strain of doing so caused him to experience chest pain and trouble breathing. Once the bike had been raised he had

some discussion with the young man about the location of the kick stand, and that the motorcycle could be evidence. After he lifted the motorcycle, Mr. Dionne headed back to his truck, as his symptoms were becoming increasingly worse.

[53] Mr. Dionne was feeling chest pain like he never had before. He thought he was going into cardiac arrest and that he was going to pass out. He was fighting for air. He smelled and tasted blood in his mouth, felt weak and like he was wobbling, and began experiencing tunnel vision. At some point while he was at his truck, Mr. Dionne panicked and lost control of his bowels and urinated himself.

[54] When he got back to his truck, Mr. Dionne administered his “puffer” inhaler to open his bronchial tubes. Though he considered it, he decided not to administer the stronger nitro spray that he had with him. He then sat in the truck and waited for the inhaler to take effect. He could hear the ambulance and saw more people milling around outside. Mr. Dionne was scared that he would suffer a cardiac arrest or that his ICD would go off and shock him.

[55] When his breathing had slowed down somewhat, Mr. Dionne stepped out of his truck, surveyed the scene, and then returned to the vehicle. He testified that at this time, he was still in medical distress.

[56] Mr. Dionne believed he was having a medical emergency, and decided to leave the scene of the accident to seek urgent medical care. Mr. Dionne was aware the ambulance was arriving for the victim and he thought it was best that he attend Surrey Memorial Hospital (“SMH”), at least 20 blocks away, where they were aware of his medical condition. He also did not consider calling an ambulance because the acuteness of his medical symptoms prevented him from being able to speak or formulate words to explain his medical distress.

[57] According to Mr. Dionne, at the point when he decided to leave the scene, he had not come to any determination as to whether he was involved in the accident. When he drove out of the Shopper’s Drug Mart parking lot, Mr. Dionne did not notice anyone running behind him to get his attention.

[58] Though Mr. Dionne left with the intention of going to the hospital, he ultimately did not attend. While Mr. Dionne was on the way, the acuteness of his symptoms subsided. Though his heart was still racing, his breathing had returned to normal and he no longer considered himself to be in immediate distress. When he found himself close to Surrey Memorial Hospital, he noticed that it was busy. He decided not to proceed to the emergency. Mr. Dionne continued to drive and noticed that he was driving towards his old residence from where he had just moved a few days prior. Mr. Dionne turned into an Esso gas station at King George Blvd and 104th Street which also had a Tim Hortons. His intention was to turn around, but the location was busy and he found himself in the drive-thru lane of the Tim Horton's. He purchased two coffees, turned around, and headed home.

[59] When Mr. Dionne arrived at his home, he used his cellphone's flashlight to look for damage to his truck. Mr. Dionne was still trying to figure out what happened at this stage. He noted some old scuff marks on the bumper.

[60] Mr. Dionne took two muscle relaxants, and went to sleep. In the morning, Mr. Dionne went for a blood test. While driving, he heard a report on CBC radio about the accident and that the police were looking for a white vehicle. Mr. Dionne's truck was white, and he stated that this was the first confirmation that he was involved in the accident. Mr. Dionne's heart started racing. He pulled over and called his brother. Mr. Dionne attended the RCMP station with his brother later that morning to speak to police.

[61] There were a number of discrepancies in Mr. Dionne's evidence which lead me to conclude that he was neither a reliable nor credible witness. For example:

- a) His testimony was internally inconsistent. He provided varying accounts on numerous issues, such as why he could not get medical assistance at the scene; whether he had used his nitro spray; when he started and stopped experiencing heart symptoms and breathing difficulties; whether he had heard the bump as well as feeling it; when he came to the

realization that he might have been involved in the accident; and his reasons for going to the police station.

- b) There were material contradictions between Mr. Dionne's testimony in court, and his police statement, such as:
 - i. Mr. Dionne told the police that when he left the accident scene he was heading home; he did not tell the police of his intention to go to the hospital.
 - ii. Despite speaking at length to the police about his reasons for leaving the scene, Mr. Dionne did not mention his fear of having a heart attack at the scene.
 - iii. He told the court that he did not get a good sleep before he gave his statement to the police, yet he told the police that when he woke up that morning he thought "wow I had a great night's sleep".
 - iv. He told the court that his puffer had not kicked in by the time he left the scene, as it takes 10-15 minutes, yet he told the police that it had kicked in and his breathing was ok.
- c) He left out crucial aspects of the narrative which were only admitted to under cross-examination. For example, in his direct evidence he made no mention of exiting his truck for a second time, and initially denied this under cross-examination. Only when his statement to the police was put to him did he admit that he got out of the truck for a second time.
- d) Many aspects of his testimony were implausible, defied common sense, or otherwise lacked credibility, such as:
 - i. It is implausible that his medical condition was so dire that he had to leave the scene immediately to go to the hospital, and yet he was able to drive calmly and effectively for the over 20 block distance to SMH;

- ii. It is implausible that he left the scene for medical concerns only to never go to the hospital.
- iii. It is implausible that he never intended to order coffee and “accidentally” ended up in the Tim Horton’s line up. He could have simply driven through without placing any order, or ordered one coffee instead of two. He also had ample opportunity to think about his decision to buy coffee since he stated that he had to go back to his Truck to get another form of payment;
- iv. It defies common sense that he would not use his nitro spray if he was truly concerned about his cardiac health, or that he would purchase and drink coffee knowing that coffee was not good for his heart.
- v. It defies common sense that his memory the day after the accident, would be worse than his memory at a trial held over 2.5 years after the accident.
- vi. Mr. Dionne’s explanation that his memory was worse when he gave his police statement because he was agitated at the time, and was being questioned without sleeping for hours and being served baloney for two days, is not credible. When he was confronted with the fact that he had only been in jail since that morning, he said that he could not remember how long he had been in jail when he gave his statement.
- vii. He told the court that when he went to the police station, he was not sure that he was involved in the collision, and went there to find out what happened. This is inconsistent with his Agreed Statement of Fact at para. 11, where he admits that when he presented himself at the police station, he informed Cst. Byrnes that he had been involved in the collision with Mr. Rana the previous evening.

[62] Mr. Dionne also refused to agree to uncontroversial or sensible propositions, and was frequently vague and evasive under cross-examination.

[63] I turn now to addressing the issues raised in this case.

VI. ACTUS REUS

[64] The actus reus in this case has been proven beyond a reasonable doubt.

[65] The fact that Mr. Dionne was involved in a collision with Mr. Rana is admitted. The evidence also establishes that while Mr. Dionne initially stopped at the scene of the accident, he failed to provide his name and address, and did not offer assistance to Mr. Rana, who was injured.

VII. MENS REA

[66] I turn first to considering whether Mr. Dionne knew, or was reckless as to whether, his vehicle had been involved in an accident.

A. Knowledge or Recklessness Regarding Involvement in Accident

[67] The evidence establishes beyond a reasonable doubt, that Mr. Dionne was reckless as to whether his vehicle was involved in an accident. For reasons outlined earlier, I reject Mr. Dionne's testimony as lacking in credibility, where it conflicts with proof of mens rea.

[68] The following are some highlights of Mr. Dionne's testimony regarding the circumstances of the collision:

- a) he saw a motorcyclist driving toward him as he turned, and heard it accelerating;
- b) he took his eyes off the road to look at his ABS light;
- c) he heard a bump, felt a bump and heard an unusual and loud scraping noise which lasted several seconds, and sounded like a snow plow;
- d) the collision happened in May and it was a pleasant day;
- e) he looked at the road and there was no motorcyclist lying on the road or a motorcycle on the road when he turned;

- f) approximately 25 seconds after the collision he saw the motorcycle on the ground and a man on the ground some distance away from the motorcycle;
- g) he knew the motorcycle had been involved in an accident;
- h) the motorcycle on the ground was the same one that he had seen coming towards him when he turned; and
- i) he knew that leaving the scene of the accident was against the law.

[69] Mr. Dionne's police statement is also revealing and provides strong proof of mens rea. Mr. Dionne told the police that after he saw the man and the motorcycle on the road, he thought that he may have caused the accident. This is just before he helped the young man lift the bike. Though Mr. Dionne denied under cross-examination that this was his thought process at the scene, when read within the context of the sequential events that are being relayed by Mr. Dionne to the police, it is clear that it is.

[70] There is only one possible conclusion that someone in Mr. Dionne's position could come to, in light of the knowledge that he possessed at the time, and that was that he had or might have been involved in an accident with the motorcycle. Though there is ample evidence that Mr. Dionne was wilfully blind, a finding of recklessness is sufficient in this case. I am satisfied beyond a reasonable doubt, that Mr. Dionne was reckless as to whether his vehicle was involved in an accident. Any doubt that Mr. Dionne had about his involvement in the accident could have been cleared up if he had made further inquiries. His failure to do so was reckless.

B. Knowledge or Recklessness of Death or Bodily Harm

[71] The finding that Mr. Dionne knew or was reckless as to whether death or bodily harm ensued from the accident, is met on Mr. Dionne's evidence.

[72] Mr. Dionne acknowledged in his testimony that he saw Mr. Rana lying on the road. He was not moving, and people were giving him assistance. He believed that

Mr. Rana had just been involved in a motorcycle accident and could be seriously injured by the accident, such that an ambulance was coming. He did not go and check on Mr. Rana.

[73] The evidence leads me to conclude that at the time of committing the offence, Mr. Dionne knew, or at the minimum, was reckless, as to whether the accident resulted in the death of Mr. Rana or in bodily harm to Mr. Rana whose death ensued.

C. Reasonable Excuse

[74] I now turn to the final issue before me, and that is whether Mr. Dionne had a reasonable excuse for failing to give his name and address, or offer assistance to Mr. Rana. As noted earlier, failure to do any one of these things is sufficient to warrant a conviction. I will first consider Mr. Dionne's excuse in the context of his failure to give his name and address.

[75] There is no dispute that a "reasonable excuse" is required to be proven by the accused on a balance of probabilities: *R. v. Goleski*, 2014 BCCA 80, aff'd 2015 SCC 6 at para. 74; and *R. v. Ali*, 2015 BCCA 333 at para. 30. At issue is whether the evidence in this case meets this standard of proof.

[76] To determine if Mr. Dionne has provided a reasonable excuse for failing to comply with any of the requirements of s. 320.16(1), it is necessary to consider the meaning of the phrase¹. The phrase, "reasonable excuse" is a recent addition to the offence of "failure to remain" at the scene of an accident, and there is very little jurisprudence on it in relation to s. 320.16 of the *Code*.

[77] The former offence under s. 252 of the *Code* read as follows:

252 (1) Every person commits an offence who has the care, charge or control of a vehicle, vessel or aircraft that is involved in an accident with
(a) another person,

¹ I am indebted to Crown Counsel for their detailed and very helpful submissions on this particular issue, and have borrowed heavily from their brief of argument.

(b) a vehicle, vessel or aircraft, or

(c) in the case of a vehicle, cattle in the charge of another person,

and with intent to escape civil or criminal liability fails to stop the vehicle, vessel or, if possible, the aircraft, give his or her name and address and, where any person has been injured or appears to require assistance, offer assistance.

(...)

252 (1.3) Every person who commits an offence under subsection (1) is guilty of an indictable offence and liable to imprisonment for life if (a) the person knows that another person involved in the accident is dead; or (b) the person knows that bodily harm has been caused to another person involved in the accident and is reckless as to whether the death of the other person results from that bodily harm, and the death of that other person so results.

[78] The former s. 252 was replaced with s. 320.16 in December 2018, through Bill C-46. In addition to a change in the mens rea required to prove the offence, the requirement that the Crown prove an accused's "intent to escape criminal or civil liability" was removed. Instead, liability for this offence can be excused on the basis of a "reasonable excuse".

[79] There is one reported decision in which the phrase "reasonable excuse" under s. 320.16 was at issue.

[80] In the case of *R. v. Wells*, 2020 ONCJ 294 the accused was involved in an accident with a bicyclist. Right before the accident with the bicyclist, there was an altercation where the rider struck and damaged the accused's car. Following the collision, the rider punched the accused in the face through the car window. The main issue at trial was whether the accused had a reasonable excuse. The court concluded that he did. The accused was found to have a reasonable excuse, arising from a reasonable fear of suffering physical violence because the accused had been punched in the face by a cyclist with whom the accused had collided in his vehicle.

[81] In coming to this conclusion, the court reviewed the caselaw related to s. 252 and reached the conclusion that "the recast new offence is not a continuing offence, and that the reasonable excuse applies only to the point in time where the failure to stop occurs": *Wells* at para. 62.

[82] I agree with defence counsel that *Wells* supports the proposition that what Mr. Dionne did after leaving the accident scene cannot go to the reasonableness of his excuse. However, this evidence can be taken into consideration in determining Mr. Dionne's credibility.

[83] The defence submits that Mr. Dionne did stop at the scene of the accident and offered assistance by lifting the motorcycle and that this conduct supports the proposition that he did not attempt to evade detection and liability. His reason for leaving the scene was to seek urgent medical attention because he believed he was having a medical emergency. Defence counsel submits that Mr. Dionne's testimony is credible from a subjective standpoint. It is argued that even if Mr. Dionne was not having a medical emergency, he believed it to be so. Thus, his concern over having a cardiac event and being shocked by his ICD is subjectively understandable.

[84] I disagree. First, in order to establish reasonableness of his excuse, this court must not only believe Mr. Dionne's evidence about his subjective fear that he was having a medical emergency, but there must also be an objective basis for his fear: *Wells* at para. 30. Second, Mr. Dionne's evidence, taken as a whole, falls far short of establishing the reasonableness of his excuse.

[85] As noted elsewhere, I did not find Mr. Dionne to be a credible or reliable witness. Some of those reasons are summarized below:

- a) Mr. Dionne's actions at the scene were inconsistent with someone who was having a medical emergency.
- b) There were material differences between Mr. Dionne's testimony in court and his police statement, with regards to the reason why he left the scene. He told the police that it was because he was concerned about the ICD shock. At trial, he said it was because he believed he was about to have a heart attack. Though he told the Court that he was on his way to the hospital, he made no mention of this to the police, and ultimately never attended at the hospital.

- c) His custodial statement reveals that the real reason for Mr. Dionne to leave the scene was denial and panic.
- d) Mr. Dionne stated in his police statement repeatedly that he was worried that the ICD might shock him, “knock him on his ass”, or possibly cause him to black out. Even if this is accepted as his excuse for fleeing, rather than denial and panic, it is not reasonable. Mr. Dionne agreed that the ICD is designed to restore normal cardiac functioning, and it is a form of medicine to make his heart function properly. Further, he had no experience with having had an ICD shock before, and there was no evidence that the shock would produce adverse medical events other than Mr. Dionne’s fear of being knocked “on his ass” or blacking out.

[86] Even if Mr. Dionne’s testimony on the reason for leaving is believed, it does not constitute a reasonable excuse. It is not an objectively reasonable excuse to drive over 20 blocks away to seek medical attention over fears of an imminent heart attack, when one is aware that an ambulance with qualified medical professionals is seconds away from arriving. Mr. Dionne acknowledged that he was a responsible driver, and driving while at risk of passing out is not something a responsible driver would do.

[87] I conclude that Mr. Dionne has failed to establish a reasonable excuse on a balance of probabilities, for failing to give his name and address at the scene of the accident.

VIII. CONCLUSION

[88] Section 320.16(1) imposes a positive obligation on a driver involved in an accident to stop; give their name and address; and offer assistance if a person has been injured or appears to require assistance.

[89] The actus reus of the offence is met if the accused fails to do any one of these three things. In this case, I find that Mr. Dionne failed to give his name and address, contrary to the requirements imposed on him by s. 320.16(3). In the

circumstances it is not necessary for me to consider whether he had a reasonable excuse for failing to render assistance to Mr. Rana.

IX. VERDICT

[90] On the charge of failing to give his name and address at the scene of an accident where the death of Mr. Rana ensued, contrary to s. 320.16(3) of the *Code*, I find Mr. Dionne, guilty.

“Shergill J.”

Tab 6:
R. v. McKinnon,
[2020] AJ No 558,
2020 ABPC 86

In the Provincial Court of Alberta

Citation: R v McKinnon, 2020 ABPC 86

Date: 20200511

Docket: 190947903P1

Registry: Calgary

Between:

Her Majesty the Queen

- and -

Shirley M. McKinnon

Judgment of the Honourable Judge Bruce R. Fraser

Introduction

[1] The accused is charged with failing to provide a breath sample into an approved screening device (ASD) at a check stop shortly after midnight on the 19th July, 2019, contrary to Section 320.15(1) of the *Criminal Code* pursuant to a demand under Section 320.27(2). The Crown called the officer who made the demand and entered a body cam video of the interaction at the check stop. The defence called the accused.

Issue

[2] The accused was given a proper demand and failed to provide a sample of her breath into an approved screening device. The sole issue is whether she had a reasonable excuse for not doing so.

Facts In Evidence

[3] Police had set up a routine check stop in the 3000 block of 10th Street NW Calgary. There was a check stop bus and spaces to pull vehicles over. Shortly after midnight the accused was driving northbound on 10th Street and was stopped at the check stop by Cst. Casavant. She

was given the mandatory alcohol screening demand pursuant to Section 320.27(2). She was asked if she had consumed any alcohol in the last 15 minutes or smoked a cigarette in the last five minutes. She replied in the negative. She was asked if she understood the demand and she replied, "Yes". Cst. Casavant had the instrument in her hand. She gave the accused instructions. She told her to place the instrument in her mouth, take a deep breath, form a tight seal and blow into the instrument until she was told to stop. She was asked if she understood and she replied, "Yes".

[4] She was told to blow. According to the officer she pretended to blow and instead held her breath. No tone emanated from the instrument telling the officer no air was going into it. She explained this to the accused. This occurred three times with the same result.

[5] The officer changed the mouthpiece and told her to blow again. Two more attempts were unsuccessful. The officer observed she did not blow long enough, she did not form a seal, she was moving her mouth around, she was not blowing hard enough, she could hear air escaping and see air escaping through her open mouth. She told the accused she was not following her instructions.

[6] The officer then asked another officer to attend and give her a demonstration. Cst. Fisher did so beside the accused's vehicle while she remained inside. Cst. Fisher blew for four or five seconds, providing a proper sample and a reading of zero.

[7] Cst. Casavant offered to have her step out of the vehicle and blow while standing. The accused agreed and they went to the front of her vehicle out of the way of traffic. She was again instructed and again provided two more insufficient samples. The officer could hear air going into her cheek during blows six and seven.

[8] At this point the battery gave out on the ASD so the officer retrieved a second one. When she returned, for the first time, she smelled alcohol on the accused's breath. This gave her a suspicion she had alcohol in her body. As a result, she read another ASD demand pursuant to Section 320.27(1). She read it twice. The accused said she understood. There was an eighth attempt and another insufficient sample. The officer said she observed her moving her mouth and could hear air escaping. She could see the mouthpiece poking inside her cheek.

[9] At some point the accused said she had asthma. The officer asked if she needed her inhaler. She answered, "No, I do not need my inhaler. I am not having any trouble breathing right now". There were two more attempts, both insufficient. This time the instrument emitted a tone and as soon as it did, the accused stopped blowing and the tone stopped.

[10] After 10 or 11 attempts the officer arrested her for failure to comply. Her belief was that the accused was purposely not providing a sample. She said the accused gave no reason for not complying and at no time appeared to be in any kind of medical distress.

[11] The *Charter* and caution were read. At this point the accused became uncooperative saying she did not understand, wanted her glasses, wanted the card the officer was reading from and wanted to read it herself. She had previously walked away from the officer and retrieved her phone from her vehicle when the officer was attempting to read the second demand.

[12] She was served with release papers and then wanted to speak to a lawyer. She was taken to the bus and allowed to do so in a private booth. When she emerged, she asked if she could provide a breath sample. She was told no, she had been given ample opportunity.

[13] Cst. Casavant tried to serve documents on her but she again became uncooperative and argued over every document. A sergeant drove her home.

[14] The body cam video was played which filled in areas the officer did not recall or did not have notes, but essentially corroborated the testimony of the officer.

[15] In cross-examination the officer explained that if no tone was being emitted, no air was blowing into the instrument. The instrument would only message on the screen “high” or “insufficient”. Only if there was a sufficient sample would it show a reading. Some times there was no tone. When there was a tone the accused stopped blowing.

[16] The accused testified she did not blow very hard at the beginning and did not know how to blow. She was out of breath after blowing. She did not know what she was doing wrong. She admitted the mouthpiece did go into her cheek. She is missing some teeth on her top right side and gave that as the reason. She said when she heard the ‘beep’ she stopped blowing and wondered why she had to keep blowing. She was trying to blow hard until she heard the beep. She thought she was doing everything asked. She said the officer was a bully.

[17] She testified she went to her doctor afterward to get her asthma checked. She could not blow for long. It took her eight seconds to complete the test. She also indicated she had the interlock installed in her vehicle and she had difficulty blowing into that but she was able to.

[18] The cross-examination was extensive and searching. I will review it during my analysis.

The Law

[19] The law as to the elements of the offence of failing to provide a proper breath sample has been correctly set out in the written submissions of the Crown in my view. The written submissions of the defence do not take issue with them. At one time there was some controversy as to whether the *mens rea* required by the Crown to prove was a general intent or a specific intent.

[20] In a previous judgment, **R v Le**, 2014 ABPC 177 (**Le**), I concluded the offence was one of general intent following the authorities of **R v Porter**, 2012 ONSC 3504 (**Porter**) (Ont. SC) and **R v Lemay**, 2013 ABPC 144, which also followed **Porter**. However, **R v Lewko** (2002), 169 CCC (3d) 359 (**Lewko**) (Sask. CA) has been interpreted to mean the offence requires a specific intent. In **R v Moser** (1992), 71 CCC (3d) 165 (**Moser**) (Ont. CA), Justice Doherty had made it clear that the elements of the offence consist of a proper demand and a refusal or failure to comply with that demand. It does not involve a specific intent.

[21] As the Crown points out, the section has been rewritten in the amendments to make it clear it is a general intent offence and the elements are those as set out in **Moser**. Section 320.15(1) replacing Section 254(5) reads:

Everyone commits an offence who, knowing that a demand has been made, fails or refuses to comply without reasonable excuse, with a demand made under Section 320.27 or 320.28.

[22] By inserting the words “knowing that a demand has been made”, it has eliminated any uncertainty as to the intent required. The only elements of the offence the Crown must prove beyond a reasonable doubt is that the accused knew a demand had been made and she failed to supply a suitable sample of her breath. In this case there is no doubt as to both elements. She acknowledged she understood both demands made and she never provided a proper sample. These elements are conceded by the defence.

[23] Once the Crown has proven the elements of the offence, there must be a conviction entered unless the accused presents a reasonable excuse. Once again **Lewko** has created uncertainty as to who has the onus to establish or disprove a reasonable excuse. Based on its interpretation of Section 794(2) of the *Criminal Code*, the Saskatchewan Court of Appeal in **Lewko** found once an excuse was raised on an evidentiary basis by the accused, the onus fell to the Crown to disprove the excuse raised was reasonable. This was based on an amendment to Section 794(2) inserting the words, “except by way of rebuttal”.

[24] That phrase was added by the Senate to ensure the Crown had the right in rebuttal if the accused raised a reasonable excuse. It was not meant to change the onus set out in the first part of the section from the accused to the Crown, (see **R v Goleski**, 2014 BCCA 80), as **Lewko** interpreted it.

[25] The authorities cited by the defence in support of the onus on the Crown are all based on the **Lewko** interpretation being correct in law. In **R v Plante**, 2013 ABQB 222 (**Plante**) the decision was based on the authority of **Lewko**. **R v Schenk**, 2013 ABPC 289 followed the decision in **Plante** as did **R v Mercado**, 2013 ABPC 330 (**Mercado**).

[26] In **R v Goleski**, 2014 BCCA 80, Justice Frankel conducted an exhaustive review of the history of Section 794(2) back to the 1800’s and the common law which was the basis for the statute law. He cited **R v Edwards**, [1975] 1 QB 27 at 36 where the English Court of Appeal discussed the 1848 English statute on which the first *Criminal Code* version, (in 1889), of 794 was based. They said the object of the proviso was to apply the common law relating to exceptions and provisos into the statute.

[27] In **Le**, my previous judgment I reviewed **Goleski** in detail as well as **R v Sheehan** (2003), 35 MVR (4th) 61 (NL Prov. Ct.) and concluded, as those cases did, that the reasoning in **Lewko** was flawed. The onus remains on the accused to establish a reasonable excuse on a balance of probabilities. In my view, **Goleski** was the correct law.

[28] Since **Le**, the Supreme Court of Canada has affirmed **Goleski** as the correct law on appeal. (**R v Goleski**, 2015 SCC 6). The proper interpretation of Section 794(2) places the onus on the defence and not the Crown.

[29] Since the Supreme Court decision, Parliament in 2018 repealed Section 794(2) in its entirety. That then takes us back to the common law as the applicable law. As stated in **Goleski** at para. 74:

... when Parliament first enacted a provision dealing with exceptions, etc. in the context of summary conviction proceedings, it did so in a way that affirmed the

common-law principle which placed the burden of proving such matters on an accused on a balance of probabilities.

[30] The common law is preserved in the *Criminal Code* by Section 8(3) which states:

Every rule and principle of the common law that renders any circumstance a justification or excuse for an act or a defence to a charge continues in force ...

[31] This was recognized in **R v Allen**, 2020 ABPC 34, a decision of mine delivered after the repeal of Section 794(2) recognizing the common law prevails as to the law of reasonable excuse and the onus is on the accused to establish such an excuse on a balance of probabilities as it was under Section 794(2) and prior as stated in **Goleski**.

[32] Based on this review, I find I do not accept the defence submission that the onus is on the Crown based on **Plante** being the prevailing law. I find with the greatest respect **Plante**, **Schenk** and **Mercado** are not correct in law as they are based on **Lewko** which is incorrect. Since Section 794(2) is repealed, the common law prevails and the onus continues to be on the accused and remains on the accused.

[33] Justice Frankel in **Goleski** cited numerous authorities in support of the common law at para. 70 such as:

- 1) **R v Hogue** (1970), 1 CCC (2d) 549 at 559 (NBCA)
- 2) **R v Childs** (1982), 39 Nfld and PEI 200 at para 7 (Nfld. CA)
- 3) **R v Aubut**, [1992] JQ No. 501 (CA)
- 4) **R v Peck** (1994), 128 NSR (2d) 206 at para. 18 (NSCA)
- 5) **R v Ferron** (1989), 49 CCC (3d) 432 at 442 (BCCA)

Analysis

[34] Based on the law, the issue is, has the accused established a reasonable excuse for failing to provide a proper sample of breath into the ASD knowing such a demand was made, the Crown having proven all the elements of the offence. The accused must establish such excuse on a balance of probabilities.

[35] The defence submits the Crown has not established she did not have a reasonable excuse for two reasons. As this submission is wrong in law, I will treat the submission as stating the accused has established she had a reasonable excuse for the same two reasons. They are, firstly, that the instructions and directions given by Cst. Casavant were inconsistent and inaccurate so that the accused had no understanding how to provide a sample. Secondly, she was physically incapable of providing a sample at the time because of her diminished capacity.

1) Instructions How to Comply

[36] I have reviewed the evidence of both Cst. Casavant and the accused as well as the body cam video.

[37] Defence submits there is a reasonable excuse not to comply because the instructions given by the officer were incomplete, inaccurate and changing resulting in the accused being

unclear how to comply. They further submit the instructions were confusing, intimidating and misleading.

[38] In my view, based on these submissions and the examples given, the defence is confusing 'instructions' with attempts to discern and advise the accused why she is not providing a proper sample as per the instruction causing the instrument to signify 'insufficient' on its message screen. The officer is required to give instructions as to what she wants the accused to do. She is not required to explain to her how she is defeating the instruments obtaining a proper sample.

[39] The demand in the *Criminal Code* states the accused must provide proper samples of breath that in the officer's opinion are necessary to enable a proper analysis by means of the approved screening device. The officer's opinion is based on the instrument telling her it has received a proper sample by giving a reading. If the instrument shows 'insufficient' on the screen, the officer knows or forms the opinion the accused did not provide a proper sample. She makes observations as to how the accused defeated providing a proper sample so she can determine if she is purposely doing so. She may tell the accused what she observed and tell her not to do that in an effort to obtain a proper sample but that should not be confused with giving proper instructions.

[40] The only instructions necessary were to take a deep breath, form a tight seal on the mouthpiece and blow into it until told to stop. Obviously, one must blow until the instrument gives a reading. The video exhibit shows those instructions were given to the accused multiple times. She said she understood the demands and the instructions several times. She was asked if she had any questions and several times said, "No".

[41] Those instructions are quite simplistic. If followed, a proper sample would be provided that the instrument could analyse.

[42] In direct examination the accused testified she did not blow very hard at the beginning and she did not know how to blow; she did not know what she was doing wrong, yet she knew the mouthpiece went into her cheek. Then she said she heard a 'beep' and said, "Why am I still blowing?" She said she was trying to blow hard until she heard the beep. She stopped blowing when she heard the beep. Therefore, she intentionally stopped blowing when she heard the beep contrary to the instructions. By doing this, based on her own evidence, she intentionally did not and could not provide a proper sample.

[43] In cross-examination she said she was 66 years old and worked 11 years as an operations analyst for an oil and gas company. She said this involved research and accumulating data for senior management. I find this to involve technical, analytical, responsibilities that only an intelligent, educated person could perform.

[44] She acknowledged she understood what 'blow' means, what to form a seal means, and that she was physically capable of doing both. She knew what was meant by providing a breath sample. She understood the demand. She understood the instructions. She did not ask for further instructions. She understood everything the officer told her. She did not ask for any clarification.

[45] She said she did not have her teeth in front of the straw and does not recall air escaping from the straw. She again confirmed that when she heard the beep, she stopped blowing rather than continuing until the officer told her to stop. She said the officer took it out of her mouth. What she is implying is the officer prevented her from continuing to blow and providing a proper

sample. This of course makes no sense. The officer's purpose was to obtain a proper sample and gave her 11 opportunities to do so and tried everything to encourage her to do so.

[46] The accused called the officer a bully. I have reviewed the video and find no evidence of bullying. In fact, I found Cst. Casavant to be a model of patience and was cordial, especially when the accused became confrontational and walked away from the officer to get her phone and then not listening to the second demand based on suspicion of alcohol in her body. She once again demonstrated patience when reading the *Charter* and the accused became confrontational. Her patience was demonstrated when she asked another officer to demonstrate how to provide a suitable breath sample.

[47] I find the accused was not in the least confused by the instructions which were simple and straightforward and could be followed by almost anyone, certainly a person of the accused's background and abilities. She did not provide a proper sample but certainly not because she did not know or understand how to comply or was intimidated.

2) Physically Incapable of Complying

[48] In order to establish a reasonable excuse for medical reasons, it is not necessary for the accused to disclose the medical reason at the scene or to call medical evidence at the trial in most circumstances but not all.

[49] It is difficult to comprehend the medical condition being put forward by the defence as a reasonable excuse. The accused testified she was unable to blow hard enough or long enough to comply with the demand for a breath sample. The officer observed no breathing difficulties at the scene and none is apparent on the video. The officer observed other reasons for not providing a sufficient sample such as placing the mouthpiece in front of her teeth, placing her tongue in front of it, allowing the straw to go into her cheek, not blowing at all at times, stopping blowing before being told to stop, and not forming a tight seal on the straw with her mouth. The accused admitted she was not blowing very hard on the first few blows. I find she meant this was deliberate. She also testified she deliberately stopped blowing when she heard the tone or 'beep', as she called it, from the instrument contrary to the instructions she was given. If she purposely did not blow hard and stopped as soon as the instrument emitted a tone, it seems to me that is why she failed to comply, not because of some unidentified medical condition.

[50] In cross-examination she admitted she was not sick or coughing and not having breathing problems.

[51] The other reason advanced or perhaps is the medical condition relied on as to why she could not blow hard enough or long enough, is that she suffers from asthma. She told the officer this twice. The first time she immediately said, "But that's okay". The second time she mentioned it the officer asked if she needed her inhaler but the accused said, "No, I do not need my inhaler. I am not having any trouble breathing right now". That would indicate to me, in the accused's mind, the asthma was not affecting her ability to comply with the instructions given. I accept she has asthma but not every asthmatic is incapable of providing a suitable breath sample.

[52] The accused testified that after being charged with failure to provide the sample, she went to a doctor for testing regarding lung capacity and had difficulty completing the test but eventually did. I have no idea what type of test she was referring to or what type of instrument she was being tested on or how it compares to the ASD since there is no credible evidence before

the court that would have any effect on whether the accused could provide a proper sample into an ASD. For that type of evidence to have any bearing, some medical or technical evidence would have to be called. I cannot just assume because she had difficulty blowing into some unknown instrument, although capable of eventually providing the sample, therefore she could not provide a sample into the ASD.

[53] Similarly, the accused made reference to the interlock device she had installed in her vehicle to allow her to drive if she had not been drinking alcohol. She testified she had difficulty providing breath samples into this device unless she held her nose. I take it from this evidence she was eventually successful in providing proper samples. Again, I have no evidence before me of any comparisons between an ASD and an interlock device. What I can take from it is that the accused was able to provide suitable samples into both devices but did not into the ASD.

[54] I find neither her asthma nor any other medical condition prevented her from complying to provide a suitable sample and she has not established a reasonable excuse on a balance of probabilities.

Conclusion

[55] I find the accused deliberately failed to comply with two lawful demands to provide a suitable sample of her breath for analysis without reasonable excuse and is therefore guilty beyond reasonable doubt.

Dated at the City of Calgary, Alberta this 11th day of May, 2020.

Bruce R. Fraser
A Judge of the Provincial Court of Alberta

Appearances:

Megan Riddell
for the Crown

Brandon Tralenberg
for the Defence

Tab 7:
R. v. Charles,
2021 175 W.C.B. (2d) 16

2021 CarswellOnt 13159
Ontario Court of Justice

HER MAJESTY THE QUEEN v. CHARLES

2021 CarswellOnt 13159, 175 W.C.B. (2d) 16

HER MAJESTY THE QUEEN v. DERICK T. CHARLES

D.M. Stone J.

Heard: July 20, 2021
Judgment: July 20, 2021
Docket: Oshawa 2811-998-20-37013-00

Counsel: M. Fabre, for Crown
M. Capotosto, for Derick Charles

Related Abridgment Classifications

Criminal law

XIII Offences against the person and reputation

XIII.39 Refusing to comply with roadside screening demand

XIII.39.b Specific defences

Headnote

Criminal law --- Offences against the person and reputation — Refusing to comply with roadside screening demand — Specific defences

During roadside stop where police officers were not all complying with COVID-19 public interaction protocols, accused refused to provide breath test, and was arrested and released at scene — Accused was charged with refusing to comply with demand by peace officer — Accused convicted — Lack of detail in arresting officer's notes gave aura of incompleteness, but officer's evidence was credible while accused's evidence was too convenient and unreliable — In disagreement over whether officer smelt alcohol in vehicle and whether accused admitted to consuming "one beer", officer's evidence was preferred and left no reasonable doubt that officer had grounds for lawful demand for breath test — Police officers' lack of masks was not reasonable excuse for refusing to supply breath sample, and accused exaggerated when he stated that he observed screening device to be unsanitary — Onus was on accused to prove his reasonable excuse on balance of probabilities and his false and exaggerated evidence was incapable of doing so — Huge variety of arrestees and issues militated against finding new rule that every arrestee should be connected privately to lawyer before leaving scene of arrest, and accused had no enhanced right to delay his release until he was able to call lawyer — Even if failure to arrange call to counsel at roadside amounted to breach of accused rights to counsel, there was no reasonable basis for exclusion of any pre-arrest evidence.

Table of Authorities

Cases considered by D.M. Stone J.:

R. v. Cummins (2021), 2021 ONCJ 291, 2021 CarswellOnt 7129 (Ont. C.J.) — considered

R. v. Goleski (2014), 2014 BCCA 80, 2014 CarswellBC 490, 307 C.C.C. (3d) 1, 10 C.R. (7th) 188, 352 B.C.A.C. 142, 601 W.A.C. 142, 64 M.V.R. (6th) 254, 383 D.L.R. (4th) 3 (B.C. C.A.) — considered

R. v. Goleski (2015), 2015 SCC 6, 2015 CSC 6, 2015 CarswellBC 293, 2015 CarswellBC 294, 72 M.V.R. (6th) 1, 17 C.R. (7th) 53, 467 N.R. 1, 383 D.L.R. (4th) 1, 320 C.C.C. (3d) 433, 365 B.C.A.C. 1, 627 W.A.C. 1, [2015] 1 S.C.R. 399 (S.C.C.) — considered

R. v. Lewko (2002), 2002 SKCA 121, 2002 CarswellSask 665, [2003] 2 W.W.R. 197, 169 C.C.C. (3d) 359, 31 M.V.R. (4th) 1, 7 C.R. (6th) 71, 227 Sask. R. 77, 287 W.A.C. 77 (Sask. C.A.) — referred to

R. v. McCann (2015), 2015 ONCJ 169, 2015 CarswellOnt 4751 (Ont. C.J.) — referred to

R. v. W. (D.) (1991), 3 C.R. (4th) 302, 63 C.C.C. (3d) 397, 122 N.R. 277, 46 O.A.C. 352, [1991] 1 S.C.R. 742, 1991 CarswellOnt 80, 1991 CarswellOnt 1015 (S.C.C.) — followed

Statutes considered:

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11

Generally — referred to

s. 8 — referred to

s. 9 — referred to

s. 10(b) — referred to

s. 24(2) — considered

Criminal Code, R.S.C. 1985, c. C-46

s. 320.15(1) [en. 2018, c. 21, s. 15] — pursuant to

s. 320.27 [en. 2018, c. 21, s. 15] — referred to

s. 320.27(1) [en. 2018, c. 21, s. 15] — referred to

s. 320.27(2) [en. 2018, c. 21, s. 15] — referred to

s. 320.28 [en. 2018, c. 21, s. 15] — referred to

s. 794(2) — considered

D.M. Stone J. (orally):

1 This is my judgment at the end of a blended trial and Charter application process involving Derick T. Charles, who was charged that he did, “knowing that a demand had been made, fail or refuse to comply with a demand made by a peace officer under s. 320.27 or 320.28 of the Criminal Code, contrary to s. 320.15(1)” of the Code.

2 The demand he is alleged to have failed or refused to comply with was that he supply a sample of his breath into an approved screening device, at a roadside in Durham Region. This is an unusual “refuse ASD” case. It features at least these potential issues. I am lumping some together.

3 First of all, the defence never did file a *Charter* application that raised the s. 8 or 9 infringement. The accused’s evidence in-chief essentially raised the question and led me to say so in cross-examination, in overruling a defence objection. At the end of the case, I took Mr. Capotosto to implicitly say the breath demand might have been unlawful as, depending on credibility findings, there were no grounds for the s. 320.27(1) demand made by the officer and this was not a s. 320.27(2) scenario. Next, depending on credibility findings, the officer never actually made a demand.

4 Then, against a background of police officers not complying with COVID-19 public interaction protocols of the Durham Regional Police Service, when dealing with a member of the public who was very sensitive to and in favour of compliance, did the citizen's failure or refusal to provide a breath sample arise from a reasonable excuse? That issue involves various components, including possible sanitizing of the approved screening device.

5 Next, the defence says there was never a final refusal, but at most a conditional refusal.

6 The next point, when Mr. Charles was arrested and read his rights to counsel, if he was read his rights to counsel, the defence argues the s. 10(b) right to consult counsel immediately was infringed or denied when the officer did not facilitate a call from the roadside or from a police station, and instead released him at the roadside.

7 Of course, credibility was a major issue. And then next, the question of the onus in this case of a reasonable excuse, in the wake of the repeal of s. 794(2) of the Code. If the defence is correct, the Crown must prove all elements of the offence and negative possible reasonable excuses beyond a reasonable doubt, a process that engages *R. v W.(D.)*, (1991), 63 CCC (3d) 397 at page 409, Supreme Court of Canada. The Crown says the defence must prove any reasonable excuse on a balance of probabilities, upsetting some of *W.(D.)*'s application.

8 I recognize, supported by defence cases, that it is possible for a reasonable excuse to exist to refuse to submit to a health-endangering process that could include an approved screening device test. I recognize that identifying what could be health-endangering would at least usually involve expert evidence, rather than judicial notice based on news reports, as well as that, for some people, their genuine subjective fear might greatly exceed reasonable reality. I recognize that some people could use the COVID-19 pandemic in an exaggerated way. I recognize, in a general judicial notice sense, that some people, including authority figures, are pandemic deniers, and that some police officers, over time, have fabricated evidence. I have seen it in cases before me.

9 Then I turned to the fact that the evidence of the main police officer and the accused person were strikingly unreconcilable in a number of places, and began an analysis of issues of credibility and reliability. The main onus of proof fell on the Crown, but the analysis of when I had heard credible evidence and when I had not was a more balanced exercise, using customary signposts and tools. This analysis led me to conclusions culminating, in the end, in a finding of guilt with respect to Mr. Charles on this count.

10 So, as I say, it finally became obvious that the challenging arguments of counsel depended, in most issues, on credibility and reliability of the witnesses, especially Mr. Charles and P.C. Lowe. I recognize I can accept some, all or none of any witness's evidence. When witnesses disagree, it is not a matter of choosing one or the other. Both may be wrong. Honest witnesses can make a mistake and dishonest witnesses can tell the truth. I have to assess reasonableness and common sense, plus other reliable evidence. Does the evidence disclose a bias or interest? Mr. Charles had a right, included in the caution read to him when he was finally arrested, not to say anything. Are there inconsistencies, especially unexplained inconsistencies between pieces of evidence and within one person's evidence? Are there any markers of recent contrivance?

11 I factored in the evidence of the other three police officers who testified before me. They were not there as investigators, but were to provide safety and support. They also stood off beside a busy road and highway on a long weekend evening. They heard little, if anything, but generally supported the timeline and activities of Constable Lowe. I find as a fact, contrary to any possible inference from Constable McCubbin's evidence, that the approved screening device was never in the trunk of P.C. Lowe's vehicle, but was retrieved from the body of the car. I also note Mr. Charles' evidence provides the only subjective evidence of what was in his mind during the event.

12 Constable Lowe's notes and typed report, prepared not more than about two hours after the event, were not filed before the court, of course, but were seemingly thin on direct quotations or details of other responding officers. It was obvious that, contrary to Constable Lowe's inability to name officers or recognize them, at least one of them was from his own division. I accept that the activities of other officers might well be irrelevant to an investigation, or often to reasonable standards of recording events for purposes of disclosure to the defence. Also, there was questioning around the absence of notations about things that may never have happened, but the defence alleged did occur. When notes are not detailed and do not refer to some things that did occur, then an aura of incompleteness can grow.

13 There was one issue of that, in my view, that was important in the level of disagreement between the main witnesses and could be tested, and that drew my attention. According to Constable Lowe, the accused admitted consuming alcohol when he was asked at the roadside. According to Mr. Charles, he said the opposite, and then he raised the importance level by setting out to prove non-consumption and by implicitly seeking to prove that the officer was simply wrong.

14 Had Mr. Charles succeeded, it would have been a small step to throw into doubt certain other things the officer said, such as that the accused used a number of profane words, and used a couple of non-standard English words such as "fam", F-A-M, and "yeep", Y-E-E-P, as recorded in his notes. Alternatively, successfully casting doubt on the normally minor question whether the accused swore, et cetera, could help cast doubt on the statement, when the officer stopped Mr. Charles, that he had consumed alcohol. Plainly one of these speakers lied about what Mr. Charles said about drinking and they were not both mistaken. Whoever made this misstatement, this was a value-loaded issue and could give rise to legal consequences, rights or obligations.

15 Constable Lowe testified that after he stopped the vehicle he had been dispatched to investigate and asked for the driver's driver's licence, ownership and insurance, he noted the smell of an alcoholic beverage in the vehicle. He described the smell as emanating from the vehicle, of course, its interior. He asked Mr. Charles if he had consumed alcohol. He testified Mr. Charles replied he had consumed one beer, as opposed to - sorry. As opposed to the answer, he did not include the specific words of the question in - or maybe the question itself in his notebook and I do not recall him being asked about his typed report. He maintained he asked the question and Mr. Charles testified about his answer to the question. There was no doubt he asked Mr. Charles if he had consumed alcohol, and Mr. Charles agreed that the question got asked. That does not prove the officer smelled the odour of an alcoholic beverage from the car, but is consistent with it, although it is also merely consistent with the officer and others being dispatched to a "following impaired", where a citizen was following a suspicious vehicle.

16 The key issue is Mr. Charles' response to the question about drinking. In-chief he testified he answered, "No." He then said the officer asked if Mr. Charles wanted to accompany him to his car, to perform a test, and he responded, "Yes". Mr. Capotosto returned to the answer given to the officer about drinking. Again Mr. Charles said he said, "No," and confirmed he said, "Nothing else", those being the words he used to me in describing what he said to the officer. So the witness was testifying he said, "No," and he said no other word. As examination in-chief went on and early in cross-examination, Mr. Charles locked down a position that he had consumed no alcohol at all that day, nor bought any, although he does in normal life consume alcohol and beer. But when in cross-examination he was asked whether he had answered Constable Lowe's question by saying, "One beer," he said he had answered, "No, I had nothing to drink." Mr. Fabre properly confronted Mr. Charles that he had answered that question to his lawyer by denying he had said anything besides, "No," and Mr. Charles said he did not remember that question and answer. In re-examination, Mr. Charles was again asked by Mr. Capotosto if he had said he had had, "one beer". He testified, "No, I had nothing to drink," and that, "No, I had nothing to drink," was his answer on October 10, 2020 to Constable Lowe's question. Later in the case, among the fanciful positions put forward was that this could have simply been a misunderstanding, and that maybe Constable Lowe heard "one beer" out of a phrase such as, "No, I had nothing to drink, not even one beer." Of course, there was never any evidence that that extended statement was ever made by anybody.

17 In the course of the trial, the defence, assisted by weak note-taking by a newer officer who had been trained on apparently two systems (Toronto and Durham), variously pressed home that, for example, Constable Lowe could not be sure exactly when the demand was made by Mr. Charles that Lowe be masked, or that maybe one thing or another was said or done involving Lowe or another officer. I have gone through those questions at issue to seek out incidents that occurred or may never have occurred and what evidence I can put faith in, if any. However, the evidence concerning the officer's grounds for the approved screening device demand, in the language used, contradicted or not contradicted, acted upon or not, and in the acid test of common sense, makes it clear to me that Constable Lowe told me the truth and Mr. Charles lied. Mr. Charles fabricated this important evidence of what he said to the officer. The actual admission by Mr. Charles was clear and accurately heard and it was acted upon by the officer. It is true, as Mr. Capotosto showed, that Constable Lowe was aware that s. 320.7(2) of the Code permitted the officer to make a demand without a reasonable suspicion that Mr. Charles had alcohol in his body. The officer did not seek to rely on that subsection because he had a solid reasonable suspicion from the words of Mr. Charles.

18 Next, because I believe that Mr. Charles told the officer he had consumed one beer and because however much he consumed, he would not lie to a police officer about consuming alcohol when he actually had none, I accept the officer's

evidence of detecting the odour of an alcoholic beverage as opposed to, for example, an odour of chicken or the later possible odour of hand sanitizer. I might say there was no question, and acknowledged by the officer, that there was hand sanitizer in the vehicle, which emerged later.

19 On the whole, Constable Lowe also impressed me as a thoroughly honest witness. Mr. Fabre described it as “blunt honesty”. Before the evidence about the roadside discussion with Mr. Charles, Crown counsel was trying to lead the officer through observations Lowe made of Mr. Charles’ driving. This was a point that Mr. Fabre had pleaded in his written response to the defence *Charter* application. But in court Constable Lowe said he had no independent recollection of seeing that driving. The Crown referred Lowe to his notes, which apparently did mention the point. Constable Lowe acknowledged the presence of the note, but said he still had no independent recollection of the recorded conversation. He never did adopt the content of that part of his relatively timely notes. To be clear, no application was made with respect to past recollection recorded. I understood Constable Lowe to simply continue with evidence on which he *did* have an independent recollection. And although Mr. Capotosto asked questions and debated with the officer on whether he could be pulling events from others in the approximately 20 impaired cases he had investigated, the officer presented as careful and fair in what he could answer, what he could not, and also defence suggestions he should accept as possible or even accurate. As for other cases he had investigated, Lowe testified this was his first case of a refused demand.

20 A demand which was lawful is one of the elements of the Crown’s case which must be proven beyond a reasonable doubt and the three-pronged test in *R. v. W.(D.)* applies. In this odd case, after reading the *Charter* material and hearing the Crown’s opening, together with defence counsel at one point saying there was no issue on the words of the approved screening device demand, I thought the lawfulness of the demand was not in issue. After hearing Mr. Charles’ evidence in-chief, I knew it was in issue. By the time all of the evidence was in, I was satisfied that Mr. Charles’ recollection of how he answered Constable Lowe’s question about alcohol consumption was not true, that Constable Lowe’s evidence about one beer was credible, then that Constable Lowe’s evidence on that point was also reliable, ultimately that Mr. Charles’ evidence, in the face of the credible evidence and common sense, did not leave me in doubt on the second branch of *R. v. W.(D.)*. And finally, at the end of all of the evidence, I was not left with any reasonable doubt but that Constable Lowe’s evidence of Mr. Charles’ answer was correct. Therefore the officer had grounds for a lawful demand, as I have already indicated.

21 Mr. Capotosto seemed to withdraw somewhat from his concession concerning the words of Constable Lowe’s demand, and this able counsel, to the extent he did, might have been responding to his client’s evidence. However, while he was able to make some progress on Constable Lowe’s inexperience, which included that this was the first time for the officer testifying on the trial of a criminal charge, Lowe convinced me, as Mr. Fabre argued, that he read the demand from his notebook, therefore the proper words, as one would expect from a newer officer. And again I note, as to Lowe’s independent memory, in re-examination he testified this was his first refused demand that he had had.

22 The lawful approved screening device demand was probably the first element of the offence charged that I realized the Crown had proved beyond a reasonable doubt. It also means that no *Charter* s. 8 or 9 issue arose on the grounds for demand. As I said before, I can accept some, all or none of any witness’s evidence. It does not follow necessarily that Constable Lowe was as credible or reliable on all of his evidence as he was on this point. Similarly, it does not follow necessarily that because Mr. Charles sought to mislead me about what he answered to Constable Lowe, that he fabricated all of the rest of his evidence. For example, I am not prepared to find that Mr. Charles used some subterfuge to come into possession of Exhibit 1, the Popeye’s Louisiana Kitchen receipt. He may very well have purchased chicken and fries in Whitchurch-Stouffville that late afternoon, before 7:00 p.m. But the exhibit and his evidence do not raise a doubt now that he did not consume an alcoholic beverage. However, as noted, I do find Constable Lowe was a credible witness and more of Mr. Charles’ evidence became too convenient, unreliable and eventually rejected as mere attempts to attack Constable Lowe’s evidence gathering and ultimately Constable Lowe’s character. So language such as “fam” and “yeep” which both those witnesses claimed not to use, and in one case not to know, was used by Mr. Charles. In court Mr. Charles speaks and comports himself as a well-educated businessman in the construction trade. But on October 10, 2020, at a roadside in Durham Region, when under pressure by police to provide a breath sample, after admitting he had had a beer, and some officers in the gathering were not masked as they should have been under the COVID protocol and the Ontario Government policy, Mr. Charles swore more than once. This issue of language used by Mr. Charles and whether it was invented by Constable Lowe systematically relates to credibility. During the deliberation process, I need not apply any test other than whether the speaker displayed credibility. I note that when a Crown witness is not more than likely trying to tell the truth on a balance of probabilities on a charge, that is often the end of consideration of that witness’s evidence, unless it was actually deliberately untrue, when a special consideration, or a *Charter* breach or remedy is being considered. On the other hand, when a defendant or a defendant’s

witness, whoever called them, is not probably trying to tell the truth, their evidence must still be considered, for example on the second and third branches of *R. v. W.(D.)*. Putting all of the evidence of Constable Lowe into the context of the events of that evening, it is far more likely than not that he tried to be fair with Mr. Charles and that he tried to tell me the truth about what Lowe did, saw and heard. It is far more likely than not that he did not invent the swearing or use of non-standard English. When he argued with Mr. Charles, it was during his firm intent to get Mr. Charles to sign the promise to appear in court, so Lowe could release Charles at the scene, rather than, for example, take him to the police station cells. On the other hand, considering Mr. Charles' evidence in the full context of his trial and *Charter* evidence and what was happening on October 10, 2020, and looking at his situation in isolation, in the sense of not saying one of the two main witnesses must be right — of course that is not part of the test — I find it at least a little more likely than not that Mr. Charles' denial of swearing and using words like “fam” and “yeep” is untrue. This is possibly a different kind of untruth than the lie about “one beer”, in that I need not say whether Mr. Charles actually knows, as opposed to being mistaken as to the language he used in the tumult of that evening.

A Reasonable Excuse?

23 Notwithstanding the above concerns about Mr. Charles' evidence, I have no basis or reason to discount Mr. Charles' details about his family on COVID-19. I accept he has two children who suffer from asthma to such a serious extent that they had and continue to be in need of hospital intervention, and Mr. Charles' wife is a PSW and contracted COVID, being sick for at least one month. It is common ground that Mr. Charles was masked against COVID on October 10th and in possession of hand sanitizer. I accept that Durham Regional Police Service protocol expected officers interacting with parties in the public to observe masking and social distancing standards. I expect that that protocol made allowances for close contact as required for some police duties, including perhaps arrest and keeping the peace. Of the five officers, including one new officer in training who attended the arrest scene, two were masked from the start, and three, including Constable Lowe, were not. Lowe stated as a reason for not masking when he approached Mr. Charles' car a desire to be able to smell if alcohol was present in the air. He indicated that that was a practice of his. The officers were alive to the issue of masking, as when Mr. Charles was objecting to the lack of masks, one officer backed away and provided his support for the arresting officer from a greater distance, and another retreated back to his car. As for Constable Lowe, he put on a surgical mask when the accused, in response to a formal demand read to him, said he wasn't going to do it, and then, after rambling, complained that the officer was not wearing a mask. Lack of a mask was not, in my opinion, a reasonable excuse for refusing to supply a breath sample into an approved screening device.

24 A more challenging question is whether Mr. Charles had a reasonable excuse to refuse to blow into the approved screening device because of his opinion or belief that the device was unsanitary and the mouthpiece had been compromised by sputum emitted by Constable Lowe. However, once again there was a sharp disagreement between Constable Lowe and Mr. Charles on the facts. In my view, Mr. Charles exaggerated his evidence of seeing “spit and saliva all over” the approved screening device. There was some evidence given of darkness at that hour and it was 8:00 p.m. on October 10. Much more credible was Constable Lowe's evidence that he was sure he showed Mr. Charles the mouthpiece in its plastic container and asked him unsuccessfully to put that mouthpiece into the machine. If Mr. Charles, who was so upset about nearby officers being unmasked despite being outdoors and at a distance, with McCubbin being at a distance of ten feet or more, if Mr. Charles had seen Constable Lowe spitting on the approved screening device, he would have been clear on demanding a fresh mouthpiece.

25 When Constable Lowe had to be reminded by cross-examination of certain events, and then engaged on the ones he knew occurred, his evidence once given was more consistent. Mr. Charles' evidence shifted and was added to in the sense of sometimes embellishing. As to whether there was a refusal to provide a suitable sample of breath, the accused himself testified he told the officer that if he wasn't going to sanitize the approved screening device, then he should go ahead and arrest Mr. Charles. On the credible evidence of Constable Lowe, I accept the available inference that Mr. Charles firmly refused to provide a suitable sample. I reject Mr. Charles' evidence that he never saw a separate mouthpiece not attached to the approved screening device. That evidence is as convenient as his evidence that he denied consuming any alcohol with one word, “No.” In his evidence, at one point Constable Lowe used the word “games” to describe what he was not interested in playing with Mr. Charles. If Mr. Charles' evidence had been credible, then while some judicial notice could have been taken of the pandemic and of COVID-19, some underling medical evidence probably would have been needed for a proper analysis of risk to Mr. Charles and his family. In light of the evidence I find credible, even if the burden of persuasion on the Crown was proof beyond a reasonable doubt on all elements, including the denial of any reasonable excuse on the part of Mr.

Charles, the Crown could prove all elements that Constable Lowe made a lawful demand, that Mr. Charles knew a lawful demand had been made, and that Mr. Charles did not comply with that lawful demand, without a reasonable excuse.

The Onus in Cases of Alleged Reasonable Excuse

26 In passing, I will note my view of the results of the repeal of s. 794(2) of the Criminal Code in 2017. Mr. Capotosto has argued vigorously that when Parliament repealed that section, noting in a Department of Justice backgrounder that one reason for the repeal was to avoid wrongful convictions, it did away with the effect of *R. v. Goleski*, [2015] 1 SCR 399, and the British Columbia Court of Appeal decision, [2014] BCJ No 347, 307 CCC (3d) 1, it upheld. I agree that the very brief Supreme Court of Canada judgment used language of the meaning specifically and only of s. 794(2) and did not analyze other cases further. However, notwithstanding the language of the backgrounder, with its reference to *Charter* rights that could be impacted by the sections about to be repealed, the repeal of s. 794(2) did not address the detailed analysis by the Court of Appeal per Frankel, JA. That part of the common law remained to speak for itself. In turn, serious doubt was cast by *R. v. Goleski* in the British Columbia Court of Appeal on the law relating to onus in cases of reasonable excuse, as held in *R. v. Lewko*, 2002 SKCA 121, 169 CCC (3d) 359 (Court of Appeal). If I am correct, the onus in the case at bar was on Mr. Charles to prove his reasonable excuse on the balance of probabilities. His false and exaggerated evidence was incapable of doing so. Under scrutiny, starting with his statement of any alcohol he had consumed, his evidence amounted to a house of cards, as it was generally overstated and unreliable on the issues at bar.

Section 10(b) Application

27 The defence, of course, applied for a remedy based on an alleged infringement of Mr. Charles' right to immediate contact with counsel. He had been arrested at the roadside and was not immediately put in touch with counsel, despite an expressed wish to speak with counsel and despite the wording of the officer's question, "Do you wish to speak with an officer now," in the very present tense. Despite the frailties of Mr. Charles' evidence, it is clear that he was arrested. I reject his evidence that the police officer did not read him his rights to counsel, although Constable Lowe delayed six minutes after arrest before reading them, followed by determining that Mr. Charles wanted to contact a lawyer. A caution was read after that. I might just record, for the record, that the officer had arrived at about 7:59 p.m. The arrest occurred at 8:06 p.m. and the rights to counsel were read at 8:12 p.m. The caution was read at 8:14. These times are supported by the officer's notes.

28 Rightly or wrongly, Constable Lowe decided that he could not give Mr. Charles adequate privacy for a call to counsel from the roadside. If Mr. Charles was to be kept in custody for an Intoxilyzer test, he would have been presumably driven to a police station and would have called a lawyer from there. Here the evidence indicates a COVID policy in effect to keep people like Mr. Charles away from the police station, by releasing them at the scene with respect to many kinds of crime. After some administrative paperwork in the case at bar, Mr. Charles was taken out of Constable Lowe's cruiser, the cuffs were removed from his wrists and a conversation began to release him at the scene. He was reluctant to sign a promise to attend court and was angry, and so a more senior officer stepped in, to eventually get Mr. Charles' oral agreement to attend, whereupon he was released. I note and was very much in agreement with the language of my brother, Justice Schwarzl, in *R. v. Cummins*, 2021 ONCJ 291, a decision delivered May 18 of this year. Mr. Charles testified to demanding to be taken to the police station on the basis that there, with a lawyer's help, he could obtain use of a sterilized approved screening device for his test. While contacting a lawyer was mentioned, the test was not. Noting that the statute expects a motorist will "immediately" provide a suitable breath sample after a lawful approved screening device demand and provide that sample to the officer who demanded it, I see some questionable assumptions on Mr. Charles' part in this process. Unlike the expectation of the judge in *R. v. McCann*, 2015 OJ 1653, 2015 ONCJ 169, not every person who refuses to provide an approved screening device sample at roadside will be permitted to undo their fully committed offence and arrest after they reach a lawyer and realize their mistake of law, and what would have happened is unknown to this court. In this case, after Mr. Charles was uncuffed and released with his cell phone in hand, there is no evidence of a call made from the roadside or taxi by him to counsel. It is not clear to me that even Constable Peters, who testified to the duty to facilitate contact with counsel, including possibly at the scene of arrest, would have found Mr. Charles a suitable private location with a phone that night, at that roadside. He testified more hypothetically and admitted that he himself had never arranged such a call. He is a 20-year veteran.

29 If these facts amount to a breach of Mr. Charles' rights to counsel, I do not see a reasonable basis for the exclusion of

any pre-arrest evidence in this case. While some recent cases are straining to find a contextual connection between a post-arrest breach and the pre-arrest evidence, in this case it is too remote. The huge variety of arrestees and issues militate against a new hard and fast rule that every arrestee should or must be connected privately to a lawyer before leaving the scene of arrest. The present approved screening device practices are already the result of *Charter* litigation and include the suspension of rights. With the limited information Mr. Charles had given the police, there was no enhanced right in Mr. Charles to delay his release by finding some way for him to call a lawyer.

30 Here there was no causal relationship before the arrest with the alleged breach and no investigative abuse of the accused after the arrest and breach. This is therefore not a serious breach, if there was any breach at all.

31 The impact of *Charter*-protected interests of the defendant were hypothetical with respect to whether his refusal to provide a sample could be remedied. As it was, release at the scene ended his detention. No new evidence was obtained after his arrest. He could have phoned a lawyer the moment he was released. This factor militates in favour of inclusion of the evidence.

32 There is a great public interest in trying drinking and driving charges on their merits, in part because such offences are a scourge on society. The evidence here existed before any arrest or breach and was necessary to the prosecution. This factor significantly favours inclusion of the evidence.

33 Section 24(2) of the Charter is not meant to punish police officers. Its focus is more on the repute or disrepute of the criminal justice system. See again *R. v. Cummins*, supra, at paragraph 34.

34 In my respectful view, the pre-arrest evidence should be included in the trial. Assuming, without finding, a very minor breach of the right to facilitate access to counsel, I would not exclude the evidence in this case.

35 In the end then, on the issues enumerated above, I render a finding of guilt with respect to this charge.

Accused convicted.

Tab 8:
R. v. Slowinski,
2021 ABPC 160

In the Provincial Court of Alberta

Citation: R v Slowinski, 2021 ABPC 160

Date: 20210521
Docket: A71467126R
A71467130R
Registry: Edmonton

Between:

Her Majesty the Queen

- and -

Kaileigh Anne Slowinski

Decision of His Worship Justice of the Peace A. Schlayer

[1] Miss Slowinski (hereinafter referred to as the Defendant) is charged with two separate offences under the City of Edmonton Bylaw 13145, the *Animal Licensing and Control Bylaw* (hereinafter referred to as the *Bylaw*). Those offences are contained in two separate violation tickets and are violations of: (1) ss. 13(1) *Bylaw* (failure to control and leash a dog); and (2) para 14(1)(c) *Bylaw* (dog attack causing injury). As both of these alleged offences arose out of the same incident, at the start of the trial an application was made to try both together - that is, pursuant to one trial. Noting that the Defendant agreed with this application and finding that it would be in the interests of justice to conduct only one trial I granted that application in accordance with *R v Clunas*, [1992] 1 SCR 595.

[2] To properly understand the legal issues involved in this case both ss. 13(1) *Bylaw* and s. 14 *Bylaw* (in full) are set out as follows:

13(1) The Owner or any other person having care or control of a Dog or Nuisance Dog shall, at all times when it is off the property of the Owner, have it:

(a) under control; and

(b) held on a leash not exceeding two metres in length.

14(1) The Owner or any other person having care or control of a Dog or Nuisance Dog shall ensure it does not:

- (a) damage property;
- (b) chase, attack or bite any person or animal; or
- (c) chase, attack or bite any person or animal causing physical injury.

14(2) This section does not apply if the chase, attack, bite or damage is a direct result of the Dog or Nuisance Dog being provoked.

The Evidence

[3] The evidence in this case is not particularly complicated. The Crown called two witnesses, only one of which is relevant here; the Defendant testified and called one witness.

[4] The relevant Crown evidence is encompassed in the testimony of Joanne Snyder (Snyder). She stated that she and the Defendant were neighbours and that the Defendant had three aggressive dogs, including a German Shepherd named Moose (hereinafter called Moose), the one involved in this incident. The backyards of their respective properties were separated by a three foot high chain link fence. Because of the aggressive nature of the dogs, Snyder would not mow her grass when the dogs were in the Defendant's backyard unless the Defendant or someone else was present to supervise the dogs. Snyder viewed the dogs as a threat to her; she was afraid of them. When she was in her backyard, the dogs were "always at the fence, snarling, barking aggressively. There was no control over these animals." Specifically with respect to Moose, he would cause some difficulties at the fence, "Snapping, snarling, feet on the fence, barking aggressively." Nevertheless none of the dogs had ever come onto Snyder's yard and Snyder had never complained about the dogs either to "Animal Control" or the actual owner of the property. The Defendant did not own the property; she was just a renter.

[5] Because the Defendant was present on June 29, 2019, Snyder made the decision to mow her lawn. At the point when she was mowing the grass near the fence line of their properties, with the Defendant being a couple of feet from that fence line, Moose charged, got his front paws on the fence, and barked in her face. Initially she reflexively put her arm up to protect herself (not extending it out and not placing it over the fence) and then put it back down onto her lawn mower. Moose then lunged at her and his head came over the fence. Initially he bit her black T-shirt and brassiere underneath but later, as she put her right arm up to defend herself, he bit that arm around the elbow. Snyder, with some assistance from the Defendant, was eventually able to get her arm free but not before approximately 30 seconds had elapsed. As a result of this incident Snyder suffered serious injuries. Her arm became infected and suffered nerve damage. Snyder had to be placed on intravenous antibiotics for eight days and as of the date of the trial, her arm was still not back to normal. It was disabled to a certain extent causing her difficulties such as hanging onto a steering wheel.

[6] The Defendant testified that on June 29, 2019 she and her boyfriend, Steven Wobben (Wobben), were in her backyard with her dogs and mowing her grass (or at least attempting to do so) at the same time that Snyder was mowing hers. Moose was not restrained; he had free run

of the backyard. The Defendant stated that Moose was irritated with Snyder's lawn mower. On one occasion she walked him away from the fence. At the point when Snyder was near the fence the Defendant described her as reaching over the fence on three occasions. The Defendant described this action in two different fashions. At one point she stated it was to try and calm down Moose; at another point as trying to greet or befriend it. On each of these three occasions Moose did not jump onto the fence and on each occasion the Defendant took Moose away from the fence but did not take him into her house, stating that her history with Moose was such that she had no indication that he would react in the way that he eventually did. After the third occasion Moose jumped onto the fence. His front feet were on the top of the fence and his hind feet on the ground on the Defendant's side of the fence. The Defendant pushed him down with the intention of taking him inside. However, before she could do that Moose circled around her, jumped up onto the fence, and bit Snyder. The Defendant immediately intervened to assist in getting Moose's jaws off of Snyder's arm. She was able to do that after approximately ten seconds.

[7] Prior to June 29, 2019 the Defendant stated that there had been no previous incidents involving Moose and Snyder, nor had Snyder ever complained to her about Moose. Moose had never previously bitten either a person or another animal.

[8] Wobben testified that on June 29, 2019 he and the Defendant went outside to mow the Defendant's grass after hearing Snyder mowing her grass and noting that it had stopped raining. At the time of the incident he was approximately 25-30 feet away from the fence. He noticed Moose barking on the fence (his front paws were on the top of the fence) on two occasions. Prior to the first occasion, and on the first occasion, he saw Snyder put her hand out (he was not sure whether it was over the fence or not) "almost to look like she was trying to befriend him, stop him, from barking." On the first occasion the Defendant pushed Moose down. Moose then circled around the Defendant and jumped on the fence for a second time, this time biting Snyder while she was pushing her lawn mower.

The Law

Nature of the Offences

[9] The offences under ss. 13(1) *Bylaw* and para 14(1)(c) *Bylaw* are strict liability offences as those types of offences are defined in the case of *R v Sault Ste. Marie (City)*, [1978] 2 SCR 1299 (*Sault Ste. Marie*). Neither the Crown nor the Defendant disputes this proposition. The application of the principled approach to categorizing offences as set out in *Sault Ste. Marie* the seminal case in this area, reveals that this is the case.

[10] A portion of the preamble to the *Bylaw* states:

Whereas, pursuant to section 7(a) of the *Municipal Government Act*, a council may pass bylaws for municipal purposes respecting the safety, health and welfare of people and the protection of people and property; and

Whereas, pursuant to section 7(h) of the *Municipal Government Act*, a council may pass bylaws for municipal purposes respecting wild and domestic animals and activities in relation to them

[11] Section 1 of the *Bylaw* sets out its guiding purpose as follows:

The purpose of this bylaw is to establish a system of licensing and control with respect to animals within the City.

A review of the rest of the bylaw reveals that its subject matter is in compliance with both the preamble and the purpose set out in s. 1.

[12] Bearing in mind that purpose, and applying the principles set out in *Sault Ste. Marie* at para 1 and *R v Wholesale Travel Group Inc.*, [1991] 3 SCR 154 (*Wholesale Travel*) at para 25 with respect to what are public welfare offences, there can be no doubt that ss. 13(1) *Bylaw* and para 14(1)(c) *Bylaw* are both public welfare offences. Accordingly, there is a presumption that it does not require *mens rea* - *Sault Ste. Marie* at para 61.

[13] Next, there are no words like “willfully”, “knowingly”, “purposely”, or “with intention” in either ss. 13(1) *Bylaw* or para 14(1)(c) *Bylaw* that would mandate a *mens rea* – *Sault Ste. Marie* at para 61. In the result then, both offences are not *mens rea* offences.

[14] Finally, there is nothing in the legislation to indicate that either offence is an absolute liability offence. In fact the opposite is the case. The overall regulatory pattern, the subject matter, the importance of the penalty (ss. 37(1) *Bylaw* sets out the maximum penalty for an offence under the bylaw as a fine not exceeding \$10,000 and to imprisonment for not more than six months for non-payment of a fine), and the lack of any precise language to that effect all point to the offences as not being offences of absolute liability – *Sault Ste. Marie* at paras 61 and 66.

[15] Hence there is no doubt that both of these offences are strict liability offences. This is very similar to the situation in *Sault Ste. Marie* at para 66:

... Since s. 32(1) [of the Ontario *Water Resources Act*] creates a public welfare offence, without a clear indication that liability is absolute and without any words such as “knowingly” or “willfully” expressly to import *mens rea*, application of the criteria which I have outlined above undoubtedly places the offences in the category of strict liability.

Strict Liability Offences in General Terms

[16] For strict liability offences the Crown need only prove the *actus reus* beyond a reasonable doubt. Once that is done it “... is presumptively relieved of having to prove anything further. Fault is presumed from the bringing about of the proscribed result, and the onus shifts to the defendant to establish reasonable care on the balance of probabilities.” - *Wholesale Travel* at para 109. That is normally referred to as the defence of due diligence. Due diligence is defined in *Sault Ste. Marie* at para 60. It is available “... if the accused reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent, or if he took all reasonable steps to avoid the particular event...” This defence must be proved by the defendant on the balance of probabilities. While the shift of onus to a defendant infringes s. 11(d) of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 (*Charter*) that infringement is saved by s. 1 *Charter* - see *Wholesale Travel* and the subsequent case of *R v Ellis-Don*, [1992] 1 SCR 840.

[17] The Defendant has submitted that the case of *Swankhuizen v Tirmizi*, 2008 ABPC 157 offers some assistance to the concept of strict liability. In particular he refers to para 14 of that case. I do not find that case to be of any assistance. It is decided in the context of a civil matter and when the Court refers to “strict liability”, it doing so in the civil context. As just noted, a strict liability offence is clearly and precisely defined in the quasi-criminal context. There is no need to resort to principles relevant in a civil context. Not only is that unnecessary but it also has the potential to create needless confusion.

[18] To phrase the matter of the *actus reus* in another fashion, a defendant need only raise a reasonable doubt about the *actus reus* to secure an acquittal.

[19] Accordingly, one of the most important aspects of any analysis of a strict liability offence is the consideration of the *actus reus*. That consideration involves: (1) how an analysis of the *actus reus* is addressed in the context of the due diligence defence; and (2) specifically, what is the *actus reus* of the particular offence in question - in this case s. 13(1) *Bylaw* and para 14(1)(c) *Bylaw*. Each of these matters will be dealt with in turn.

Actus Reus v The Defence of Due Diligence

[20] As mentioned, for a strict liability offence there are two separate and distinct onuses - the onus on the Crown to prove the *actus reus* beyond a reasonable doubt and the onus on the defendant to prove the defence of due diligence on the balance of probabilities. Normally it makes no sense to consider the onus on the defendant until it has been determined that the Crown has proved the *actus reus* beyond a reasonable doubt. Thus it is extremely important to keep these two onuses separate and not let them blend into each other.

[21] I have performed an extensive analysis of the interaction of the *actus reus* of a strict liability offence with the defence of due diligence in the case of *R v Majstruk*, (13 June, 2012), Edmonton A60780941Z (ABPC). There is no need to repeat that here. Suffice it to say that before there is a shifting of the persuasive onus onto the defendant the Court must conclude that, on the basis of all of the evidence, the Crown has proved the *actus reus* of the offence beyond a reasonable doubt.

[22] Like any other case the *actus reus* must be assessed in accordance with the principles in *R v W(D)*, [1991], 1 SCR 742 (*R v W(D)*). That that is so is supported by the cases of *R v Novelo*, 2009 ONCJ 346 at paras 13 and 14; and *R v Woldenga*, 2009 ONCJ 38 at paras 15 and 16. See also *R v Winter*, 2006 CanLII 36586 (NL PC) at para 15, and *R v Lamb*, 2007 CanLII 24166 (NL PC) at para 23.

[23] Accordingly I instruct myself in accordance with those principles. Specifically, I instruct myself in accordance with the law set out at para 11 of *R v W(D)*:

Ideally, appropriate instructions on the issue of credibility should be given not only during the main charge, but on any recharge. A trial Judge might well instruct the jury on the question of credibility along these lines:

First, if you believe the evidence of the accused, obviously you must acquit.

Second, if you do not believe the testimony of the accused but you are left in reasonable doubt by it, you must acquit.

Third, even if you are not left in doubt by the evidence of the accused, you must ask yourself whether, on the basis of the evidence which you do accept, you are convinced beyond a reasonable doubt by that evidence of the guilt of the accused.

Actus Reus of the Offences

[24] The *actus reus* of an offence includes all of the elements of the offence which go to the *actus reus* component. For the offences before the Court, like for all offences, the *actus reus* includes proof of the date of the offence, the relevant jurisdiction, and the identity of the Defendant as the person who committed the offence. None of these are in issue in this case for either of the offences.

[25] For the particular offence of s. 13(1) *Bylaw* the *actus reus* also includes: (1) proof of ownership or care or control; (2) of “a Dog”; (3) not having “it under control and held on a leash not exceeding two metres in length”; and (4) “it is off the property of the Owner”. Here the first three elements are not in dispute. It is only the last element, “off the property”, that is contested.

[26] With respect to the offence under para 14(1)(c) *Bylaw* the *actus reus* also includes: (1) proof of ownership or care or control; (2) of “a Dog”; (3) not ensuring “it does not chase, attack or bite any person or animal”; and (4) thereby “causing physical injury”. None of these elements is contested in this case. The only issue with respect to this offence is whether ss. 14(2) *Bylaw* (i.e. provocation) is in play and if so, whether the onus is upon the Defendant to prove provocation on the balance of probabilities or on the Crown to disprove provocation beyond a reasonable doubt. A part of that issue is the determination of whether lack of provocation is an element of the offence, the onus of which to prove beyond a reasonable doubt is on the Crown or whether provocation is an “exemption, proviso, excuse, qualification or the like”.

Provocation - ss. 14(2) Bylaw

[27] The analysis of ss. 14(2) consists of two different parts: (1) what kind of acts constitute provocation; and (2) upon whom is the onus fixed.

[28] Both of these parts deal with the interpretation of the subsection. In general terms how a particular piece of legislation is to be interpreted has been spelled out in the case of *Rizzo & Rizzo Shoes Ltd., (Re)*, [1998] 1 SCR 27 (*Rizzo*) where, at para 21, the Court states:

Although much has been written about the interpretation of legislation (see, e.g., Ruth Sullivan, *Statutory Interpretation* (1997); Ruth Sullivan, *Driedger on the Construction of Statutes* (3rd ed. 1994) (hereinafter “*Construction of Statutes*”); Pierre-André Côté, *The Interpretation of Legislation in Canada* (2nd ed. 1991), Elmer Driedger in *Construction of Statutes* (2nd ed. 1983) best encapsulates the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone. At p. 87 he states:

Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their

grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

This principle has subsequently been followed many times - see for example *R v Gladue*, [1999] 1 SCR.688 at para 25, *Bell ExpressVu Ltd Partnership v Rex*, [2002] 2 SCR 559, 2002 SCC 42 at para 26 (*Bell Express Vu*), and *R v Jarvis*, [2002] 3 SCR 757, 2002 SCC 73 at para 77. It will be applied hereinafter along with other relevant principles of statutory construction where necessary and appropriate.

i) *Provocation*

[29] Starting then with the first part of the analysis, that is concerned with the meaning of the word “provoke”. Unfortunately, the *Bylaw* itself does not provide a definition. There is no doubt that provocation has been extensively examined and analyzed in the criminal context, particularly with respect to the defence of provocation, s. 232 CC. The Defendant herself has provided a definition from *Black’s Law Dictionary*, Third Pocket Edition, Bryan A. Garner Editor in Chief, St. Paul, Minnesota, U.S.A: Thomson/West, 2006. From the context that definition is clearly referencing the criminal context. That however, is of only limited, assistance here. The contrast between the two situations (one deals with provocation of a human being; the other with an animal) is so stark that no analogies can be drawn. Albeit in the context of sentencing, the Court in *R v Hardy*, 2007 ABQB 747 at para 16, states: “There was also argument that to declare the dog to be vicious is to put it in jail, to sentence it to a life of confinement. In my view, these phrases are best left to assessing sentencing of humans. An anthropomorphic approach to interpreting animal control bylaws is not helpful, and detracts from the paramount need to protect the public.” The same applies here.

[30] Consequently, resort to reputable dictionaries (an entirely appropriate resource when interpreting legislation) and case authority is necessary to decipher the meaning of “provoke”. Dictionary definitions will be examined first.

[31] The *Webster’s Third New International Dictionary*, 2002, Merriam-Webster Inc., Publishers, Springfield, Massachusetts, U.S.A. provides the following relevant definitions of “provoke”:

- 1 b): to incite to anger; and
- 3 b): to stir up on purpose: bring about deliberately

Then in the section on “Syn” it states:

EXCITE, STIMULATE, PIQUE, QUICKEN: PROVOKE may center attention on the fact of rousing to action or calling forth a response; often it implies little about cause, manner, or result, but is often used in connection with angry or vexed reactions.

[32] A very similar definition of “provoke” is found in a more recent online version of this source. In *Merriam-Webster.com*. 2011. <https://www.merriam-webster.com> (8 May 2011) the relevant definition of “provoke” is:

- 1 a to stir up purposely; and
- 2 a to incite to anger

[33] Finally, in *The Oxford English Dictionary*, Second Edition (Clarendon Press, Oxford, 1989) “provoke” is defined as:

- II. 4. To incite or urge (a person or animal) *to* some act or *to do* something: to stimulate to action; to excite, rouse, stir up, spur on.
- 4. b. To stir up, agitate.
- 5. To incite to anger (a person or animal): to enrage, vex, irritate, exasperate.
- 6. To excite, stir up, arouse (feeling, action, etc.); to give rise to, call forth.
- 6. b. *transf.* To excite, give rise to, induce, bring about (a physical action, condition, etc.).

[34] All of these definitions are similar and will be very useful and of assistance later - in the analysis of whether the facts of this case evidence provocation.

[35] There is limited case authority on what amounts to provocation. None of the cases discovered provide a general definition of “provocation”. The case of *Whitehorse (City) v Parry*, 2007 YKTC 31 defines not what provocation is but what it is not. At paras 19-21 it states that intervening in a dog fight cannot amount to provocation. At first blush, it is arguable that an inference from a second case, *Burnaby (City) Animal Control Officer v Nagra*, 2010 BCPC 34 (*Nagra*) at paras 3 and 4, can be drawn that barking also does not amount to provocation. Nevertheless, a closer examination of that case reveals that such an inference may be suspect. Unlike the legislation in the former case, where “without provocation” was included in the definition of a “dangerous dog”, in the latter case it was not (see s. 49 of the *Community Charter*, S.B.C. 2003, c. 26). Thus, provocation was not specifically dealt with in that case and was not a particularly relevant issue.

[36] A third case, *Bolen v Regina (City)*, 2004 SKQB 263, again appears to describe what is not provocation. At para 8 it states: The suggestion that a tethered cat is almost a provocation to a dog must be almost rejected.” The same applies to the case of *New Westminster (City) Animal Control Officer v Letendre*, 2010 BCPC 38 (*Letendre*). There, albeit, again, in the context of the same legislation in issue in *Nagra*, the Court essentially concludes that “friendly, submissive and consummately non- threatening behaviours” (para 44) like extending a hand to allow an unfamiliar dog to sniff it before moving nearer (para 14) does not amount to provocation. For comprehensive details on this point, see, in full, paras 14, 15, 23, 44, 54, and 61.

[37] One case was found that does describe a particular type of conduct that can amount to provocation. In *R v Rasuli*, 2017 BCPC 310 at paras 54-61 the Court found that the action of one dog jumping at a second dog amounts to provocation of the second dog.

[38] Another case, *R v Howdek*, 2008 SKQB 434, in the context of whether a dog was dangerous and where part of the definition of “dangerous” required “without provocation”, does provide a little more guidance. It concludes that in deciding whether a dog is dangerous the normal way that a dog acts must be taken into account. Specifically, at para 24 it states:

In determining whether a dog is dangerous, the assessment must be in the context of a dog acting in the normal way of canines.

There is no reason why that too cannot be taken into account in determining what provocation is. In fact, that is made somewhat explicit in a very recent case from this Court, *R v Shirjang*, 2020

ABPC 76. In the context of deciding whether provocation existed in that case the Court, at para 30 states: “I do not have evidence that Tookie did anything more then [sic] any other dog would have done when excitingly greeting her owner.”

[39] That case also wrestles with the definition of provocation. It discusses a number of the cases just cited but it too does not provide a general definition. By stating: “...I am not prepared to conclude that Tookie's presence on the date in question, as well as the continuous barking that Tookie exhibited from the moment she left her home and ran down the stairs in excitement towards her owner and Mr. Shirjang's property, rise to the level necessary for provocation. If Tookie had growled, aggressively barked, or bit Axel or Mr. Shirjang first, this would most certainly constitute provocation.” it is simply another example of what specific facts can or cannot amount to provocation. Again, helpful, but only as far as it goes.

[40] In the end case authority is of some, but limited, assistance. Whether there was or was not provocation here will depend on the individual circumstances as found in this case.

ii) *Onus*

[41] Turning now to second part, the issue of onus, it is to be first observed that no argument has been put forth based on any of the provisions of the *Charter* – specifically ss. 11(d) thereof, the presumption of innocence. And second, this part involves an analysis of two distinct matters. First is whether provocation is an “exemption, proviso, excuse, qualification or the like” and second if so, upon whom is the onus placed. The former is factually and statutorily driven and thus best left to be addressed below in the section on whether the Crown has proved the *actus reus* of the offence. The latter is of a very general nature and will be addressed here.

[42] To begin this analysis it is to be observed that the interpretation of ss. 14(2) *Bylaw* would have been far less complicated if ss. 794(2) *Criminal Code*, R.S.C. 1985, c. C-46 (*Criminal Code* or *CC*) was still in effect. That subsection read:

The burden of proving that an exception, exemption, proviso, excuse or qualification prescribed by law operates in favour of the defendant is on the defendant, and the prosecutor is not required, except by way of rebuttal, to prove that the exception, exemption, proviso, excuse or qualification does not operate in favour of the defendant, whether or not it is set out in the information.

[43] The case of *R v Goleski*, 2014 BCCA 80 (*Goleski*) at paras 73 – 81, affirmed, [2015] 1 SCR 399, makes it clear that this section placed the onus on the defendant to prove on the balance of probabilities any “exception, exemption, proviso, excuse or qualification” – see paras 73-81. Thus, the only issue would have been whether ss. 14(2) *Bylaw* was an “exception, exemption, proviso, excuse or qualification”.

[44] However, ss. 94(2) *CC* was repealed by s. 68 of *An Act to amend the Criminal Code and the Department of Justice Act and to make consequential amendments to another Act*, S.C. 2018, c. 29 (formerly Bill C-51 and hereinafter referred to as Bill C-51). That section simply read: “Subsection 794(2) of the Act is repealed.” It came into effect on December 13, 2018, well before the date of the offences in this case. The apparent simplicity of this amendment belies the extremely difficult nature of any interpretations associated therewith. Those will become readily apparent immediately below.

[45] Bill C-51 begins with, in part, the following summary:

This enactment amends the *Criminal Code* to amend, remove or repeal passages and provisions that have been ruled unconstitutional or that **raise risks with regard to the Canadian Charter of Rights and Freedoms**, as well as passages and provisions that are obsolete, redundant or that no longer have a place in criminal law. It also modifies certain provisions of the Code relating to sexual assault in order to clarify their application and to provide a procedure applicable to the admissibility and use of a complainant's record when in the possession of the accused.

[Emphasis added.]

[46] Thereinafter not only is ss. 794(2) CC repealed but a number of other provisions that purported to place an onus on the accused are also amended. There are numerous examples of this. To name but a few, see for example:

- 1) s. 5 of Bill C-51 (removed the words “the proof of which lies on the person” from ss. 82(1) CC);
- 2) s. 9 of Bill C-51 (removed the words “the proof of which lies on him” (or “them” or “the person”) from subsections 145(1) to (5.1) CC);
- 3) s. 14 of Bill C-51 (removed the words “the proof of which lies on him” from s. 177 CC); and
- 4) 4) s. 35 of Bill C-51 (removed the words “the proof of which lies on that person” from ss. 349(1) CC).

[47] The concern with a provision that places a burden on a defendant, like the former ss. 794(2) CC did, is always whether it violates of ss. 11(d) *Charter*, the presumption of innocence. It matters not whether the burden is with respect to “an essential element, a collateral factor, an excuse, or a defence” – see *R v Whyte*, [1988] 2 SCR 3 (*Whyte*) at paras 26-37 and in particular para 34; and *R v Keegstra*, [1990] 3 SCR.697 at paras 146-147. Case authority has demonstrated that in the vast majority of situations a reverse onus will be found to be a violation of s. 11(d) *Charter*. The real focus is on whether the reverse onus can be saved by s. 1 *Charter*. And in the context of criminal law, and recent case authority, that is in serious doubt. As stated at para 97 in *R v Laba*, [1994] 3 SCR 965 during a s. 1 *Charter* analysis in the criminal context: “Imposing a legal or persuasive burden on the accused in respect of an **offence characterized as a true criminal offence is a serious impairment of s. 11(d).**” [Emphasis added.]

[48] The constitutionality of s. 794 CC has been the subject of recent commentary in the legal literature – see for example Sankoff, Peter, Sarah Denholm and Brandyn Rodgerson. “*An Unfair and Costly Burden: Assessing the Impact of Section 794(2) of the Criminal Code on the Criminal Justice System*” (2017), 42 *Queen's L.J.* 1. The whole tenor of this article is that ss. 794(2) CC was likely unconstitutional in the criminal law context as being a violation of s. 11(d) *Charter* and not capable of being saved by s. 1 *Charter*. Its concluding statement is: “In short, section 794(2) is a relic of a bygone era and most likely unconstitutional. It should be repealed or struck down as soon as possible”. Further, as noted in the article, the constitutionality issue had been brought into sharp focus following the decision in the case of *Goleski*. Prior to that case there was conflicting case authority concerning the interpretation of ss. 794(2) CC. Rather than placing

a reverse onus on the accused other case authority concluded that it only placed an evidentiary burden on an accused. The leading authority espousing this conclusion was *R v Lewko*, 2002 SKCA 121 (*Lewko*). It is significant that if that latter interpretation was correct, constitutional issues would have largely been avoided. In a case predating *Goleski*, the Alberta case of *R v Plante*, 2013 ABQB 222 (*Plante*), adopted the reasoning of *Lewko* with one of the reasons for doing so being that to do otherwise would require that it place an unconstitutional meaning on s. 794(2) CC (paras 62-78). Specifically, at para 74 it states: “I doubt that an interpretation of s. 254(2) [in the context of ss. 794(2) CC] which offends the presumption of innocence could withstand *Charter* scrutiny.”

[49] While I am unaware of any cases that have outright struck down ss. 794(2) CC on this basis in the criminal law context, that very issue has been referred to many times. No doubt older authority can be found that upholds s. 794(2) CC in the criminal context— see for example *R v Peck*, 1994 CarswellNS 1, (1994), 128 N.S.R. (2d) 206 (*Peck*) where the Court concluded that s. 794(2) CC violated ss. 11(d) *Charter* but was saved by s. 1 *Charter*. Nevertheless, I can find no cases that have subsequently followed this case on this constitutional issue nor am I aware of more recent such authority (at least authority that analyzes this in any kind of detailed fashion), that takes into account how the interpretation of the *Charter* has evolved in general, and how it has evolved in the context of a reverse onus provision in particular, since that case. In fact *Peck* was questioned in the substantially later Alberta case of *Plante* at paras 70-76 on the basis that the conclusion that s. 794(2) CC created a reverse onus was suspect to a *Charter* challenge (see paras 70-76). I also note that *Goleski* at para 30, itself was very careful to acknowledge that the case before it did not involve any *Charter* considerations (see para 30). As will become clear later, many cases have also addressed s. 794(2) CC in the context of regulatory offences.

[50] A preamble of an enactment (like the summary of Bill C-51 set out above) assists in the interpretation of the enactment itself – see s. 13 *Interpretation Act*, R.S.C. 1985, c. I-21 (hereinafter referred to as the *Interpretation Act (federal)*). As an example of its application, see *R v D(C)*, [2005] 3 SCR 668, at paras 33-38. From the combination of the summary of Bill C-51, the repeal in that Bill of many other provisions that purported to place an onus on the accused at the same time as the repeal of ss. 794(2) CC, the case authority on reverse onus provisions in general and s. 794(2) CC in particular, and the legal literature, arguably an inference can be drawn that when Parliament repealed ss. 794(2) CC, they had very real concerns about whether ss. 794(2) CC would withstand *Charter* scrutiny in the criminal law context. That may have been a significant factor, and may have formed a substantial basis, for its repeal. While some arguments may be advanced to the contrary, one cannot be faulted for being somewhat skeptical of their success. In making this comment I would be remiss in not noting that there is, in fact, Provincial Court authority in this jurisdiction that concludes that the onus still remains on an accused notwithstanding the repeal of s. 794(2) CC - see *R v McKinnon*, 2020 ABPC 86 at paras 29-32 (subsequently followed in *R v Daytec*, 2021 ABPC 48). Fortunately, it is not absolutely essential to decide that issue in this case. But neither can it be completely ignored.

[51] Subsection 794(2) CC was in the *Criminal Code*; it was not specifically contained in any Alberta legislation. Nevertheless it had been incorporated into Alberta law by virtue of s. 3 of the *Provincial Offences Procedure Act*, R.S.A. 2000, c. P-34 (*POPA*). That section reads:

Except to the extent that they are inconsistent with this Act and subject to the regulations, all provisions of the *Criminal Code* (Canada), including the

provisions in Part XV respecting search warrants, that are applicable in any manner to summary convictions and related proceedings apply in respect of every matter to which this Act applies.

Subsection 794(2) *CC* applied to summary conviction proceedings in the *Criminal Code*.

[52] It is worthwhile to note that ss. 794(2) *CC* also applied to all other federal legislation. Like s. 3 *POPA*, ss. 34(2) of the *Interpretation Act (federal)* applied the summary conviction proceedings in the *Criminal Code* to all federal legislation except where otherwise stated.

[53] Thus, the repeal of s. 794(2) *CC* has created difficult interpretation issues with respect to at least three different areas:

- 1) federal legislation dealing with the criminal law of which the *Criminal Code* is but one example;
- 2) federal legislation dealing with summary conviction offences concerning public welfare type offences; and
- 3) provincial legislation, like Alberta's legislation, that incorporated it into provincial law.

[54] For reasons previously mentioned (see para 50 above), it can be argued that any analysis of the effect of the repeal of ss. 794(2) *CC* is probably simplest with respect to federal matters in the criminal law area, like the *Criminal Code*. Likely the most difficult interpretation issue involves federal legislation dealing with public welfare offences in the summary conviction context. Fortunately, for the purposes here, it is not essential to directly deal with either of these two matters. The precise issue here is the effect of the repeal in the Alberta context.

[55] To analyze the effect of the repeal of s. 794(2) *CC* on Alberta law it is essential to be mindful of three significant matters. First, Alberta had no direct involvement with the repeal, that is, no legislation was passed by the Alberta legislature to give effect to this repeal. Second, the context in which the repeal occurred is crucial, that context being a repeal of a matter involving the criminal law, specifically a provision of the *Criminal Code*. Pursuant to s. 91(27) of the *Constitution Act, 1867 (U.K.)*, U.K., 30 & 31 Vict., c. 3, reprinted R.S.C. 1985, App. II, No. 5 only Parliament has any jurisdiction over criminal law; a province does not. As noted in *Sault Ste. Marie* at para 63 valid provincial legislation cannot create "an offence which is criminal in the true sense." And finally, when applying the previously discussed approach to the interpretation of statutes, it is the words of the relevant Alberta legislation that are to be read in their context with the scheme of Alberta legislation generally, the object of the relevant Alberta legislation, and the intention of the Alberta legislature. It is to be stressed that it is not the object of the federal legislation or the intent of the Parliament of Canada that are directly relevant. They are only relevant in an indirect sense.

[56] It is in this setting that the words of *Bell ExpressVu* at para 12, with the necessary changes, take on particular meaning and emphasis:

...where the provision under consideration is found in an Act that is itself a component of a larger statutory scheme, the surroundings that colour the words and the scheme of the Act are more expansive. In such an instance, the application of

Driedger's principle gives rise to what was described in *R. v. Ulybel Enterprises Ltd.*, [2001] 2 S.C.R. 867, 2001 SCC 56, at para. 52, as "the principle of interpretation that presumes a harmony, coherence, and consistency between statutes dealing with the same subject matter". (See also *Stoddard v. Watson*, [1993] 2 S.C.R. 1069 (S.C.C.), at p. 1079; *Pointe-Claire (Ville) c. S.E.P.B., Local 57*, [1997] 1 S.C.R. 1015 (S.C.C.), at para. 61, *per* Lamer C.J.)

[57] And as well, as already alluded to and as will become clearer, it is also in this setting that there is ambiguity as to what is the effect of the repeal of s. 794(2) CC on Alberta law. Does the repeal mean that "an exception, exemption, proviso, excuse or qualification" now has to be disproved by the Crown beyond a reasonable doubt or does the onus remain, as it was before the repeal, on the Defendant to prove "an exception, exemption, proviso, excuse or qualification" on the balance of probabilities? That is, the repeal is "reasonably capable of more than one meaning" and "the words are ambiguous enough to induce two people to spend good money in backing two opposing views as to their meaning (para 29 and 30 of *Bell ExpressVu* respectively). Accordingly, this is a different situation from that that existed in *R v McIntosh*, [1995] 1 SCR 686 at para 19 and 30-31 where the Court found that no ambiguity existed and thus resort could not be made to an argument with respect to absurdity (para 36). As here there is ambiguity, it is entirely appropriate "to consider which of the alternative interpretations that are available best accords with Parliament's intention" and "[a]bsurdity is a factor to consider" - *R v Hibbert*, [1995] 2 SCR 973 at paras 31 and 32 respectively. Additionally, other relevant principles of statutory interpretation are available to aid in determining which interpretation is the correct one - *Bell ExpressVu* at paras 28-29 and *R v S (O S)*, 2002 ABCA 214 at para 19.

[58] To continue with, and to aid in, this analysis two different sources of authority have to be considered, the first a relevant principle of statutory construction and the second the effect of any relevant Alberta legislation.

[59] With respect to the first, one of the principles of statutory interpretation is that legislation overriding the common law must be strictly construed. An older Supreme Court of Canada case, *Controni v Quebec (Police Commission)*, (1977), [1978] 1 SCR 1048 at para 16 describes this principle in very strict terms as follows:

A rule of common law is not repealed by a statute that does not mention it (*Alliance des professeurs catholiques de Montréal v. Labour Relations Board* [citation omitted]).

[60] However, the strictness of this principle was relaxed in the later case of *R v G(B)*, [1999] 2 SCR 475. Bastarache J. states at paras 40 and 43:

First, the principle that legislation that overrides the common law must be strictly interpreted prevailed for a long time in Canada. **Under this principle, it would have to be concluded that s. 672.21 does not in any way proscribe the use of the common law rules of evidence since it does not expressly provide for this.** The application of this rule is not, however, conclusive.

.....

In my view, that question has already been settled in *Whittle* supra; the issue here is simply to determine the scope of that decision. Also, contrary to the appellant's contention, the actual wording of s. 672.21 **is not inconsistent with the application of the confessions rule** [a common law rule]. **In fact, nothing in the wording indicates that Parliament was trying to abolish, it**, especially if the section is read with the above-mentioned principles of interpretation [one of which is set out the passage immediately above] in mind.

[Emphasis added.]

[61] *Goleski*, at para 77 Frankel, J.A. describes this principle as follows:

Also militating against an interpretation of s. 794(2) that would result in a significant change in the law is the presumption that legislation respects the common law and should not be interpreted as having changed established legal principles unless such an interpretation is clearly required. This principle is stated in *Sullivan on the Construction of Statutes*, 5th ed. (Markham: LexisNexis Canada, 2008) at 431:

Presumption against changing the common law. Although legislation is paramount, it is presumed that legislatures respect the common law. It is also presumed that legislatures do not intend to interfere with common law rights, to oust the jurisdiction of common law courts, or generally to change the policy of the common law. As explained in *Halsbury* [36 Hals., 3rd ed., § 625], in a formulation adopted by many Canadian courts:

Except in so far as they are clearly and unambiguously intended to do so, statutes should not be construed so as to make any alteration in the common law or to change any established principle of law.

[62] Why this principle of statutory interpretation is so important is that ss. 794(2) CC was a codification of the common law. An exhaustive history of ss. 794(2) CC is set out at paras 31-59 of *Goleski*. What becomes very clear from that analysis is that ss. 794(2) CC was exactly that, a codification of the common law – *Goleski* at paras 73-78. An earlier case, *R v Lee's Poultry Ltd.*, 1985 CanLII 166 (ON CA) (*Lee's Poultry*) at para 6-8, also reached the same conclusion. What that common law encompassed was essentially settled by the English case of *R v Edwards*, (1975), [1974] 2 All E.R. 1085 (Eng. Q.B.) (*Edwards*). Although the following cited passages from that case are lengthy, those passages are necessary and appropriate to fully understand the common law and its true flavour. At p. 1095 the Court states:

In our judgment this line of authority establishes that over the centuries the common law, as a result of experience and the need to ensure that justice is done both to the community and to defendants, has evolved an exception to the fundamental rule of our criminal law that the prosecution must prove every element of the offence charged. This exception, like so much else in the common law, was hammered out on the anvil of pleading. It is limited to offences arising under enactments which prohibit the doing of an act save in specified circumstances or by persons of specified classes or with specified qualifications

or with the licence or permission of specified authorities. Whenever the prosecution seeks to rely on this exception, the court must construe the enactment under which the charge is laid. If the true construction is that the enactment prohibits the doing of acts, **subject to provisos, exemptions and the like, then the prosecution can rely on the exception.**

In our judgment its application does not depend on either the fact, or the presumption, that the defendant has peculiar knowledge enabling him to prove the positive of any negative averment. As Wigmore pointed out in his great treatise on evidence this concept of peculiar knowledge furnishes no working rule. If it did, defendants would have to prove lack of intent. What does provide a working rule is what the common law evolved from a rule of pleading. We have striven to identify it in this judgment. Like nearly all rules it could be applied oppressively; but the courts have ample powers to curb and discourage oppressive prosecutors and do not hesitate to use them.

Two consequences follow from the view we have taken as to the evolution and nature of this exception. First, as it comes into operation on an enactment being construed in a particular way, there is no need for the prosecution to prove a prima facie case of **lack of excuse, qualification or the like**; and secondly, what shifts is the onus: it is for the defendant to prove that he was entitled to do the prohibited act. What rests on him is the legal or, as it is sometimes called, the persuasive burden of proof. It is not the evidential burden.

[Emphasis added.]

[63] In its written submissions the Crown has cited two other English cases, *R v Turner*, (1816), 5 M & S 206 and *Williams v Russell*, (1933), 149 LT 190 for this common law principle. But in light of the difficulties in how the former case was being interpreted (*Edwards* at 1090-1092) it is more correct to rely on *Edwards*. It was that case that was referred to in *Lee's Poultry* at para 7 and, with some deletions, the same passages from that case, as set out above, were cited. See also *R v Williams*, 2008 ONCA 173 (*Williams*) at paras 25-26.

[64] This common law is of a longstanding nature dating back centuries. Obviously for not as long a period so too is the incorporation of this common law into Alberta through the operation of s. 794(2) CC. Without delving into the total history of this incorporation, it is to be observed that it predates the *Provincial Offences Procedures Act* which came into effect on November 1, 1989. Prior to that it was incorporated by virtue of *The Summary Convictions Act*, R.S.A. 1970, c. 355 – see s. 5.

[65] Turning now to the second authority, relevant Alberta statutes, that involves an examination of both s. 3 *POPA* and the *Interpretation Act*, R.S.A. 2000, c. I-8 (*Interpretation Act* or *IA*).

[66] At first blush the words “Except to the extent that they are inconsistent with this Act and subject to the regulations” in s. 3 *POPA* appear to be dispositive. Upon the removal of ss. 794(2) CC a literal reading of the federal legislation would result in no provision for an “exception, exemption, proviso, excuse or qualification”. The logical conclusion for Alberta would then be that the common law applies.

[67] But this could be said to be too simplistic. To simply adopt and accept this literal interpretation would be to ignore how the legislation might be interpreted in the federal context. As of yet, I not aware of any definitive authority as to the effect of the repeal of ss. 794(2) *CC* on criminal legislation like the *Criminal Code*. But, as per the previous discussion, there is a distinct possibility that in that context it could be concluded that the repeal was sufficiently clear to alter the common law with the result that any “exception, exemption, proviso, excuse or qualification” will now have to be disproved by the Crown.

[68] A more helpful statutory provision is contained in the *Interpretation Act*. Because one is dealing with an interpretation of Alberta law, it is this statute that is material and not the federal legislation, *Interpretation Act (federal)*, even though the amendment involves federal legislation. As already noted, provisions in the *Criminal Code* relating to summary conviction proceedings have been incorporated into Alberta law.

[69] The provision of particular importance in the *Interpretation Act* is s. 33 *IA*. That section reads:

If an enactment provides that another enactment of Alberta, Canada or another province or territory applies, it applies with the necessary changes and so far as it is applicable.

[70] The words “it applies with the necessary changes and so far as it is applicable” are the most relevant and important for our purposes. Although I could find no cases that have judicially considered this provision, a plain reading of it indicates that the legislation that has been made applicable to Alberta may have one interpretation in the originating jurisdiction but a different one in Alberta. To put that in terms relevant to this case it means that the effect of the repeal of ss. 794(2) *CC* on federal criminal law may be entirely different than the effect on Alberta law. And is the effect on Alberta legislation that must be determined.

[71] It is trite to say that context is everything but there can be no doubt that that is the case here. Alberta law does not and cannot involve criminal law. As a rule, Alberta laws involve public welfare type of offences. The case of *Sault Ste. Marie* defines these types of offences:

- 1) as offences that “... relate to such everyday matters as traffic infractions, sales of impure food, violations of liquor laws, and the like...” at para 1;
- 2) as offences to maintain “... high standards of public health and safety...” at para 24;
- 3) as offences that “... involve a shift of emphasis from the protection of individual interests to the protection of public and social interests ...” at para 28; and
- 4) as offences that “... are not criminal in any real sense but are prohibited in the public interest ...” at para 1.

What is extremely important in our context is that: “Although enforced as penal laws through the utilization of the machinery of the criminal law, the offences [public welfare offences] are in substance of a civil nature and might well be regarded as a branch of administrative law **to which traditional principles of criminal law have but limited application.**” at para 1.

[Emphasis added.] The distinction between a “... true criminal offence and the public welfare offence **is one of prime importance...**” [Emphasis added.] *Sault Ste. Marie* at para 22.

[72] The subsequent case of *Wholesale Travel* essentially concurs with many of these comments and makes similar types of statements. For example, in that case, in a minority opinion (the opinion of Cory J. concurred in by L’Heureux-Dube, J.) it is noted that public welfare offences are:

- 1) offences that prohibit conduct in the public interest (para 17);
- 2) offences that are “designed to protect those who are unable to protect themselves.” (para 18);
- 3) offences “created by statutes enacted for the regulation of individual conduct in the interests of health, convenience, safety and general welfare of the public” (para 20); and
- 4) offences that are the primary mechanism employed to implement public policy objectives and that “regulation is absolutely essential for our protection and well-being as individuals, and for the effective functioning of society.” (paras 29-33)

[73] The minority opinion then goes on to make it clear that there is a distinct difference between true crimes and public welfare offences (para 28). Although lengthy, the following passages provide the basis for this clear distinction (paras 24-27):

It has always been thought that there is a rational basis for distinguishing between crimes and regulatory offences. Acts or actions are criminal when they constitute conduct that is, in itself, so abhorrent to the basic values of human society that it ought to be prohibited completely. Murder, sexual assault, fraud, robbery and theft are all so repugnant to society that they are universally recognized as crimes. At the same time, some conduct is prohibited, not because it is inherently wrongful, but because unregulated activity would result in dangerous conditions being imposed upon members of society, especially those who are particularly vulnerable.

The objective of regulatory legislation is to protect the public or broad segments of the public (such as employees, consumers and motorists, to name but a few) from the potentially adverse effects of otherwise lawful activity. Regulatory legislation involves a shift of emphasis from the protection of individual interests and the deterrence and punishment of acts involving moral fault to the protection of public and societal interests. While criminal offences are usually designed to condemn and punish past, inherently wrongful conduct, regulatory measures are generally directed to the prevention of future harm through the enforcement of minimum standards of conduct and care.

It follows that regulatory offences and crimes embody different concepts of fault. Since regulatory offences are directed primarily not to conduct itself but to the consequences of conduct, conviction of a regulatory offence may be thought to import a significantly lesser degree of culpability than conviction of a true crime. The concept of fault in regulatory offences is based upon a reasonable care standard and, as such, does not imply moral blameworthiness in the same manner

as criminal fault. Conviction for breach of a regulatory offence suggests nothing more than that the defendant has failed to meet a prescribed standard of care.

[74] It is the distinction between true criminal offences and public welfare offences that is key to this decision. *Charter* considerations always have to be analyzed contextually - see *Wholesale Travel*, per Cory J. at paras 43-51. Specifically, at para 48 it is stated “...constitutional standards developed in the criminal context cannot be applied automatically to regulatory offences.” The difference between criminal offences and regulatory offences requires that they be treated different for the purposes of *Charter* review (*Wholesale Travel*, Cory J. at para 51). The justification for the difference in treatment is twofold – a licensing justification and a vulnerability justification. Those justifications are exhaustively discussed in *Wholesale Travel* by Cory J. at paras 52-65 and 66-71 respectively. While those justifications are important and always to be kept in mind, for our purposes it is not necessary to examine them in any great detail here.

[75] It was mainly the distinction between criminal offences and public welfare offences that lead the Court in *Wholesale Travel* to uphold the onus placed on a defendant to prove due diligence. Although a minority of the Court (Cory J. concurred in by L’Heureux-Dube, J.) in *Wholesale Travel* at para 110 concluded that the onus placed on a defendant to prove due diligence was not a violation of s. 11(d) *Charter*, the rest of the Court found otherwise. That reverse onus was only saved as three other members of the Court (in a decision authored by Iacobucci J. and concurred in by Gonthier and Stevenson JJ.) found that the reverse onus could be saved by s. 1 *Charter*. The minority opinion (Cory J. concurred in by L’Heureux-Dube, J.) also found that s. 1 *Charter* would apply if they were wrong with respect to their finding of no violation at para 121.

[76] Arguably then for both types of offences a reverse onus provision, possibility with some limited exceptions (although not a perfect illustration, see, for example, *R v Schwartz*, [1988] 2 SCR 443 at paras 86-87) (*Schwartz*), will in all probability be found to be a violation of s. 11(d) *Charter*. It follows then that there is a distinct possibility that s. 794(2) *CC* would also have been found to be a violation of s. 11(d) *Charter*. Nevertheless, it is indisputable that the finding whether such a violation could be justified under s. 1 *Charter* could be different in the two different contexts – i.e. not being justified under the criminal law and being justified for public welfare offences. That would be largely for the same reasons (the distinction between criminal offences and public welfare offences) that the reverse onus of proving due diligence was saved by s. 1 *Charter*.

[77] In fact a number of cases have already concluded that s. 794(2) *CC*, at least in the context of public welfare types of offences, is not constitutionally invalid. In *Lee’s Poultry* while the Court was not dealing with s. 794(2) *CC* directly, it was dealing with it indirectly. The provision involved was a provincial provision, a provision that was equivalent to s. 794(2) *CC*. The Court found that the provincial provision did not violate s. 11(d) *Charter* but if it did, it was saved by s. 1 *Charter*. The legislation in *R v G(T)*, 1998 NSCA 61 (*G(T)*) was very similar to the legislation in Alberta. Like in Alberta the provincial legislation in Nova Scotia incorporated s. 794(2) *CC* into provincial law. It was in that context (a provincial offence) that the constitutionality of s. 794(2) *CC* became an issue. The Court at paras 19-36 made an assumption that it violated s. 11(d) *Charter* but that it was saved by s. 1 *Charter*. During its decision the Court at paras 36-47 cited a number of cases that also came to the same conclusion, albeit sometimes in a different

context. *R v Daniels*, 1990 CarswellBC 659, (1990), 60 C.C.C. (3d) 392 (B.C.C.A.) (*Daniels*) was decided in the context of federal legislation to which a previous equivalent of the now former s. 794(2) CC was applicable. It too found that the previous equivalent of s. 794(2) CC could be upheld on the basis of s. 1 *Charter*.

[78] It is also illustrative to note that even in the criminal context, provided the right circumstances are present, a reverse onus provision might also be saved by s. 1 *Charter*. *Schwartz* at paras 86-94 dealt with then ss. 106.7(1) CC (the equivalent section now being 117.11 CC), a provision that placed the onus on an accused to prove that he had the proper certificates or permits for a firearm. The context of that case was extremely important. The provision in issue was contained in a comprehensive licencing and regulatory scheme for firearms. This is somewhat akin to a public welfare type of offence where licencing provisions are the norm. Although the majority found that this provision did not violate s. 11(d) *Charter*, it went further and concluded that if it did, it was saved by s. 1 *Charter*. See also *Whyte*.

[79] In coming to any conclusion on the effect of the repeal of s. 794(2) CC on Alberta legislation all of the above must be taken into account. To summarize somewhat, that includes:

- 1) Alberta had no direct involvement with the repeal of s. 794(2) CC;
- 2) the application of the principled approach to the interpretation of legislation set out in *Rizzo* specifically bearing in mind that it is Alberta legislation that must be interpreted and the relevant intention is the intention of the Alberta legislature;
- 3) the principle of statutory construction that legislation overriding the common law must be strictly construed and it is presumed that legislatures do not intend to interfere with common law rights;
- 4) **of particular importance**, the context in which the repeal applies in Alberta, that context being with respect to public welfare offences and not offences of a truly criminal nature; and
- 5) a number of Courts of Appeal across Canada have concluded that ss. 794(2) CC is constitutional in the public welfare offence context.

[80] To elaborate on this latter point, one must be mindful that there is a substantial likelihood that a reverse onus provision in the context of public welfare offences will be saved by s. 1 but the same cannot be said in the criminal law context. After all, that is the very reason (the regulatory context) that the defence of due diligence (a reverse onus defence) was upheld by the Supreme Court of Canada in *Wholesale Travel*. An analysis of all of these factors as a whole, not individually, leads inexorably to the conclusion that the repeal of s. 794(2) CC, at least in Alberta, did not repeal the common law upon which it was based. As already noted, after its repeal a plain reading of s. 3 POPA, in combination with all of the provisions of the *Criminal Code* applicable to summary convictions, discloses that, in Alberta, there is no longer a statutory provision for an “exception, exemption, proviso, excuse or qualification”. As the common law has not been repealed it must prevail; it comes into full force and effect. It is the common law spelled out generally in *Edwards*, with particular emphasis on the passage cited at para 62 above, that now applies.

[81] In the end, although in a different context, the comments made by Frankel J.A. in *Goleski* are apropos here by analogy and with the necessary changes. At para 75 he states:

I accept that s. 794(2) can be seen as ambiguous, in that it begins by placing the positive burden on an accused to prove an exception, etc., and then appears to place a negative burden on the prosecution to disprove that very thing. **However, I am of the view that when examined through a historical lens it is evident that Parliament did not intend to effect a sea change to a provision grounded in the common law and which had been in force for close to 85 years.**

[Emphasis added.]

[82] There are two final matters that must be addressed. First there can be no doubt that the common law is also subject to *Charter* scrutiny. Whether this common law reverse onus will withstand such scrutiny is best left to when that issue is raised. For now all that will be said is that any examination will involve an analysis similar to that involved with the analysis of the due diligence defence for strict liability offences. And further, even if one might be able to conjure up a situation with respect to a public welfare offence where one would be forced to conclude that the reverse onus could not be saved by the application of s. 1 *Charter*, that does not necessarily mean that the whole concept of a common law reverse onus should be struck down. Although arguably not uncontroversial, that should turn on a case by case basis. Although in dissent on the main issues, see for example Dickson, CJC in *Schwartz* at para 74. See also G(T), at para 20, 29, and 49; and *R v H(P)*, 2000 CanLII 5063 (ON CA) (*H(P)*) at paras 6 and 12.

[83] And second, a cautionary note. Although it does not appear to have been definitively decided, the common law reverse onus rule, in all likelihood, does not apply to defences ordinarily recognized by law such as intoxication, necessity, duress, provocation, self-defence etc. It applies only to specific statutory defences set out in the relevant statute. That flows from the nature of the common law rule itself, particularly the words: “Whenever the prosecution seeks to rely on this exception, **the court must construe the enactment under which the charge is laid. If the true construction is that the enactment prohibits the doing of acts, subject to provisos, exemptions and the like, then the prosecution can rely on the exception.**” [Emphasis added.] Although not decisive, in the context of ss. 794(2) *CC*, the cases of *H(P)*, at paras 15-16, *Lewko* at para 18, and *Williams* at para 27-28 appear to lend some support to this proposition.

[84] The case of *R v Perka*, [1984] 2 SCR 232 is more explicit. There the common law defence of necessity and a provision of the since repealed *Narcotic Control Act*, R.S.C. 1970, c. N-1 that was essentially equivalent to s. 794(2) *CC* were in issue. Dickson J. states, at paras 60-61:

The *Narcotic Control Act* provides for several statutory exceptions to its broad prohibitions against importation, sale, manufacture and possession. The offences created by the Act are generally subject to the proviso that the accused not have been acting under the authority of the Act or the regulations thereunder. See ss. 3(1) (possession), 5(1) (importation) and 6(1) (cultivation). Section 12, of the Act implements this scheme by providing for a set of regulations governing the issuance of licences for, *inter alia*, the importation, sale, manufacture or

possession of narcotics. One who sells, imports, manufactures or possesses narcotics pursuant to such authority does not commit an offence.

It seems clear that it is to these statutory exceptions that s. 7(2) refers, and not to common law defences such as necessity. One who wishes to plead the possession of a licence or other lawful authority in response to a charge of importation bears, under s. 7(2), the burden of persuading the trier of fact that such licence exists. One who pleads necessity bears no such burden. Section 7(2) does not place a persuasive burden as to the defence of necessity on the accused.

[Emphasis added.]

Has the Crown Proved the Actus Reus of the Offences?

Subsection 13(1) Bylaw

[85] With respect to ss. 13(1) *Bylaw* the only issue raised by the Defendant with respect to the *actus reus* is whether the bite occurred wholly within the Defendant's yard or whether Moose reached across the fence to bite Snyder. If the former, the offence would not be proven as the offence has to occur "off the property of the Owner". If the latter, the only issue is whether reaching across the fence is sufficient to establish Moose was "off the property of the Owner".

[86] Clearly, on the evidence of Snyder Moose reached over the fence to bite her. The Defendant however, essentially argues that there should be a reasonable doubt on this point based upon the totality of the evidence presented by the Defendant. That is, there should be a reasonable doubt whether the bite occurred on Snyder's side of the fence or wholly on the Defendant's side.

[87] I do not find that any such interpretation can be placed on the defence evidence. At no time does either the Defendant or Wobben specifically state that the bite occurred on the Defendant's side of the fence. And even more importantly, I find as a fact that the clear inference from the evidence of both of them is that Moose reached over the fence to bite Snyder. The evidence of both the Defendant and Wobben must be examined as a whole but as examples, I cite, particularly, the following evidence:

A) The Defendant

"He [Moose] immediately circled around me, jumped up and did bite her arm, as it was bent, **pushing the mower.**" [Emphasis added.] – Trans. 31/37-38;

"...before I could even grab him, he had circled around and jumped up and bit her, **as she was pushing.**" [Emphasis added.] – Trans. 35/2-3; and

At the time of the bite the Defendant stated that Moose's back legs were on the ground of her property but his front legs were either on the fence or under her arm – Trans. 35/9-20.

B) Wobben

Wobben testified that, at the time of the bite, Moose had jumped on the fence as Snyder Miller was pushing her lawn mower. It was before the bite that Snyder Miller's arm was extended over the fence – Trans. 44/40-45/28;

“Q Do you know which side of the fence Ms. Snyder Miller's arm was on at that time [the time of the bite]?”

A I couldn't tell you – I just know she was mowing right next to the fence so the arm was probably right on the line, I'm assuming, because the fence – the lawn mower was right against the fence.” – Trans. 47/12-15; and

“From my distance I couldn't guarantee it [the hand] was over the fence, but it was definitely, like, to smell or just kind of put it out so, like, it was kind of hoping that he would probably calm down is what I'm assuming.” – Trans. 47/33-35

[88] Accordingly, taking into account all of the evidence as a whole I find that Snyder Miller was bit on the arm while both she and her arm were on her side of the fence. After Moose had jumped on the fence with his front paws he reached across the fence into Snyder Miller's yard and bit her. In making this finding I have applied the principles in *R v W(D)*. For the reasons just provided, I cannot accept that the defence evidence supports the proposition that the bite occurred on the Defendant's side of the fence nor does that evidence raise a reasonable doubt in my mind.

[89] Next, I conclude that that is sufficient to find that Moose was “off the property” in accordance with ss. 13(1) *Bylaw*. A literal reading of that subsection does not require that the dog be fully off the property when the incident occurs. To not give full effect to that interpretation would be to lessen the effectiveness of this section in protecting the safety and health of the public thereby violating one of the purposes of the *Bylaw* as expressed in the first preamble to it, that being “**Whereas, pursuant to section 7(a) of the *Municipal Government Act*, a council may pass laws for municipal purposes respecting the safety, health and welfare of people and the protection of people and property** [Emphasis added.]

Paragraph 14(1)(c) Bylaw

[90] With respect to para 14(1)(c) *Bylaw* the only issue raised is provocation, that is ss. 14(2) *Bylaw*. That involves an examination of four different issues:

- 1) is there an evidentiary basis for provocation;
- 2) if yes, does that evidence, if accepted, amount, in law, to provocation;
- 3) if yes, is provocation an “exemption, excuse, qualification or the like”; and
- 4) if yes, has the Defendant proved provocation on the balance of probabilities.

Each will be dealt with in turn.

i) Evidentiary basis

[91] It cannot be argued that there is evidence of provocation in the Crown's case. Such evidence, if any, must be gleaned from the evidence presented by the Defendant. To summarize, that evidence consists of:

A) *The Defendant*

Snydmiller reached over the fence on three occasions to **“try and calm down Moose”** [Emphasis added.] – Trans. 31/32-33;

Three times Snydmiller reached over the fence **“to try and, like, befriend him and that – the extend-your-hand motion that’s kind of synonymous with greeting dogs.”** [Emphasis added.] – Trans. 34/7-19; and

In cross examination the Defendant agreed that Snydmiller reached over the fence three times – Trans. 40/23-26.

B) *Wobben*

“She [Snydmiller] kind of put her hand out, **almost to look like she was trying to befriend him**, stop him from barking. I saw the hand kind of twice from where I was...” [Emphasis added.] – Trans. 43/30-32;

“She was holding the lawn mower with one hand, but the other hand was wearing, like, a gardening glove or a leather glove or something like that, and she had stuck that out to – **it looked like befriend or just kind of have him sniff, hoping that that would stop him probably from barking.**” [Emphasis added.] – Trans. 45/18-21; and

“From my distance I couldn’t guarantee it [the hand] was over the fence, but it was definitely, **like, to smell or just kind of hoping that he would probably calm down** is what I’m assuming.” [Emphasis added.] – Trans. 47/33-35.

[92] Accordingly, it can be argued that there is some evidence of provocation – the reaching over the fence by Snydmiller.

ii) *Provocation in Law*

[93] The next issue is whether that evidence, if accepted, is capable in law of amounting to provocation under ss. 14(2) *Bylaw*. Or to put this in another fashion is there an “air of reality” to the issue of provocation. Taking into account the dictionary definitions of “provoke” and the case authority previously cited and discussed (see paras 31-39 above) it is my view the evidence here is not capable in law of amounting to provocation. There is no “air of reality” to this issue.

[94] The reaching over the fence cannot be looked at in isolation. The description of that reaching, and the reason for it as contained in the evidence presented by the Defendant, is crucial. There are a number of variations of that description and the reason therefore including (for transcript references for the following passages see para 91 above):

- 1) “try and calm down Moose”;

- 2) “to try and, like, befriend him and that - the extend-your-hand motion that’s kind of synonymous with greeting dogs”;
- 3) “almost to look like she was trying to befriend him”;
- 4) “it looked like befriend or just kind of have him sniff, hoping that that would stop him probably from barking”; and
- 5) “like, to smell or just kind of hoping that he would probably calm down”.

[95] None of these descriptions can be said to be in accord with the dictionary definitions of “provoke” previously set out. That is, they cannot be said “to incite to anger”, “to stir up purposely”, “to stir up, agitate” etc. In fact, they could be described as “friendly, submissive and consummately non-threatening behaviours”, conduct that was found in *Letendre* at para 44 not to amount to provocation.

iii) *Exemption, proviso, excuse, qualification or the like*

[96] If I am wrong in that respect, I have to then determine, in accordance with the common law reverse onus provision, whether ss. 14(2) *Bylaw* is an “exemption, proviso, excuse, qualification or the like”. That is part of the common law reverse onus provision and is largely established by the words (words that have been cited before but repeated here for convenience) in *Edwards* at 1095: “Whenever the prosecution seeks to rely on this exception, the court must construe the enactment under which the charge is laid. If the true construction is that the enactment prohibits the doing of acts, **subject to provisos, exemptions and the like, then the prosecution can rely on the exception.**” [Emphasis added.]. Effectively what is required is a determination of whether the provision is an “exemption, excuse, qualification or the like” or an essential element of the offence *Hundt v The Queen*, 1971 ALTASCAD 22 (*Hundt*) at paras 9-13, a case cited by the Crown.

[97] Many cases have struggled with this very issue and it can sometimes be an extremely difficult task. In the context of ss. 794 *CC* (and previous versions of the same section) see for example *Hundt* at paras 13-24, *H(P)* at paras 14-15, and *Williams* at paras 16-24. But here, while not easy, it is somewhat less difficult than it might otherwise be.

[98] Cognizance of the grammatical structure of s. 14 *Bylaw* is necessary and important. That section is divided into two different subsections, an indication, obviously not determinative, that ss. 2 *Bylaw* is an “exemption, excuse, qualification or the like”. However, this indication is buttressed by the fact that ss. 1 *Bylaw* can be viewed as a stand-alone provision without requiring any support from ss. 2 *Bylaw*. That is, ss. 1 *Bylaw* evidences an offence in and of itself. Additionally, what ss. (1) *Bylaw* does is create a blanket prohibition and what ss. (2) *Bylaw* does is create an “exception” to that blanket prohibition – see for example *Daniels* at paras 10-15 and *R v Whatmore*, 2011 ABPC 320 at paras 43-44. And finally, ss. 2 *Bylaw* is limited to s. 14 *Bylaw* itself. That is, it is particular to that section and that section alone; it does not apply to the *Bylaw* in general terms. On this last point see *R v Sheehan*, 2003 CanLII 32876 (NL PC) at para 13. All that combined leads to the conclusion that proof of no provocation is not an element of the offence but that provocation is actually an “exemption, excuse, qualification or the like”. That fits in nicely with the general purpose of the *Bylaw* (the safety, health and welfare of people and

the protection of people and property), and the particular importance of the purpose to s. 14 *Bylaw*.

iv) *Has the Defendant proved provocation?*

[99] Having found that provocation is an “exemption, excuse, qualification or the like” and not an element of the offence I necessarily have to find that the Crown has proved the *actus reus* of this offence beyond a reasonable doubt. None of the other elements of the *actus reus* are in dispute. But as it is convenient to do so here I will carry on to address the issue of provocation in its entirety. Mindful of my analysis that the onus is on the Defendant to prove provocation, I turn now to whether the Defendant has proved that on the balance of probabilities.

[100] I have listened carefully to the evidence of both the Crown and the Defendant. I find that all the witnesses who testified are believable. There is nothing, either in the way that any of them has testified or in how the evidence that they have provided fits within the context of this case as a whole, that leads me to conclude that I should accept one witness’s evidence over that of another. That is, I cannot decide which version of the facts, where there is a discrepancy, to believe. Essentially, I am in the same position as was the trial judge in *Goleski*, at paras 15-16. This is one of those rare cases where the outcome is determined on the basis of which party has the onus.

[101] As the only evidence of provocation comes from the evidence presented by the Defendant, and not being able to accept it, it follows that the Defendant has not met her onus. Provocation has not been proved.

Conclusion with Respect to the Actus Reus of the Offences

[102] The only issue concerning ss. 13(1) *Bylaw* is whether the bite occurred off of the Defendant’s property. I have found that, although Moose was not entirely off the Defendant’s property at the time of the bite, his mouth was. That is sufficient for a violation of that subsection. The Crown has proved all the element of the *actus reus* for this offence beyond a reasonable doubt.

[103] With respect to para 14(1)(c) *Bylaw* the Crown has also proved all the elements of the offence beyond a reasonable doubt. Provocation is not one such element. It is an “exemption, proviso, excuse, qualification or the like” which has not proven on the balance of probabilities by the Defendant either because the evidence presented on this point is not capable in law of amounting to provocation or because that evidence was not accepted.

Has the Defendant Proved the Defence of Due Diligence?

[104] That then leaves only the issue of due diligence.

[105] The Defendant has raised this issue with respect to both offences. As exactly the same analysis applies to both offences for this defence, the offences will be treated collectively and not differentiated.

[106] The Defendant faces the same difficulty for this defence as she did with respect to the provocation defence. To repeat, I am not able to accept the evidence presented by the Defendant on this issue.

[107] On the Crown's evidence due diligence has not been established. Snyder Miller described Moose and other dogs in the Defendant's yard as being aggressive to the point where she would not cut her grass unless the Defendant or someone else was in the Defendant's yard to supervise the dogs. Specifically with respect to Moose she stated that he would cause difficulties at the fence: "Snapping, snarling, feet on the fence, barking aggressively." Snyder Miller viewed the Defendant's dogs, including Moose, as a threat to her and she was afraid of them. Notwithstanding that Moose had never before come into Snyder Miller's yard these issues should have been addressed in some fashion. This is especially so in the context of a low three foot high fence. But on the evidence of Snyder Miller they were not.

[108] In light of non-acceptance of the Defendant's evidence that essentially ends the matter. Nevertheless, I will go on to fully deal with this matter. Even if the evidence presented by the Defendant was accepted, I question whether the defence of due diligence has been established on the balance of probabilities on the basis of that evidence. In saying that I am mindful that Moose had never bitten anyone before and that there were no previous incidents between Moose and Snyder Miller. However, the evidence presented by the Defendant also highlights a number of other things. First, that Moose had an issue with barking, and on the day in question, but prior to the incident, he was: "barking at the fence" (Trans. 43/24-25). A precursor such as this cannot simply be ignored. As stated by Wobben, the Defendant's boyfriend, "...when Moose is barking, I'm usually telling Kaileigh [the Defendant] that we need to bring the dogs down, put them in or pull them from the fence, because they bark a lot."- Trans. 43/33-34. Second Moose was running freely around the yard at the time of the incident. Third, the fence between the Defendant's yard and Snyder Miller's yard was a low fence, being only three feet in height. And finally, of great significance is that it was only after Moose had approached the fence on three occasions in such a fashion that the Defendant had to, on each of those three occasions, try to calm him down, that she decided to take him inside. Previously she had simply moved Moose to another part of the yard. In those circumstances I have grave doubts that the defence of due diligence can be made out on that evidence.

Conclusion

[109] With the repeal of s. 794(2) CC, at least in Alberta, the common law reverse onus provision for summary conviction offences is now applicable. As s. 794(2) CC was a codification of the common law, the law in Alberta remains essentially the same as it was before the repeal. To be clear, that common law (and the law that is now applicable) is spelled out in the case of *Edwards*. Of particular importance are the passages at p 1095 of that case, the passages that have been set out at para 62 of this decision. To summarize, the onus is on a defendant to prove an "exemption, proviso, excuse, qualification or the like" on the balance of probabilities.

[110] In this case the Crown has proved the *actus reus* of both of these offences beyond a reasonable doubt. With respect to ss. 13(1) *Bylaw* Moose was "off the property" at the time of the incident. With respect to para 14(1)(c) *Bylaw* lack of provocation is not an element of the offence; provocation is an "exemption, proviso, excuse, qualification or the like" and therefore the onus is on the Defendant to establish that (i.e. the application of ss. 14(2) *Bylaw*) on the

balance of probabilities. She has not done so, either because the evidence presented by the Defendant did not amount to provocation under ss. 14(2) *Bylaw* or because that evidence could not be accepted. The Defendant has also not proved the defence of due diligence for either of these offences.

[111] Accordingly, I find the Defendant guilty of both offences.

Heard on the 9th day of January, 2020, December 16, 2020, May 20, 2021, and May 21, 2021.
Dated at the City of Edmonton, Alberta this 21st day of May, 2021.

Arnold Schlayer
Justice of the Peace

Appearances:

K. Johnson and L. Ramaswamy
for the Crown

W. Smith
for the Defendant

Tab 9:
R. v. Dillman,
2021 ABQB 363

Court of Queen's Bench of Alberta

Citation: R v Dillman, 2021 ABQB 363

Date: 20210510
Docket: 190874768Q2
Registry: Peace River

Between:

Her Majesty the Queen

Crown

- and -

**Clinton Dillman and
Joshua Lyons**

Accused

**Reasons for Decision
of the
Honourable Mr. Justice E.J. Simpson**

Introduction

[1] In the trial of this matter, an evidentiary issue arose as to whether the Crown or the Defence bears the onus with respect to the words “where it is proved” in section 84(3)(d)(i) and (ii) of the *Criminal Code*, RSC 1985, c C-46. The item in question was a sawed off .22 calibre rifle.

[2] In my oral decision in this trial, I advised I would provide a written decision on that issue to supplement my oral reasons. This decision deals with that evidentiary issue and may be read in conjunction with my oral reasons.

Application of s 84(3)(d)(i) and (ii)

[3] That subsection reads as follows:

84(3) For the purposes of sections 91 to 95, 99 to 101, 103 to 107 and 117.03 of this Act and the provisions of the *Firearms Act*, the following weapons are deemed not to be Firearms:

...

(d) any other barrelled weapon, where it is proved that the weapon is not designed or adapted to discharge

(i) a shot, bullet or other projectile at a muzzle velocity exceeding 152.4 m per second or at a muzzle energy exceeding 5.7 Joules, or

(ii) a shot, bullet or other projectile that is designed or adapted to attain a velocity exceeding 152.4 m per second or an energy exceeding 5.7 Joules.

[4] This subsection applies to offences related to the possession, trafficking, transferring, and importing and exporting of certain Firearms, and the failure to report, or the false reporting of the loss, finding, or destruction of those Firearms - those Firearms being prohibited Firearms, restricted Firearms and non-restricted Firearms without a licence or registration certificate. It deems certain barrelled weapons which discharge a bullet at a velocity of less than 152.4 m/sec or about 500 ft/sec either at the muzzle or at any point thereafter, or have a muzzle energy or flight energy less than 5.7 Joules not to be Firearms.

[5] Therefore, in this case notwithstanding my conclusion to this point regarding the application of the definition of firearm to this barrelled weapon this section may deem the sawed off .22 calibre rifle not a firearm.

[6] This subsection thereby provides an exemption. It exempts anyone possessing a low powered barreled weapon from the requirement of holding a license or other authorization which may be required for a Firearm. What this means is that any person can own any barrelled weapon that fires a shot, bullet or other projectile without a licence so long as it does not exceed the velocity and energy set out in the subsection. The point of this exemption is not to sweep in as a Firearm low-powered barrelled weapons such as BB guns, pellet guns and the like. What Parliament has done has set a standard below which any owner of low-powered barrelled weapons can enjoy the use of the barrelled weapon without bothering to acquire a Firearm's licence.

The Onus – Crown or Defence

[7] The Defence and Crown dispute who has the onus to prove the velocity or energy.

[8] In respect of defences, the law is clear: the accused need not prove a defence. As the SCC stated in *R v Holmes*, [1988] 1 SCR 914 at 935, "all that the accused need do is point to some evidence which supports the defence. The Crown is then required to disprove the defence beyond a reasonable doubt." The law seems to be more complex in respect of exceptions and exemptions.

[9] Ordinarily, in a trial, the Crown need not disprove an exemption.

[10] As the BC Court of Appeal explained in **R v Goleski**, 2014 BCCA 80, aff'd 2015 SCC 6, [2015] 1 SCR 399, the shift to place the onus on the accused respecting exceptions dates back to 1848 with the enactment in England of *An Act to facilitate the Performance of the Duties of Justices of the Peace out of Sessions, within England and Wales, with respect to summary Convictions and Orders*, 11 & 12 Vict, c 43, s 14. It was first enacted in Canada by *An Act respecting the duties of Justices of the Peace out of Sessions, in relation to summary convictions and orders*, SC 1869, c 31, s 4. It was introduced to the *Criminal Code* as s 852 (*The Criminal Code of Canada*, 1892, SC 1892, c 29), and eventually became s 794 (2), which was repealed in 2018 (*An Act to amend the Criminal Code and the Department of Justice Act and to make consequential amendments to another Act*, SC 2018, c 29, s 68). Notably, this provision applied only to offences prosecutable by summary conviction.

[11] It seems that this principle entered the common law, and thus neither the limitation contained in former s 794(2), nor its repeal preclude the application of this principle to indictable offences. In **R v Edwards**, [1974] 2 All ER 1085, [1975] QB 27, 59 CrAppR 213 (CA), the English Court of Appeal addressed the question of whether the Crown must prove a lack of exceptions contained in a statute. Lawton LJ stated [at 1095 ER]:

In our judgment this line of authority establishes that over the centuries the common law, as a result of experience and the need to ensure that justice is done both to the community and to the defendants, has evolved an exception to the fundamental rule of our criminal law that the prosecution must prove every element of the offence charged. This exception, like so much else in the common law, was hammered out on the anvil of pleading. It is limited to offences arising under enactments which prohibit the doing of an act save in specified circumstances or by persons of specified classes or specified qualifications or with the licence or permission of specified authorities. Whenever the prosecution seeks to rely on this exception, the court must construe the enactment under which the charge is laid. If the true construction is that the enactment prohibits the doing of acts, subject to provisos, exemptions and the like, then the prosecution can rely upon the exception.

[12] More importantly, our Court of Appeal stated the following in **R v Thompson**, 1992 ABCA 259 (at paras 9-10):

While the *Criminal Code* does not provide for the burden of proving exceptions in indictable offences, it does address their pleading (s. 581) where the common-law rule seems to be continued. While s. 794(2) is located in Part XXVII of the *Criminal Code* which guides summary conviction procedure alone, the rule, even s. 794(2) itself, has been relied upon in prosecutions by indictment in Canada. This is so even though the exception-onus provision is not reproduced in those Parts of the *Criminal Code* relating to procedure in trials by indictment. The sense and purpose of the exception-onus rule is clear. I am not persuaded that its application in Canada should be repressed simply because of the place of its statutory expression in the *Criminal Code*.

In *R. v. Volk* 1973 ALTASCAD 66, [1971] 12 C.C.C. (2d) 395 (Alta. App. Div.), the Appellate Division held that the burden of proof of establishing the statutory exception to the indictable offence of gross indecency - that the consenting

complainant was 21 years old - rested on the defence. A similar result was reached in *R. v. Duchesne* [1976] 36 C.R.N.S. 365 (Que. C.A.), where the court addressed the proof burden escorting the statutory age exception to the indictable offence of buggery. The rule applies in prosecutions by indictment in England where, as in Canada, there is express statutory provision for provisos and exceptions only in summary proceedings (see the English legislation quoted in Sopinka, Lederman and Bryant, The Law of Evidence in Canada (1992) p. 88 n).

...

[13] In accord, see *R v Ali*, 2015 BCCA 333 at para 30.

[14] I am aware of only one reported case where the onus in s 84(3) was considered. In *R v Binns*, 2002 OJ No 5153, 2002 Carswell Ont 4617, an oral decision from the Ontario Court of Justice, Bellefontaine J stated (at paras 2-3, OJ):

This section applies to a limited selection of firearms offences. It does not appear to apply to any offences where a firearm is actually used but applies to many of the possessory and licencing provisions affecting firearms and weapons. It does apply to the three counts in question before me today. Counts four and six have as an essential element that the pistol be a firearm whereas count three does not require it to be a firearm but simply a weapon, although the Crown has particularized the pistol to be a handgun which for the purposes of Part Three of the code it can only be if it is also a firearm. The Crown submits in response that section 84 only applies to barrelled weapons not otherwise defined as firearms. Respectfully I can only see the section to make sense as creating an overriding exemption for all barrelled weapons of low muzzle velocity to exempt them from the onerous firearms controls. Although they may maintain their status as weapons for the offences applicable to weapons of a general sort I view them as not intended to be controlled at the same level as the more dangerous firearms. The Crown secondly submits that the section is a qualification or exemption that the Crown need not prove. The wording of the section where it is proved arguably places an evidentiary burden on the defence that may reasonably be placed on the defence as cases may exist where the items is proven by circumstantial evidence to meet the Section Two definition of a firearm but has not been seized by the police to be tested for section 84.3 compliance or 84.2 compliance. In such circumstances if the Accused alone had access to the firearm the muzzle velocity would be information that the defence alone could obtain. No cases have been provided by the Crown or the defence dealing with the application of the section or who bears the burden of proof on the point. *R. v. Ledoux* provided by the defence mentions the issue in *obiter* but is not helpful in any way. I've been unable to find any case dealing with the issue. To compound matters the Crown has proceeded by indictment and cannot avail itself of section 794(2) which, in summary conviction proceedings, places the burden on the defence to establish the application of a qualification or exemption. The absence of a comparable section for indictable matters suggests the Crown must bear the burden of proving the point when it has proceeded by indictment. The narrow nature of the rule at common law has been noted by our Court of Appeal in *R. v. HP* and by commentators such as McWilliams in *Canadian Criminal Evidence*. Indeed in

dealing with the many variations of wording used to create evidential burdens and reverse onuses none as oblique or ambiguous as this section are mentioned by McWilliams. *Absent clear language or statutory or common law authority, it is inconsistent with the presumption of innocence to impose the burden on the defence to prove the point.* I regret the bizarre interpretation this creates where opposite results occur depending on the whim of the Crown in making their election. However the result can be justified. In the event the Crown wants the benefit of the increased penalty available when proceeding by indictment they must be prepared to forego the evidentiary shortcuts available in summary conviction proceedings.

For the foregoing reasons the Crown bears the burden of proving the firearms velocity for the applicable sections whereby a firearm is an essential element of the offence....
(emphasis)

[15] In reaching this anomalous conclusion or “bizarre interpretation”, Bellefontaine J was bound by the narrow approach set out in **R v H (P)** (2000), 143 CCC (3d) 223 at para 14 (OntCA). In contrast, in Alberta, the law is set out in **Thompson** and **Volk**.

First Principles

[16] Given the lack of authorities, I turn to first principles.

[17] The law generally imposes an onus on the Accused to invoke the exemption provided in s 84(3) and to provide an air of reality to the claim that the weapon at issue is not in fact a “Firearm”. After all, the Accused will be in the best position to know about the existence of any authorizations, or to show that the weapon is an antique, a starter pistol, or a device associated with animals. This conclusion is consistent with **Thompson** and **Volk**.

[18] However, the specific exemption set out in s 84(3)(d) gives me pause. Parliament adopted a highly technical definition. This definition frequently comes up in cases involving pellet guns and air guns. The determination of pellet guns’ muzzle velocity is commonly referred to as “the pig’s eye test”, because the muzzle velocity listed in s 84(3)(d) is required for projectiles to penetrate the human eye and pigs’ eyes are similar in size and composition to human eyes. (**R v Crawford**, 2015 ABCA 175 at paras 24, 35; **R v Dunn**, 2013 ONCA 539 at paras 8, 40).

[19] Considering the state of most accused, it is unlikely that they would be able to have access to, or afford the requisite testing. Placing the burden of measurement of velocity on the Accused strikes me as being akin to requiring an accused to provide evidence with respect to the measurement of electricity or the torque of an engine. Requiring the Accused to present such evidence would impose an undue and unreasonable burden on the Accused.

[20] My conclusion in respect of s 84(3)(d) is reinforced by the inclusion in the stem of this provision of the words “where *it is proved* that the weapon is not designed or adapted to discharge”. This wording appears to anticipate this as a part of the element of a Firearm, and that it is the Crown who has proven the weapon’s muzzle velocity or projectile velocity.

[21] Finally, I note that s 84(3) does not contain the usual phrases which denote an onus on the Accused, such as “absent evidence to the contrary” or “the proof of which lies with the Accused”.

Conclusion

[22] In sum, I agree with Bellefontaine J that, absent clear statutory language, it is inconsistent with the presumption of innocence to impose the burden on the Accused to prove muzzle velocity or projectile velocity. I conclude that it is the Crown who bears the burden of proof in respect of s 84(3)(d).

[23] I am aware of logistical problems commonly besetting the Crown causing the Crown to experience significant delays in obtaining certificates from government labs in a timely manner. Nevertheless, that does not relieve the Crown of the burden to prove all elements of a charge.

[24] Therefore, notwithstanding that the sawed off .22 calibre rifle, otherwise meets the definition of Firearm, having reached the conclusion that the Crown must prove the velocity or energy as part of proving the barrelled weapon as a Firearm and not having that evidence that proof of the element in the first three charges in the indictment fails.

Heard on the 27 to 29th day of April, 2021.

Dated at the Town of Peace River, Alberta this 7th day of May, 2021.

E.J. Simpson
J.C.Q.B.A.

Appearances:

James Brydon
for the Crown

Tina Lind
for the Accused Clinton Dillman

Kevin Gubbins
for the Accused Joshua Lyons

Tab 10:
R. v. Zora,
2020 SCC 14

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*

INDEXED AS: R. v. ZORA

2020 SCC 14

File No.: 38540.

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

Chaycen Michael Zora *Appellant*

c.

Sa Majesté la Reine *Intimée*

et

**Procureur général de l'Ontario,
procureur général de la Colombie-
Britannique,
Criminal Lawyers' Association of Ontario,
Vancouver Area Network of Drug Users,
British Columbia Civil Liberties Association,
Association canadienne des libertés civiles,
Independent Criminal Defence Advocacy
Society, Pivot Legal Society et
Association québécoise des avocats et avocates
de la défense** *Intervenants*

RÉPERTORIÉ : R. c. ZORA

2020 CSC 14

N° du greffe : 38540.

2019 : 4 décembre; 2020 : 18 juin.

Présents : Le juge en chef Wagner et les juges Abella,
Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin et
Kasirer.

**EN APPEL DE LA COUR D'APPEL DE LA
COLOMBIE-BRITANNIQUE**

Droit criminel — Omission de se conformer aux conditions d'une promesse ou d'un engagement — Éléments de l'infraction — Mens rea — Prévenu déclaré coupable d'omission de se conformer aux conditions d'une promesse ou d'un engagement après avoir omis de répondre à la porte lorsque la police s'est rendue à sa résidence — La mens rea pour l'infraction d'omission de se conformer aux conditions d'une promesse ou d'un engagement doit-elle être évaluée en fonction d'une norme subjective ou objective? — Code criminel, L.R.C. 1985, c. C-46, art. 145(3).

Z a été accusé d'infractions relatives aux drogues et a obtenu une mise en liberté sous conditions, notamment un couvre-feu et l'exigence de se présenter à la porte de sa résidence dans un délai de cinq minutes lorsque la police

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

ou une personne en charge de la surveillance de sa liberté sous caution se présente pour confirmer qu'il respecte le couvre-feu. À deux reprises, Z ne s'est pas présenté à sa porte lorsque la police s'est rendue à sa résidence, et il a été inculpé en vertu du par. 145(3) du *Code criminel* de deux chefs d'accusation pour ne pas avoir respecté son couvre-feu et de deux chefs relatifs au manquement à sa condition de répondre à la porte. Z a présenté une preuve démontrant qu'il était dans sa chambre à coucher et qu'il lui aurait été difficile, voire impossible, d'entendre quelqu'un sonner ou frapper à la porte d'entrée. Le juge du procès a acquitté Z relativement aux allégations de violation du couvre-feu mais l'a déclaré coupable des deux chefs d'accusation d'omission de se présenter à la porte. Le juge d'appel des poursuites sommaires a rejeté l'appel de Z et conclu qu'une *mens rea* objective était suffisante pour une déclaration de culpabilité en vertu du par. 145(3) et que son comportement constituait un écart marqué par rapport à ce qu'une personne raisonnable aurait fait pour s'assurer qu'elle respectait ses conditions de mise en liberté sous caution. La Cour d'appel a rejeté l'appel de Z. Les juges majoritaires de la cour ont conclu que le par. 145(3) créait une infraction fondée sur une obligation qui nécessitait seulement une *mens rea* objective.

Arrêt : Le pourvoi est accueilli, les déclarations de culpabilité de Z sont annulées et la tenue d'un nouveau procès sur les deux chefs relatifs à l'omission de répondre à la porte est ordonnée.

En vertu du par. 145(3) du *Code criminel*, la Couronne est tenue de prouver la *mens rea* subjective. Elle doit établir que la personne prévenue a commis un manquement à une condition d'une promesse, d'un engagement ou d'une ordonnance sciemment ou par insouciance. En conséquence, la tenue d'un nouveau procès est nécessaire concernant les deux chefs accusant Z d'avoir omis de répondre à la porte de sa résidence, en raison de l'erreur commise par les tribunaux d'instance inférieure, qui ont appliqué une norme de faute objective.

Pour la plupart des crimes, la forme de mise en liberté par défaut est la libération de la personne prévenue sur promesse d'être présente au procès, sans autres conditions. Des conditions de mise en liberté sous caution peuvent être imposées, mais seulement si elles sont clairement énoncées, les moins nombreuses possible, nécessaires, raisonnables, les moins sévères possible dans les circonstances et suffisamment liées aux risques que pose la personne prévenue au regard des motifs de détention prévus au par. 515(10) : assurer la présence de la personne prévenue au tribunal, assurer la protection ou la sécurité du public ou ne pas miner la confiance du public envers l'administration

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

de la justice. La détermination des conditions de mise en liberté sous caution doit être conforme à la présomption d'innocence et au droit de ne pas se voir privé sans juste cause d'une mise en liberté assortie d'un cautionnement raisonnable garanti par l'al. 11e) de la *Charte canadienne des droits et libertés*. De plus, l'art. 515 du *Code criminel* codifie le principe de l'échelle, selon lequel la forme de mise en liberté et les conditions de celle-ci imposées à la personne prévenue ne doivent pas être plus sévères que ce qui est nécessaire pour répondre aux risques énumérés au par. 515(10). Seules les conditions qui sont expressément adaptées à la situation personnelle de la personne prévenue peuvent satisfaire aux critères exigés. Les conditions de mise en liberté sous caution se veulent donc des normes de comportement particularisées conçues pour limiter les risques énoncés dans la loi que pose une personne en particulier et doivent être imposées avec retenue. La retenue est nécessaire parce que les conditions de mise en liberté sous caution restreignent la liberté d'une personne présumée innocente de l'infraction sous-jacente et, par l'infraction prévue au par. 145(3), créent de nouvelles sources de responsabilité criminelle éventuelle propre à la personne prévenue visée.

Le paragraphe 145(3) du *Code criminel* prévoit une infraction mixte qui s'applique aux manquements à des conditions imposées à une personne prévenue dans une ordonnance judiciaire lorsque celle-ci est en liberté avant le procès, en attendant la détermination de la peine ou pendant un appel. Il s'agit d'un crime contre l'administration de la justice qui entraîne une peine maximale de deux ans d'emprisonnement. Toute personne prévenue est par conséquent passible d'un emprisonnement en vertu du par. 145(3) si elle manque à une condition de sa mise en liberté sous caution, même si en fin de compte elle n'est déclarée coupable d'aucun crime pour lequel elle était initialement accusée. Dans bien des cas, la personne prévenue s'expose à des sanctions pénales pour une conduite qui, n'eût été la condition de sa mise en liberté sous caution imposée, constituerait un exercice légal de sa liberté personnelle. Par conséquent, l'élément de faute qu'exige le par. 145(3) a des conséquences d'une portée considérable sur les libertés civiles et le fonctionnement équitable et efficace de la mise en liberté sous caution dans notre pays, et il existe un lien direct entre les conditions qui peuvent être imposées dans une ordonnance de mise en liberté sous caution et l'intention législative de criminaliser le manquement à celles-ci aux termes du par. 145(3).

Afin de déterminer la *mens rea* qu'exige le par. 145(3), il faut dégager la norme de faute que voulait le Parlement. La présomption est que le Parlement veut qu'un crime s'accompagne d'une faute subjective à moins qu'il existe

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.

une intention claire de la part du Parlement d’écarter la présomption. S’il existe une ambiguïté quant à la *mens rea* requise pour une infraction criminelle prévue dans le *Code criminel*, alors la présomption n’a pas été écartée. Le texte et le contexte du par. 145(3) laissent entendre que le Parlement voulait que la norme de la faute subjective s’applique. Le texte du par. 145(3) est neutre en ce sens qu’il n’indique pas une intention claire de la part du Parlement à l’égard d’une *mens rea* subjective ou objective. L’absence de mots exprès indiquant une intention subjective ne suffit pas, à elle seule, à écarter la présomption de *mens rea* subjective. De plus, rien n’établit une intention claire de créer une infraction fondée sur une obligation qui appelle une *mens rea* objective. Les infractions fondées sur des obligations se rapportent à des obligations légales très différentes de celle de se conformer aux conditions d’une ordonnance judiciaire. De plus, contrairement à ces infractions fondées sur des obligations, les conditions de mise en liberté sous caution n’imposent pas une norme de conduite minimale uniforme en fonction d’intérêts de la société plutôt que des normes de conduite personnelles. Le Parlement a adopté un système de mise en liberté sous caution basé sur un processus individualisé et l’ordonnance de mise en liberté sous caution devrait énumérer des normes de conduite personnalisées et précises. Par conséquent, il n’est pas nécessaire de recourir à une norme sociale uniforme pour bien comprendre à quelle norme de diligence on s’attend que se conforme la personne prévenue dans le cadre du respect des conditions de sa mise en liberté sous caution, et il n’est pas nécessaire d’examiner ce qu’une personne raisonnable aurait fait dans les circonstances pour comprendre l’obligation imposée par le par. 145(3). De plus, la nature hautement individualisée des conditions de mise en liberté sous caution exclut la possibilité d’une norme sociale uniforme de conduite qui serait applicable à toutes les éventuelles infractions d’omission de se conformer à une condition. Les conditions de mise en liberté sous caution et les risques auxquels elles répondent varient aussi énormément parmi les individus faisant l’objet d’une mise en liberté, de sorte qu’il n’est pas sensé de renvoyer aux concepts d’écart « marqué » ou « simple » par rapport à la norme de la personne raisonnable. L’infraction prévue au par. 145(3) n’est pas comparable aux autres infractions dont la perpétration suppose une faute objective, et la mise en liberté assortie d’un cautionnement raisonnable ne peut être comparée à une activité réglementée que l’on entreprend volontairement. D’ailleurs, l’infraction d’omission de se conformer aux conditions de mise en liberté sous caution est similaire à celle du défaut de se conformer à une ordonnance de probation pour laquelle une *mens rea* subjective est requise.

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

L'exigence d'une faute subjective cadre avec les pénalités et les conséquences qui découlent d'une déclaration de culpabilité aux termes du par. 145(3). Une déclaration de culpabilité a des répercussions profondes sur le droit à la liberté de la personne contrevenante, y compris l'emprisonnement même si la personne contrevenante est acquittée de l'infraction sous-jacente ou des conditions additionnelles imposées dans le cadre d'une peine. Une déclaration de culpabilité au titre du par. 145(3) engendre un casier judiciaire ou l'alourdit. Aussi, le fait de faire l'objet d'une accusation en vertu du par. 145(3) inverse le fardeau de la preuve en imposant aux personnes prévenues la charge de démontrer pourquoi elles devraient être à nouveau libérées sous caution. Les déclarations de culpabilité antérieures prononcées en vertu du par. 145(3) peuvent également être prises en compte lors d'enquêtes sur le cautionnement tenues relativement à des infractions ultérieures et mener à ce que la mise en liberté sous caution soit refusée ou à des conditions de mise en liberté sous caution plus sévères pour des infractions ultérieures non liées. Les accusations de manquement s'accumulent souvent rapidement, menant à un cercle vicieux de conditions de mise en liberté sous caution de plus en plus nombreuses et sévères, plus d'accusations de manquement et finalement la détention avant procès. Ces conséquences graves présupposent que la personne a violé sa condition de mise en liberté sous caution sciemment, et non par inadvertance.

L'intention du Parlement d'exiger une faute subjective ressort également de l'objectif distinct du par. 145(3), soit de punir et dissuader les personnes prévenues qui manquent sciemment ou par insouciance à leurs conditions de mise en liberté sous caution. Le Parlement ne voulait pas que les sanctions pénales soient le principal moyen de gérer les risques ou les préoccupations associés aux individus libérés sous conditions. De tels risques ou préoccupations doivent être pris en compte par l'établissement de conditions qui sont minimales, raisonnables, nécessaires, les moins sévères possible et suffisamment liées au risque que pose la personne prévenue; des modifications à ces conditions lorsque cela est nécessaire, au moyen de révisions de la mise en liberté sous caution et de l'annulation des ordonnances de mise en liberté sous caution; et la révocation de la mise en liberté sous caution lorsque les conditions ne sont pas respectées. Les accusations portées en vertu du par. 145(3) ne sont pas, et ne devraient pas être, le principal moyen d'atténuer le risque. La révision d'une mise en liberté sous caution constitue la principale façon de contester ou de modifier des conditions de mise en liberté sous caution. La révocation de la mise en liberté sous caution en vertu de l'art. 524 du *Code criminel* et les

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.

accusations criminelles en vertu du par. 145(3) ont pour effet combiné de favoriser le respect des conditions de mise en liberté sous caution, mais elles ont des objectifs législatifs distincts et différents. L'article 524 joue un rôle de gestion de risque; le par. 145(3) vise à punir et dissuader certaines conduites. Le paragraphe 145(3) est une mesure de dernier recours lorsque les autres outils de gestion du risque n'ont pas rempli leur fonction. L'effet de dissuasion individuelle n'existe que peu ou pas si la personne accusée ignorait qu'elle faisait quelque chose de mal. Pour être dissuadée d'adopter la conduite interdite, la personne accusée doit savoir quelle norme de comportement elle doit respecter et que sa conduite n'y répond pas.

L'exigence voulant que les conditions de mise en liberté sous caution soient adaptées à la personne prévenue indique qu'il faut une *mens rea* subjective de manière à ce que les caractéristiques individuelles de celle-ci seront prises en considération lors de l'établissement des conditions de mise en liberté sous caution et en cas de manquement à celles-ci. Exiger une *mens rea* subjective renforce, reflète et respecte l'approche individualisée que commande l'imposition des conditions de mise en liberté sous caution. En pratique, le nombre de conditions de mise en liberté sous caution inutiles et déraisonnables, et la croissance du nombre d'accusations de manquement à une condition, indiquent que les conditions de mise en liberté sous caution ne sont pas suffisamment individualisées. La majorité des ordonnances de mise en liberté sous caution prévoient de nombreuses conditions qui souvent ne tiennent manifestement pas compte des risques que pose la personne prévenue. Une culture d'aversion du risque contribue à ce que les tribunaux imposent des conditions excessives. Le caractère expéditif des enquêtes sur le cautionnement engendre aussi une culture de consentement, qui aggrave le manque de retenue dans l'imposition de conditions de mise en liberté excessives et qui incite les personnes prévenues à consentir à des conditions sévères de mise en liberté plutôt qu'à courir le risque d'être détenues. L'imposition de conditions sévères touche de façon disproportionnée les populations vulnérables et marginalisées, notamment celles vivant dans la pauvreté ou aux prises avec des problèmes de toxicomanie ou des maladies mentales, ainsi que les personnes autochtones. La présence d'un trop grand nombre de conditions inutiles, excessives et sévères fournit le contexte législatif pertinent pour conclure qu'il n'y a aucune intention claire du Parlement d'écarter la norme présumée de faute subjective pour le par. 145(3) et illustre la nécessité de faire preuve de retenue et d'examiner attentivement les conditions de mise en liberté sous caution.

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

Selon les principes de retenue et de l'échelle, quiconque propose d'ajouter des conditions de mise en liberté sous caution doit chercher à savoir quels risques se poseraient si la personne prévenue était libérée sans condition. Seules les conditions qui ciblent le risque de fuite de la personne prévenue, le risque d'atteinte à la protection ou à la sécurité du public ou le risque que le public perde confiance envers l'administration de la justice sont nécessaires. La condition de mise en liberté sous caution doit atténuer le risque qui empêcherait autrement la libération de la personne prévenue sans cette condition. Les conditions ne peuvent être imposées de façon injustifiée ou dans un but punitif et ne devraient pas être fondées sur un comportement. Elles doivent être suffisamment liées aux risques définis dans la loi, définies aussi étroitement que possible pour réaliser leur objectif et raisonnables. Elles ne seront raisonnables que si, de façon réaliste, elles peuvent être et seront respectées par la personne prévenue. Elles ne peuvent contrevenir à une loi fédérale ou provinciale ou encore à la *Charte*, et doivent être claires, peu intrusives et proportionnées à tout risque précis que pose la personne prévenue. L'établissement des conditions de mise en liberté sous caution est un processus individualisé dans le cadre duquel des conditions normalisées, systématiques ou types n'ont pas leur place, peu importe que la mise en liberté sous caution soit contestée ou qu'elle résulte d'un consentement. Certaines conditions précises non énumérées sont couramment incluses dans les ordonnances de mise en liberté, mais il faut qu'elles soient examinées afin de s'assurer que chaque condition est nécessaire, raisonnable, le moins sévère possible et suffisamment lié à un risque mentionné au par. 515(10). Toutes les personnes qui jouent un rôle dans le système de mise en liberté sous caution sont tenues d'agir avec retenue et d'examiner attentivement les conditions de mise en liberté sous caution qu'elles proposent ou imposent. La Couronne, la défense et les tribunaux ont l'obligation de respecter les principes de la retenue et de la révision. En dernier ressort, l'obligation de s'assurer que les ordonnances de mise en liberté sous caution sont appropriées incombe aux entités judiciaires. Ces obligations s'appliquent aussi aux mises en liberté avec consentement. Les entités judiciaires ne devraient pas systématiquement remettre en question les propositions conjointes, mais elles ont toutefois le pouvoir discrétionnaire de rejeter les propositions trop larges et doivent agir avec prudence dans l'examen et l'approbation des ordonnances de mise en liberté sous caution obtenues avec consentement.

La *mens rea* subjective de l'infraction prévue au par. 145(3) peut être établie lorsque la Couronne prouve :

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

(1) que la personne prévenue connaissait les conditions de sa mise en liberté sous caution ou faisait preuve d'aveuglement volontaire à leur égard; et (2) que la personne prévenue a sciemment omis d'agir conformément aux conditions de sa mise en liberté sous caution, ou qu'elle faisait preuve d'aveuglement volontaire face aux circonstances et qu'elle a omis de se conformer aux conditions malgré le fait qu'elle les connaissait, ou la personne prévenue a par insouciance omis d'agir conformément aux conditions, c'est-à-dire qu'elle était consciente qu'il y avait un risque important et injustifié que sa conduite ne respecte pas les conditions mais qu'elle n'a pas cessé d'agir de la sorte. L'oubli véritable d'une condition pourrait constituer une erreur de fait qui écarterait la *mens rea*. La personne prévenue n'est pas tenue d'être au courant des conséquences juridiques ou de la portée de la condition à laquelle elle est assujettie, mais elle doit savoir qu'elle est liée par la condition. La connaissance dans ce deuxième élément de la *mens rea* signifie que la personne prévenue doit être consciente des circonstances factuelles qui exigent qu'elle agisse (ou s'abstienne d'agir) pour se conformer aux conditions, ou fasse preuve d'aveuglement volontaire à leur égard. Ce deuxième élément de la *mens rea* peut aussi être prouvé en démontrant que la personne prévenue a fait preuve d'insouciance. La connaissance du risque est essentielle pour qu'il y ait insouciance — la personne prévenue doit connaître les conditions de sa mise en liberté sous caution et le risque que se présentent les circonstances factuelles qui exigent qu'elle agisse (ou s'abstienne d'agir) pour se conformer aux conditions de sa mise en liberté sous caution. L'insouciance est une norme subjective et la personne prévenue doit être consciente que sa conduite créait un risque important de manquement aux conditions de sa mise en liberté sous caution ainsi que de tout facteur faisant en sorte que le risque n'était pas justifié.

En l'espèce, il convient d'ordonner la tenue d'un nouveau procès en raison de l'erreur de droit commise par les tribunaux d'instance inférieure, qui ont appliqué une norme de faute objective plutôt que subjective pour l'infraction prévue au par. 145(3). Il ne s'agit pas en l'espèce d'une situation où la disposition réparatrice prévue au sous-al. 686(1)(b)(iii) du *Code criminel* s'applique — le fait d'arrêter la mauvaise norme de faute ne constitue pas une erreur inoffensive ou négligeable. La *mens rea* subjective aurait obligé le juge du procès à tenir compte

trial is therefore needed to address whether Z knowingly or recklessly breached his conditions.

de l'état d'esprit de Z, ce qui aurait de toute évidence pu avoir une incidence sur le verdict. La preuve n'est pas à ce point accablante qu'une déclaration de culpabilité est inévitable. Un nouveau procès est donc nécessaire pour déterminer si Z a omis sciemment ou par insouciance de se conformer à ses conditions.

Cases Cited

Referred to: *R. v. Antic*, 2017 SCC 27, [2017] 1 S.C.R. 509; *R. v. Ludlow*, 1999 BCCA 365, 125 B.C.A.C. 194; *R. v. Tunney*, 2018 ONSC 961, 44 C.R. (7th) 221; *R. v. Pearson*, [1992] 3 S.C.R. 665; *R. v. Morales*, [1992] 3 S.C.R. 711; *R. v. St-Cloud*, 2015 SCC 27, [2015] 2 S.C.R. 328; *R. v. Oland*, 2017 SCC 17, [2017] 1 S.C.R. 250; *R. v. Oakes*, [1986] 1 S.C.R. 103; *R. v. Myers*, 2019 SCC 18, [2019] 2 S.C.R. 105; *R. v. Schab*, 2016 YKTC 69, 35 C.R. (7th) 48; *R. v. Prychitko*, 2010 ABQB 563, 618 A.R. 146; *R. v. Penunsi*, 2019 SCC 39, [2019] 3 S.C.R. 91; *R. v. McCormack*, 2014 ONSC 7123; *R. v. Burdon*, 2010 ABCA 171, 487 A.R. 220; *R. v. Rowan*, 2018 ABPC 208; *R. v. Hundal*, [1993] 1 S.C.R. 867; *R. v. Creighton*, [1993] 3 S.C.R. 3; *R. v. Naglik*, [1993] 3 S.C.R. 122; *R. v. Custance*, 2005 MBCA 23, 194 C.C.C. (3d) 225; *R. v. Legere* (1995), 22 O.R. (3d) 89; *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; *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; *R. v. Companion*, 2019 CanLII 119787; *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; *R. v. A.D.H.*, 2013 SCC 28, [2013] 2 S.C.R. 269; *R. v. Sault Ste. Marie*, [1978] 2 S.C.R. 1299; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27; *R. v. Holmes*, [1988] 1 S.C.R. 914; *R. v. Moser* (1992), 7 O.R. (3d) 737; *R. v. Goleski*, 2014 BCCA 80, 307 C.C.C. (3d) 1, aff'd 2015 SCC 6, [2015] 1 S.C.R. 399; *R. v. Santeramo* (1976), 32 C.C.C. (2d) 35; *R. v. Docherty*, [1989] 2 S.C.R. 941; *R. v. Eby*, 2007 ABPC 81, 77 Alta. L.R. (4th) 149; *R. v. Bingley*, 2008 BCPC 245; *R. v. Laferrière*, 2013 QCCA 944; *R. v. John*, 2015 ONSC 2040; *R. v. Bremmer*, 2006 ABPC 93; *R. v. Lacasse*, 2015 SCC 64, [2015] 3 S.C.R. 1089; *R. v.*

Jurisprudence

Arrêts mentionnés : *R. c. Antic*, 2017 CSC 27, [2017] 1 R.C.S. 509; *R. c. Ludlow*, 1999 BCCA 365, 125 B.C.A.C. 194; *R. c. Tunney*, 2018 ONSC 961, 44 C.R. (7th) 221; *R. c. Pearson*, [1992] 3 R.C.S. 665; *R. c. Morales*, [1992] 3 R.C.S. 711; *R. c. St-Cloud*, 2015 CSC 27, [2015] 2 R.C.S. 328; *R. c. Oland*, 2017 CSC 17, [2017] 1 R.C.S. 250; *R. c. Oakes*, [1986] 1 R.C.S. 103; *R. c. Myers*, 2019 CSC 18, [2019] 2 R.C.S. 105; *R. c. Schab*, 2016 YKTC 69, 35 C.R. (7th) 48; *R. c. Prychitko*, 2010 ABQB 563, 618 A.R. 146; *R. c. Penunsi*, 2019 CSC 39, [2019] 3 R.C.S. 91; *R. c. McCormack*, 2014 ONSC 7123; *R. c. Burdon*, 2010 ABCA 171, 487 A.R. 220; *R. c. Rowan*, 2018 ABPC 208; *R. c. Hundal*, [1993] 1 R.C.S. 867; *R. c. Creighton*, [1993] 3 R.C.S. 3; *R. c. Naglik*, [1993] 3 R.C.S. 122; *R. c. Custance*, 2005 MBCA 23, 194 C.C.C. (3d) 225; *R. c. Legere* (1995), 22 O.R. (3d) 89; *R. c. Lemay*, 2018 QCCS 1956; *R. c. J.A.D.*, 1999 SKQB 262, 187 Sask. R. 95; *R. c. Howe*, 2014 NBQB 259, 430 R.N.-B. (2e) 202; *R. c. Mullin*, 2003 YKTC 26, 13 C.R. (6th) 54; *R. c. Selamio*, 2002 NWTSC 15; *R. c. Josephie*, 2010 NUCJ 7; *R. c. Ritter*, 2007 ABCA 395, 422 A.R. 1; *R. c. Loutitt*, 2011 ABQB 545, 527 A.R. 212; *R. c. Lofstrom*, 2016 ABPC 197, 39 Alta. L.R. (6th) 367; *R. c. Al Khatib*, 2014 NSPC 62, 350 N.S.R. (2d) 133; *R. c. A.M.Y.*, 2017 NSSC 99; *R. c. L.T.W.*, 2004 CanLII 2897; *R. c. Companion*, 2019 CanLII 119787; *R. c. Hammoud*, 2012 ABQB 110, 534 A.R. 80; *R. c. Qadir*, 2016 ABPC 27; *R. c. Osmond*, 2006 NSPC 52, 248 N.S.R. (2d) 221; *R. c. Brown*, 2012 NSPC 64, 319 N.S.R. (2d) 128; *R. c. Foote*, 2018 CanLII 38297; *R. c. A.D.H.*, 2013 CSC 28, [2013] 2 R.C.S. 269; *R. c. Sault Ste-Marie*, [1978] 2 R.C.S. 1299; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 R.C.S. 27; *R. c. Holmes*, [1988] 1 R.C.S. 914; *R. c. Moser* (1992), 7 O.R. (3d) 737; *R. c. Goleski*, 2014 BCCA 80, 307 C.C.C. (3d) 1, conf. par 2015 CSC 6, [2015] 1 R.C.S. 399; *R. c. Santeramo* (1976), 32 C.C.C. (2d) 35; *R. c. Docherty*, [1989] 2 R.C.S. 941; *R. c. Eby*, 2007 ABPC 81, 77 Alta. L.R. (4th) 149; *R. c. Bingley*, 2008 BCPC 245; *R. c. Laferrière*, 2013 QCCA 944; *R. c. John*, 2015 ONSC 2040; *R. c. Bremmer*, 2006 ABPC 93; *R. c. Lacasse*, 2015 CSC 64, [2015] 3 R.C.S. 1089; *R. c.*

Omeasoo, 2013 ABPC 328, 94 Alta. L.R. (5th) 244; *R. v. Parsons* (1997), 161 Nfld. & P.E.I.R. 145; *R. v. Morris*, 2013 ONCA 223, 305 O.A.C. 47; *R. v. Badgerow*, 2010 ONCA 236, 260 O.A.C. 273; *R. v. T.J.J.*, 2011 BCPC 155; *R. v. Mehan*, 2016 BCCA 129, 386 B.C.A.C. 1; *R. v. Birtchnell*, 2019 ONCJ 198, [2019] O.J. No. 1757 (QL); *R. v. Coombs*, 2004 ABQB 621, 369 A.R. 215; *R. v. Murphy*, 2017 YKSC 34; *Ewert v. Canada*, 2018 SCC 30, [2018] 2 S.C.R. 165; *R. v. S.K.*, 1998 CanLII 13344; *R. v. McDonald*, 2010 ABQB 770; *R. v. K. (R.)*, 2014 ONCJ 566; *R. v. D.A.*, 2014 ONSC 2166, [2014] O.J. No. 2059 (QL); *R. v. Pammett*, 2014 ONSC 5597; *R. v. Clarke*, [2000] O.J. No. 5738 (QL); *R. v. Shoker*, 2006 SCC 44, [2006] 2 S.C.R. 399; *R. v. Manseau*, [1997] AZ-51286266; *R. v. Denny*, 2015 NSPC 49, 364 N.S.R. (2d) 49; *R. v. Grey* (1993), 19 C.R. (4th) 363; *R. v. D.R.* (1999), 178 Nfld. & P.E.I.R. 200; *R. v. Gosai*, [2002] O.J. No. 359 (QL); *R. v. Doncaster*, 2013 NSSC 328, 335 N.S.R. (2d) 331; *R. v. A.D.B.*, 2009 SKPC 120, 345 Sask. R. 134; *R. v. Delacruz*, 2015 MBQB 32; *R. v. Tithi*, 2019 SKQB 299, [2019] S.J. No. 299 (QL); *R. v. Sabados*, 2015 SKCA 74, 327 C.C.C. (3d) 107; *R. v. Goddard*, 2019 BCCA 164, 377 C.C.C. (3d) 44; *R. v. Nowazek*, 2018 YKCA 12, 366 C.C.C. (3d) 389; *R. v. Singh*, 2011 ONSC 717, [2011] O.J. No. 6389 (QL); *R. v. A.D.M.*, 2017 NSPC 77; *R. v. Singh*, 2018 ONSC 5336, [2018] O.J. No. 4757 (QL); *Pappajohn v. The Queen*, [1980] 2 S.C.R. 120; *R. v. Edgar*, 2019 QCCQ 1328; *R. v. Smith*, 2008 ONCA 101, 233 O.A.C. 145; *R. v. Brown*, 2008 ABPC 128, 445 A.R. 211; *R. v. Chen*, 2006 MBQB 250, 209 Man. R. (2d) 181; *R. v. Withworth*, 2013 ONSC 7413, 59 M.V.R. (6th) 160; *R. v. Syblis*, 2015 ONCJ 73; *R. v. Blazevic* (1997), 31 O.T.C. 10; *R. v. Hutchinson* (1994), 160 A.R. 58; *R. v. Nedlin*, 2005 NWTTC 11, 32 C.R. (6th) 361; *R. v. Briscoe*, 2010 SCC 13, [2010] 1 S.C.R. 411; *R. v. Buzzanga* (1979), 25 O.R. (2d) 705; *Sansregret v. The Queen*, [1985] 1 S.C.R. 570; *R. v. Hamilton*, 2005 SCC 47, [2005] 2 S.C.R. 432; *Leary v. The Queen*, [1978] 1 S.C.R. 29; *R. v. Seymour*, [1996] 2 S.C.R. 252; *R. v. Sekhon*, 2014 SCC 15, [2014] 1 S.C.R. 272.

Statutes and Regulations Cited

Bail Reform Act, S.C. 1970-71-72, c. 37, s. 133(3) [in R.S.C. 1970, c. 2 (2nd Supp.), s. 4].
Canadian Charter of Rights and Freedoms, ss. 7, 11(e).
Controlled Drugs and Substances Act, S.C. 1996, c. 19.
Criminal Code, R.S.C. 1985, c. C-46, ss. 2, “justice”, 19, Part IV, 145(2), (3) [ad. 2018, c. 29, s. 9(7)], (4), (5) [ad. 2019, c. 25, s. 47(1)], (5.1), 161(1) to (4), 215 to

Omeasoo, 2013 ABPC 328, 94 Alta. L.R. (5th) 244; *R. c. Parsons* (1997), 161 Nfld. & P.E.I.R. 145; *R. c. Morris*, 2013 ONCA 223, 305 O.A.C. 47; *R. c. Badgerow*, 2010 ONCA 236, 260 O.A.C. 273; *R. c. T.J.J.*, 2011 BCPC 155; *R. c. Mehan*, 2016 BCCA 129, 386 B.C.A.C. 1; *R. c. Birtchnell*, 2019 ONCJ 198, [2019] O.J. No. 1757 (QL); *R. c. Coombs*, 2004 ABQB 621, 369 A.R. 215; *R. c. Murphy*, 2017 YKSC 34; *Ewert c. Canada*, 2018 CSC 30, [2018] 2 R.C.S. 165; *R. c. S.K.*, 1998 CanLII 13344; *R. c. McDonald*, 2010 ABQB 770; *R. c. K. (R.)*, 2014 ONCJ 566; *R. c. D.A.*, 2014 ONSC 2166, [2014] O.J. No. 2059 (QL); *R. c. Pammett*, 2014 ONSC 5597; *R. c. Clarke*, [2000] O.J. No. 5738 (QL); *R. c. Shoker*, 2006 CSC 44, [2006] 2 R.C.S. 399; *R. c. Manseau*, [1997] AZ-51286266; *R. c. Denny*, 2015 NSPC 49, 364 N.S.R. (2d) 49; *R. c. Grey* (1993), 19 C.R. (4th) 363; *R. c. D.R.* (1999), 178 Nfld. & P.E.I.R. 200; *R. c. Gosai*, [2002] O.J. No. 359 (QL); *R. c. Doncaster*, 2013 NSSC 328, 335 N.S.R. (2d) 331; *R. c. A.D.B.*, 2009 SKPC 120, 345 Sask. R. 134; *R. c. Delacruz*, 2015 MBQB 32; *R. c. Tithi*, 2019 SKQB 299, [2019] S.J. No. 299 (QL); *R. c. Sabados*, 2015 SKCA 74, 327 C.C.C. (3d) 107; *R. c. Goddard*, 2019 BCCA 164, 377 C.C.C. (3d) 44; *R. c. Nowazek*, 2018 YKCA 12, 366 C.C.C. (3d) 389; *R. c. Singh*, 2011 ONSC 717, [2011] O.J. No. 6389 (QL); *R. c. A.D.M.*, 2017 NSPC 77; *R. c. Singh*, 2018 ONSC 5336, [2018] O.J. No. 4757 (QL); *Pappajohn c. La Reine*, [1980] 2 R.C.S. 120; *R. c. Edgar*, 2019 QCCQ 1328; *R. c. Smith*, 2008 ONCA 101, 233 O.A.C.; *R. c. Brown*, 2008 ABPC 128, 445 A.R. 211; *R. c. Chen*, 2006 MBQB 250, 209 Man. R. (2d) 181; *R. c. Withworth*, 2013 ONSC 7413, 59 M.V.R. (6th) 160; *R. c. Syblis*, 2015 ONCJ 73; *R. c. Blazevic* (1997), 31 O.T.C. 10; *R. c. Hutchinson* (1994), 160 A.R. 58; *R. c. Nedlin*, 2005 NWTTC 11, 32 C.R. (6th) 361; *R. c. Briscoe*, 2010 CSC 13, [2010] 1 R.C.S. 411; *R. c. Buzzanga* (1979), 25 O.R. (2d) 705; *Sansregret c. La Reine*, [1985] 1 R.C.S. 570; *R. c. Hamilton*, 2005 CSC 47, [2005] 2 R.C.S. 432; *Leary c. La Reine*, [1978] 1 R.C.S. 29; *R. c. Seymour*, [1996] 2 R.C.S. 252; *R. c. Sekhon*, 2014 CSC 15, [2014] 1 R.C.S. 272.

Lois et règlements cités

Charte canadienne des droits et libertés, art. 7, 11e).
Code criminel, L.R.C. 1985, c. C 46, art. 2, « juge de paix », 19, Partie IV, 145(2), (3) [aj. 2018, c. 29, art. 9(7)], (4), (5) [aj. 2019, c. 25, art. 4(7)], (5.1), 161(1) à (4), 215 à 217.1, 469, 493, « juge », 493.1, 493.2, 515, 518(1)c(iii), 520, 521, 522(4), 523(2), 523.1, 524, 680, 686(1)b(iii), 733.1, Partie XXV, 811a), b).

217.1, 469, 493, “judge”, 493.1, 493.2, 515, 518(1)(c) (iii), 520, 521, 522(4), 523(2), 523.1, 524, 680, 686(1) (b)(iii), 733.1, Part XXV, 811(a), (b).

Authors Cited

- Ashworth, Andrew, and Lucia Zedner. *Preventive Justice*. Oxford: Oxford University Press, 2014.
- Beattie, Karen, André Solecki and Kelly E. Morton Bourgon. *Police and Judicial Detention and Release Characteristics: Data from the Justice Effectiveness Study*. Ottawa: Government of Canada, 2013.
- Berger, Benjamin L., and James Stribopoulos. “Risk and the Role of the Judge: Lessons from Bail”, in Benjamin L. Berger, Emma Cunliffe and James Stribopoulos, eds., *To Ensure that Justice is Done: Essays in Memory of Marc Rosenberg*. Toronto: Thomson Reuters, 2017.
- British Columbia. Prosecution Service. *Crown Counsel Policy Manual*, “Bail — Adult”, April 2019 (online: <https://www2.gov.bc.ca/assets/gov/law-crime-and-justice/criminal-justice/prosecution-service/crown-counsel-policy-manual/bai-1.pdf>; archived version: https://www.scc-csc.ca/cso-dce/2020SCC-CSC14_1_eng.pdf).
- Canada. Canadian Committee on Corrections. *Report of the Canadian Committee on Corrections — Toward Unity: Criminal Justice and Corrections*. Ottawa: Queen’s Printer, 1969.
- Canada. Department of Justice. *Research and Statistics Division. Research in Brief: Assessments and Analyses of Canada’s Bail System*, by Kyle Coady. Government of Canada, 2018.
- Canada. House of Commons. *House of Commons Debates*, vol. 3, 3rd Sess., 28th Parl., February 5, 1971, p. 3117.
- Canada. House of Commons. *House of Commons Debates*, vol. 148, No. 300, 1st Sess., 42nd Parl., May 24, 2018, pp. 19603 and 19606.
- Canada. 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, pp. 12 and 29.
- Canada. Public Prosecution Service. *Public Prosecution Service of Canada Deskbook*, Part III, c. 19, “Bail Conditions to Address Opioid Overdoses”, updated April 1, 2019 (online: <https://www.ppsc-sppc.gc.ca/eng/pub/fpsd-sfpg/fps-sfp/tpd/d-g-eng.pdf>; archived version: https://www.scc-csc.ca/cso-dce/2020SCC-CSC14_2_eng.pdf).

Loi réglementant certaines drogues et autres substances, L.C. 1996, c. 19.

Loi sur la réforme du cautionnement, S.C. 1970 71-72, c. 37, art. 133(3) [dans S.R.C. 1970, c. 2 (2^e suppl.), art. 4].

Doctrine et autres documents cités

- Ashworth, Andrew, and Lucia Zedner. *Preventive Justice*, Oxford, Oxford University Press, 2014.
- Beattie, Karen, André Solecki et Kelly E. Morton Bourgon. *Les caractéristiques de la détention et de la mise en liberté par la police et par le tribunal : Données tirées de l’Étude de l’Efficacité du Système de Justice*, Ottawa, Gouvernement du Canada, 2013.
- Berger, Benjamin L., and James Stribopoulos. « Risk and the Role of the Judge : Lessons from Bail », in Benjamin L. Berger, Emma Cunliffe and James Stribopoulos, eds., *To Ensure that Justice is Done : Essays in Memory of Marc Rosenberg*, Toronto, Thomson Reuters, 2017.
- Canada. Chambre des communes. *Débats de la Chambre des communes*, vol. 3, 3^e sess., 28^e lég., 5 février 1971, p. 3117.
- Canada. Chambre des communes. *Débats de la Chambre des communes*, vol. 148, n^o 300, 1^{re} sess., 42^e lég., 24 mai 2018, p. 19603 et 19606.
- Canada. Chambre des communes. *Procès-verbaux et témoignages du Comité permanent de la justice et des questions juridiques*, vol. 1, n^o 8, 3^e sess., 28^e lég., 23 février 1971, p. 12 et 29.
- Canada. Comité canadien de la réforme pénale et correctionnelle. *Rapport du Comité canadien de la réforme pénale et correctionnelle: justice pénale et correction: un lien à forger*, Ottawa, Imprimeur de la Reine, 1969.
- Canada. Comité sénatorial permanent des affaires juridiques et constitutionnelles. *Justice différée, justice refusée : L’urgence de réduire les longs délais dans le système judiciaire au Canada*. Ottawa, juin 2017 (en ligne : https://sencanada.ca/content/sen/committee/421/LCJC/reports/Court_Delays_Final_Report_f.pdf; version archivée : https://www.scc-csc.ca/cso-dce/2020SCC-CSC14_3_fra.pdf).
- Canada. Ministère de la Justice. Division de la recherche et de la statistique. *Évaluation et analyses du système de mise en liberté sous caution du Canada*, par Kyle Coady, Gouvernement du Canada, 2018.
- Canada. Service des poursuites pénales. *Guide du Service des poursuites pénales du Canada*, Partie III, c. 19, « Conditions de libération provisoire visant les surdoses d’opioïdes », mis à jour 1^{er} avril 2019 (en ligne :

- Canada. Standing Senate Committee on Legal and Constitutional Affairs. *Delaying Justice is Denying Justice: An Urgent Need to Address Lengthy Court Delays in Canada*. Ottawa, June 2017 (online: https://sencanada.ca/content/sen/committee/421/LCJC/reports/Court_Delays_Final_Report_e.pdf; archived version: https://www.scc-csc.ca/cso-dce/2020SCC-CSC14_3_eng.pdf).
- Canada. Statistics Canada. Canadian Centre for Justice Statistics. *Adult criminal and youth court statistics in Canada, 2016/2017*, by Zoran Miladinovic. Ottawa: Statistics Canada, January 2019.
- Canada. Statistics Canada. Canadian Centre for Justice Statistics. *Trends in offences against administration of justice*, by Maria Burczycka and Christopher Munch. Ottawa: Statistics Canada, October 2015.
- Canada. Statistics Canada. Canadian Centre for Justice Statistics. *Trends in the Use of Remand in Canada*, by Lindsay Porter and Donna Calverly. Ottawa: Statistics Canada, May 2011.
- Canada. Statistics Canada. *Table 35-10-0177-01 — Incident-based crime statistics, by detailed violations, Canada, provinces, territories and Census Metropolitan Areas* (online: <https://www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=3510017701>; archived version: https://www.scc-csc.ca/cso-dce/2020SCC-CSC14_4_eng.pdf).
- Canadian Civil Liberties Association and Education Trust. *Set Up to Fail: Bail and the Revolving Door of Pre-trial Detention*, by Abby Deshman and Nicole Myers, 2014 (online: <https://ccla.org/cclanewsitewp-content/uploads/2015/02/Set-up-to-fail-FINAL.pdf>; archived version: https://www.scc-csc.ca/cso-dce/2020SCC-CSC14_5_eng.pdf).
- Friedland, Martin L. *Detention before Trial: A Study of Criminal Cases Tried in the Toronto Magistrates' Courts*. Toronto: University of Toronto Press, 1965.
- Friedland, Martin L. "Reflections on Criminal Justice Reform in Canada" (2017), 64 *Crim. L.Q.* 274.
- Friedland, Martin L. "The Bail Reform Act Revisited" (2012), 16 *Can. Crim. L.R.* 315.
- John Howard Society of Ontario. *Reasonable Bail?* September 2013 (online: <https://johnhoward.on.ca/wp-content/uploads/2014/07/JHSO-Reasonable-Bail-report-final.pdf>; archived version: https://www.scc-csc.ca/cso-dce/2020SCC-CSC14_6_eng.pdf).
- Manikis, Marie, and Jess De Santi. "Punishing while Presuming Innocence: A Study on Bail Conditions and Administration of Justice Offences" (2019), 60 *C. de D.* 873.
- <https://www.ppsc-sppc.gc.ca/fra/pub/sfpg-fpsd/sfp-fps/tpd/d-g-fra.pdf>; version archivée : https://www.scc-csc.ca/cso-dce/2020SCC-CSC14_2_fra.pdf).
- Canada. Statistique Canada. Centre canadien de la statistique juridique. *Statistiques sur les tribunaux de juridiction criminelle pour adultes et les tribunaux de la jeunesse au Canada, 2016-2017*, par Zoran Miladinovic, Ottawa, Statistique Canada, janvier 2019.
- Canada. Statistique Canada. Centre canadien de la statistique juridique. *Tendances de l'utilisation de la détention provisoire au Canada*, par Maria Burczycka et Christopher Munch, Ottawa, Statistique Canada, octobre 2015.
- Canada. Statistique Canada. Centre canadien de la statistique juridique. *Tendances des infractions contre l'administration de la justice*, par Lindsay Porter et Donna Calverly, Ottawa, Statistique Canada, mai 2011.
- Canada. Statistique Canada. *Tableau 35-10-0177-01 — Statistiques des crimes fondés sur l'affaire, par infractions détaillées, Canada, provinces, territoires et régions métropolitaines de recensement* (en ligne : https://www150.statcan.gc.ca/t1/tbl1/fr/tv.action?pid=3510017701&request_locale=fr; version archivée : https://www.scc-csc.ca/cso-dce/2020SCC-CSC14_4_fra.pdf).
- Canadian Civil Liberties Association and Education Trust. *Set Up to Fail : Bail and the Revolving Door of Pre-trial Detention*, by Abby Deshman and Nicole Myers, 2014 (en ligne : <https://ccla.org/cclanewsitewp-content/uploads/2015/02/Set-up-to-fail-FINAL.pdf>; version archivée : https://www.scc-csc.ca/cso-dce/2020SCC-CSC14_5_eng.pdf).
- Colombie-Britannique. Prosecution Service. *Crown Counsel Policy Manual*, « Bail — Adult », April 2019 (en ligne : <https://www2.gov.bc.ca/assets/gov/law-crime-and-justice/criminal-justice/prosecution-service/crown-counsel-policy-manual/bai-1.pdf>; version archivée : https://www.scc-csc.ca/cso-dce/2020SCC-CSC14_1_eng.pdf).
- Friedland, Martin L. *Detention before Trial : A Study of Criminal Cases Tried in the Toronto Magistrates' Courts*, Toronto, University of Toronto Press, 1965.
- Friedland, Martin L. « Reflections on Criminal Justice Reform in Canada » (2017), 64 *Crim. L.Q.* 274.
- Friedland, Martin L. « The Bail Reform Act Revisited » (2012), 16 *Rev. can. D.P.* 315.
- John Howard Society of Ontario. *Reasonable Bail?* September 2013 (en ligne : <https://johnhoward.on.ca/wp-content/uploads/2014/07/>

- Manning, Morris, and Peter Sankoff, *Manning, Mewett & Sankoff: Criminal Law*, 5th ed., Markham, Ont.: LexisNexis, 2015.
- Myers, Nicole Marie. “Eroding the Presumption of Innocence: Pre-Trial Detention and the Use of Conditional Release on Bail” (2017), 57 *Brit. J. Criminol.* 664.
- Ontario. Ministry of the Attorney General. *Ontario Prosecution Directive*, “Judicial Interim Release (Bail)”, November 2017 (online: https://files.ontario.ca/books/crown_prosecution_manual_english_1.pdf; archived version: https://www.scc-csc.ca/cso-dce/2020SCC-CSC14_7_eng.pdf).
- Pivot Legal Society. *Project Inclusion: Confronting Anti-Homelessness & Anti-Substance User Stigma in British Columbia*, by Darcie Bennett and D.J. Larkin, 2019 (online: <https://d3n8a8pro7vnm.cloudfront.net/pivotlegal/pages/3297/attachments/original/1543970419/project-inclusion-digital.pdf?1543970419>; archived version: https://www.scc-csc.ca/cso-dce/2020SCC-CSC14_8_eng.pdf).
- Rankin, Micah B. “Using Court Orders to Manage, Supervise and Control Mentally Disordered Offenders: A Rights-Based Approach” (2018), 65 *C.L.Q.* 280.
- Reid, Hubert, avec la collaboration de Simon Reid. *Dictionnaire de droit québécois et canadien*, 5^e éd. Montréal: Wilson & Lafleur, 2015, “omission”.
- Rogin, Jillian. “Gladue and Bail: The Pre-Trial Sentencing of Aboriginal People in Canada” (2017), 95 *Can. Bar Rev.* 325.
- Scollin, John A. *The Bail Reform Act: An Analysis of Amendments to the Criminal Code Related to Bail and Arrest*. Toronto: Carswell, 1972.
- Stuart, Don. *Canadian Criminal Law: A Treatise*, 6th ed. Scarborough, Ont.: Thomson/Carswell, 2011.
- Sullivan, Ruth. *Sullivan on the Construction of Statutes*, 6th ed. Markham, Ont.: LexisNexis, 2014.
- Sylvestre, Marie-Eve, Nicholas K. Blomley and Céline Bellot. *Red Zones: Criminal Law and the Territorial Governance of Marginalized People*. Cambridge: Cambridge University Press, 2019.
- Trotter, Gary T. *The Law of Bail in Canada*, 3rd ed. Toronto: Carswell, 2010 (loose-leaf updated 2019, release 1).
- Webster, Cheryl Marie. “Broken Bail” in *Canada: How We Might Go About Fixing It*. Ottawa: Government of Canada, June 2015.
- JHSO-Reasonable-Bail-report-final.pdf; version archivée : https://www.scc-csc.ca/cso-dce/2020SCC-CSC14_6_eng.pdf).
- Manikis, Marie, and Jess De Santi. « Punishing while Presuming Innocence : A Study on Bail Conditions and Administration of Justice Offences » (2019), 60 *C. de D.* 873.
- Manning, Morris, and Peter Sankoff. *Manning, Mewett & Sankoff : Criminal Law*, 5th ed., Markham (Ont.), LexisNexis, 2015.
- Myers, Nicole Marie. « Eroding the Presumption of Innocence : Pre-Trial Detention and the Use of Conditional Release on Bail » (2017), 57 *Brit. J. Criminol.* 664.
- Ontario. Ministère du Procureur général. *Directive sur les poursuites*, « Mise en liberté provisoire par voie judiciaire (cautionnement) », novembre 2017 (en ligne : https://files.ontario.ca/books/crown_prosecution_manual_french_1.pdf; version archivée : https://www.scc-csc.ca/cso-dce/2020SCC-CSC14_7_fra.pdf).
- Pivot Legal Society. *Project Inclusion : Confronting Anti-Homelessness & Anti-Substance User Stigma in British Columbia*, by Darcie Bennett and D.J. Larkin, 2019 (en ligne : <https://d3n8a8pro7vnm.cloudfront.net/pivotlegal/pages/3297/attachments/original/1543970419/project-inclusion-digital.pdf?1543970419>; version archive : https://www.scc-csc.ca/cso-dce/2020SCC-CSC14_8_eng.pdf).
- Rankin, Micah B. « Using Court Orders to Manage, Supervise and Control Mentally Disordered Offenders : A Rights-Based Approach » (2018), 65 *C.L.Q.* 280.
- Reid, Hubert, avec la collaboration de Simon Reid. *Dictionnaire de droit québécois et canadien*, 5^e éd., Montréal, Wilson & Lafleur, 2015, « omission ».
- Rogin, Jillian. « Gladue and Bail : The Pre-Trial Sentencing of Aboriginal People in Canada » (2017), 95 *R. du B. Can.* 325.
- Scollin, John A. *The Bail Reform Act : An Analysis of Amendments to the Criminal Code Related to Bail and Arrest*, Toronto, Carswell, 1972.
- Stuart, Don. *Canadian Criminal Law : A Treatise*, 6th ed., Scarborough (Ont.), Thomson/Carswell, 2011.
- Sullivan, Ruth. *Sullivan on the Construction of Statutes*, 6th ed., Markham (Ont.), LexisNexis, 2014.
- Sylvestre, Marie-Eve, Nicholas K. Blomley and Céline Bellot. *Red Zones : Criminal Law and the Territorial Governance of Marginalized People*, Cambridge, Cambridge University Press, 2019.

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

Trotter, Gary T. *The Law of Bail in Canada*, 3rd ed., Toronto, Carswell, 2010 (loose-leaf updated 2019, release 1).

Webster, Cheryl Marie. *Lacunes relatives à la mise en liberté sous caution au Canada : comment y remédier?* Ottawa, Gouvernement du Canada, juin 2015.

Yule, Carolyn, and Rachel Schumann. « Negotiating Release? Analysing Decision Making in Bail Court » (2019), 61 *Rev. can. crim. just. pén.* 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.

POURVOI contre un arrêt de la Cour d’appel de la Colombie-Britannique (les juges Stromberg-Stein, Willcock, Savage, Fenlon et Fisher), 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.), qui a confirmé une décision du juge Thompson, 2017 BSCS 2070, [2017] B.C.J. No. 2298 (QL), 2017 CarswellBC 3175 (WL Can.), qui a confirmé les déclarations de culpabilité pour omission de se conformer à une condition d’un engagement prononcées contre l’accusé. Pourvoi accueilli.

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

Sarah Runyon, Garth Barriere et Michael Sobkin, pour l’appellant.

Éric Marcoux and Ryan Carrier, for the respondent.

Éric Marcoux et Ryan Carrier, pour l’intimée.

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

Susan Reid, pour l’intervenant le procureur général de l’Ontario.

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

Susanne Elliott, pour l’intervenant le procureur général de la Colombie-Britannique.

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

Christine Mainville, pour l’intervenante Criminal Lawyers’ Association of Ontario.

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

Jason B. Gratl et Toby Rauch-Davis, pour l’intervenant Vancouver Area Network of Drug Users.

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

Alexandra Luchenko, Roy W. Millen et Danny Urquhart, pour l’intervenante British Columbia Civil Liberties Association.

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

Danielle Glatt, pour l’intervenante l’Association canadienne des libertés civiles.

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

Matthew Nathanson et Chantelle van Wiltenburg,
pour l’intervenante Independent Criminal Defence
Advocacy Society.

David N. Fai et Caitlin Shane, pour l’intervenante
Pivot Legal Society.

Nicholas St-Jacques et Pauline Lachance, pour
l’intervenante l’Association québécoise des avocats
et avocates de la défense.

Version française du jugement de la Cour rendu
par

LA JUGE MARTIN —

I. Introduction

[1] Tout individu accusé d’avoir commis un crime est présumé innocent et a le droit de ne pas être privé sans juste cause d’une mise en liberté assortie d’un cautionnement raisonnable. La plupart des personnes prévenues ne sont pas détenues sous garde entre la date de l’accusation et le procès parce que le *Code criminel*, L.R.C. 1985, c. C-46 (« *Code* »), et la *Charte canadienne des droits et libertés* (« *Charte* ») exigent en règle générale qu’elles fassent l’objet d’une libération communément appelée « mise en liberté sous caution »¹. Les personnes prévenues qui ne sont pas remises en liberté par la police sont conduites devant une entité judiciaire (c.-à-d. juge de paix ou juge)² pour une enquête sur le cautionnement. Pour la plupart des crimes, la forme de mise en liberté par défaut est la libération de la personne prévenue sur promesse d’être présente au procès, sans conditions restreignant ses activités ou actions (par. 515(1) du *Code*). Toutefois, l’entité judiciaire peut imposer des conditions de mise en liberté si la

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).

¹ Par l’expression « mise en liberté sous caution », je renvoie à toutes les formes de mise en liberté provisoire par voie judiciaire ou de mise en liberté avant le procès prévues dans le *Code*.

² J’utilise le terme « entité judiciaire » pour désigner à la fois les juges de paix et les juges. Dans le *Code*, « juge de paix » s’entend de juges de paix ou de juges d’une cour provinciale (art. 2), alors que « juge » s’entend de juges d’une cour supérieure d’une province ou d’un territoire, sauf au Nunavut, où le terme renvoie aux juges de la Cour de justice unifiée du Nunavut (art. 493).

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 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.

Couronne la convainc que des restrictions particulières doivent être prises pour assurer la présence de la personne prévenue au tribunal, pour assurer la protection ou la sécurité du public ou pour ne pas miner la confiance du public envers l'administration de la justice (par. 515(10); *R. c. Antic*, 2017 CSC 27, [2017] 1 R.C.S. 509, par. 21, 34 et 67j)).

[2] Le Parlement a créé une infraction criminelle distincte pour le manquement aux conditions de mise en liberté sous caution au par. 145(3) du *Code*.³ Il s'agit d'un crime contre l'administration de la justice qui entraîne une peine maximale de deux ans d'emprisonnement. Toute personne prévenue est par conséquent passible d'un emprisonnement en vertu du par. 145(3) si elle manque à une condition de sa mise en liberté sous caution, même si en fin de compte elle n'est déclarée coupable d'aucun crime pour lequel elle était initialement accusée. Dans bien des cas, la personne prévenue s'expose à des sanctions pénales pour une conduite qui, n'eût été les conditions de sa mise en liberté sous caution, constituerait un exercice légal de sa liberté personnelle. Comme l'élément essentiel de l'infraction est l'omission de se conformer à une ordonnance judiciaire, il n'y a souvent pas de victime ni de violence, ni de préjudice direct au public ou de dommages directs causés à des biens.

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.

³ Dans les présents motifs, l'infraction créée au par. 145(3) sera appelée l'infraction d'« omission de se conformer à une condition » et l'expression « conditions de mise en liberté sous caution » renverra à toutes les conditions découlant d'une promesse, d'un engagement, d'une directive ou d'une ordonnance mentionnées au par. 145(3), même si je note qu'une personne peut aussi être assujettie à des conditions après avoir été libérée par la police. Une personne prévenue peut également être inculpée en vertu du par. 145(3) pour avoir manqué à des conditions de non-communication prévues dans des directives et des ordonnances imposées si la personne prévenue est détenue avant le procès; cependant, par souci de simplicité, je vais employer l'expression « conditions de mise en liberté sous caution » pour désigner toutes ces conditions puisqu'il s'agit de conditions imposées avant la déclaration de culpabilité en vue de gérer les risques que pose la personne prévenue. À moins d'indication contraire, je renverrai aux dispositions pertinentes du *Code* dans leur version en vigueur au moment où M. Zora a été accusé en octobre 2015. Les dispositions du *Code* relatives à la mise en liberté sous caution ont fait l'objet d'une révision importante le 18 décembre 2019, et je traiterai de la portée de ces modifications après avoir examiné la structure de la mise en liberté sous caution qui existait au moment où M. Zora a été accusé et condamné.

[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 interveners 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

[3] L'appelant, M. Zora, interjette appel de ses déclarations de culpabilité fondées sur le par. 145(3) pour avoir, à deux reprises, omis de se conformer à une condition de sa mise en liberté, soit celle de répondre à la porte lorsque la police se rend à sa résidence pour vérifier s'il respecte ses conditions de mise en liberté. Il a commis l'acte coupable (*actus reus*) en ne répondant pas à la porte lorsque la police s'est rendue chez lui. Nous devons déterminer quelle faute ou quel élément mental la Couronne doit prouver pour obtenir une déclaration de culpabilité au titre du par. 145(3) : la *mens rea* pour cette infraction doit-elle être évaluée en fonction d'une norme subjective ou objective?

[4] Je conclus que la Couronne est tenue de prouver la *mens rea* subjective, et qu'aucune forme de faute moindre ne suffit. En vertu du par. 145(3), la Couronne doit établir que la personne prévenue a commis le manquement sciemment ou par insouciance. Rien dans le texte ou le contexte du par. 145(3) n'écarter la présomption selon laquelle le Parlement entendait exiger une *mens rea* subjective. Cette intention législative est également appuyée par la jurisprudence de la Cour sur l'interprétation de l'infraction du défaut de se conformer à une ordonnance de probation, les conséquences des accusations et des déclarations de culpabilité fondées sur le par. 145(3), le rôle du par. 145(3) au sein du régime constitutionnel et législatif de mise en liberté sous caution et l'application pratique du système de mise en liberté sous caution. Comme les modifications récentes du Parlement apportées au régime de la mise en liberté sous caution, une norme de *mens rea* subjective pour un manquement en vertu du par. 145(3) focalise l'attention sur la personne prévenue, comme il se doit.

[5] Les parties et les parties intervenantes reconnaissent que la question de la *mens rea* requise pour l'infraction prévue au par. 145(3) soulève des considérations plus larges au sujet du fonctionnement de notre système complexe de mise en liberté sous caution. Pour conclure qu'il y a eu un manquement à une condition de mise en liberté sous caution, il faut se reporter aux conditions imposées au début du processus de mise en liberté sous caution et se fonder

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.

sur celles-ci. Dans l'arrêt *Antic*, la Cour a confirmé les principes sous-tendant la mise en liberté assortie d'un cautionnement raisonnable, se fondant sur des préoccupations rapportées concernant le fonctionnement du système de mise en liberté sous caution au Canada. Trois ans après l'arrêt *Antic*, et avec le même objectif d'orienter les tribunaux, je traiterai de l'imposition de conditions de mise en liberté sous caution de nature non pécuniaire et des infractions criminelles qui découlent du manquement à ces conditions. Pour ce faire, il faut, comme dans l'arrêt *Antic*, adopter une vision d'ensemble. Les infractions prévues au par. 145(3) sont très courantes, sont en hausse et mettent souvent en jeu des conditions discutables imposées à des personnes vulnérables et marginalisées. Le Parlement a récemment pris des mesures pour s'attaquer à la façon dont les nombreuses et lourdes conditions de mise en liberté sous caution interagissent avec le par. 145(3) pour créer un cycle d'incarcération, particulièrement parmi les membres les plus vulnérables de la population. La Cour ne peut faire abstraction du contexte actuel dans lequel fonctionne le système de mise en liberté sous caution et propose, en réponse à cette réalité, une orientation concernant tant l'interprétation à donner au par. 145(3) que l'imposition des conditions de mise en liberté sous caution menant à de telles accusations.

[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

[6] Quiconque participe au système de mise en liberté sous caution doit suivre les principes de retenue et de révision au moment d'imposer ou d'appliquer des conditions de mise en liberté sous caution. Le principe de la retenue exige que les conditions de mise en liberté sous caution soient clairement énoncées, qu'elles soient les moins nombreuses possible et qu'elles soient nécessaires, raisonnables, les moins sévères possible dans les circonstances et suffisamment liées aux risques que pose la personne prévenue au regard des motifs de détention prévus au par. 515(10). Le principe de la révision requiert que tout le monde, et particulièrement les entités judiciaires, examine attentivement les conditions de mise en liberté sous caution à l'étape de la libération, peu importe que la mise en liberté sous caution fasse l'objet d'une contestation ou d'un consentement. La

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.

plupart des conditions de mise en liberté sous caution restreignent la liberté d'une personne qui est présumée innocente. Le manquement à une condition peut mener à de graves conséquences juridiques pour la personne prévenue, et le grand nombre d'accusations de manquement a des conséquences importantes sur le système de justice déjà surchargé. Avant de transformer les conditions de mise en liberté sous caution en sources personnelles d'une potentielle responsabilité criminelle, les entités judiciaires devraient être conscientes des problèmes que pourraient causer les conditions. Le fait d'exiger une *mens rea* subjective pour que la responsabilité criminelle soit engagée en vertu du par. 145(3) tient compte des principes de retenue et de révision et reflète l'approche individualisée requise pour l'imposition de conditions de mise en liberté sous caution.

[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.

[7] J'articulerai les présents motifs comme suit. Premièrement, je présenterai le contexte factuel et l'historique judiciaire du pourvoi. Deuxièmement, j'examinerai le cadre législatif et constitutionnel de la mise en liberté sous caution, lequel fournit le contexte nécessaire pour interpréter l'infraction d'omission de se conformer à une condition prévue au par. 145(3). Troisièmement, j'énoncerai pourquoi mon interprétation du par. 145(3) me mène à conclure que l'infraction exige une *mens rea* subjective. Quatrièmement, je fournirai des indications générales sur ce qui est requis pour qu'une condition de mise en liberté sous caution soit considérée comme nécessaire, raisonnable, la moins sévère possible et suffisamment liée aux risques énumérés au par. 515(10). Cinquièmement, j'expliquerai ce qui est nécessaire pour prouver la *mens rea* subjective qu'exige l'infraction d'omission de se conformer à une condition. Enfin, j'explicitai pourquoi je suis d'avis d'ordonner la tenue d'un nouveau procès dans la présente affaire.

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

II. Contexte factuel et historique judiciaire

[8] Monsieur Zora a été accusé de trois chefs de possession de substances en vue d'en faire le trafic, infraction prévue dans la *Loi réglementant certaines drogues et autres substances*, L.C. 1996, c. 19, et a

recognizance⁴ 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).

obtenu une mise en liberté sur son propre engagement⁴ et sous caution⁵, sa mère ayant accepté d’agir à ce titre. Aux termes des douze conditions de sa mise en liberté sous caution, il était tenu de [TRADUCTION] « ne pas troubler l’ordre public et d’avoir une bonne conduite », de se présenter sur demande à la personne en charge de la surveillance de sa liberté sous caution conformément aux directives données, de rester dans la province de la Colombie-Britannique sauf si la personne en charge de la surveillance de sa liberté sous caution a consenti à ce qu’il en sorte, d’obéir aux règles et règlements de sa résidence, de rester chez lui à moins de sortir le jour en étant accompagné par sa mère ou son père ou une personne approuvée par la personne en charge de la surveillance de sa liberté sous caution et d’avoir obtenu le consentement de celle-ci (condition appelée le couvre-feu ou la condition de détention à domicile), de se présenter à la porte de sa résidence dans un délai de cinq minutes lorsque la police ou une personne en charge de la surveillance de sa liberté sous caution se présente pour confirmer qu’il respecte la condition de détention à domicile, de ne pas être en possession de substances désignées non prescrites, d’accessoires facilitant la consommation de drogues ou d’un téléphone cellulaire, de prendre part à un programme de traitement en établissement s’il y consent et de n’être en possession d’aucune arme (d.a., 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 quite diligent in investigating any possible violation” of Mr. Zora’s bail conditions (B.C. Prov. Ct., Nos. 38980-6-CAC, 38980-7-CAC,

[9] Au cours de la période d’environ un mois entre la mise en liberté de M. Zora le 17 septembre 2015, et les manquements qu’il aurait commis en octobre 2015, la police est allée chez lui presque tous les jours, à différentes heures de la soirée, pour vérifier s’il respectait le couvre-feu. Le juge du procès a conclu qu’en raison de la nature des accusations, la GRC [TRADUCTION] « a fait preuve de beaucoup de diligence en enquêtant sur toute possible

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).

⁴ Selon la définition donnée dans l’arrêt *Antic*, un engagement « est la “reconnaissance formelle d’une dette envers le ministère public”, reconnaissance étant généralement annulée lorsque [la personne accusée] se présente devant le tribunal pour son procès » (note 2).

⁵ L’arrêt *Antic* comprend également une définition du terme « caution » : « [u]ne caution est une personne qui supervise [la personne accusée] et qui s’assure que [celle]-ci respecte son engagement envers le tribunal de comparaître au procès » (note 1).

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

violation » des conditions de mise en liberté sous caution de M. Zora (C. prov. C.-B., Nos. 38980-6-CAC, 38980-7-CAC, 29 mars 2017, par. 2 (« motifs du procès »), reproduits dans le d.a., p. 2).

[10] Deux soirs au cours de la fin de semaine de l’Action de grâces, les 9 et 11 octobre 2015, M. Zora ne s’est pas présenté à sa porte lorsque la police s’est rendue à sa résidence vers 22 h 30. Monsieur Zora a appris qu’il avait raté les visites de la police seulement deux semaines plus tard lorsqu’il a été informé des deux chefs d’accusation dont il faisait l’objet pour ne pas avoir respecté sa condition de couvre-feu et des deux chefs relatifs au manquement à sa condition de répondre à la porte. À la suite de ces accusations, M. Zora a été libéré sous caution aux termes d’un engagement semblable, mais avec la condition supplémentaire qu’il réponde personnellement et immédiatement au téléphone de sa résidence lorsqu’il appelle la police ou une personne en charge de la surveillance de sa liberté sous caution. M. Zora a témoigné qu’il avait par la suite installé un système audiovisuel à sa porte d’entrée et qu’il avait changé de chambre à coucher pour s’assurer de ne pas manquer les prochaines vérifications de la police.

[11] Monsieur Zora, sa mère et sa petite amie ont témoigné que les trois se trouvaient à la maison la fin de semaine de l’Action de grâces. Monsieur Zora a déclaré qu’il lui aurait été difficile, voire impossible, d’entendre quelqu’un sonner ou frapper à la porte d’entrée à partir de sa chambre à coucher. Celle-ci se trouvait au sous-sol, à l’autre extrémité de la maison, et il était fatigué ce soir-là et était allé se coucher tôt parce qu’il était en sevrage d’héroïne et suivait un programme de traitement à la méthadone. Le juge du procès a exprimé certains doutes quant à la crédibilité et à la fiabilité des personnes témoignant pour la défense, mais n’a toutefois tiré aucune conclusion de fait claire sur la question de savoir si M. Zora savait qu’il était incapable d’entendre de sa chambre la sonnette de la porte quand la police s’est présentée chez lui cette fin de semaine-là (motifs du juge du procès, par. 11-14).

[12] Le juge du procès a acquitté M. Zora relativement aux allégations de violation du couvre-feu,

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

car il n’était pas convaincu hors de tout doute raisonnable que M. Zora était à l’extérieur de la maison à ce moment. Il a déclaré M. Zora coupable des deux chefs d’accusation d’omission de se présenter à la porte lors des vérifications du respect du couvre-feu. Il a assimilé les infractions prévues au par. 145(3) à des infractions de responsabilité stricte et a par conséquent conclu que M. Zora était coupable de manquement à ses conditions étant donné qu’il n’avait pas [TRADUCTION] « organisé sa vie de manière à respecter les conditions de sa mise en liberté sous caution » (motifs du juge du procès, par. 16). M. Zora a été condamné à payer une amende de 920 \$.

[13] Le juge d’appel des poursuites sommaires a rejeté l’appel et conclu qu’une *mens rea* objective était suffisante pour une déclaration de culpabilité en vertu du par. 145(3) parce que, dans l’arrêt *R. c. Ludlow*, 1999 BCCA 365, 125 B.C.A.C. 194, la Cour d’appel de la Colombie-Britannique a retenu une norme de faute objective pour ces types d’infractions (2017 BCSC 2070, par. 7 (CanLII)). Cela signifiait que les déclarations de culpabilité de M. Zora ont été confirmées parce que son comportement constituait un écart marqué par rapport à ce qu’une personne raisonnable aurait fait pour s’assurer qu’elle respectait ses conditions.

[14] La Cour d’appel de la Colombie-Britannique, composée d’une formation de cinq juges, a rejeté l’appel (2019 BCCA 9, 53 C.R. (7th) 373). La juge Stromberg-Stein, qui a rédigé les motifs des quatre juges majoritaires, a conclu que le par. 145(3) exige seulement une *mens rea* objective. Selon les juges majoritaires, le texte, le contexte et l’objet du par. 145(3) créaient une infraction fondée sur une obligation, laquelle reposait sur l’obligation légale expresse de se conformer aux conditions de la mise en liberté sous caution, ce qui démontrait l’intention du Parlement de créer une infraction nécessitant une *mens rea* objective (par. 53-58).

[15] La juge Fenlon, qui a souscrit au résultat, a quant à elle conclu que le par. 145(3) exigeait une faute subjective. À son avis, il ne s’agissait pas d’une

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).

infraction fondée sur une obligation, et ni les mots utilisés, ni le régime établi par la disposition, ni l'objet de l'infraction ne permettaient de conclure à une intention législative claire voulant écarter la présomption de l'élément de faute subjective. La juge Fenlon a néanmoins rejeté l'appel au motif que la Couronne avait établi une faute subjective en démontrant que M. Zora avait fait preuve d'insouciance puisqu'il savait qu'il y avait des parties de sa maison où il n'entendrait pas la sonnette de la porte et il n'avait pourtant fait aucun effort pour régler la situation (par. 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

III. Cadre législatif et contexte du par. 145(3)

[16] Le paragraphe 145(3) prévoit une infraction mixte qui s'applique aux manquements à des conditions imposées à une personne prévenue dans une ordonnance judiciaire avant le procès, en attendant la détermination de la peine ou pendant un appel. L'infraction figure à la partie IV du *Code*, qui traite des infractions contre l'application de la loi et l'administration de la justice. Il existe des infractions au libellé semblable visant les personnes prévenues qui omettent d'être présentes au tribunal lorsqu'elles sont tenues de le faire (par. 145(2), (4) et (5)) ou qui omettent de se conformer à une condition d'une promesse imposée par la personne autorisée à le faire selon le par. 145(5.1). Étant donné que ces infractions sont essentiellement semblables pour ce qui est du texte et du contexte, je ne vois aucune raison pour laquelle ces infractions devraient être assorties d'une norme de faute différente de l'infraction prévue au par. 145(3).

[17] L'ancêtre du par. 145(3), le par. 133(3), a été adopté en 1972 au moyen de la *Loi sur la réforme du cautionnement*, S.C. 1970-71-72, c. 37. Il créait une infraction pour les cas où une personne assujettie aux conditions d'une promesse ou d'un engagement dans le cadre d'une mise en liberté sous caution « omet, sans excuse légitime, dont la preuve lui incombe, de se conformer à cette condition » (S.R.C. 1970, c. 2 (2^e suppl.), art. 4). Avant cette disposition,

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 interveners 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*,

il n'existait pas d'infraction pour l'omission de se conformer à une condition de mise en liberté sous caution et le *Code* ne fournissait aucune indication pour ce qui est de l'imposition de telles conditions (*Antic*, par. 23).

[18] Le paragraphe 145(3) a été modifié en 2018 pour supprimer le fardeau inversé qui incombait à la personne prévenue de prouver qu'elle avait une excuse légitime (L.C. 2018, c. 29, par. 9(7)). Le 18 décembre 2019, dans le cadre d'un ensemble de changements apportés au régime de mise en liberté sous caution, l'infraction prévue au par. 145(3) a été divisée en deux paragraphes pour traiter séparément l'omission de se conformer à une promesse au par. 145(4), et l'omission de se conformer à une ordonnance de mise en liberté ou de non-communication au par. 145(5) (L.C. 2019, c. 25, par. 47(1)). Bien que ces changements ne modifient pas réellement l'infraction d'omission de se conformer à une condition, le Parlement a aussi apporté des changements importants pour répondre aux préoccupations croissantes concernant l'imposition de conditions de mise en liberté excessives et inéquitables et le recours abusif à des sanctions pénales pour le non-respect de conditions de mise en liberté sous caution (voir *Débats de la Chambre des communes*, vol. 148, n° 300, 1^{re} sess., 42^e lég., 24 mai 2018, p. 19603 et 19606, l'hon. Jody Wilson-Raybould, ministre de la Justice et procureure générale).

[19] Les parties et les parties intervenantes reconnaissent que la question particulière dont est saisie la Cour doit être située dans le contexte juridique et factuel complexe de mise en liberté sous caution au Canada. Non seulement l'élément de faute qu'exige le par. 145(3) a des conséquences d'une portée considérable sur les libertés civiles et le fonctionnement équitable et efficace de la mise en liberté sous caution dans notre pays, mais il existe un lien direct entre les conditions qui peuvent être imposées dans une ordonnance de mise en liberté sous caution et l'intention législative de criminaliser le manquement à celles-ci aux termes du par. 145(3). Avant de regarder de quelle façon le par. 145(3) devrait être interprété, il est nécessaire de donner un aperçu des facteurs et

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, [2019] 2 S.C.R. 105, 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

du cadre qui structurent la façon dont les conditions de mise en liberté sous caution sont établies. Les conditions de mise en liberté auxquelles s’applique le par. 145(3) sont imposées dans le cadre d’un système de mise en liberté sous caution circonscrit par la *Charte*, régi par le *Code* et reposant sur la jurisprudence.

[20] D’un point de vue constitutionnel, la plupart des conditions de mise en liberté sous caution restreignent la liberté des personnes qui sont présumées innocentes et leur font courir le risque que leur responsabilité criminelle soit engagée en raison de l’infraction d’omission de se conformer à une condition, aux termes du par. 145(3). Par conséquent, la détermination des conditions de mise en liberté sous caution doit être conforme à la présomption d’innocence et au droit de ne pas se voir priver sans juste cause d’une mise en liberté assortie d’un cautionnement raisonnable garanti par l’al. 11e) de la *Charte* (voir *Antic*, par. 67; *R. c. Tunney*, 2018 ONSC 961, 44 C.R. (7th) 221, par. 36). L’alinéa 11e) protège à la fois le droit de ne pas se voir privé « sans juste cause » d’une mise en liberté sous caution et le droit à des conditions de mise en liberté raisonnables (*R. c. Pearson*, [1992] 3 R.C.S. 665, p. 689; *R. c. Morales*, [1992] 3 R.C.S. 711, p. 735; *Antic*, par. 36-41). Le droit prévu à l’al. 11e) est « un élément essentiel d’un système de justice pénale éclairé » qui « consacre l’effet de la présomption d’innocence à l’étape préalable au procès criminel et protège la liberté des [personnes accusées] » (*Antic*, par. 1)⁶. La présomption d’innocence est « un principe consacré qui se trouve au cœur même du droit criminel [qui] confirme notre foi en l’humanité » (*Antic*, par. 66-67a), citant *R. c. Oakes*, [1986] 1 R.C.S. 103, p. 119-120; voir aussi *R. c. Myers*, 2019 CSC 18, [2019] 2 R.C.S. 105, par. 1). Dans le cadre du processus de mise en liberté sous caution, la présomption d’innocence n’est respectée que lorsque les exigences de l’al. 11e) sont satisfaites (*Pearson*,

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).

⁶ Exception faite des conditions de mise en liberté sous caution imposées à la suite d’une déclaration de culpabilité, par exemple dans le cas de la mise en liberté sous caution entre la déclaration de culpabilité et la détermination de la peine ou dans l’attente de l’issue d’un appel (voir *R. c. St-Cloud*, 2015 CSC 27, [2015] 2 R.C.S. 328, par. 117; *R. c. Oland*, 2017 CSC 17, [2017] 1 R.C.S. 250, par. 35).

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.

p. 688-689; *Morales*, p. 748). Pour reprendre les mots d’Andrew Ashworth et de Lucia Zedner, la présomption d’innocence et la protection des droits à la liberté signifient que [TRADUCTION] « l’État devrait présumer que les personnes sont inoffensives [. . .] par conséquent, on aurait en principe tort de prendre des mesures coercitives contre des personnes à titre préventif à moins qu’il y ait des justifications impérieuses de le faire » (*Preventive Justice* (2014), p. 53). La *Charte* protège donc les personnes prévenues de l’imposition de conditions déraisonnables de mise en liberté sous caution.

[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 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.

[21] L’article 515 du *Code* régit la façon dont les entités judiciaires exercent leur pouvoir discrétionnaire pour accorder la mise en liberté sous caution, prévoit les formes juridiques que celle-ci peut revêtir et exige que les conditions imposées ne soient pas plus sévères que nécessaire pour répondre aux risques énumérés au par. 515(10), à savoir le risque que la personne prévenue ne se présente pas au tribunal, le risque pour la protection ou la sécurité du public et le risque que le public perde confiance envers l’administration de la justice. Les paragraphes 515(1) à (3) codifient le « principe de l’échelle », fondé sur la retenue, selon lequel « la forme de mise en liberté imposée à [la personne accusée] ne doit pas être plus sévère que ce qui est nécessaire » (*Antic*, par. 44). L’entité judiciaire n’est autorisée à imposer une forme de mise en liberté plus sévère que si la Couronne « démontre pourquoi une forme qui l’est moins serait inappropriée » (*Antic*, par. 47). Par conséquent, la forme de mise en liberté par défaut qui devrait être imposée à une personne prévenue inculpée d’une infraction, autre que les infractions très graves énumérées à l’art. 469, est la mise en liberté sur remise d’une promesse *sans conditions* (par. 515(1)). Aux termes de l’al. 515(2)a), si la Couronne démontre que la personne prévenue ne devrait pas être mise en liberté sur remise d’une promesse sans conditions, l’entité judiciaire devrait envisager de la mettre en liberté sur remise d’une promesse assortie de 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

[22] Le *Code* prévoit certaines conditions précises ainsi que d’autres conditions non précisées de mise en liberté sous caution. Les conditions énumérées

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

aux par. 515(4) à (4.2) donnent des indications quant à la nature individualisée des conditions et le degré attendu de lien entre la condition imposée et les risques énumérés au par. 515(10). La plupart des conditions discrétionnaires énumérées au par. 515(4) visent le risque de fuite de la personne prévenue ou le risque qu'elle ne se présente pas au tribunal au moment indiqué : se présenter à la personne responsable (al. 515(4)a)), demeurer dans le ressort de la juridiction (al. 515(4)b)), aviser la personne responsable de tout changement d'adresse et d'emploi (al. 515(4)c)) et remettre son passeport (al. 515(4)e)) (voir G. T. Trotter, *The Law of Bail in Canada* (3^e éd. (feuilles mobiles)), p. 6-27 à 6-32). Les conditions énumérées relatives aux ordonnances de non-communication (al. 515(4)d) et par. 515(4.2)), aux restrictions géographiques (al. 515(4)d)) et aux interdictions impératives de possession d'armes pour des infractions précises (par. 515(4.1)) sont directement liées au deuxième motif de détention : la sécurité publique. En fait, même dans le cas des interdictions impératives de possession d'armes, l'entité judiciaire dispose d'une certaine marge de manœuvre pour ne pas imposer de telles interdictions si elle considère que la condition n'est pas nécessaire pour protéger la sécurité de la personne prévenue, de la victime ou de toute autre personne (art. 515(4.1)).

[23] Aux termes de l'alinéa 515(4)f)⁷, les entités judiciaires ont aussi une certaine marge de manœuvre pour imposer des conditions non énumérées, définies de la façon suivante : « . . . telles autres conditions raisonnables [. . .] que le juge de paix estime opportunes ». Comme il ressort des douze, et ensuite treize, conditions de mise en liberté imposées à M. Zora, les conditions de mise en liberté sous caution non énumérées couvrent souvent un vaste éventail d'activités. L'éventail des conditions fréquemment imposées inclut l'exigence que la personne prévenue ne trouble pas l'ordre public et ait une bonne conduite, l'interdiction d'utiliser un téléphone cellulaire et d'avoir accès à l'Internet, le contrôle de la consommation

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.

⁷ Cette disposition se trouve à l'al. 515(4)h) depuis le 18 décembre 2019. Les autres conditions énumérées sont numérotées différemment, mais leur contenu n'a pas changé.

their rights to freedom of expression and peaceful assembly (see, e.g., Trotter, at p. 6-44.1).

d'alcool et de drogue, l'imposition d'un couvre-feu, l'imposition de restrictions de déplacement dans de grandes parties d'une ville, l'exigence de se soumettre à des fouilles effectuées au hasard, et même des restrictions quant à l'exercice par la personne prévenue de son droit à la liberté d'expression et de son droit de réunion pacifique (voir, p. ex., Trotter, 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, [2019] 3 S.C.R. 91, 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 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).

[24] La jurisprudence exige que les entités judiciaires respectent le principe de l'échelle : elles doivent d'abord considérer une mise en liberté sous caution assortie de peu de conditions, peu sévères, avant de considérer une mise en liberté sous caution assortie de conditions plus sévères (voir *R. c. Schab*, 2016 YKTC 69, 35 C.R. (7th) 48, par. 29; *R. c. Prychitko*, 2010 ABQB 563, 618 A.R. 146, par. 14). La jurisprudence indique clairement que les conditions non énumérées imposées au titre de l'al. 515(4)f), comme les conditions énumérées, doivent être minimales, nécessaires, raisonnables, les moins sévères possible dans les circonstances et suffisamment liées au risque indiqué au par. 515(10) (*Antic*, par. 67j); voir aussi *R. c. Penunsi*, 2019 CSC 39, [2019] 3 R.C.S. 91, par. 78-80). Le principe de l'échelle s'applique aux conditions de mise en liberté tout comme il s'applique aux formes de mise en liberté. Il existe un lien entre le principe de l'échelle et le nombre et le contenu des conditions de mise en liberté sous caution. Sans une approche empreinte de retenue dans l'imposition des conditions, une forme moins sévère de mise en liberté sous caution, comme une promesse assortie de conditions, peut devenir tout aussi sinon plus sévère que d'autres mesures à des échelons plus élevés de la mise en liberté sous caution, voire, dans certains cas, encore plus restrictive qu'une ordonnance de sursis et une ordonnance de probation rendues à la suite d'une déclaration de culpabilité (*R. c. McCormack*, 2014 ONSC 7123, par. 23 (CanLII); *R. c. Burdon*, 2010 ABCA 171, 487 A.R. 220, par. 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

[25] Seules les conditions qui sont expressément adaptées à la situation personnelle de la personne prévenue peuvent satisfaire à ces critères. Les conditions de mise en liberté sous caution se veulent donc des normes de comportement particularisées conçues pour limiter les risques énoncés dans la loi que pose

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 interveners 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

une personne en particulier. Elles doivent être imposées avec retenue, non seulement parce qu'elles restreignent la liberté d'une personne présumée innocente de l'infraction sous-jacente, mais aussi parce que le par. 145(3) a souvent pour effet de criminaliser un comportement qui serait autrement légal. En fait, chaque condition de mise en liberté sous caution imposée crée une nouvelle source de responsabilité criminelle éventuelle propre à la personne prévenue visée.

[26] Beaucoup de parties intervenantes ont attiré l'attention sur les problèmes répandus qui persistent, même après la publication de l'arrêt *Antic* de la Cour, en raison du fait que les personnes prévenues continuent de se voir imposer des conditions de mise en liberté sous caution inutiles, déraisonnables, indûment restrictives, trop nombreuses ou qui, dans les faits, vouent la personne prévenue à l'échec. Une telle pratique contrevient au principe de la retenue qui a toujours été la pierre angulaire du droit régissant l'établissement des conditions de mise en liberté sous caution. La retenue comporte une dimension constitutionnelle et une assise législative, et est non seulement reconnue dans la jurisprudence, mais a aussi été expressément confirmée par les modifications récentes qui sont entrées en vigueur le 18 décembre 2019. L'article 493.1 énonce maintenant explicitement le « principe de la retenue » applicable à toutes les décisions de mise en liberté provisoire. Ce principe implique de « cherche[r] en premier lieu » à accorder à la personne prévenue une mise en liberté aux « conditions les moins sévères possible dans les circonstances, notamment celles qu'[elle] peut raisonnablement respecter ». L'article 493.2 exige que les entités judiciaires qui prennent des décisions sur la mise en liberté sous caution accordent une attention particulière aux circonstances propres aux personnes prévenues autochtones ou aux personnes prévenues appartenant à des populations vulnérables qui sont surreprésentées au sein du système de justice pénale et qui souffrent d'un désavantage lorsqu'il s'agit d'obtenir une mise en liberté.

[27] Le Parlement a aussi pris des mesures pour dissiper les préoccupations concernant la surcriminalisation des manquements aux conditions de mise en liberté sous caution, qui s'explique en partie par

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)).

l’imposition initiale de conditions nombreuses et sévères. En plus des changements apportés à la révocation de la mise en liberté sous caution à l’art. 524, le Parlement a adopté une nouvelle procédure pour gérer les accusations relatives aux omissions de se conformer aux conditions de mise en liberté visées au par. 145(3), appelée la « comparution pour manquement » (art. 523.1). Si une personne prévenue a omis de se conformer aux conditions de sa mise en liberté sous caution, et qu’elle n’a pas causé de dommage à une victime, de dommages matériels ou de pertes économiques, la Couronne peut choisir de la renvoyer à une comparution pour manquement. Si elle est convaincue que la personne prévenue a omis de se conformer à l’ordonnance du tribunal ou d’être présente au tribunal, l’entité judiciaire doit examiner les conditions de mise en liberté sous caution imposées à la personne prévenue tout en tenant spécialement compte de la situation particulière de celle-ci. L’entité judiciaire peut alors décider de ne pas agir, de remettre la personne prévenue en liberté sous de nouvelles conditions ou de la détenir. Si la personne prévenue a été inculpée d’une infraction d’omission de se conformer à une condition, l’entité judiciaire doit rejeter l’accusation après avoir pris sa décision (art. 523.1; *R. c. Rowan*, 2018 ABPC 208, par. 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.

[28] Même si ces modifications ont été apportées après que M. Zora a été accusé, je remarque que mon interprétation de la *mens rea* exigée par le par. 145(3), basée sur le contexte législatif pertinent du régime de mise en liberté sous caution, cadre avec les préoccupations dont a pris acte le Parlement et auxquelles il a répondu récemment par ces modifications.

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

IV. Interprétation de la *mens rea* qu’exige le par. 145(3)

A. *Subjective and Objective Mens Rea*

A. *Mens rea subjective et objective*

[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

[29] La principale question dans le présent pourvoi est de savoir si la *mens rea* qu’exige le par. 145(3) est subjective ou objective. La norme de la faute subjective serait axée sur ce qu’avait à l’esprit la personne prévenue au moment où elle a manqué à la condition de mise en liberté sous caution. Elle commande au

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. 882-83, 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.*

tribunal de se demander si la personne prévenue « voulait, connaissait ou prévoyait réellement les conséquences ou les circonstances, selon le cas, ou les deux. Quant à savoir [si elle] “aurait pu” ou “aurait dû” les prévoir ou si une personne raisonnable les aurait prévues, ce n’est pas le critère pertinent aux fins de décider de la culpabilité » (*R. c. Hundal*, [1993] 1 R.C.S. 867, p. 882-883, citant D. Stuart, *Canadian Criminal Law* (2^e éd. 1987), p. 123-124). En appliquant une norme de *mens rea* subjective, les tribunaux peuvent tenir compte des circonstances et des difficultés personnelles de la personne prévenue d’une manière qui fait écho à l’individualisation des conditions de mise en liberté sous caution imposées.

[30] Selon la norme de la *mens rea* objective, la question serait de savoir si le comportement de la personne prévenue constituait un écart marqué par rapport au comportement d’une personne raisonnable assujettie aux conditions de mise en liberté sous caution de la personne prévenue (motifs de la C.A., par. 68). La norme repose sur ce que la personne raisonnable saurait, ferait ou aurait prévu dans les circonstances, et il importe peu que la personne prévenue ne sache pas qu’elle manque à une condition. La faute objective est fondée sur des normes sociétales uniformes de comportement et ne permet donc pas de tenir compte de l’inexpérience, du manque d’éducation, de la jeunesse, de l’expérience culturelle ni d’aucune autre circonstance propre à la personne prévenue qui ne constitue pas une incapacité ou une quasi-incapacité de respecter la condition (motifs de la C.A., par. 87 (la juge Fenlon, motifs concordants), citant *R. c. Creighton*, [1993] 3 R.C.S. 3, p. 58-74 (la juge McLachlin), et p. 38-39 (le juge La Forest); *R. c. Naglik*, [1993] 3 R.C.S. 122, p. 148 (la juge McLachlin) et p. 149 (la juge L’Heureux-Dubé)).

[31] C’est la première fois que la Cour est appelée à examiner la *mens rea* rattachée à cette infraction. Les tribunaux canadiens sont divisés sur la question de savoir si l’élément mental du crime de manquement à une condition de mise en liberté sous caution, ou d’infractions similaires prévues aux par. 145(2), (4), (5) et (5.1), doit être évalué subjectivement ou objectivement. Au Manitoba, en Ontario, au Québec, en Saskatchewan, au Nouveau-Brunswick et dans

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

les territoires, les tribunaux exigent habituellement une *mens rea* subjective pour ces infractions (voir, p. ex., *R. c. Custance*, 2005 MBCA 23, 194 C.C.C. (3d) 225; *R. c. Legere* (1995), 22 O.R. (3d) 89 (C.A.); *R. c. Lemay*, 2018 QCCS 1956; *R. c. J.A.D.*, 1999 SKQB 262, 187 Sask. R. 95; *R. c. Howe*, 2014 NBQB 259, 430 R.N.-B. (2e) 202; *R. c. Mullin*, 2003 YKTC 26, 13 C.R. (6th) 54; *R. c. Selamio*, 2002 NWTSC 15; *R. c. Josephie*, 2010 NUCJ 7). En revanche, comme le montre la présente affaire, les cours d’appel de la Colombie-Britannique ont retenu une *mens rea* objective (voir aussi l’arrêt *Ludlow*). Les tribunaux en Alberta, en Nouvelle-Écosse et à Terre-Neuve-et-Labrador ont adopté des approches diverses et modifiées en ce qui concerne la *mens rea* rattachée à ces infractions (subjective : p. ex., *R. c. Ritter*, 2007 ABCA 395, 422 A.R. 1; *R. c. Loutitt*, 2011 ABQB 545, 527 A.R. 212; *R. c. Lofstrom*, 2016 ABPC 197, 39 Alta. L.R. (6th) 367; *R. c. Al Khatib*, 2014 NSPC 62, 350 N.S.R. (2d) 133; *R. c. A.M.Y.*, 2017 NSSC 99; *R. c. L.T.W.*, 2004 CanLII 2897 (C. prov. T.-N.-L.); *R. c. Companion*, 2019 CanLII 119787 (C. prov. T.-N.-L.); objective : p. ex., *R. c. Hammoud*, 2012 ABQB 110, 534 A.R. 80; *R. c. Qadir*, 2016 ABPC 27; *R. c. Osmond*, 2006 NSPC 52, 248 N.S.R. (2d) 221; *R. c. Brown*, 2012 NSPC 64, 319 N.S.R. (2d) 128; *R. c. Foote*, 2018 CanLII 38297 (C. prov. T.-N.-L.)).

B. *Interprétation législative et présomption de faute de nature subjective*

[32] Afin de déterminer la *mens rea* qu’exige le par. 145(3), il faut procéder à une opération d’interprétation législative pour dégager la norme de faute qu’avait à l’esprit le Parlement. L’un des éléments importants du contexte de l’interprétation du par. 145(3) est la présomption de longue date selon laquelle le Parlement veut qu’un crime s’accompagne d’une faute subjective (*R. c. A.D.H.*, 2013 CSC 28, [2013] 2 R.C.S. 269, par. 23, citant *R. c. Sault Ste. Marie*, [1978] 2 R.C.S. 1299, p. 1303 et 1309-1310, le juge Dickson).

[33] Comme l’a décrit la Cour dans l’arrêt *A.D.H.*, cette présomption selon laquelle la faute doit être subjective traduit l’une des valeurs qui sous-tendent le droit criminel, à savoir que « la personne moralement

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)

innocente ne doit pas être punie » (*A.D.H.*, par. 27). Ce point de départ n’est pas une règle absolue, mais représente plutôt une idée qu’on peut supposer présente à l’esprit du Parlement lorsqu’il a adopté la disposition (par. 26). La présomption de la faute de nature subjective ne sera écartée qu’en présence d’une « intention différente clairement exprimée par le [Parlement] » (par. 27-29). Les tribunaux doivent interpréter les termes utilisés dans la loi dans leur contexte global, en suivant le sens ordinaire et grammatical qui s’harmonise avec l’économie de la loi et son objet pour déterminer s’il existe une intention claire de la part du Parlement d’écarter la présomption de la faute subjective (par. 19-21, citant *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 R.C.S. 27, p. 41 (citant E. A. Driedger, *Construction of Statutes* (2^e éd. 1983), p. 87)). S’il existe une ambiguïté quant à la *mens rea* requise pour une infraction criminelle prévue dans le *Code*, alors la présomption de la faute de nature subjective n’a pas été écartée.

[34] Le paragraphe 145(3) prévoit une infraction criminelle, comme l’indiquent le texte adopté se trouvant dans le *Code*, ses objectifs de dissuasion et de punition (décrits en détail plus loin) et les conséquences criminelles graves en cas de déclaration de culpabilité, lesquelles peuvent aller jusqu’à un emprisonnement de deux ans (voir D. Stuart, *Canadian Criminal Law : A Treatise* (6^e éd. 2011), p. 202; *Hammoud*, par. 11-15). Par conséquent, il faut présumer que le par. 145(3) exige une faute subjective. La question devient donc de savoir si le texte, le contexte, l’économie et l’objet du par. 145(3) témoignent d’une intention claire du Parlement de créer une norme de *mens rea* objective.

[35] À mon avis, ce n’est pas le cas. Non seulement il n’y a pas de raison dans le texte ni le contexte de l’infraction laissant entendre que le Parlement a voulu écarté la norme de faute subjective, mais je conclus que celui-ci voulait que la norme de la faute subjective s’applique au par. 145(3). Le libellé du par. 145(3) est neutre et ne crée pas une infraction fondée sur une obligation qui requiert une *mens rea* objective telle qu’elle est définie dans l’arrêt *A.D.H.* Tous les autres facteurs pertinents appuient l’élément de faute subjective. La Cour a déjà jugé que l’intention subjective est requise pour l’infraction similaire

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

de défaut de se conformer à une ordonnance de probation. De plus, l'historique législatif, le contexte et l'objet du par. 145(3) au regard de l'ensemble du régime législatif, ainsi que les conséquences importantes associées à une accusation ou une déclaration de culpabilité en vertu du par. 145(3), commandent une *mens rea* subjective. Les réalités du système de mise en liberté sous caution vont également dans le sens de l'intention du Parlement d'exiger une faute subjective pour faire en sorte que les caractéristiques individuelles de la personne prévenue soient prises en compte tout au long du processus de mise en liberté sous caution. La prise en compte de ce contexte social et pratique confirme que les conséquences qui découleraient du fait d'exiger seulement une *mens rea* objective pour l'infraction d'omission de se conformer à une condition ne respecterait pas l'intention du Parlement (R. Sullivan, *Sullivan on the Construction of Statutes* (6^e éd. 2014), p. 643 et 648).

C. *Le texte du par. 145(3) est neutre et ne crée pas une infraction fondée sur une obligation*

[36] Le texte du par. 145(3) est neutre en ce sens qu'il n'indique pas une intention claire de la part du Parlement à l'égard d'une *mens rea* subjective ou objective. Lorsque M. Zora a été accusé en 2015, l'infraction d'omission de se conformer à une condition était rédigée comme suit :

[145] (3) Quiconque, étant en liberté sur sa promesse remise ou son engagement contracté devant un juge de paix ou un juge et étant tenu de se conformer à une condition de cette promesse ou de cet engagement, ou étant tenu de se conformer à une ordonnance prise en vertu des paragraphes 515(12), 516(2) ou 522(2.1), omet, sans excuse légitime, dont la preuve lui incombe, de se conformer à cette condition ou ordonnance est coupable :

- a) soit d'un acte criminel passible d'un emprisonnement maximal de deux ans;
- b) soit d'une infraction punissable sur déclaration de culpabilité par procédure sommaire.

[37] Je note d'emblée que l'inclusion du moyen de défense de l'« excuse légitime » prévu au par. 145(3) ne joue aucun rôle dans l'interprétation

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

de la *mens rea* de l’infraction. L’excuse légitime constitue un moyen de défense supplémentaire que la personne prévenue ne pourrait autrement pas invoquer (voir *R. c. Holmes*, [1988] 1 R.C.S. 914, p. 948-949, voir aussi des interprétations de l’expression « excuse raisonnable » dans *R. c. Moser* (1992), 7 O.R. (3d) 737 (C.A.), p. 748-750, le juge Doherty, motifs concordants; *R. c. Goleski*, 2014 BCCA 80, 307 C.C.C. (3d) 1, conf. par 2015 CSC 6, [2015] 1 R.C.S. 399). Il ne faudrait pas la confondre avec la *mens rea* (M. Manning et P. Sankoff, *Manning, Mewett & Sankoff : Criminal Law* (5^e éd. 2015), p. 805; Trotter, p. 12-16). La possibilité d’invoquer ce moyen de défense ne change pas le fardeau de la Couronne de prouver tous les éléments de l’infraction, y compris la *mens rea*, hors de tout doute raisonnable (*Legere*, p. 99-100, citant *R. c. Santeramo* (1976), 32 C.C.C. (2d) 35 (C.A. Ont.), p. 44; *Custance*, par. 24; *Josephie*, par. 28 (CanLII)). Par conséquent, ce moyen de défense n’est pas pertinent pour la question de savoir si la *mens rea* de l’infraction est subjective ou objective.

[38] Pour évaluer s’il y a une intention législative manifeste qui écarte la présomption de la faute subjective, les tribunaux doivent regarder à la fois les mots utilisés dans la disposition et ceux qui n’y figurent pas (*A.D.H.*, par. 42). Il est vrai que le par. 145(3) ne contient pas de mots exprès indiquant une intention subjective, comme « volontaire » ou « conscient ». Toutefois, cette absence ne suffit pas, à elle seule, à écarter la présomption. En fait, c’est précisément lorsque les mots et le contexte sont neutres que la présomption d’une *mens rea* subjective s’applique pleinement.

[39] Les juges majoritaires de la Cour d’appel ont souligné que les mots « promesse », « engagement », « [t]enu de se conformer » et « [o]met » indiquent que la personne prévenue a l’obligation juridique exécutoire de satisfaire à une norme de conduite déterminée de façon objective (par. 53). Ces juges ont examiné les cinq catégories d’infractions nécessitant une *mens rea* objective recensées par la Cour dans l’arrêt *A.D.H.* aux par. 57-63 : les infractions de conduite dangereuse; les infractions axées sur le comportement négligent; les infractions sous-jacentes; les infractions relatives à la négligence

duty-based offences. Duty-based offences, such as failing to provide the necessities 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).

criminelle; et les infractions fondées sur une obligation. Au paragraphe 54, les juges majoritaires ont conclu qu’il ressortait du libellé du par. 145(3) que cette disposition tombait sous le coup de la dernière catégorie, soit les infractions fondées sur une obligation. Ces dernières, comme l’omission de s’acquitter de l’obligation de fournir les choses nécessaires à l’existence prévue à l’art. 215, reposent sur l’omission de s’acquitter d’« obligations [légales] en fonction de l’existence de liens déterminés » (*A.D.H.*, par. 67, citant *Naglik*, 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)).

[40] La Couronne fait aussi valoir que l’historique législatif du par. 145(3) appuie cette interprétation. En effet, le ministre de la Justice de l’époque a mentionné, lors de l’adoption de cette disposition, la « responsabilité » ou l’« obligation » des personnes en liberté sous caution de se présenter au tribunal et de se conformer aux conditions pour faire en sorte que le système de mise en liberté sous caution puisse compter sur la comparution volontaire plutôt que sur la détention préventive (Chambre des communes, *Procès-verbaux et témoignages du Comité permanent de la justice et des questions juridiques*, vol. 1, n° 8, 3^e sess., 28^e lég., 23 février 1971, p. 12 et 29; *Débats de la Chambre des communes*, vol. 3, 3^e sess., 28^e lég., 5 février 1971, p. 3117 (l’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:

[41] En toute déférence, je ne crois pas que le texte du par. 145(3) ou les commentaires du ministre démontrent qu’il y a une intention claire de créer une infraction fondée sur une obligation qui appelle une norme uniforme associée à une *mens rea* objective. Premièrement, le libellé du par. 145(3) ne renferme aucun des termes dont se sert habituellement le Parlement pour créer une infraction dont la perpétration exige une faute objective (voir *A.D.H.*, par. 73). Contrairement aux obligations prévues aux art. 215, 216, 217 et 217.1 du *Code*, le par. 145(3) n’inclut pas expressément les mots « obligation » ou « devoir », mots qui suggèrent une faute objective (*A.D.H.*, par. 71; *Naglik*, p. 141). Je suis d’accord avec la juge Fenlon pour dire que [TRADUCTION] « l’omission est importante » (motifs de la C.A., par. 80) lorsqu’on recherche une intention législative claire d’écarter la présomption de faute subjective. J’accepte aussi que le mot « *fails* » dans ce contexte est neutre :

“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

[TRADUCTION] Le mot « *fails* » [omet] peut avoir une connotation de négligence mais, comme le fait remarquer ma collègue, cela veut aussi dire agir de façon contraire à l’obligation ou au devoir légal convenu et être incapable de respecter les normes ou attentes fixées : *The Oxford English Dictionary*, 11^e éd., *sub verbo* « *fail* ». Cette définition est aussi compatible avec une conduite intentionnelle ou l’inadvertance.

(motifs de la C.A., par. 78)

De façon similaire, le mot « omet » dans la version française du par. 145(3) peut renvoyer à la négligence, mais aussi au fait de s’abstenir d’agir conformément à un devoir (H. Reid, avec S. Reid, *Dictionnaire de droit québécois et canadien* (5^e éd. 2015), p. 446-447, « omission »). Ni le mot « *fails* » ni le mot « omet » n’indiquent une intention législative claire d’établir une faute objective.

[42] Deuxièmement, il est dangereux d’accorder trop de poids au choix de mots d’un seul ministre, particulièrement lorsque son affirmation ne révèle pas clairement l’intention du Parlement de créer une infraction exigeant une *mens rea* objective. Par exemple, selon des commentaires formulés à la même époque, l’objectif de ces infractions était de [TRADUCTION] « veiller à ce que la personne accusée ne passe pas outre au nouveau système en toute impunité », ce qui semble suggérer une *mens rea* subjective (J. Scollin, c.r., *The Bail Reform Act : An Analysis of Amendments to the Criminal Code Related to Bail and Arrest* (1972), p. 19). L’historique législatif ne comporte aucun indice clair que le Parlement entendait créer une infraction exigeant une *mens rea* objective.

[43] Ce n’est pas parce que le ministre dit qu’une disposition qui crée une infraction criminelle impose une responsabilité ou une obligation au sens général qu’il s’agit du type d’infraction fondée sur une obligation qui était en cause dans l’arrêt *Naglik*. Le libellé du par. 145(3) ne renvoie qu’au fait d’être tenu de se conformer à une obligation et à l’omission de le faire. Il n’écarte pas la présomption d’intention subjective. Toutes les interdictions criminelles imposent des obligations d’agir ou de ne pas agir de façons précises et sont assorties de sanctions à infliger aux

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 necessities 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).

personnes qui ne les respectent pas. Si on les accepte, l’argument de la Couronne et la conclusion de la Cour d’appel transformeraient toutes les obligations de se conformer à des conditions en des « devoirs » ou « obligations » et tous les crimes en des infractions fondées sur des obligations. Toutefois, les infractions fondées sur des obligations dont il était question dans l’arrêt *A.D.H.* constituent une catégorie beaucoup plus limitée et se rapportent à des obligations légales très différentes de celle d’une personne prévenue de se conformer aux conditions d’une ordonnance judiciaire.

[44] L’infraction prévue au par. 145(3) ne comporte tout simplement pas les caractéristiques distinctives de ces infractions fondées sur une obligation exigeant une faute objective qui étaient en cause dans l’arrêt *Naglik* et examinées dans l’arrêt *A.D.H.* Parmi les points de distinction, mentionnons la nature différente des relations à l’origine des obligations légales, les niveaux variables de risque pour le public advenant le non-respect des obligations, la question de savoir si l’obligation doit être définie en fonction d’une norme sociale uniforme de conduite et celle de savoir s’il est possible et approprié dans les circonstances d’appliquer une telle norme uniforme.

[45] Les devoirs légaux, comme ceux prévus aux art. 215 à 217.1, tendent à imposer une obligation positive d’agir découlant de l’existence de certains liens identifiables, visent une obligation d’une partie plus puissante envers une partie plus vulnérable et comportent un risque direct pour la vie ou la santé si une norme sociale uniforme de conduite n’est pas respectée (*A.D.H.*, par. 67). L’obligation de ne pas manquer à une condition de mise en liberté sous caution n’est pas comparable au déséquilibre de pouvoir et aux risques pour la santé et la sécurité publiques que visent à empêcher les devoirs imposés par les art. 215 à 217.1 : fournir les choses nécessaires à l’existence de certaines personnes définies (art. 215), entreprendre des procédures médicales qui peuvent mettre en danger la vie d’une autre personne (art. 216) ou entreprendre d’accomplir un acte ou de diriger l’accomplissement d’un travail lorsque la vie humaine est en danger ou qu’il existe un risque de blessure corporelle pour autrui (art. 217 et 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 necessities 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

[46] De plus, l’infraction fondée sur une obligation dont il était question dans l’arrêt *Naglik* et d’autres types d’infractions qui requièrent une *mens rea* objective comportent des normes légales qui seraient « vide[s] de sens si [chaque personne] en définissait le contenu selon ses croyances et ses priorités personnelles » (p. 141). Selon les juges majoritaires de la Cour d’appel, les conditions de mise en liberté sous caution imposent une telle [TRADUCTION] « norme de conduite minimale uniforme en fonction d’intérêts de la société, et non de normes de conduite personnelles » (par. 57). En toute déférence, je ne suis pas de cet avis. Bien que des intérêts sociaux puissent entrer en jeu lorsque des conditions de mise en liberté sous caution sont fixées, il n’existe pas de norme de diligence uniforme pour le respect de ces conditions, comme il en existe pour la conduite automobile, l’entreposage d’une arme à feu ou le devoir de fournir les choses nécessaires à l’existence d’une personne à charge. Le Parlement a adopté un système de mise en liberté sous caution basé sur un processus individualisé, qui ne permet l’imposition que de conditions qui répondent aux risques précis que pose la personne prévenue et qui visent à assurer sa présence au tribunal, protéger la sécurité du public ou maintenir la confiance du public envers l’administration de la justice. L’ordonnance de mise en liberté sous caution devrait énumérer des normes de conduite personnalisées et précises. Par conséquent, il n’est pas nécessaire de recourir à une norme sociale uniforme pour bien comprendre à quelle norme de diligence on s’attend que se conforme la personne prévenue dans le cadre du respect des conditions de sa mise en liberté sous caution, et il n’est pas nécessaire d’examiner ce qu’une personne raisonnable aurait fait dans les circonstances pour comprendre l’obligation imposée par le par. 145(3).

[47] De plus, en raison de l’absence de norme uniforme à partir de laquelle on pourrait évaluer le manquement aux conditions, il n’est pas non plus facile de savoir quel degré de gravité du manquement entraînerait une responsabilité criminelle si une norme objective s’appliquait au par. 145(3). Seul un écart marqué par rapport à la conduite d’une personne raisonnable engagerait une responsabilité criminelle selon une norme objective de *mens rea*. Toutefois, contrairement à une activité comme la

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).

conduite automobile pour laquelle il existe toute une gamme de conduites, allant de la conduite prudente à la conduite criminelle, en passant par la conduite négligente, basées sur les risques prévisibles de la conduite d’une personne raisonnable, la nature hautement individualisée des conditions de mise en liberté sous caution exclut la possibilité d’une norme sociale uniforme de conduite qui serait applicable à toutes les éventuelles infractions d’omission de se conformer à une condition. Les conditions de mise en liberté sous caution peuvent restreindre les activités normales comme les déplacements et la communication avec autrui et sont spécifiquement conçues pour répondre aux risques *particuliers* que pose chaque personne prévenue. Ces conditions et les risques auxquels elles répondent varient énormément parmi les individus faisant l’objet d’une mise en liberté, de sorte qu’il n’est pas sensé de renvoyer aux concepts d’écart « marqué » ou « simple » par rapport à la norme de la personne raisonnable. En l’absence d’une condition de mise en liberté sous caution, la conduite réglementée ne constituerait normalement pas un écart par rapport à une norme sociale uniforme de conduite. Sans cette capacité de faire la distinction entre un écart marqué et un simple écart, il existe un risque que la norme de la faute objective entraîne insidieusement une responsabilité absolue pour l’infraction prévue au par. 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

[48] De même, l’infraction prévue au par. 145(3) n’est pas comparable aux autres infractions dont la perpétration suppose une faute objective énumérées dans l’arrêt *A.D.H.* Bien qu’une évaluation du risque soit effectuée lors de l’établissement des conditions de mise en liberté sous caution, ce risque individualisé sera rarement le même que les risques sociaux généraux que posent les infractions dont la perpétration suppose une faute objective comme la conduite dangereuse ou l’entreposage négligent d’armes à feu. Comme l’a déclaré le Comité sénatorial permanent des affaires juridiques et constitutionnelles, les infractions d’omission de se conformer à une condition, à l’instar de beaucoup d’infractions contre l’administration de la justice, diffèrent des autres infractions criminelles parce qu’elles causent rarement du tort à une victime, elles ne visent habituellement pas un comportement qui serait par ailleurs considéré comme criminel en l’absence d’une ordonnance

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,

judiciaire, et elles constituent des infractions secondaires qui ne peuvent survenir qu’après que la personne a été accusée d’une infraction sous-jacente (*Justice différée, justice refusée : L’urgence de réduire les longs délais dans le système judiciaire au Canada* (juin 2017) (en ligne), p. 156 (« Rapport du Comité sénatorial »)). Un manquement à de nombreuses conditions de mise en liberté sous caution n’entraînerait pas automatiquement un risque pour la santé et la sécurité du public.

[49] Enfin, la mise en liberté assortie d’un cautionnement raisonnable est un droit que garantit l’al. 11e) de la *Charte* et ne peut être comparée à une activité réglementée que l’on entreprend volontairement, comme la conduite automobile ou la possession d’armes à feu pour laquelle une norme de faute objective pour des infractions connexes est encore plus justifiée (*Hundal*, p. 884). La personne prévenue qui est présumée innocente a le droit de recouvrer sa liberté après son arrestation sous réserve des mesures les moins sévères possible pour répondre au risque particulier qu’elle pose en ce qui concerne l’omission d’être présente au tribunal au moment demandé, la protection et la sécurité du public et l’administration de la justice. Le fait que la personne prévenue consente aux conditions de sa mise en liberté sous caution pour être libérée ne signifie pas qu’elle a choisi de se livrer à une activité réglementée comparable à la conduite automobile ou à la possession d’armes à feu.

D. *Une mens rea subjective est requise pour le défaut de se conformer à une ordonnance de probation*

[50] La jurisprudence de la Cour exigeant une *mens rea* subjective pour l’infraction de défaut de se conformer à une ordonnance de probation tend également à confirmer que l’infraction d’omission de se conformer à une condition de mise en liberté exige une *mens rea* subjective. Les infractions de défaut de se conformer à une ordonnance de probation (art. 733.1) et d’omission de se conformer à une condition de mise en liberté sous caution (par. 145(3)) sont des infractions semblables, qui découlent toutes deux d’un manquement par la personne prévenue à des conditions énoncées dans une

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

ordonnance judiciaire. Dans *R. c. Docherty*, [1989] 2 R.C.S. 941, la Cour a statué que l’infraction de défaut de se conformer à une ordonnance de probation exige une *mens rea* subjective. Le libellé de cette infraction comportait les mots « volontairement » et « refuse », qui renforcent la présomption de faute subjective, et ne se retrouvent pas au par. 145(3). Toutefois, même après le retrait du mot « volontairement » du libellé de l’infraction actuelle de défaut de se conformer à une ordonnance de probation, la plupart des tribunaux continuent à interpréter l’infraction comme exigeant une *mens rea* subjective en se fondant sur le raisonnement de la Cour dans l’arrêt *Docherty* et sur le fait que le retrait du mot « volontairement » n’indique pas, à lui seul, l’intention de créer une infraction exigeant une *mens rea* objective (voir, p. ex., *R. c. Eby*, 2007 ABPC 81, 77 Alta. L.R. (4th) 149; *R. c. Bingley*, 2008 BCPC 245, par. 18 (CanLII); *R. c. Laferrière*, 2013 QCCA 944, par. 82-83 (CanLII); *R. c. John*, 2015 ONSC 2040, par. 16 (CanLII); *contra*, *R. c. Bremmer*, 2006 ABPC 93, par. 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).

[51] Allant au-delà du texte du par. 733.1, la Cour a conclu dans l’arrêt *Docherty* que l’exigence d’une *mens rea* subjective était étayée par la présomption de faute subjective, la possibilité d’emprisonnement advenant une déclaration de culpabilité et l’objectif de la disposition de dissuader les gens de ne pas se conformer aux ordonnances de probation (p. 950-952). De la même façon, ces facteurs militent en faveur d’une *mens rea* subjective pour l’infraction prévue au par. 145(3). De plus, la différence entre les deux situations, à savoir qu’une ordonnance de probation régit le comportement d’une personne qui a déjà été déclarée coupable d’un crime alors que les conditions de mise en liberté sous caution restreignent principalement les libertés civiles de personnes présumées innocentes de l’infraction sous-jacente, tend également à confirmer que la faute doit être subjective pour l’infraction prévue au par. 145(3) (voir, p. ex., M. Manikis et J. De Santi, « Punishing while Presuming Innocence : A Study on Bail Conditions and Administration of Justice Offences » (2019), 60 *C. de D.* 873, p. 879-880).

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) The Consequences of Charges and Conviction of Failure to Comply

[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

E. *Le paragraphe 145(3) dans le régime législatif*

[52] L’exigence d’une faute subjective pour l’infraction prévue au par. 145(3) cadre avec : (1) les pénalités et conséquences qui découlent d’une déclaration de culpabilité aux termes du par. 145(3); (2) le rôle du par. 145(3) en matière de révision et d’application des conditions de mise en liberté sous caution au sein du cadre législatif; (3) l’approche individualisée et empreinte de retenue qui doit guider l’octroi d’une mise en liberté sous caution et l’imposition de conditions.

(1) Les conséquences d’une accusation et d’une déclaration de culpabilité relatives à l’omission de se conformer à une condition

[53] Si « l’échelle des peines est [généralement] peu révélatrice de l’élément de faute requis » pour la plupart des infractions (*A.D.H.*, par. 72), l’infraction prévue au par. 145(3) est différente des autres pour les raisons suivantes : elle peut criminaliser une conduite par ailleurs légale, les accusations peuvent s’accumuler rapidement et les déclarations de culpabilité (et même les accusations) peuvent avoir une incidence sur la capacité de la personne prévenue à obtenir une mise en liberté sous caution dans le futur. Par conséquent, les graves et nombreuses conséquences qui découlent d’une déclaration de culpabilité, voire d’une accusation en vertu du par. 145(3), démontrent que le Parlement a accepté que ce crime exige une faute subjective.

[54] Une déclaration de culpabilité fondée sur le par. 145(3) a des répercussions profondes sur le droit à la liberté de la personne contrevenante. Le Parlement a prévu une peine pouvant aller jusqu’à deux ans d’emprisonnement pour une conduite qui, dans bien des cas, n’était par ailleurs pas criminelle, ne comportait pas de violence, n’a pas fait de victime et non seulement a eu lieu à un moment où la personne prévenue était présumée innocente de l’infraction sous-jacente, mais peut aussi entraîner une responsabilité criminelle même si la personne prévenue est acquittée de cette accusation. Outre un éventuel emprisonnement d’une durée maximale de deux ans pour chaque infraction, il existe une

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

possibilité bien réelle que des conditions additionnelles soient imposées dans le cadre de la détermination de la peine. Une déclaration de culpabilité au titre du par. 145(3) engendre un casier judiciaire ou l'alourdit, avec tous les stigmates et les difficultés que cela peut entraîner sur les plans de l'emploi, du logement et des responsabilités familiales.

[55] Une accusation fondée sur le par. 145(3) a aussi de graves conséquences négatives sur la situation juridique de la personne prévenue lors d'enquêtes ultérieures sur le cautionnement avant la déclaration de culpabilité. Le simple fait de faire l'objet d'une accusation en vertu du par. 145(3) inverse le fardeau de la preuve en imposant aux personnes prévenues la charge de démontrer pourquoi elles devraient être libérées sous caution, que ce soit avant leur audience concernant une accusation portée en vertu du par. 145(3) ou avant celle concernant l'accusation sous-jacente (al. 515(6)c)). Par conséquent, la personne prévenue qui ne s'acquitte pas du fardeau de preuve inversé risque de ne pas obtenir une mise en liberté sous caution à la suite de l'accusation de manquement, pourrait perdre sa liberté et devoir attendre son ou ses procès en détention.

[56] Les déclarations de culpabilité antérieures prononcées en vertu de l'art. 145 peuvent également être prises en compte lors d'enquêtes sur le cautionnement tenues relativement à des infractions ultérieures (voir sous-al. 518(1)c)(iii)). Le Parlement et les tribunaux considèrent souvent les déclarations de culpabilité pour omission de se conformer à une condition fondées sur le par. 145(3) comme indiquant que la personne prévenue a des antécédents de désobéissance délibérée aux ordonnances judiciaires et qu'elle est donc plus susceptible de violer à nouveau les ordonnances rendues à son égard. Une déclaration de culpabilité pour omission de se conformer à une condition peut donner lieu à des suppositions selon lesquelles la personne prévenue a fait preuve de « manque de respect [. . .] à l'égard des ordonnances des tribunaux et de la loi », ce qui pourrait avoir une incidence sur les décisions ultérieures concernant la détermination de la peine et la libération (*R. c. Lacasse*, 2015 CSC 64, [2015] 3 R.C.S. 1089, par. 118; voir aussi *Schab*, par. 24; *R. c. Omeasoo*, 2013 ABPC 328, 94 Alta. L.R. (5th)

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.

244, par. 47). Une étude du ministère de la Justice sur des dossiers fermés de 2008 a révélé que 43,9 p. 100 des personnes prévenues ayant été déclarées coupables d'une infraction prévue au par. 145 dans le passé se voyaient refuser la mise en liberté sous caution, ce qui constitue un taux de détention provisoire beaucoup plus élevé que celui associé aux personnes prévenues qui n'ont pas de tels antécédents, et même légèrement plus élevé que le taux de détention provisoire des personnes prévenues qui ont déjà été déclarées coupables d'une infraction avec violence (39,9 p. 100) ou d'une infraction d'ordre sexuel (39,5 p. 100) : K. Beattie, A. Solecki et K. E. Morton-Bourgon, *Les caractéristiques de la détention et de la mise en liberté par la police et par le tribunal : Données tirées de l'Étude sur l'Efficacité du Système de Justice* (2013), p. 17-18. Ainsi, une déclaration de culpabilité au titre du par. 145(3) peut mener à ce que la mise en liberté sous caution soit refusée ou à ce qu'il y ait une probabilité accrue que des conditions de mise en liberté sous caution plus sévères soient imposées en cas d'infractions ultérieures non liées.

[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*

[57] Ce constat pose problème parce que les accusations de manquement s'accumulent souvent rapidement : l'omission de M. Zora de répondre à la porte deux fois pendant la même fin de semaine a donné lieu à quatre accusations distinctes au titre du par. 145(3). Les personnes ayant des dépendances ou des handicaps et celles vivant dans des conditions précaires peuvent se retrouver avec un casier judiciaire comptant plus de 10 déclarations de culpabilité pour manquement. Les déclarations de culpabilité pour des infractions d'omission de se conformer à une condition peuvent par conséquent mener à un cercle vicieux où des conditions de mise en liberté sous caution de plus en plus nombreuses et sévères sont imposées lors de la déclaration de culpabilité, ce qui rend le respect desdites conditions encore plus difficile, menant ainsi la personne prévenue à faire l'objet de plus d'accusations de manquement et à se voir imposer des conditions de mise en liberté sous caution plus restrictives, voire une détention avant procès (C. M. Webster, *Lacunes relatives à la mise en liberté sous caution au Canada : comment y remédier?* (juin 2015), p. 8 (« rapport Webster »); Association canadienne des libertés civiles et le

& *Anti-Substance User Stigma in British Columbia*, by D. Bennett and D.J. Larkin (2019) (online), at p. 101 (“Pivot Report”).

Fidécimmis canadien d’éducation en libertés civiles, *Set Up to Fail : Bail and the Revolving Door of Pre-trial Detention*, A. Deshman et N. Myers (2014) (en ligne), p. 49 et 66 (« rapport de l’ACLC »); M.-E. Sylvestre, N. K. Blomley et C. Bellot, *Red Zones : Criminal Law and the Territorial Governance of Marginalized People* (2019), p. 132; Pivot Legal Society, *Project Inclusion : Confronting Anti-Homelessness & Anti-Substance User Stigma in British Columbia*, D. Bennett et D. J. Larkin (2019) (en ligne), p. 101 (« rapport Pivot »).

[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.

[58] Les conséquences juridiques importantes et de longue durée d’une accusation ou d’une déclaration de culpabilité fondée sur le par. 145(3) militent en faveur d’une exigence de *mens rea* subjective. Si une intention subjectivement coupable n’était pas requise pour une déclaration de culpabilité en vertu du par. 145(3), il serait beaucoup moins justifié sur le plan de la logique que le Parlement choisisse de présumer que la personne qui a omis de se conformer à certaines conditions de mise en liberté sous caution a « manqué de respect [. . .] à l’égard des ordonnances des tribunaux et de la loi » et est moins susceptible de se conformer dans le futur à des conditions différentes de mise en liberté sous caution (*Lacasse*, par. 118; *Code*, sous-al. 518(1)c)(iii)). Le fait qu’une accusation de manquement à une ordonnance de mise en liberté sous caution crée de graves conséquences pour la personne prévenue en inversant le fardeau de la preuve lors de la libération et en rendant plus difficile l’obtention d’une mise en liberté sous caution à l’égard d’autres infractions présuppose que la personne a violé sa condition de mise en liberté sous caution sciemment, et non par inadvertance.

(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

(2) Le rôle du par. 145(3) au sein du cadre législatif

[59] L’intention du Parlement d’exiger une faute subjective pour l’infraction prévue au par. 145(3) ressort également de l’examen du rôle de cette infraction au sein du *Code*. Le Parlement a compris que la mise en liberté sous caution fait partie d’un processus accéléré et est souvent fondée sur des renseignements limités, et a ainsi créé de nombreux

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.

mécanismes pour assurer la révision et l'application des conditions de mise en liberté sous caution une fois imposées. Lorsqu'il appert que la personne prévenue ne devrait pas être assujettie à une condition ou ne respecte pas une condition de sa mise en liberté sous caution, celle-ci ou la Couronne, selon le cas, peut demander une révision ou une annulation de l'ordonnance de mise en liberté sous caution. La Couronne peut aussi demander la révocation de la mise en liberté sous caution ou porter une accusation criminelle en vertu du par. 145(3). Vu l'existence de ces autres mécanismes qui gèrent le risque découlant de l'incapacité ou de l'omission de la personne prévenue de se conformer aux conditions de mise en liberté sous caution, il est manifeste que le par. 145(3) a un objectif distinct : punir et dissuader les personnes prévenues qui manquent sciemment ou par insouciance à leurs conditions de mise en liberté sous caution.

[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)).

[60] L'intimée a fait valoir que le par. 145(3) est devenu [TRADUCTION] « un excellent moyen de faire exécuter les conditions de mise en liberté pour atténuer les risques et répondre aux préoccupations qui auraient autrement justifié la détention d'une personne » (m.i., par. 63-67). Les accusations criminelles portées en vertu du par. 145(3) sont courantes, en hausse et entraînent souvent une perte de liberté. Selon Statistique Canada, le nombre d'accusations et de poursuites pour des violations d'ordonnances judiciaires, y compris les conditions de mise en liberté sous caution, a augmenté depuis 2004, et on estime qu'en 2008-2009 une personne sur cinq en détention avant le procès l'était en raison d'un manquement à des conditions d'une ordonnance judiciaire ou d'une ordonnance de probation (*Tendances de l'utilisation de la détention provisoire au Canada* (mai 2011); *Tendances des infractions contre l'administration de la justice* (octobre 2015), p. 13 (« rapport de Statistique Canada »); *Tableau 35-10-0177-01 : Statistiques des crimes fondés sur l'affaire, par infractions détaillées, Canada, provinces, territoires et régions métropolitaines de recensement* (en ligne)).

[61] Offences relating to the administration of justice represented about 1 in 10 police reported crimes in 2014 (Statistics Canada Report, at p. 6).

[61] Les infractions relatives à l'administration de la justice représentaient environ un dixième des crimes déclarés par la police en 2014 (rapport de

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

Statistique Canada, p. 6). Les infractions d'omission de se conformer à une ordonnance judiciaire, y compris l'infraction prévue au par. 145(3)⁸, représentaient 57 p. 100 des infractions relatives à l'administration de la justice déclarées en 2014 (Rapport de Statistique Canada, p. 7). En 2016-2017, l'omission de se conformer à une ordonnance était l'infraction la plus grave reprochée dans 9 p. 100 de toutes les affaires criminelles réglées visant des délinquants adultes (Statistique Canada, *Statistiques sur les tribunaux de juridiction criminelle pour adultes et les tribunaux de la jeunesse au Canada, 2016-2017* (janvier 2019)). Le taux global des personnes accusées d'avoir omis de se conformer à une ordonnance a continué d'augmenter entre 2017 et 2018 (*Tableau 35-10-0177-01*). Bien que les taux d'accusations relatives à une omission de se conformer à une condition varient aussi dans l'ensemble du pays, entre 2005-2006 et 2013-2014, la plupart des provinces ont rapporté une augmentation de la proportion des affaires criminelles closes visant des personnes délinquantes adultes qui comprenaient au moins une infraction contre l'administration de la justice (Rapport de Statistique Canada, p. 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),

[62] Le professeur Friedland, dont l'étude intitulée *Detention Before Trial* a été utilisée pour la réalisation de l'importante réforme du système de mise en liberté sous caution dans les années 1970, a affirmé que l'augmentation du nombre d'accusations d'omission de se conformer à une condition de mise en liberté sous caution avait probablement contribué à la croissance du nombre de personnes détenues avant le procès (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 *Rev. can. D.P.* 315, p. 321; M. L. Friedland, *Detention before Trial : A Study of Criminal Cases Tried in the Toronto Magistrates' Courts* (1965)). La détention avant le procès peut avoir des conséquences négatives sur l'emploi et les revenus de la personne prévenue ainsi que sur

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)).

⁸ Dans le rapport de Statistique Canada, ces infractions comprennent les infractions prévues aux par. 145(3) à (5.1), mais aussi les infractions relatives à l'omission de se conformer à une peine avec sursis ou à une ordonnance de probation (par. 161(1) à (4)), ou à un engagement à ne pas troubler l'ordre public (al. 811a) et b)).

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

sa possibilité de trouver un logement, sa santé et son accès aux médicaments, ses relations, ses possessions personnelles et sa capacité à s’acquitter de ses obligations parentales (Comité canadien de la réforme pénale et correctionnelle, *Rapport du Comité canadien de la réforme pénale et correctionnelle* (1969), p. 101-102 (« rapport Ouimet »); rapport de l’ACLC, p. 8-10; rapport Pivot, p. 81). Le Comité sénatorial permanent des affaires juridiques et constitutionnelles a aussi conclu que les infractions d’omission de se conformer à une condition congestionnaient les cours malgré qu’il ne s’agisse pas d’« actes criminels au sens strict » et qu’elles « ne causent de tort à aucune victime » (rapport du Comité sénatorial, p. 154-157).

[63] À mon avis, malgré les hauts taux d’accusations criminelles pour omission de se conformer à une condition, le Parlement ne voulait pas que les sanctions pénales soient le principal moyen de gérer les risques ou les préoccupations associés aux individus libérés sous conditions. Le régime établi par le *Code* indique que de telles préoccupations doivent être prises en compte par l’établissement de conditions qui sont minimales, raisonnables, nécessaires, les moins sévères possible et suffisamment liées au risque que pose la personne prévenue; des modifications peuvent être apportées à ces conditions lorsque cela est nécessaire au moyen de révisions de la mise en liberté sous caution et de l’annulation des ordonnances de mise en liberté sous caution; et la mise en liberté sous caution peut être révoquée lorsque les conditions ne sont pas respectées, ce qui peut donner lieu à une libération aux mêmes conditions avec un comportement différent attendu de la part de la personne prévenue, une modification des conditions ou une détention. Les accusations portées en vertu du par. 145(3) ne sont pas, et ne devraient pas être, le principal moyen d’atténuer le risque.

[64] La révision d’une mise en liberté sous caution effectuée conformément aux art. 520 et 521 constitue la principale façon de contester ou de modifier des conditions de mise en liberté sous caution qui ne sont pas, ou ne sont plus, minimales, raisonnables, nécessaires, les moins sévères possible et suffisamment

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)).

[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

liées aux risques que pose la personne prévenue (sauf pour la personne prévenue inculpée d'infractions très graves prévues à l'art. 469)⁹. Les conditions imposées dans l'agitation d'une séance occupée de libération sous caution, à l'aide de renseignements limités, peuvent, et devraient lorsque cela est nécessaire, être peaufinées au moyen d'une révision de la mise en liberté sous caution. Une telle révision suppose un processus hybride, et non une instance *de novo* (*St-Cloud*, par. 92 et 118). Les juges en révision peuvent intervenir si l'entité judiciaire a commis une erreur de droit, si la décision contestée était manifestement inappropriée ou si la nouvelle preuve démontre un changement important et pertinent dans les circonstances (par. 121). De plus, le par. 523(2) permet à l'entité judiciaire, dans certaines circonstances, d'annuler une ordonnance de libération antérieure et de rendre une ordonnance différente, notamment lorsque la personne prévenue et la Couronne consentent à l'annulation de l'ordonnance (al. 523(2)c)).

[65] Le Parlement a aussi prévu deux outils pour répondre aux manquements aux conditions de mise en liberté sous caution : la révocation de la mise en liberté sous caution en vertu de l'art. 524 et les accusations criminelles en vertu du par. 145(3). Ces deux dispositions ont pour effet combiné de favoriser le respect des conditions de mise en liberté sous caution, de pair avec les dispositions relatives à la confiscation pour les sommes d'argent prévues dans un engagement (voir la partie XXV du *Code*). Toutefois, ces deux mécanismes ont des objectifs législatifs distincts et différents. Alors que la révocation au titre de l'art. 524 joue un rôle de gestion de risque, la responsabilité criminelle dont il est question au par. 145(3) vise à punir et dissuader certaines conduites.

[66] La révocation de la mise en liberté sous caution se fait en vertu de l'art. 524. Une personne prévenue peut être arrêtée lorsqu'il existe des motifs raisonnables de croire qu'elle a violé ou est sur le

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

⁹ Les infractions indiquées à l'art. 469 sont assorties d'un mécanisme différent de révision de la mise en liberté sous caution aux termes du par. 522(4) et de l'art. 680 du *Code*.

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

point de violer une sommation, une citation à comparaître, une promesse de comparaître ou autre promesse ou un engagement dont elle fait l'objet ou si elle a commis un acte criminel après avoir été libérée (par. 524(1) et (2)). La Couronne peut alors décider si elle procédera à une audience sur la révocation devant une entité judiciaire (Trotter, p. 11-9 à 11-10). Lorsque l'entité judiciaire conclut, selon la prépondérance des probabilités, que la personne prévenue a violé ou était sur le point de violer l'ordonnance applicable ou qu'il existe des motifs raisonnables de croire que la personne prévenue a commis un autre acte criminel pendant qu'elle était en mise en liberté sous caution, elle doit annuler l'ordonnance et ordonner la détention de la personne prévenue (par. 524(4) et (8); voir *R. c. Parsons* (1997), 161 Nfld. & P.E.I.R. 145 (C.A. T.-N.-L.), par. 21; *R. c. Morris*, 2013 ONCA 223, 305 O.A.C. 47, par. 18). La personne prévenue a alors le fardeau de démontrer pourquoi sa détention n'est pas justifiée. Si elle parvient à le faire, l'entité judiciaire peut ordonner sa libération et l'assortir d'une ou de plusieurs des options prévues à l'art. 515, et peut notamment changer les conditions de la promesse ou de l'engagement (par. 524(4) à (9)). Cela signifie que l'entité judiciaire est habilitée à examiner si l'ordonnance de mise en liberté originale était appropriée et elle peut retirer ou restreindre des conditions de cette ordonnance lorsque la personne prévenue démontre qu'elles ne sont plus nécessaires, raisonnables, les moins sévères possible ou suffisamment liées aux critères prévus au par. 515(10) (Trotter, p. 11-1).

[67] La révocation aux termes de l'art. 524 fait en sorte que la personne prévenue qui ne respecte pas les conditions de sa mise en liberté sous caution peut être arrêtée pour qu'on réévalue si elle devrait être libérée dans la collectivité, et à quelles conditions, dans le cas où il est évident qu'elle ne se conformera pas, ou ne pourra se conformer, aux conditions initialement imposées. La révocation fournit au tribunal plus de souplesse pour établir si, malgré le manquement aux conditions de mise en liberté sous caution, la personne prévenue a démontré qu'elle devrait être à nouveau libérée, que ce soit selon les mêmes conditions ou des conditions différentes

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.

(voir, p. ex., *R. c. Badgerow*, 2010 ONCA 236, 260 O.A.C. 273, par. 36; *R. c. T.J.J.*, 2011 BCPC 155, par. 57-59 (CanLII); *R. c. Mehan*, 2016 BCCA 129, 386 B.C.A.C. 1). Il peut y avoir révision des conditions pour répondre au risque qu'il y ait un nouveau manquement tout en faisant en sorte que la personne prévenue puisse raisonnablement se conformer à ces conditions.

[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.

[68] Si la détention constitue le résultat proportionné à la violation par la personne prévenue des conditions de mise en liberté sous caution, alors la révocation aux termes de l'art. 524 est la bonne façon de procéder. La révocation de la mise en liberté sous caution est le processus qui a été conçu pour établir si les facteurs de risque associés à une personne prévenue faisaient en sorte que son omission de se conformer aux conditions de mise en liberté sous caution signifiait qu'elle devait être détenue plutôt que libérée selon des conditions différentes. La révocation peut donc être une réponse aux manquements aux conditions de mise en liberté sous caution commis par négligence ou insouciance, sans créer de responsabilité criminelle supplémentaire. Bien que la révocation s'accompagne de la menace de détention et qu'elle ne devrait être sollicitée que lorsque les répercussions négatives pouvant découler de la détention sont justifiées, elle permet aussi de répondre aux risques qui découlent des manquements aux conditions de mise en liberté sous caution sans ajout de nouvelles infractions contre l'administration de la justice au casier judiciaire de la personne prévenue.

[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

[69] En plus de prévoir la révocation, le Parlement a adopté le par. 145(3) du *Code*, qui fait du manquement aux conditions de mise en liberté sous caution un crime distinct contre l'administration de la justice, passible d'une peine maximale de deux ans d'emprisonnement et comportant d'autres conséquences importantes pour la personne prévenue (comme nous l'avons vu). Il s'agit d'une infraction criminelle qui exige que la Couronne prouve hors de tout doute raisonnable tous les éléments constitutifs de l'infraction. Des accusations de manquement aux conditions de mise en liberté sous caution portées en vertu du

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.

par. 145(3) peuvent s'ajouter à une demande de révocation de la mise en liberté sous caution (*Parsons*, par. 28 et 37). En plus de pouvoir perdre la mise en liberté sous caution avant le procès, la personne prévenue pourrait voir sa responsabilité criminelle engagée aux termes du par. 145(3). Par conséquent, les accusations criminelles doivent être considérées comme une mesure de dernier recours pour sanctionner des comportements répréhensibles lorsque les autres outils de gestion du risque n'ont pas rempli leur fonction.

[70] Ce cadre législatif indique que le Parlement entendait que la Couronne recoure principalement à la révision et à la révocation de la mise en liberté sous caution, plutôt qu'aux accusations criminelles, pour gérer les personnes prévenues qui ne peuvent ou ne pourront se conformer à leurs conditions de mise en liberté sous caution, particulièrement lorsque ces conditions concernent une conduite qui ne serait par ailleurs pas criminelle. Évidemment, différentes considérations s'appliquent au manquement à une condition visant une conduite qui est par ailleurs criminelle ou qui cause du tort ou constitue une menace à autrui, par exemple, lorsqu'une personne prévenue viole une condition d'interdiction de communiquer en menaçant ou en intimidant une victime. Dans de telles circonstances, les accusations criminelles peuvent être justifiées. Le Parlement a créé un processus de comparution pour manquement à l'art. 523.1 afin de permettre à la poursuite d'écarter les accusations fondées sur le par. 145(3) lorsque le manquement n'a pas causé de dommages — matériels, corporels ou moraux — ou de pertes économiques à une victime. Cela vient étayer encore davantage la thèse selon laquelle les poursuites et la déclaration de culpabilité au titre du par. 145(3) devraient constituer une mesure de dernier recours, conçue pour répondre avant tout aux manquements préjudiciables et intentionnels à des conditions de mise en liberté sous caution lorsque les mesures possibles dans le cadre des processus de révision et de révocation de la mise en liberté sous caution seraient insuffisantes.

[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

[71] Malgré l'existence de ce nouveau processus, la Couronne devrait examiner sérieusement la possibilité de demander une modification ou une révocation de la mise en liberté sous caution pour certains types de manquements allégués afin de réduire le nombre d'accusations criminelles de manquements à des conditions qui encombrant les tribunaux. Lorsque l'omission de la personne prévenue de se conformer à une condition peut justifier la détention, la révocation pourrait être appropriée. On peut voir les avantages de cette possibilité en examinant les accusations dont fait l'objet M. Zora parce qu'il aurait violé le couvre-feu et omis de répondre à la porte — accusations qui n'ont pas causé de préjudice à autrui et qui concernent une conduite qui n'aurait pas été criminelle n'eût été ses conditions de mise en liberté sous caution. Si la Couronne avait cherché à obtenir la révocation de la mise en liberté sous caution au lieu de porter des accusations, M. Zora aurait été arrêté et aurait eu à démontrer pourquoi il devrait être à nouveau libéré malgré son manquement. (Il se trouvait dans une situation comparable quand il a été accusé en vertu du par. 145(3) et devait démontrer pourquoi il devrait être libéré.) Toutefois, la procédure de révocation de la mise en liberté sous caution permet expressément à l'entité judiciaire de le libérer selon des conditions modifiées. Celles-ci pourraient permettre de gérer le même risque d'une façon plus ciblée et viable, sans exposer M. Zora aux graves conséquences découlant des déclarations de culpabilité additionnelles pour ne pas avoir répondu à la porte.

[72] Compte tenu de ce qui précède, l'objectif principal du par. 145(3) n'est pas la gestion d'un risque futur, mais la sanction d'un comportement passé et la dissuasion d'autres manquements. Comme l'a fait remarquer la juge Wilson dans l'arrêt *Docherty*, aux p. 951-952, concernant les manquements à des conditions de probation, l'effet de dissuasion individuelle n'existe que peu ou pas si la personne accusée ignorait qu'elle faisait quelque chose de mal. Pour être dissuadée d'adopter la conduite interdite, la personne accusée doit savoir quelle norme de comportement elle doit respecter et que sa conduite n'y

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 intervenor 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

répond pas. Si le paragraphe 145(3) a pour objet de dissuader et de punir les personnes qui manquent à leurs conditions de mise en liberté sous caution, la même logique que celle exposée dans l’arrêt *Docherty* étaye l’existence d’une *mens rea* subjective pour le par. 145(3).

(3) Établissement des conditions de mise en liberté sous caution et manquement à celles-ci aux termes du par. 145(3)

[73] Il existe un lien puissant, et même inexorable, entre l’établissement des conditions de mise en liberté sous caution et l’application du par. 145(3), notamment en matière de *mens rea*. Dans la présente section, j’examinerai l’argument selon lequel le Parlement entendait que les infractions prévues au par. 145(3) requièrent une *mens rea* objective parce que les conditions de mise en liberté sous caution sont adaptées à la personne visée. À mon avis, cet argument est dénué d’un fondement conceptuel solide et ne tient pas compte de la façon dont les conditions de mise en liberté sous caution continuent d’être imposées malgré les principes exposés dans la *Charte*, dans le *Code* et par la Cour dans l’arrêt *Antic*. Je conclus que l’opposé est vrai : l’exigence voulant que les conditions de mise en liberté sous caution soient adaptées à la personne prévenue indique qu’il faut une *mens rea* subjective de manière à ce que les caractéristiques individuelles de celle-ci soient prises en considération tant lors de l’établissement des conditions de mise en liberté sous caution qu’en cas de manquement à celles-ci.

[74] L’intimée et l’intervenant le procureur général de la Colombie-Britannique (« PGCB ») soutiennent que la *mens rea* requise au par. 145(3) peut être établie par la preuve d’une norme de faute objective. L’intimée et l’intervenant font valoir que les conditions de mise en liberté sous caution, fixées au début du processus, sont soigneusement adaptées à la personne prévenue et ne devraient entraîner qu’une responsabilité criminelle minimale pour celle-ci. Le PGCB établit un lien entre les divers stades du système de mise en liberté sous caution,

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 interveners 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

mais soutient qu’on [TRADUCTION] « répond efficacement, au stade initial du processus, à la préoccupation légitime concernant les personnes marginalisées pour lesquelles le manquement aux conditions de mise en liberté sous caution pose un risque atténué » (m. interv. (PGCB), par. 3). Autrement dit, les préoccupations concernant le traitement des personnes marginalisées sont prises en compte dans les conditions mêmes qui sont imposées, ce qui écarte la nécessité d’une norme de faute subjective s’il y a un manquement à ces conditions.

[75] Je ne souscris pas à ce raisonnement. Cet argument repose sur une fausse dichotomie qui suppose qu’une analyse de la situation de la personne prévenue ne peut avoir lieu qu’à un seul stade du processus. Sur le plan conceptuel, il n’y a aucune raison pour laquelle les droits et intérêts de la personne prévenue devraient être abandonnés à l’une ou l’autre des étapes. Rien n’empêche une appréciation individualisée tant au moment où les conditions sont imposées qu’au moment du manquement. Les valeurs prônées dans l’arrêt *Antic* militent en faveur d’une approche cohérente et complémentaire selon laquelle les droits applicables garantis par la *Charte* et les principales protections conférées par le *Code* sous-tendent tous les aspects du système de mise en liberté sous caution : de l’imposition des conditions au manquement à celles-ci. Exiger une *mens rea* subjective renforce, reflète et respecte l’approche individualisée que commande l’imposition de toute condition de mise en liberté sous caution.

[76] Je rejetterais aussi la thèse avancée par le PGCB en raison de la prépondérance des conditions de mise en liberté sous caution qui ne reflètent pas les exigences de la mise en liberté sous caution prévues par la *Charte*, le *Code* et les principes qu’a énoncés la Cour dans l’arrêt *Antic*. En pratique, le nombre de conditions de mise en liberté sous caution inutiles et déraisonnables, et la croissance du nombre d’accusations de manquement à une condition mettent à mal l’argument selon lequel les conditions de mise en liberté sous caution sont suffisamment individualisées. Bon nombre de parties intervenantes ont expliqué qu’il ressort d’études effectuées partout au pays que, malgré le fait que la forme de mise en liberté par

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).

défaut devrait être une promesse sans condition en vertu du par. 515(1), la majorité des ordonnances de mise en liberté sous caution prévoient de nombreuses conditions, qui souvent ne tiennent manifestement pas compte des risques que pose la personne prévenue quant à son éventuelle omission d'être présente au tribunal, quant à la sécurité du public ou à la confiance envers l'administration de la justice (voir Sylvestre, Blomley et Bellot, p. 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, p. 677; rapport Webster, p. 7; Société John Howard de l'Ontario, *Reasonable Bail?* (septembre 2013) (en ligne), p. 11; rapport de l'ACLC, p. 48-49; Ministère de la Justice, Division de la recherche et de la statistique, *Recherche en bref : Évaluations et analyses du système de mise en liberté sous caution du Canada* (2018)). Selon des recherches effectuées sur les conditions de mise en liberté sous caution à Vancouver et à Montréal, la probabilité qu'une personne prévenue soit accusée d'avoir manqué à ses conditions augmente lorsqu'elle est assujettie à un grand nombre de conditions et à une longue ordonnance judiciaire (Sylvestre, Blomley et Bellot, p. 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).

[77] Plusieurs facteurs contribuent à l'imposition de conditions de mise en liberté nombreuses et sévères. Les tribunaux et les commentaires ont invariablement fait état d'une culture d'aversion du risque qui contribue à ce que les tribunaux imposent des conditions excessives (*Tunney*, par. 29; voir aussi p. 223-224 (commentaire de T. Quigley); *Schab*, par. 15; Friedland (2017); B. L. Berger et J. Stribopoulos, « Risk and the Role of the Judge : Lessons from Bail », dans B. L. Berger, E. Cunliffe et J. Stribopolous, dir., *To Ensure that Justice is Done : Essays in Memory of Marc Rosenberg* (2017), p. 308 et 323-324). Dans la décision *Tunney*, le juge Di Luca a souligné que cette culture se poursuit malgré les directives données dans l'arrêt *Antic*. Il a déclaré, avec raison selon moi, que [TRADUCTION] « la culture de l'aversion du risque doit être tempérée par les principes constitutionnels qui sous-tendent le droit à une mise en liberté assortie d'un cautionnement raisonnable » (par. 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 (QL), at para. 29). 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. 24-25; *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

[78] Le caractère expéditif des enquêtes sur le cautionnement engendre aussi une culture de consentement, qui aggrave le manque de retenue dans l'imposition de conditions de mise en liberté excessives. Il s'agit de la réalité pratique des tribunaux chargés des mises en liberté sous caution, qui doivent travailler efficacement pour réduire au minimum le temps que les personnes prévenues passent inutilement en détention avant le procès. Comme l'a déjà reconnu la Cour, le moment où ont lieu les enquêtes sur le cautionnement et la rapidité à laquelle elles se déroulent ont des conséquences sur les personnes prévenues du fait que cela rend difficile pour elles de se trouver de la représentation juridique. Ainsi, beaucoup d'entre elles ne sont pas représentées ou se fient au service de représentation du tribunal, qui ne dispose souvent que de peu de temps pour se préparer (*St-Cloud*, par. 109). Ce processus incite les personnes prévenues à consentir à des conditions sévères de mise en liberté plutôt qu'à courir le risque d'être détenues avant et après une enquête sur le cautionnement contestée (voir le rapport de la CCLA, p. 46-47; rapport Pivot, p. 79; Myers, p. 667 et 676-677; Sylvestre, Blomley et Bellot, p. 118; Berger et Stribopolous, p. 319; *R. c. Birtchnell*, 2019 ONCJ 198, [2019] O.J. No. 1757 (QL), par. 29). Lorsque des propositions conjointes sont présentées, il a même été affirmé qu'on demande rarement à la Couronne de justifier les conditions de mise en liberté proposées, ce qui est [TRADUCTION] « peut-être un facteur clé qui contribue au grand nombre de conditions imposées dans les cas de libération sur consentement par rapport à ce à quoi on pourrait s'attendre selon la loi » (C. Yule et R. Schumann, « Negotiating Release? Analysing Decision Making in Bail Court » (2019), 61 *Rev. can. crim. just. pén.* 45, p. 57-60).

[79] Une troisième constatation en ce qui concerne la mise en liberté sous caution est que l'imposition de conditions sévères touche de façon disproportionnée les populations vulnérables et marginalisées (rapport de l'ACLC, p. 72-79). Les personnes vivant dans la pauvreté ou aux prises avec des problèmes de toxicomanie ou des maladies mentales ont souvent de la difficulté à respecter les conditions auxquelles elles ne sont pas raisonnablement en mesure

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

de se conformer (voir, p. ex., *Schab*, par. 24-25; *Omeasoo*, par. 33 et 37; *R. c. Coombs*, 2004 ABQB 621, 369 A.R. 215, par. 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). Les personnes autochtones, surreprésentées au sein du système de justice criminelle, sont aussi touchées de façon disproportionnée par l'imposition de conditions de mise en liberté sous caution inutiles et déraisonnables et des accusations pour manquement qui en découlent (voir, p. ex., *R. c. Murphy*, 2017 YKSC 34, par. 31-34 (CanLII); *Omeasoo*, par. 44; rapport de l'ACLC, p. 75-79; J. Rogin, « Gladue and Bail : The Pre-Trial Sentencing of Aboriginal People in Canada » (2017), 95 *R. du B. can.* 325; *Ewert c. Canada*, 2018 CSC 30, [2018] 2 R.C.S. 165, par. 57-60; voir aussi la version de l'art. 493.2 en vigueur en date du 18 décembre 2019). On retrouve dans le rapport souvent cité de l'ACLC le résumé percutant suivant :

[TRADUCTION] Les tribunaux canadiens chargés des mises en liberté sous caution imposent régulièrement l'abstinence à des personnes alcooliques ou toxicomanes, des conditions de résidence à des sans-abri, des exigences de contrôle strictes dans des lieux difficiles d'accès, des conditions interdisant les contacts entre des membres d'une même famille et des couvre-feux stricts qui perturbent l'emploi et la vie quotidienne. De nombreuses conditions restrictives, imposées pour de longues périodes de temps, font en sorte que les personnes échouent; or, l'omission de se conformer à une condition de mise en liberté sous caution est une infraction criminelle, même si le comportement qui sous-tend cette infraction ne constitue pas par ailleurs un acte criminel. [p. 1]

[80] La présence d'un trop grand nombre de conditions inutiles et le caractère généralisé des accusations de manquement découlant de l'imposition de conditions excessives et sévères font partie du contexte législatif pertinent pour l'interprétation du par. 145(3) (Sullivan, p. 648-649). Il s'agit du même contexte pour lequel le Parlement est récemment intervenu en modifiant le régime de mise en liberté sous caution. On ne peut présumer que les conditions de mise en liberté sous caution sont suffisamment individualisées et la Cour ne prétendra pas que le régime actuel fonctionne parfaitement, alors que ce

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

n'est manifestement pas le cas. Il n'y a aucun fondement théorique ou pratique justifiant d'accepter qu'une imposition individualisée de conditions de mise en liberté sous caution dès le départ démontre une intention claire d'écarter la norme présumée de faute subjective. De fait, les études concordantes et convaincantes présentées à la Cour illustrent la nécessité d'exposer, avec davantage de précision et d'insistance, comment l'intention du Parlement de sanctionner les personnes qui manquent intentionnellement à leurs conditions de mise en liberté sous caution aux termes du par. 145(3), tout en garantissant leur droit à une mise en liberté assortie d'un cautionnement raisonnable et des conditions nécessaires les moins sévères possible, exige que les acteurs du système de mise en liberté sous caution agissent avec retenue et examinent attentivement les conditions pour s'assurer qu'elles sont conformes à la *Charte*, au *Code* et à l'arrêt *Antic*. C'est ce que je vais maintenant faire.

V. Retenue et révision : conditions de mise en liberté sous caution nécessaires et raisonnables et par. 145(3)

[81] Dans l'arrêt *Antic*, lorsqu'elle s'est penchée sur le recours excessif au cautionnement en espèces et aux cautions, la Cour a énoncé l'approche à adopter pour l'application des dispositions relatives à la mise en liberté sous caution du *Code*. Comme les questions concernant ce sujet sont particulièrement susceptibles d'échapper à l'examen judiciaire (voir *Penunsi*, par. 11), il est devenu nécessaire de reprendre le cadre énoncé dans l'arrêt *Antic* pour donner des indications sur l'imposition de conditions non pécuniaires de mise en liberté sous caution et les graves conséquences qui découlent du manquement à celles-ci.

[82] Nous pouvons en apprendre beaucoup sur la façon de fixer des conditions de mise en liberté sous caution lorsqu'on voit comment elles peuvent devenir des infractions criminelles aux termes du par. 145(3). Chaque condition ajoutée à une ordonnance de mise en liberté non seulement limite la liberté d'une personne présumée innocente, mais crée un nouveau risque de responsabilité criminelle, propre à la personne prévenue, et peut conduire à une

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?

perte de liberté, que ce soit en raison de la révocation de la mise en liberté sous caution ou d'un emprisonnement. Le lien direct entre le comportement visé dans les conditions de mise en liberté sous caution et la conduite qui est criminalisée au par. 145(3) peut s'établir dans les deux sens. Le processus individualisé d'établissement des conditions de mise en liberté sous caution donne lieu à la norme de faute subjective applicable au manquement et sert de base à celle-ci. À l'inverse, le fait de comprendre la façon dont le par. 145(3) pourrait entraîner une responsabilité criminelle renforce la règle selon laquelle les principes de retenue et de révision doivent dans les faits orienter la décision initiale d'imposer des conditions de mise en liberté sous caution. Le paragraphe 145(3) apporte donc une perspective essentielle par laquelle nous pouvons prendre en considération les principes généraux de mise en liberté sous caution; les préoccupations concernant des conditions précises; et la façon dont toutes les personnes jouant un rôle dans le système de mise en liberté sous caution ont des responsabilités en matière de retenue et de révision.

A. *Principes généraux régissant les conditions de mise en liberté sous caution*

[83] Toutes les personnes qui jouent un rôle dans l'établissement des conditions de mise en liberté sous caution doivent se reporter aux principes généraux en cette matière, qui restreignent la façon dont les conditions sont établies. Comme le *Code* prévoit par défaut la mise en liberté sans condition, la première question consiste à savoir s'il a été démontré que l'imposition de conditions est nécessaire. Selon les principes de retenue et de l'échelle, quiconque propose d'ajouter des conditions de mise en liberté sous caution doit chercher à savoir si l'un des risques mentionnés au par. 515(10) est en cause et comprendre quels risques précis se poseraient si la personne prévenue était libérée sans condition : cette personne présente-t-elle un risque de fuite, sa mise en liberté pose-t-elle un risque pour la protection ou la sécurité du public ou est-elle susceptible de miner la confiance du public envers l'administration de la 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 (CanLII); *J.A.D.*, at paras. 9 and 11). 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

[84] Seules les conditions qui ciblent les risques précis mentionnés au par. 515(10) sont nécessaires. Si la personne prévenue pose un risque de fuite, mais aucun autre risque, seules les conditions qui réduisent ce risque au minimum devraient être imposées. De même, si la personne prévenue pose un risque pour la sécurité ou la protection du public, seules les conditions les moins sévères possible pour répondre à cette menace précise devraient être imposées (*R. c. S.K.*, 1998 CanLII 13344 (C. prov. Sask.), par. 16-19). De plus, de telles conditions ne seront pas nécessaires pour la protection ou la sécurité du public simplement du fait qu’il est possible que la personne prévenue commette une autre infraction pendant sa mise en liberté sous caution, à moins qu’il n’y ait une « probabilité marquée » qu’elle commette une infraction compromettant la protection ou la sécurité du public (*Morales*, p. 736-737; al. 515(10)(b)). Toute condition imposée pour ne pas miner la confiance du public envers l’administration de la justice doit être fondée sur l’examen, du point de vue d’un membre raisonnable du public, de l’effet combiné de toutes les circonstances pertinentes, et tout particulièrement des quatre facteurs énoncés à l’al. 515(10)(c) : le fait que l’accusation paraît fondée, la gravité de l’infraction, les circonstances entourant sa perpétration et la question de savoir si la personne prévenue encourt une longue peine d’emprisonnement (*St-Cloud*, par. 55-71 et 79).

[85] L’exigence de nécessité signifie aussi que la condition particulière doit atténuer les risques qui empêcheraient autrement la libération de la personne prévenue sans cette condition. Les conditions ne peuvent être imposées de façon injustifiée ou dans un but punitif (*Antic*, par. 67(j); *Birtchnell*, par. 27-28; *R. c. McDonald*, 2010 ABQB 770, par. 34-36 (CanLII)). Une condition qui peut convenir en vue d’un objectif de détermination de la peine, comme la réadaptation, ne sera pas appropriée à moins qu’elle ne vise à répondre aux risques prévus au par. 515(10) (*Omeasoo*, par. 31). Les conditions ne devraient pas être fondées sur un comportement (*R. c. K. (R.)*, 2014 ONCJ 566, par. 14-19 (CanLII); *J.A.D.*, par. 9 et 11). Une condition qui semble simplement [TRADUCTION] « bonne à avoir », mais qui n’est pas nécessaire pour la mise en liberté de la personne prévenue, n’est pas appropriée (*Birtchnell*, par. 40). Même si une

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 (QL), at paras. 14-17; *R. v. Pammett*, 2014 ONSC 5597, at paras. 10-12 (CanLII); *R. v. Clarke*, [2000] O.J. No. 5738 (QL) (Sup. Ct.), at paras. 9 and 12; *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. 399, 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

condition donnée se veut thérapeutique, vise à aider ou « ne pourrait pas faire de mal », la possibilité qu’une responsabilité criminelle additionnelle soit engagée en vertu du par. 145(3) signifie que de telles limites à un comportement qui serait autrement légal pourraient aussi entraîner des sanctions pénales. La Cour insiste sur la retenue dans l’arrêt *Antic*, au par. 67j) :

Les conditions de mise en liberté visées au par. 515(4) ne peuvent [TRADUCTION] « être imposées que dans la mesure où elles sont nécessaires » pour dissiper les préoccupations liées aux critères légaux de détention et pour permettre la mise en liberté de [la personne accusée]. Elles ne doivent pas être imposées pour modifier le comportement de [la personne accusée] ou pour [la] punir. [Note en bas de page omise.]

[86] De plus, les conditions de mise en liberté sous caution doivent être suffisamment liées aux risques définis dans la loi. Elles devraient être définies aussi étroitement que possible pour réaliser leur objectif de répondre aux risques prévus au par. 515(10) (*R. c. D.A.*, 2014 ONSC 2166, [2014] O.J. No. 2059 (QL), par. 14-17; *R. c. Pammett*, 2014 ONSC 5597, par. 10-12 (CanLII); *R. c. Clarke*, [2000] O.J. No. 5738 (QL) (C.S.), par. 9 et 12; *K. (R.)*, par. 14-19; *J.A.D.*, par. 9 et 11). Comme pour l’établissement des conditions de probation, le lien entre une condition non énumérée et un risque prévu au par. 515(10) devrait être comparable aux liens évidents entre les conditions énumérées au par. 515(4) et les risques prévus au par. 515(10) (*R. c. Shoker*, 2006 CSC 44, [2006] 2 R.C.S. 399, par. 13-14). Récemment, dans l’arrêt *Penunsi*, la Cour l’a souligné en ce qui a trait aux conditions relatives aux engagements de ne pas troubler l’ordre public :

Lorsqu’elle n’est pas manifestement rattachée à la crainte alléguée, la condition risque davantage d’amener [la partie défenderesse] à ne pas la respecter [. . .] Aucune condition ne devrait être sévère au point de constituer dans les faits une ordonnance de détention en vouant [la partie défenderesse] à l’échec. [Références omises; par. 80.]

[87] Les conditions de mise en liberté sous caution doivent être raisonnables. Comme pour les conditions de probation, les conditions de mise en liberté sous caution ne peuvent contrevenir à une

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

loi fédérale ou provinciale ou encore à la *Charte* (*Shoker*, par. 14). Les conditions de mise en liberté sous caution énumérées aux par. 515(4) à (4.2) aident à déterminer l’étendue du pouvoir discrétionnaire dont dispose l’entité judiciaire pour imposer d’autres conditions raisonnables non énumérées de mise en liberté sous caution (*Shoker*, par. 14). Les conditions doivent être claires, peu intrusives et proportionnées à tout risque posé. Aussi, elles ne seront raisonnables que si, de façon réaliste, elles peuvent être et seront respectées par la personne prévenue, car [TRADUCTION] « [e]xiger que la personne prévenue soit tenue à l’impossible ne constitue qu’un autre moyen de la priver d’une mise en liberté provisoire par voie judiciaire » en faisant en sorte qu’elle échoue, en plus de lui faire courir le risque d’engager sa responsabilité criminelle si elle omet de se conformer à une condition (*Omeasoo*, par. 33 et 37-38; voir aussi *Penunsi*, par. 80). Comme l’a noté le juge Rosborough dans la décision *Omeasoo*, le retrait d’une condition déraisonnable n’exposera pas la collectivité à plus de risques que l’imposition d’une condition impossible à respecter pour la personne prévenue (par. 39). Les conditions raisonnables ne doivent pas non plus restreindre les droits garantis par la *Charte* à la personne prévenue, comme la liberté d’expression ou d’association, à moins que la condition soit raisonnablement liée aux risques que pose la personne prévenue, soit le risque de fuite, le risque d’atteinte à la sécurité du public ou le risque que le public perde confiance envers l’administration de la justice, ou qu’elle soit nécessaire pour répondre à de tels risques (*R. c. Manseau*, [1997] AZ-51286266 (C.S. Qc); *Clarke*).

[88] Les conditions de mise en liberté sous caution doivent être adaptées aux risques individuels que pose la personne prévenue. On ne devrait pas imposer machinalement une liste de conditions. La seule condition de mise en liberté sous caution qui devrait être systématiquement imposée est celle qui exige la présence au tribunal de la personne prévenue (*Birtchnell*, par. 6), ainsi que celles qui doivent être envisagées pour certaines infractions aux termes des par. 515(4.1) à (4.3). Le recours à des listes de vérification pour passer en revue les conditions possibles ne pose aucun problème. Il n’y a problème que si

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?

des conditions sont simplement ajoutées, non parce qu'elles sont strictement nécessaires, mais simplement par habitude, parce que la personne prévenue y a consenti ou parce qu'un changement de comportement serait considéré comme souhaitable. Les conditions de mise en liberté sous caution peuvent être faciles à imposer, mais difficiles à vivre.

[89] En résumé, les questions suivantes peuvent aider à structurer l'analyse afin que les principes de retenue et de révision fassent réellement partie intégrante de l'élaboration de conditions de mise en liberté sous caution appropriées :

- Si elle était libérée sans condition, la personne prévenue poserait-elle un risque précis prévu par la loi qui justifie l'imposition de conditions de mise en liberté sous caution? Si la personne prévenue est libérée sans condition, existe-t-il un risque qu'elle ne se présente pas au tribunal au moment exigé, qu'il y ait atteinte à la sécurité ou à la protection du public ou que soit minée la confiance du public envers l'administration de la justice?
- La condition est-elle nécessaire? Si la condition n'était pas imposée, y aurait-il un risque de fuite de la part de la personne prévenue, un risque d'atteinte à la protection ou à la sécurité du public ou un risque que le public perde confiance envers l'administration de la justice, qui empêcherait le tribunal de libérer la personne prévenue sur remise d'une promesse sans condition?
- La condition est-elle raisonnable? La condition est-elle claire et proportionnelle au risque que pose la personne prévenue? Peut-on s'attendre à ce que la personne prévenue respecte la condition de façon sécuritaire et raisonnable? Sur le fondement de ce que l'on sait de la personne prévenue, est-il probable que ses conditions de vie, sa dépendance, son handicap ou sa maladie fassent en sorte qu'elle serait incapable de se conformer à la condition?
- La condition est-elle suffisamment liée aux motifs de détention prévus à l'al. 515(10)c)? Se limite-t-elle à répondre au risque précis que pose la libération de la personne prévenue?

- 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?

- Quel est l'effet cumulatif de toutes les conditions? Prises ensemble, constituent-elles les conditions les moins nombreuses et les moins sévères nécessaires dans les circonstances?

Ces questions sont interreliées et n'ont pas besoin d'être abordées dans un ordre particulier, ni d'être posées et de recevoir une réponse concernant chaque condition dans tous les cas. Compte tenu des considérations d'ordre pratique des tribunaux chargés des remises en liberté sous caution, qui sont très occupés, il n'est ni réaliste ni souhaitable d'exiger que les entités judiciaires se penchent sur les conditions qui ne soulèvent pas de préoccupations particulières. Ce qui importe est que quiconque participe à l'établissement des conditions de mise en liberté sous caution recoure à ce type de questions pour orienter les politiques et évaluer quelles conditions devraient être visées et imposées.

[90] Lorsque l'on examine le caractère approprié des conditions de mise en liberté sous caution, il faut garder à l'esprit que l'infraction criminelle créée au par. 145(3) non seulement recommande la retenue et la révision, mais fournit un cadre de référence additionnel qui intègre des considérations de proportionnalité dans l'évaluation. Étant donné la relation directe entre l'imposition de conditions et le manquement, les évaluations de la nécessité et du caractère raisonnable dont il est question dans l'arrêt *Antic* devraient aussi tenir compte du fait que les omissions de se conformer aux conditions imposées deviennent des crimes distincts contre l'administration de la justice. Par conséquent, la question est la suivante : est-il nécessaire et raisonnable d'imposer cette condition susceptible d'entraîner une responsabilité criminelle, alors que l'on sait que le manquement peut donner lieu à une privation de liberté en raison d'une accusation ou d'une déclaration de culpabilité au titre du par. 145(3)? En résumé, lors de l'examen de la question de savoir si une condition proposée répond à un risque établi et précis, il faut chercher à savoir s'il serait proportionné qu'un manquement à cette condition constitue une infraction criminelle ou devienne une raison de révoquer la mise en liberté sous caution.

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 abstinence conditions may effectively punish them for what are recognized health concerns, "if that individual is suffering from an alcohol addiction, an absolute abstinence 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

B. *Conditions précises*

[91] Je me penche maintenant sur certaines conditions précises non énumérées couramment incluses dans les ordonnances de mise en liberté. Bon nombre de ces types de conditions se retrouvaient dans l'ordonnance de mise en liberté de M. Zora. Comme je l'ai déjà indiqué, en raison de la criminalisation des manquements aux conditions aux termes du par. 145(3), les principes de retenue et de révision commandent un examen approfondi pour établir si un type particulier de condition est nécessaire, raisonnable, le moins sévère possible et suffisamment lié à un risque mentionné au par. 515(10). L'analyse de conditions précises qui suit montre de quelle façon ces types courants de conditions doivent être examinés.

[92] Premièrement, les entités judiciaires doivent être prudentes pour ce qui est des conditions pouvant viser des symptômes de maladie mentale, comme les conditions interdisant de consommer à des personnes prévenues ayant un problème d'alcoolisme ou de toxicomanie. Si la personne prévenue ne peut respecter une telle condition, alors celle-ci n'est pas raisonnable (*Penunsi*, par. 80; *Omeasoo*, par. 37-38). De plus, la réadaptation ou le traitement d'une dépendance ou d'une autre maladie ne constitue pas un objectif approprié pour une condition de mise en liberté sous caution — une condition ne sera appropriée que si elle est nécessaire pour répondre aux risques précis que pose la personne prévenue. Assujettir des personnes qui sont présumées innocentes à des conditions d'abstinence pourrait dans les faits les punir pour ce qui est reconnu comme étant un problème de santé : [TRADUCTION] « si l'individu souffre d'alcoolisme, l'abstinence absolue pourrait présenter un risque important pour sa santé et son bien-être » et même « avoir éventuellement des effets de sevrage létaux » (*R. c. Denny*, 2015 NSPC 49, 364 N.S.R. (2d) 49, par. 14-15; voir aussi la Société John Howard de l'Ontario, p. 12-13). S'il est nécessaire d'imposer une condition d'abstinence, celle-ci doit être rédigée avec soin pour viser le risque réel pour la sécurité publique, par exemple, en interdisant à la personne prévenue de consommer de l'alcool à l'extérieur de son domicile si les infractions reprochées

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.

ont eu lieu alors qu'elle était ivre et qu'elle ne se trouvait pas chez elle (*Omeasoo*, par. 42). Quiconque sollicite ou impose des conditions de mise en liberté sous caution devrait aussi tenir compte du fait qu'il est possible que le problème de la personne prévenue lié à la consommation d'une substance, ou toute autre maladie mentale dont elle pourrait souffrir, n'ait pas encore été diagnostiqué. De plus, au besoin, on devrait recourir abondamment aux dispositions relatives à la révision et à la modification de la mise en liberté sous caution prévues aux art. 520, 521 et 523 pour tenir compte de telles circonstances. La mise en liberté sous caution est un processus dynamique d'évaluation continue, une collaboration entre toutes les parties qui jouent un rôle dans l'élaboration des conditions les plus raisonnables et les moins sévères possible, même au fil de l'évolution de la situation.

[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.

[93] Deuxièmement, d'autres conditions liées au comportement qui visent à réadapter ou aider la personne prévenue ne seront pas appropriées à moins qu'elles soient nécessaires pour répondre aux risques que pose cette dernière. Comme l'a expliqué Cheryl Webster dans son rapport pour le ministère de la Justice, « des conditions comme l'obligation de “fréquenter l'école” ou “de suivre une thérapie ou un traitement” peuvent s'inscrire dans l'atteinte d'objectifs sociaux plus vastes, mais elles n'ont [généralement] aucun lien avec l'infraction alléguée » (rapport Webster, p. 11). Il peut y avoir des exceptions, comme dans la décision *S.K.*, où la juge a conclu que la condition de [TRADUCTION] « fréquenter l'école » était suffisamment liée aux risques que posait la personne prévenue. Toutefois, même si une condition semble suffisamment liée aux risques que pose la personne prévenue, la question est aussi de savoir si la condition est proportionnelle : l'imposition de telles conditions a pour conséquence que la personne prévenue pourrait être déclarée coupable d'une infraction criminelle pour avoir manqué une journée d'école.

[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

[94] Troisièmement, la condition de [TRADUCTION] « ne pas troubler l'ordre public et avoir une bonne conduite » est obligatoire pour les ordonnances de probation, les ordonnances de sursis et les engagements à ne pas troubler l'ordre public, mais pas pour une mise en liberté sous caution (*S.K.*,

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 (QL) (Sup. Ct.), at paras. 18-28). 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).

par. 39). Il faudrait sérieusement l’examiner lorsqu’elle est proposée comme condition de mise en liberté sous caution. Cette condition générique est habituellement considérée comme une interdiction pour la personne prévenue de troubler la paix ou de violer toute loi fédérale ou provinciale ou tout règlement municipal (*R. c. Grey* (1993), 19 C.R. (4th) 363 (C.J. Ont.); *R. c. D.R.* (1999), 178 Nfld. & P.E.I.R. 200 (C.A. T.-N.); *R. c. Gosai*, [2002] O.J. No. 359 (QL) (C.S.), par. 18-28). Comme un manquement à une condition de mise en liberté sous caution constitue une infraction criminelle, cette condition [TRA-
DUCTION] « ajoute un nouveau niveau de sanction, pas seulement à l’égard d’un comportement criminel, mais aussi de toute violation de règlement, pouvant aller du non-respect de la limite de vitesse sur les biens fonciers fédéraux, comme les aéroports, au non-respect d’un règlement municipal sur le port de la laisse pour les chiens » et « n’est pas compatible avec la présomption d’innocence » qui s’applique habituellement lorsque la personne prévenue est en liberté sous caution (*R. c. Doncaster*, 2013 NSSC 328, 335 N.S.R. (2d) 331, par. 16-17; voir aussi *R. c. A.D.B.*, 2009 SKPC 120, 345 Sask. R. 134, par. 17 et 20; Trotter, par. 6-41 à 6-44). Étant donné la large portée de la condition, il est difficile de voir en quoi l’imposition à la personne prévenue d’une interdiction additionnelle pour la violation de toute règle de droit substantiel, que ce soit une contravention routière ou l’omission d’enregistrer un chien, pourrait être raisonnable, nécessaire, le moins sévère possible et suffisamment liée au risque de fuite de la personne prévenue, au risque pour la sécurité ou la protection du public ou au risque que la confiance du public envers l’administration de la justice soit minée (voir *S.K.*, par. 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

[95] Quatrièmement, les conditions larges qui exigent que la personne prévenue suive les règles de la maison ou y soit assujettie, ou qu’elle suive les instructions légitimes du personnel dans une résidence, peuvent poser problème, particulièrement pour les jeunes personnes prévenues. Dans *J.A.D.*, la Cour du Banc de la Reine de la Saskatchewan a conclu qu’une telle condition était nulle pour cause d’imprécision et délégation irrégulière de la fonction judiciaire (par. 11). Ces types de conditions empêchent la personne prévenue de comprendre ce qu’elle doit faire

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.

pour éviter de manquer à la condition, étant donné que les règles de la maison peuvent changer au gré de la personne qui les fixe (*K. (R.)*, par. 19-22). Imposer une condition qui délègue la création de règles de mise en liberté sous caution à une caution (ou à quiconque) contourne l'obligation de l'entité judiciaire de respecter les principes de retenue et de révision et d'évaluer si les règles de la maison répondent véritablement aux risques que pose la personne prévenue.

[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.

[96] Cinquièmement, certaines conditions peuvent avoir des conséquences malencontreuses ou des incidences négatives non voulues sur la sécurité de la personne prévenue ou du public. Ces effets non voulus mettent en évidence la nécessité de réviser attentivement et rigoureusement chacune des conditions de mise en liberté sous caution. Par exemple, une condition qui empêche la personne prévenue d'utiliser un téléphone cellulaire peut l'empêcher d'appeler à l'aide en cas d'urgence ou faire obstacle à sa capacité de travailler ou de s'occuper de personnes à charge (*Prychitko*, par. 19-25; Trotter, p. 6-44 à 6-45). D'autres conditions peuvent entraver l'administration de la justice en punissant des personnes prévenues qui sont par ailleurs victimes d'actes criminels. Dans la décision *Omeasoo*, la police a répondu à une plainte de violence familiale, dont M^{me} Omeasoo était la victime. Cependant, cette dernière a été arrêtée et inculpée d'omission de se conformer à une condition parce qu'elle avait consommé de l'alcool, ce qui était contraire à sa condition de mise en liberté sous caution (par. 6). Elle a donc été accusée de l'infraction d'être en état d'ébriété alors qu'elle était victime d'une agression. Certes, on espère que le pouvoir discrétionnaire de la poursuite aide à empêcher ce type de conséquences non voulues, mais de telles conditions peuvent décourager la dénonciation de crimes graves et augmenter considérablement la vulnérabilité de certaines personnes.

[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

[97] Mentionnons comme autres exemples de conditions ayant des conséquences malencontreuses les conditions relatives à une « zone rouge », qui empêchent la personne prévenue d'entrer dans une région géographique précise, et celles relatives à l'« interdiction de posséder des accessoires facilitant la consommation de drogues ». De telles conditions

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.

peuvent avoir des incidences particulièrement importantes sur les personnes prévenues marginalisées. Les conditions relatives à une « zone rouge » peuvent empêcher les gens d’avoir accès à des services essentiels et à leur réseau de soutien (Sylvestre, Blomley et Bellot). Les interdictions de posséder des accessoires facilitant la consommation de drogues peuvent encourager le partage de seringues si les personnes prévenues ne peuvent pas avoir sur elles leurs propres seringues propres (rapport Pivot, p. 89-95). En outre, les lignes directrices sur les conditions de mise en liberté sous caution imposées aux personnes prévenues ayant des troubles liés à la consommation d’une substance, publiées en 2019 par le Service des poursuites pénales du Canada, reconnaissent que ces types de conditions « ne devraient pas, en règle générale, être imposées » (*Guide du Service des poursuites pénales du Canada*, Partie III, c. 19, « Conditions de libération provisoire visant les surdoses d’opioïdes » (mis à jour le 1^{er} avril 2019) (en ligne)). De façon générale, les incidences de ces conditions font ressortir la nécessité que toute condition de mise en liberté proposée soit attentivement examinée et ne vise qu’à répondre au risque de fuite de la personne prévenue et à protéger la sécurité du public ou la confiance de celui-ci envers l’administration de la justice. Autrement, la condition pourrait avoir des conséquences négatives non voulues sur la personne prévenue et le 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 (QL), at para. 14; *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

[98] Enfin, je note que certaines conditions de mise en liberté sous caution peuvent avoir une incidence sur d’autres droits que garantit la *Charte* à la personne prévenue outre son droit d’être présumée innocente, son droit à la liberté (art. 7) et son droit à une mise en liberté assortie d’un cautionnement raisonnable (al. 11e)). Les principes de retenue et de révision exigent que les entités judiciaires examinent rigoureusement ces conditions et établissent si elles contreviennent à la *Charte*. Par exemple, certaines personnes prévenues font l’objet de conditions de mise en liberté sous caution aux termes desquelles elles sont tenues de se soumettre, sur demande et sans qu’il y ait de mandat, à des fouilles sur leur personne ainsi qu’à des fouilles de leur véhicule, de leur téléphone ou de leur résidence (voir, p. ex., *R. c. Delacruz*, 2015 MBQB 32; *R. c. Tithi*, 2019 SKQB 299, [2019] S.J. No. 299 (QL), par. 14; *R. c.*

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.

Sabados, 2015 SKCA 74, 327 C.C.C. (3d) 107). Comme l’a mentionné la Cour dans l’arrêt *Shoker*, dans le contexte des conditions de probation, les juges n’ont pas compétence pour imposer une condition qui assujettit la personne accusée à une norme inférieure en matière de fouilles et de perquisitions à celle qui serait autrement requise, à moins que le Parlement ne crée un régime législatif conforme à la *Charte* pour les fouilles et les perquisitions ou que la personne accusée ne consente à la fouille ou à la perquisition (par. 22 et 25; voir aussi *R. c. Goddard*, 2019 BCCA 164, 37 C.C.C. (3d) 44, par. 53; *R. c. Nowazek*, 2018 YKCA 12, 366 C.C.C. (3d) 389, par. 128). Ces types de conditions constituent en fait des mécanismes d’application de la loi qui « facilit[ent] l’obtention d’éléments de preuve », « ne permettent pas simplement de surveiller le comportement [de la personne prévenue] » et ne sont pas liés au risque que pose la personne prévenue aux termes du par. 515(10) (*Shoker*, par. 22). Comme de telles conditions ne relèvent pas des conditions de mise en liberté sous caution énumérées à l’art. 515 et qu’il n’existe pas non plus de régime établi par le Parlement pour les fouilles et perquisitions, elles sont suspectes sur le plan constitutionnel.

[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 (QL), at paras. 41-47; *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.

[99] D’autres conditions peuvent aussi avoir une incidence sur la liberté d’expression ou la liberté d’association de la personne prévenue (voir, p. ex., *R. c. Singh*, 2011 ONSC 717, [2011] O.J. No. 6389 (QL), par. 41-47; *Manseau*, p. 10; *Clarke*). Il convient d’évaluer rigoureusement de telles conditions restreignant d’autres droits garantis par la *Charte* pour établir si cette restriction est justifiée et proportionnelle au risque que pose la personne prévenue. Il ne faut jamais oublier qu’en assortissant la mise en liberté sous caution d’une telle condition, l’entité judiciaire criminalise l’exercice par la personne prévenue des droits que lui garantit la *Charte* à un moment où cette dernière est présumée innocente avant la tenue du procès.

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

C. Responsabilités

[100] Toutes les personnes jouant un rôle dans le système de mise en liberté sous caution sont tenues d’agir avec retenue et d’examiner attentivement les conditions de mise en liberté sous caution qu’elles

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.

proposent ou imposent. La retenue est requise par la loi, elle constitue la pierre angulaire du principe de l'échelle et est étayée par l'exigence que toute condition de mise en liberté sous caution soit nécessaire, raisonnable, la moins sévère possible dans les circonstances et suffisamment liée aux facteurs de risque précis que prévoit le par. 515(10), soit le risque que la personne prévenue ne se présente pas au tribunal au moment exigé, le risque pour la protection ou la sécurité du public ou le risque de perte de confiance du public envers l'administration de la justice (Trotter, p. 1-59; *Antic*, par. 67j); voir aussi l'art. 493.1 du *Code* dans sa version en vigueur le 18 décembre 2019). L'établissement des conditions de mise en liberté sous caution est un processus individualisé dans le cadre duquel des conditions normalisées, systématiques ou types n'ont pas leur place, peu importe que la mise en liberté sous caution soit contestée ou qu'elle résulte d'un consentement. Le principe de la révision signifie que quiconque joue un rôle dans l'élaboration des conditions de la mise en liberté sous caution devrait prendre le temps de se demander si la condition pertinente satisfait à toutes les exigences constitutionnelles, législatives et jurisprudentielles.

[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)

[101] Quiconque participe au système de mise en liberté sous caution a aussi le devoir de respecter la présomption d'innocence et le droit à une mise en liberté assortie d'un cautionnement raisonnable (voir Berger et Stribopolous, p. 323-324). En effet, [TRANSDUCTION] « l'imposition automatique de conditions de mise en liberté sous caution qui ne peuvent se rattacher rationnellement à un besoin lié à la mise en liberté sous caution n'est pas compatible avec la présomption d'innocence » (*R. c. A.D.M.*, 2017 NSPC 77, par. 29 (CanLII), citant l'arrêt *Antic*). La Couronne, la défense et les tribunaux ont l'obligation de respecter les principes de la retenue et de la révision. Sauf dans des situations où le fardeau de la preuve est inversé, la Couronne devrait comprendre, et si on le lui demande, être en mesure d'expliquer, pourquoi les conditions proposées de mise en liberté sous caution sont nécessaires, raisonnables, les moins sévères possible et suffisamment liées aux risques prévus au par. 515(10). Cette responsabilité de retenue qui incombe à la poursuite lorsqu'elle envisage des conditions de mise en liberté sous caution

(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.

se dégage des deux documents de politique des juristes de la Couronne que nous ont présentés les parties intervenantes (Ontario, ministère du Procureur général, *Directives de l'Ontario sur les poursuites*, « Mise en liberté provisoire par voie judiciaire (cautionnement) » (novembre 2017) (en ligne); et British Columbia Prosecution Service, *Crown Counsel Policy Manual*, « Bail — Adult » (avril 2019) (en ligne)). La défense devrait aussi être à l'affût des conditions de mise en liberté sous caution qui ne sont pas minimales, nécessaires, raisonnables, les moins sévères possible et suffisamment liées au risque que pose la personne prévenue, tant en cas de mise en liberté contestée que de mise en liberté avec consentement, particulièrement lorsque la personne cliente peut simplement être prête à consentir à des conditions excessives et trop générales pour obtenir une mise en liberté. Cela dit, il n'est pas inhabituel que la défense accepte une condition qui semble quelque peu sévère mais ne justifie pas la tenue d'une audience avec contestation, ce qui pourrait faire en sorte que la personne prévenue aurait à rester détenue quelques jours supplémentaires. Dans de tels cas, la défense peut aussi demander un examen de la condition après un laps de temps raisonnable et demander qu'elle soit modifiée.

[102] En dernier ressort, l'obligation de faire en sorte que les personnes prévenues soient libérées aux termes d'ordonnances de mise en liberté sous caution appropriées incombe aux entités judiciaires. Comme pour la fixation du montant des dépôts d'argent dans l'arrêt *Antic*, si une entité judiciaire ne comprend pas en quoi une condition est appropriée, « [l'entité judiciaire appelée] à fixer le cautionnement a l'obligation positive » de chercher à savoir si la condition suspecte de mise en liberté sous caution est nécessaire, raisonnable, le moins sévère possible et suffisamment liée aux risques que pose la personne prévenue (par. 56 et 67i)). Avant de transformer les conditions de mise en liberté sous caution en sources personnelles de responsabilité criminelle éventuelle, les entités judiciaires doivent exercer leur pouvoir discrétionnaire avec sérieux et examiner les conditions proposées pour s'assurer qu'elles sont ciblées, bien circonscrites et formulées de façon précise en vue de répondre aux risques que pose la personne prévenue.

[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

[103] Les entités judiciaires disposent d’outils adéquats pour faire en sorte que les ordonnances de mise en liberté sous caution soient généralement appropriées, mais aussi que les ressources judiciaires ne soient pas gaspillées. Elles peuvent et devraient remettre en question les conditions qui semblent inhabituelles ou excessives. Elles devraient aussi être à l’affût de tout signe laissant croire que des conditions sont imposées de façon routinière ou abusive.

[104] Ces obligations s’appliquent aussi aux mises en liberté avec consentement, qui appellent des considérations particulières. Il peut exister de nombreuses raisons impérieuses qui pousseraient une personne sous garde à « accepter » les restrictions proposées pour obtenir une libération, même si ces restrictions sont trop larges. En plus de l’aspiration universelle de l’être humain à la liberté, il y a le fait que les individus s’inquiètent des effets de la détention continue sur leur famille, leurs revenus, leur emploi et leur aptitude à conserver leur résidence et à avoir accès à des médicaments et aux services nécessaires, comme je l’ai déjà indiqué. Lorsqu’on leur présente une promesse de mise en liberté qui semble assortie « de conditions à prendre ou à laisser », bon nombre de personnes prévenues se contentent d’acquiescer pour éviter le maintien en détention ou une enquête sur le cautionnement avec contestation. C’est la raison pour laquelle des personnes alcooliques, qui savent pertinemment qu’elles ont déjà échoué à sortir de leur dépendance, consentiraient à une condition qui leur interdit de consommer de l’alcool. Ces facteurs, entre autres, exercent de la pression et ont contribué à une culture de consentement dans le cadre de laquelle des personnes prévenues, qui ne bénéficient pas de représentation juridique aux enquêtes sur le cautionnement, acceptent fréquemment d’être liées par des conditions qui ne sont ni nécessaires ni raisonnables, et qui pourraient même être inconstitutionnelles.

[105] On appliquera plus strictement les principes de l’échelle et de l’évaluation rigoureuse des conditions de mise en liberté sous caution en cas de contestation de celle-ci, mais les propositions conjointes doivent néanmoins reposer sur les critères applicables à ces conditions établis en fonction des droits garantis par la *Charte*, des dispositions

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 (QL), 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]

[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.

du *Code* et de la jurisprudence de la Cour (*Antic*, par. 44). Les entités judiciaires « ne devr[ai]ent pas systématiquement remettre en question les propositions conjointes » étant donné que les mises en liberté avec consentement demeurent une méthode efficace pour obtenir une mise en liberté dans le contexte où les tribunaux chargés des mises en liberté sous caution sont occupés (*Antic*, par. 68). Toutefois, l’on devrait aussi savoir que les entités judiciaires ont le pouvoir discrétionnaire de rejeter les propositions trop larges, et elles devraient garder à l’esprit les préoccupations relevées concernant les mises en liberté avec consentement. Dans *R. c. Singh*, 2018 ONSC 5336, [2018] O.J. No. 4757 (QL), le juge Hill a fait remarquer que, même depuis l’arrêt *Antic*, les parties ne semblent parfois pas être conscientes de l’existence de ce pouvoir discrétionnaire :

[TRADUCTION] Comme il ressort de certaines transcriptions d’audiences de justification, les parties agissent trop souvent comme si une mise en liberté sous caution obtenue « avec consentement » régit le résultat de la libération ou de la détention et que la signature du tribunal n’est qu’une formalité. Parfois, celles-ci vont jusqu’à manifester de l’hostilité pure et simple à l’endroit des juges de paix qui président l’audience et qui osent poser des questions, exiger plus d’information ou contester raisonnablement le bien-fondé de la proposition. Cette attitude est fondamentalement inappropriée. [par. 24]

[106] Je suis de cet avis. Les tribunaux chargés des mises en liberté sous caution sont effectivement très occupés, et les mises en liberté avec consentement peuvent favoriser l’efficacité, mais force est de constater que peu est réalisé en matière d’efficacité si la personne prévenue est libérée sous des conditions qu’elle n’est pas dans les faits en mesure de respecter, ce qui mène inévitablement à une utilisation accrue du temps et des ressources du tribunal en raison des demandes de révision ou de révocation des conditions de mise en liberté sous caution ou des accusations pour manquement qui y sont portées. Les entités judiciaires doivent donc agir avec prudence, en gardant à l’esprit les conséquences de l’imposition des conditions de mise en liberté sous caution, dans l’examen et l’approbation des ordonnances de mise en liberté sous caution obtenues avec consentement.

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:

D. *Conclusion sur la façon dont le par. 145(3) oriente l'imposition des conditions de mise en liberté sous caution*

[107] En conclusion, l'infraction prévue au par. 145(3) exige une *mens rea* subjective. Non seulement cette conclusion est compatible avec la présomption de faute subjective pour des crimes comme celui visé au par. 145(3), mais elle est aussi étayée par la place et l'objet de cette disposition au sein de l'ensemble du système de mise en liberté sous caution, par les graves conséquences qui découlent d'un manquement et par la façon dont la situation personnelle de la personne prévenue doit fonder l'établissement des conditions et la détermination de l'élément mental nécessaire à leur violation. Le fait de comprendre que le par. 145(3) vise à criminaliser une conduite associée à un risque, conduite qui est interdite dans les conditions de mise en liberté sous caution, donne des indications sur la mesure dans laquelle le bon fonctionnement de notre système de mise en liberté sous caution repose sur la retenue et la révision, afin que seules des conditions convenables soient imposées et que seules les omissions intentionnelles de se conformer à ces conditions fassent l'objet de poursuites.

VI. Éléments constitutifs de la *mens rea* subjective pour l'infraction prévue au par. 145(3)

[108] Ayant conclu qu'une *mens rea* subjective est requise pour l'infraction d'omission de se conformer à une condition, j'expliquerai maintenant ce que la Couronne doit établir pour prouver la *mens rea* subjective requise au par. 145(3).

[109] La *mens rea* subjective doit généralement être prouvée à l'égard de toutes les circonstances et conséquences qui font partie de l'*actus reus* de l'infraction (*Sault Ste. Marie*, p. 1309-1310; *Pappajohn c. La Reine*, [1980] 2 R.C.S. 120, p. 139, le juge Dickson, dissident, mais pas sur ce point). Par conséquent, la *mens rea* subjective de l'infraction prévue au par. 145(3) peut être établie lorsque la Couronne prouve les éléments suivants :

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 p. 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;

1. La personne prévenue connaissait les conditions de sa mise en liberté sous caution ou faisait preuve d’aveuglement volontaire à leur égard;
2. La personne prévenue a sciemment omis d’agir conformément aux conditions de sa mise en liberté sous caution, c’est-à-dire qu’elle connaissait les circonstances qui exigeaient qu’elle se conforme aux conditions de l’ordonnance dont elle faisait l’objet, ou qu’elle faisait preuve d’aveuglement volontaire face aux circonstances, et qu’elle a omis de se conformer aux conditions malgré le fait qu’elle les connaissait; ou

La personne prévenue a par insouciance omis d’agir conformément aux conditions de sa mise en liberté sous caution, c’est-à-dire qu’elle était consciente qu’il y avait un risque important et injustifié que sa conduite ne respecte pas les conditions de sa mise en liberté sous caution mais qu’elle n’a pas cessé d’agir de la sorte.

[110] Ces éléments concordent avec la *mens rea* requise dans les ressorts qui reconnaissent la *mens rea* subjective pour les infractions d’omission de se conformer à des conditions en exigeant que la Couronne démontre hors de tout doute raisonnable que la personne prévenue a manqué sciemment ou par insouciance à la condition (*Legere*, p. 100; *Custance*, par. 10).

[111] La jurisprudence est toutefois quelque peu partagée sur le premier élément : la mesure dans laquelle la personne prévenue doit connaître les conditions de sa mise en liberté sous caution, et donc savoir qu’elle manque à une condition. Certaines décisions suivent l’arrêt *Custance*, où la Cour d’appel du Manitoba a simplement exigé que la personne prévenue ait [TRADUCTION] « sciemment et volontairement accompli ou omis d’accomplir un acte ou de commettre une omission qui constitue [*l’actus reus*] de l’infraction », ce qui semble signifier que la Couronne a uniquement besoin de prouver que la personne prévenue a intentionnellement commis l’acte ou l’omission, mais n’a pas besoin de

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 J.J.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 (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

démontrer que la personne prévenue connaissait les conditions auxquelles elle était assujettie au moment de la commission de l'acte ou de l'omission (par. 10 et 12; voir, p. ex., *Al Khatib*, par. 27; *Companion*, par. 48; *R. c. Edgar*, 2019 QCCQ 1328, par. 109 (CanLII); *L.T.W.*, par. 22).

[112] Je préfère l'autre approche. La personne prévenue doit connaître les conditions auxquelles elle est tenue ou faire preuve d'aveuglement volontaire à leur égard pour pouvoir être déclarée coupable. Elle n'a toutefois pas besoin de connaître les conséquences juridiques ou la portée des conditions (voir, p. ex., *R. c. Smith*, 2008 ONCA 101, 233 O.A.C. 145 (les juges Doherty, Borins et Lang, *per curiam*); *R. c. Brown*, 2008 ABPC 128, 445 A.R. 211; *R. c. Chen*, 2006 MBQB 250, 209 Man. R. (2d) 181, par. 36; *Ritter*, par. 11; *R. c. Withworth*, 2013 ONSC 7413, 59 M.V.R. (6th) 160, par. 13 et 16; *R. c. Syblis*, 2015 ONCJ 73, par. 18 et 25 (CanLII)). Dans plusieurs affaires portant sur des omissions de comparaître, les tribunaux ont aussi exigé que la personne prévenue connaisse la date de son audience de manière à ce que le véritable oubli de la part de la personne prévenue puisse écarter la *mens rea* (*Josephie*, par. 30-31; *Loutitt*, par. 15 et 22-23; *R. c. Blazevic* (1997), 31 O.T.C. 10 (C.J.); *Mullin*, par. 6; *R. c. Hutchinson* (1994), 160 A.R. 58; *R. c. Nedlin*, 2005 NWTTC 11, 32 C.R. (6th) 361, par. 62). Je souscris à la position de la Cour d'appel de l'Ontario dans l'arrêt *Smith*, où elle a jugé que le fait que la personne prévenue avait mal entendu les modalités de son engagement et omis d'examiner ces modalités signifiait qu'elle n'avait pas sciemment manqué à sa condition ni qu'elle avait fait preuve d'aveuglement volontaire à son égard. La personne prévenue doit connaître les conditions de sa mise en liberté pour avoir la *mens rea* de l'infraction d'omission de se conformer à une condition.

[113] L'aveuglement volontaire remplace la connaissance des faits par la personne prévenue chaque fois que la connaissance est un élément de la *mens rea* et que la personne prévenue reste délibérément dans l'ignorance (*R. c. Briscoe*, 2010 CSC 13, [2010] 1 R.C.S. 411, par. 21 et 24). Pour qu'un

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

tribunal conclue que la personne prévenue a fait preuve d'aveuglement volontaire dans le contexte de l'infraction d'omission de se conformer à une condition, celle-ci doit savoir qu'elle devait se renseigner et refuser délibérément de faire les démarches nécessaires pour confirmer la nature exacte de la condition de mise en liberté sous caution à laquelle elle était assujettie (*Smith*, par. 5; *Withworth*, par. 13).

[114] Exiger que la personne prévenue connaisse les conditions de sa mise en liberté sous caution, ou qu'elle fasse preuve d'aveuglement volontaire à leur égard, ne veut pas dire qu'elle doit connaître la loi, ce qui serait contraire à la règle voulant que l'ignorance de la loi n'excuse pas la perpétration de l'infraction (art. 19 du *Code*). Bien que la *mens rea* subjective pour l'infraction prévue au par. 145(3) signifie que la personne prévenue qui a une croyance sincère mais erronée quant aux conditions de sa mise en liberté sous caution ne peut être tenue responsable, cela ne veut pas dire que la personne prévenue doit connaître et comprendre son obligation juridique de respecter ces conditions. L'oubli véritable d'une condition pourrait constituer une erreur de fait qui écarterait la *mens rea*, alors qu'une erreur au sujet de la portée ou de l'effet juridique d'une condition constitue une erreur de droit qui n'excuserait pas le non-respect de la condition (voir *Withworth*, par. 16-19, le juge Trotter). Dans l'arrêt *Custance*, par exemple, le prévenu savait qu'il devait rester dans un appartement donné mais comme il ne pouvait y entrer, il a choisi de dormir dans son automobile, pensant qu'il respecterait ainsi la condition qui lui avait été imposée. Le prévenu était au courant de la condition de sa mise en liberté sous caution, mais il s'est trompé sur ce que la loi exigeait pour le respect de cette condition. Il s'agissait d'une erreur de droit qui n'écarterait pas la *mens rea*.

[115] La conclusion selon laquelle la personne prévenue doit connaître les conditions de sa mise en liberté sous caution, ou faire preuve d'aveuglement volontaire à leur égard, pour avoir la *mens rea* qu'exige le par. 145(3) est aussi compatible avec le raisonnement de la juge Wilson dans l'arrêt *Docherty*, qui a souligné l'importance de la connaissance pour conclure que la personne prévenue a manqué à une

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

condition. Dans cette affaire, la juge a conclu que pour prouver qu'il y a eu violation de l'ordonnance de probation, il faut démontrer que la personne accusée savait qu'elle était soumise à l'ordonnance de probation et que celle-ci contenait une condition à laquelle elle dérogerait si elle adoptait une certaine conduite, et qu'elle est quand même allée de l'avant et a adopté la conduite (p. 957-958). Le raisonnement est utile même si la condition violée dont il était question dans l'arrêt *Docherty* exigeait que la personne accusée sache qu'elle commettait une infraction criminelle, ce qui signifiait qu'elle était au courant des conséquences juridiques de ses actes (p. 960-961). À l'inverse, le par. 145(3) n'exige pas que la personne prévenue soit au courant des conséquences juridiques ou de la portée de la condition à laquelle elle est assujettie, mais elle doit savoir qu'elle est liée par la condition. À l'instar de l'infraction de violation d'une ordonnance de probation, le par. 145(3) a pour objet de punir et de dissuader l'omission de se conformer aux conditions de mise en liberté sous caution. Comme je l'ai mentionné précédemment, la connaissance et la dissuasion sont liées : la personne prévenue ne sera dissuadée de manquer à ses conditions que si elle sait qu'elle fait quelque chose de mal, c'est-à-dire qu'elle doit savoir qu'elle est assujettie à une condition particulière de mise en liberté sous caution (*Docherty*, p. 951-952).

[116] Le deuxième élément constitutif de la *mens rea* de l'infraction prévue au par. 145(3) peut être prouvé en démontrant que la personne prévenue agissait sciemment ou par insouciance lorsqu'elle a manqué à sa condition. La connaissance dans ce deuxième élément signifie que la personne prévenue doit, au moment du manquement, être consciente des circonstances factuelles qui exigent qu'elle agisse (ou s'abstienne d'agir) pour se conformer aux conditions, ou fasse preuve d'aveuglement volontaire à leur égard (p. ex., dans l'affaire qui nous occupe, M. Zora devait savoir que la police se trouvait à sa porte).

[117] Ce deuxième élément peut aussi être prouvé en démontrant que la personne prévenue a fait preuve d'insouciance. Lorsque, comme en l'espèce, le texte ou la nature de l'infraction n'indique pas d'exigence

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

plus élevée quant à un caractère « délibéré » ou « intentionnel », l'insouciance est généralement comprise dans la *mens rea* subjective (voir *Sault Ste. Marie*, p. 1309-1310; *R. c. Buzzanga* (1979), 25 O.R. (2d) 705 (C.A.), p. 71). L'insouciance exige que la personne prévenue soit consciente du risque qu'elle omette de se conformer à sa condition et agisse malgré ce risque (*Josephie*, par. 30; *Sansregret c. La Reine*, [1985] 1 R.C.S. 570, p. 584). La connaissance du risque est essentielle pour qu'il y ait insouciance. Par conséquent, la personne prévenue doit tout de même connaître les conditions de sa mise en liberté sous caution pour être consciente de tout risque de manquement. Elle doit aussi être consciente du risque que se présentent les circonstances factuelles qui exigent qu'elle agisse (ou s'abstienne d'agir) pour se conformer aux conditions de sa mise en liberté sous caution et elle doit continuer à avoir cette conduite malgré le risque. L'insouciance ne peut, et ne devrait pas en raison d'une mauvaise application, être assimilée à la négligence. L'insouciance n'a rien à voir avec la question de savoir si la personne prévenue *aurait dû* voir le risque en question, mais porte plutôt sur la question de savoir si la personne prévenue a subjectivement vu le risque et a continué à agir sans en tenir compte.

[118] Étant donné que l'application du par. 145(3) peut criminaliser un comportement quotidien par ailleurs légal, je suis d'avis que la connaissance de *n'importe quel* risque de manquement ne suffit pas pour établir qu'une personne prévenue a fait preuve d'insouciance. La personne prévenue doit plutôt être consciente que le fait qu'elle continue d'avoir cette conduite crée un *risque injustifié et important* de manquement aux conditions de sa mise en liberté sous caution. La Cour a déjà adopté cette norme de risque pour décrire l'insouciance concernant certaines infractions (voir *R. c. Hamilton*, 2005 CSC 47, [2005] 2 R.C.S. 432, par. 27-29; *Leary c. La Reine*, [1978] 1 R.C.S. 29, p. 35 (le juge Dickson, dissident, mais pas sur ce point)). Le risque ne peut être invraisemblable, négligeable ou minime. L'étendue du risque, ainsi que la nature du préjudice, la valeur sociale se rattachant au risque et la facilité avec laquelle le risque pourrait être évité sont toutes des considérations pertinentes (Manning et Sankoff,

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

p. 229). Même si les juges du procès évalueront si un risque est injustifié en fonction de ces considérations, puisque l'insouciance est une norme subjective, l'accent doit être mis sur la question de savoir si la personne prévenue avait conscience du risque important qu'elle prenait et de tout facteur faisant en sorte que le risque n'était pas justifié.

[119] Il est justifié d'exiger cette norme de risque pour l'insouciance parce que l'infraction peut criminaliser des activités de tous les jours et avoir des conséquences imprévues sur la vie quotidienne des gens. Par exemple, dans le contexte d'une condition exigeant que la personne prévenue réponde à la porte si la police se présente après son couvre-feu, la personne prévenue n'aurait pas fait preuve d'insouciance si elle avait pris le risque minime et justifié de prendre une courte douche après son couvre-feu, alors qu'elle aurait fait preuve d'insouciance si elle avait débranché la sonnette de sa porte ou porté des bouchons d'oreille dans la maison. Comme l'a énoncé la Cour dans l'arrêt *Hamilton* aux par. 32-33, il ne faut pas interpréter les présents motifs comme modifiant les principes généraux relatifs à l'insouciance en tant qu'élément fautif, exposés dans l'arrêt *Sansregret*, car ma description de l'insouciance se rapporte précisément à l'infraction prévue au par. 145(3).

[120] Enfin, je ne peux accepter l'argument selon lequel l'exigence d'une faute subjective rendrait trop difficile pour la Couronne de prouver que la personne prévenue a omis sciemment ou par insouciance de se conformer aux conditions de sa mise en liberté sous caution. Si la Couronne choisit de porter une accusation criminelle en vertu du par. 145(3), alors qu'il est aussi possible de faire modifier ou révoquer la mise en liberté sous caution, c'est parce qu'il existe une possibilité raisonnable d'obtenir une déclaration de culpabilité compte tenu d'une pleine appréciation de tous les éléments constitutifs de l'infraction. De nombreux crimes sont assortis d'une norme de faute subjective et il existe des façons reconnues de présenter une preuve suffisante pour convaincre les tribunaux hors de tout doute raisonnable que la personne prévenue a agi sciemment ou par insouciance. Les tribunaux peuvent inférer qu'une faute subjective

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.

a été commise pour ce qui est des accusations pour omission de se conformer à une condition, que la personne prévenue décide ou non de témoigner. Les juges des faits, après examen de l’ensemble de la preuve, peuvent être en mesure de conclure hors de tout doute raisonnable que la personne prévenue avait l’état d’esprit requis pour qu’il y ait déclaration de culpabilité, sur le fondement d’une inférence conforme au bon sens que les personnes « veulent les conséquences naturelles et probables de leurs actes » (*R. c. Seymour*, [1996] 2 R.C.S. 252, par. 19 et 23; *Docherty*, p. 958; *Loutitt*, par. 18). Comme l’a fait remarquer l’intervenant le procureur général de l’Ontario, l’exigence de la faute subjective n’a pas empêché que des déclarations de culpabilité fondées sur le par. 145(3) soient prononcées en 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).

[121] La préoccupation de la Couronne, selon laquelle les personnes prévenues peuvent simplement dire qu’elles ont oublié leurs conditions de mise en liberté sous caution pour échapper à la responsabilité criminelle découlant d’un manquement à ces conditions, est prise en compte parce que les juges [TRADUCTION] « agiront sans aucun doute judicieusement dans leur évaluation de l’authenticité des prétentions concernant les oublis des dates de comparution et des conditions de mise en liberté sous caution. Ce n’est pas parce qu’on invoque l’oubli qu’il faut accueillir cette affirmation » (*Withworth*, par. 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).

[122] En conclusion, comme l’ont accepté l’intimée et le PGCB, [TRADUCTION] « [l]e ciel ne nous tombera pas sur la tête si la Couronne doit prouver un élément mental » (*Loutitt*, par. 17; transcription, p. 64; m. interv. (PGCB), par. 23).

VII. A New Trial Should Be Ordered

VII. Il y a lieu d’ordonner la tenue d’un nouveau procès

[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).

[123] Je suis d’accord avec M. Zora qu’il convient d’ordonner la tenue d’un nouveau procès en raison de l’erreur de droit commise par les tribunaux d’instance inférieure, qui ont appliqué une norme de faute objective plutôt que subjective pour l’infraction prévue au par. 145(3).

[124] This is not a case where the curative proviso allows this Court to dismiss an appeal under

[124] Il ne s’agit pas en l’espèce d’une situation où la disposition réparatrice permet à la Cour de rejeter

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.

l’appel en vertu du sous-al. 686(1)(b)(iii) parce qu’il n’y a eu « aucun tort important ou aucune erreur judiciaire grave » malgré l’erreur de droit. Il est approprié de recourir à la disposition réparatrice uniquement lorsque « l’erreur est inoffensive ou négligeable » ou que « la preuve est à ce point accablante que, même si l’erreur n’est pas sans importance, les juges des faits concluraient forcément à la culpabilité » (*R. c. Sekhon*, 2014 CSC 15, [2014] 1 R.C.S. 272, par. 53). La *mens rea* est un élément essentiel des infractions criminelles et le fait d’arrêter la mauvaise norme de faute ne constitue pas une erreur « inoffensive ou négligeable ». La *mens rea* subjective aurait obligé le juge du procès à tenir compte de l’état d’esprit de M. Zora, ce qui aurait de toute évidence pu avoir une incidence sur le verdict.

[125] De plus, la preuve n’est pas à ce point accablante qu’une déclaration de culpabilité est inévitable. Comme il s’est concentré sur ce qu’une personne raisonnable aurait fait dans les circonstances, le juge du procès n’a pas eu besoin de tirer des conclusions de fait claires ou des conclusions définitives quant à la crédibilité qui auraient permis à la Cour d’évaluer ou d’inférer la connaissance et l’état d’esprit de M. Zora. Si elles sont établies au procès, les circonstances propres à M. Zora, notamment la question de savoir s’il dormait profondément en raison de son sevrage de l’héroïne et de son traitement à la méthadone, seraient pertinentes pour déterminer son état d’esprit. Comme il a été expliqué précédemment, l’insouciance requiert la connaissance du risque important et injustifié associé aux circonstances qui mènent à un manquement interdit. Sans une conclusion claire que M. Zora était conscient du risque qu’il pourrait ne pas entendre la police à sa porte, ainsi que d’autres conclusions de fait nécessaires pour établir si le risque était important et injustifié, la Cour ne peut conclure qu’il a fait preuve d’insouciance en ne répondant pas à la porte.

[126] En raison des déclarations négatives du juge du procès concernant la crédibilité des témoins de la défense, un acquittement ne serait pas non plus approprié. Un nouveau procès est nécessaire pour déterminer si M. Zora a omis sciemment ou par insouciance de se conformer à ses 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.

Solicitors for the appellant: Marion & Runyon, Criminal Lawyers, Campbell River; Michael Sobkin, Ottawa.

Solicitor for the respondent: Public Prosecution Service of Canada, Vancouver.

Solicitor for the intervener the Attorney General of Ontario: Attorney General of Ontario, Toronto.

Solicitor for the intervener the Attorney General of British Columbia: Attorney General of British Columbia, Vancouver.

Solicitors for the intervener the Criminal Lawyers' Association of Ontario: Henein Hutchison, Toronto.

Solicitors for the intervener the Vancouver Area Network of Drug Users: Gratl & Company, Vancouver.

Solicitors for the intervener the British Columbia Civil Liberties Association: Blake, Cassels & Graydon, Vancouver.

Solicitors for the intervener the Canadian Civil Liberties Association: Paliare Roland Rosenberg Rothstein, Toronto.

Solicitors for the intervener the Independent Criminal Defence Advocacy Society: Peck and Company, Vancouver.

VIII. Conclusion

[127] Par conséquent, une faute subjective est nécessaire pour qu'il y ait déclaration de culpabilité en vertu du par. 145(3) du *Code*. Je suis d'avis d'accueillir le pourvoi, d'annuler les déclarations de culpabilité de M. Zora et d'ordonner la tenue d'un nouveau procès sur les deux chefs relatifs à l'omission de répondre à la porte.

Pourvoi accueilli.

Procureurs de l'appelant : Marion & Runyon, Criminal Lawyers, Campbell River; Michael Sobkin, Ottawa.

Procureur de l'intimée : Public Prosecution Service of Canada, Vancouver.

Procureur de l'intervenant le procureur général de l'Ontario : Procureur général de l'Ontario, Toronto.

Procureur de l'intervenant le procureur général de la Colombie-Britannique : Procureur général de la Colombie-Britannique, Vancouver.

Procureurs de l'intervenante Criminal Lawyers' Association of Ontario : Henein Hutchison, Toronto.

Procureurs de l'intervenant Vancouver Area Network of Drug Users : Gratl & Company, Vancouver.

Procureurs de l'intervenante British Columbia Civil Liberties Association : Blake, Cassels & Graydon, Vancouver.

Procureurs de l'intervenante l'Association canadienne des libertés civiles : Paliare Roland Rosenberg Rothstein, Toronto.

Procureurs de l'intervenante Independent Criminal Defence Advocacy Society : Peck and Company, Vancouver.

Solicitors for the intervener the Pivot Legal Society: David N. Fai, Law Corporation, North Vancouver; Pivot Legal Society, Vancouver.

Solicitors for the intervener Association québécoise des avocats et avocates de la défense: Desrosiers, Joncas, Nouraie, Massicotte, Montréal.

Procureurs de l'intervenante Pivot Legal Society : David N. Fai, Law Corporation, North Vancouver; Pivot Legal Society, Vancouver.

Procureurs de l'intervenante l'Association québécoise des avocats et avocates de la défense : Desrosiers, Joncas, Nouraie, Massicotte, Montréal.

Tab 11:
R. v. R.E.M,
2008 SCC 51

Her Majesty The Queen *Appellant*

v.

R.E.M. *Respondent*

and

**Attorney General of Ontario and Attorney
General of Alberta** *Interveners*

INDEXED AS: R. v. R.E.M.

Neutral citation: 2008 SCC 51.

File No.: 32038.

2008: May 16; 2008: October 2.

Present: McLachlin C.J. and Binnie, LeBel, Fish,
Abella, Charron and Rothstein JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR
BRITISH COLUMBIA

*Criminal law — Trial — Judgments — Reasons for
judgment — Accused convicted of three offences relating
to sexual assault — Whether judge's reasons on cred-
ibility of witnesses in criminal trial sufficient.*

The complainant testified to 11 incidents of sexual assault by the accused over a period of years when she was between the ages of 9 and 17. The accused testified. He admitted to having sexual intercourse with the complainant, but claimed that the relationship only became sexual after she was 15 and that the intercourse was consensual. The age for minor consent at the time was 14.

The trial judge found the complainant to be a credible witness and accepted most of her evidence, while rejecting some portions that had been contradicted by other evidence. He discussed the reasons for these conclusions in some detail, noting that the complainant was a child at the time of most of the incidents, and that they had occurred a long time before. Some errors in her evidence were understandable, he concluded. The trial judge largely disbelieved the accused's evidence, although he found that on some points, it was not challenged. Again he gave reasons, although less extensive than he had in the case of the complainant's evidence. In the end, the trial judge convicted the accused on three counts.

Sa Majesté la Reine *Appelante*

c.

R.E.M. *Intimé*

et

**Procureur général de l'Ontario et procureur
général de l'Alberta** *Intervenants*

RÉPERTORIÉ : R. c. R.E.M.

Référence neutre : 2008 CSC 51.

N^o du greffe : 32038.

2008 : 16 mai; 2008 : 2 octobre.

Présents : La juge en chef McLachlin et les juges Binnie,
LeBel, Fish, Abella, Charron et Rothstein.

EN APPEL DE LA COUR D'APPEL DE LA
COLOMBIE-BRITANNIQUE

*Droit criminel — Procès — Jugements — Motifs —
Accusé déclaré coupable de trois infractions d'ordre
sexuel — Les motifs du juge sur la crédibilité des témoins
dans le procès criminel étaient-ils suffisants?*

La plaignante a témoigné relativement à 11 incidents répartis sur de nombreuses années, où l'accusé l'aurait agressée sexuellement alors qu'elle avait entre 9 et 17 ans. L'accusé a témoigné. Il a reconnu avoir eu des rapports sexuels avec la plaignante, mais il a soutenu qu'elle avait 15 ans lorsque leur relation a pris une tournure sexuelle et qu'il s'agissait de rapports consensuels. L'âge du consentement était alors fixé à 14 ans.

Le juge du procès a estimé que la plaignante était un témoin crédible et il a retenu la plupart de son témoignage, en rejetant néanmoins certaines parties contredites par d'autres éléments de preuve. Il a exposé de façon assez détaillée les motifs de ces conclusions, faisant observer que la plaignante était encore une enfant au moment de la plupart des incidents, survenus longtemps auparavant. Il était compréhensible, a-t-il conclu, que des erreurs se soient glissées dans son témoignage. Le juge du procès n'a guère cru le témoignage de l'accusé, bien qu'il ait conclu, à certains égards, qu'il n'était pas mis en doute. Encore une fois, il a exprimé des motifs, bien que moins détaillés que ses motifs concernant le témoignage de la plaignante. Le juge du procès a finalement déclaré l'accusé coupable de trois chefs d'accusation.

The Court of Appeal set aside the convictions on two of the three counts. It found the trial judge's reasons to be deficient on the grounds that the trial judge: (i) did not clearly explain which of the offences were proved by which of the 11 incidents; (ii) failed to mention some of the accused's evidence; (iii) failed to make general comments about the accused's evidence; (iv) failed to reconcile his generally positive findings on the complainant's evidence with the rejection of some of her evidence; and (v) failed to explain why he rejected the accused's plausible denial of the charges.

Held: The appeal should be allowed and the verdicts of guilty restored.

A trial judge's reasons serve three main functions: to explain the decision to the parties, to provide public accountability and to permit effective appellate review. Proceeding with deference, the appellate court is to ensure that, read in the context of the record as a whole, the trial judge's reasons demonstrate that he or she was alive to and resolved the central issues before the court. [11] [55]

The three offences of which the accused was convicted found support in the evidence as to a number of the incidents. This gives rise to a reasonable inference that the trial judge accepted some or all of this evidence and grounded the convictions on that evidence. While reasons drawing a precise link between each count on which the accused was found guilty and the particular evidence that the trial judge accepted in support of that count might have been desirable, this omission did not render the reasons deficient. [63]

Nor did the trial judge's failure to mention some of the accused's evidence render the reasons for judgment deficient. A trial judge is not obliged to discuss all of the evidence on any given point, provided the reasons show that he or she grappled with the substance of the live issues on the trial. It is clear from the reasons that the trial judge considered the accused's evidence carefully, and indeed accepted it on some points. In these circumstances, failure to mention some aspects of his evidence does not constitute error. This also applies to the fact that the trial judge failed to make general comments about the accused's evidence. As helpful as it might be in a given case, a trial judge is not required to summarize specific findings on credibility by issuing a general statement as to "overall" credibility. It is enough that the trial judge has demonstrated a recognition, where applicable, that the witness's credibility was a live issue. [64]

La Cour d'appel a annulé la déclaration de culpabilité à l'égard de deux des trois chefs d'accusation, concluant que les motifs du juge du procès étaient déficients parce que celui-ci (i) n'a pas indiqué clairement lesquels des 11 incidents mis en preuve avaient démontré la perpétration de chacune des infractions; (ii) n'a pas mentionné une partie de la preuve offerte par l'accusé; (iii) n'a pas fait de commentaires généraux sur le témoignage de l'accusé; (iv) n'a pas concilié ses conclusions généralement positives sur le témoignage de la plaignante avec le rejet d'une partie de son témoignage; (v) n'a pas expliqué pourquoi il a écarté la dénégation plausible des accusations par l'accusé.

Arrêt : Le pourvoi est accueilli et les verdicts de culpabilité sont rétablis.

Les motifs du juge du procès remplissent trois fonctions principales : expliquer la décision aux parties, rendre compte devant le public et permettre un véritable examen en appel. La cour d'appel doit, en faisant preuve de retenue, s'assurer que les motifs du juge du procès, considérés dans le contexte de l'ensemble du dossier, démontrent qu'il avait conscience des questions fondamentales en litige et qu'il les a résolues. [11] [55]

Les trois infractions dont l'accusé a été déclaré coupable s'appuyaient sur la preuve relative à plusieurs incidents, d'où l'inférence raisonnable que le juge du procès a retenu cette preuve en totalité ou en partie et s'est appuyé sur elle pour prononcer les déclarations de culpabilité. Bien qu'il eût été souhaitable que les motifs établissent un lien précis entre chacun des chefs d'accusation dont l'accusé a été déclaré coupable et la preuve que le juge du procès a retenue à l'appui de ce chef, cette omission ne rendait pas les motifs déficients. [63]

L'omission du juge du procès de mentionner une partie de la preuve offerte par l'accusé ne rendait pas non plus ses motifs de jugement déficients. Le juge du procès n'est pas tenu de traiter de tous les éléments de preuve sur un point donné, pourvu qu'il ressorte des motifs qu'il a saisi l'essentiel des questions en litige au procès. Il se dégage clairement des motifs que le juge du procès a examiné soigneusement la preuve de l'accusé, et qu'il l'a d'ailleurs acceptée sur certains points. Dans ces circonstances, l'omission de mentionner certains aspects de cette preuve ne constitue pas une erreur. Il en va de même du fait que le juge du procès n'a pas fait de commentaires généraux sur la preuve offerte par l'accusé. Aussi utile que cela puisse être dans certains cas, le juge du procès n'a pas à résumer ses conclusions relatives à la crédibilité en faisant une déclaration globale sur la crédibilité « en général ». Il suffit qu'il démontre qu'il comprenait, le cas échéant, que la crédibilité du témoin était une question en litige. [64]

The trial judge's alleged failure to reconcile his generally positive findings on the complainant's evidence with the rejection of some of her evidence did not render the reasons deficient. It is open to the trier of fact to accept some of the evidence of a witness, while rejecting other evidence of the same witness. The trial judge explained that the fact that many of the incidents testified to happened many years before and the fact that the complainant was a child at the time might well explain certain inconsistencies. In fact, he did explain why he rejected some of her evidence. [65]

Finally, the trial judge's failure to explain why he rejected the accused's plausible denial of the charges provides no ground for finding the reasons deficient. The trial judge's reasons made it clear that in general, where the complainant's evidence and the accused's evidence conflicted, he accepted the evidence of the complainant. This explains why he rejected the accused's denial. He gave reasons for accepting the complainant's evidence, finding her generally truthful and "a very credible witness", and concluding that her testimony on specific events was "not seriously challenged". It followed of necessity that he rejected the accused's evidence where it conflicted with evidence of the complainant that he accepted. No further explanation for rejecting the accused's evidence was required. In this context, the convictions themselves raise a reasonable inference that the accused's denial of the charges failed to raise a reasonable doubt. [66]

It may have been desirable for the trial judge to explain certain matters more fully. However, the question is whether the reasons, considered in the context of the record and the live issues at trial, failed to disclose a logical connection between the evidence and the verdict sufficient to permit meaningful appeal. The central issue at trial was credibility. It is clear that the trial judge accepted all or sufficient of the complainant's ample evidence as to the incidents, and was not left with a reasonable doubt on the whole of the evidence or from the contradictory evidence of the accused. From this he concluded that the accused's guilt had been established beyond a reasonable doubt. When the record is considered as a whole, the basis for the verdict is evident. [67]

Instead of looking for this basis, the Court of Appeal focussed on omitted details and proceeded from a sceptical perspective. Having concluded that the accused's denial was plausible, it proceeded to examine the case

L'omission alléguée du juge du procès de concilier ses conclusions généralement positives sur le témoignage de la plaignante avec le rejet d'une partie de celui-ci ne rendait pas ses motifs déficients. Le juge des faits peut accepter une partie de la déposition d'un témoin tout en en écartant d'autres parties. Le juge du procès a indiqué que le fait que plusieurs incidents dont la plaignante avait témoigné s'étaient produits de nombreuses années auparavant, quand elle n'était qu'une enfant, pouvait expliquer certaines incohérences. En fait, il a bel et bien indiqué pourquoi il a écarté une partie de son témoignage. [65]

Enfin, l'omission du juge du procès d'expliquer pourquoi il a écarté la dénégation plausible des accusations par l'accusé ne permet pas de conclure à la déficience des motifs. Il ressort clairement des motifs du juge du procès que, de façon générale, lorsque les témoignages de la plaignante et de l'accusé se contredisaient, il a retenu celui de la plaignante. Cela explique pourquoi il a écarté la dénégation de l'accusé. Il a exposé les raisons pour lesquelles il a retenu le témoignage de la plaignante, ayant jugé qu'elle était généralement sincère et « un témoin fort crédible », et il a conclu que son témoignage sur des événements précis n'était « pas sérieusement mis en doute ». Il s'ensuit, nécessairement, qu'il a écarté le témoignage de l'accusé lorsqu'il contredisait le témoignage de la plaignante qu'il avait retenu. Aucun autre motif n'était nécessaire pour justifier le rejet des explications de l'accusé. Dans ce contexte, les condamnations elles-mêmes permettent d'inférer raisonnablement que l'accusé n'a pas réussi à soulever un doute raisonnable en niant les accusations. [66]

Il eût peut-être été souhaitable que le juge du procès explique davantage certains points. Cependant, il s'agit de savoir si les motifs, considérés dans le contexte du dossier et des questions en litige au procès, faisaient ou non ressortir entre la preuve et le verdict un lien logique suffisant pour permettre un véritable appel. La principale question en litige au procès était la crédibilité. Il est manifeste que le juge du procès a retenu la totalité ou une partie suffisante du témoignage étoffé de la plaignante concernant les incidents et que ni l'ensemble de la preuve ni le témoignage contradictoire de l'accusé n'ont laissé subsister de doute raisonnable dans son esprit. Il en a conclu que la culpabilité de l'accusé avait été établie hors de tout doute raisonnable. Lorsqu'on considère le dossier globalement, le fondement du verdict est évident. [67]

Plutôt que de s'efforcer de découvrir ce fondement, la Cour d'appel s'est intéressée principalement aux détails omis et a fait preuve de scepticisme. Après avoir conclu que la dénégation de l'accusé était plausible, elle

from that perspective, asking whether the reasons disclosed that the trial judge had properly applied the reasonable doubt standard. In doing so, it ignored the trial judge's unique position to see and hear witnesses, and instead substituted its own assessment of credibility for the trial judge's view by impugning the reasons for judgment for not explaining why a reasonable doubt was not raised. [68]

Cases Cited

Referred to: *R. v. Inhabitants of Audly* (1699), 2 Salk. 526, 91 E.R. 448; *Swinburne v. David Syme & Co.*, [1909] V.L.R. 550, aff'd on other grounds, [1910] V.L.R. 539; *Macdonald v. The Queen*, [1977] 2 S.C.R. 665; *Glennie v. McD. & C. Holdings Ltd.*, [1935] S.C.R. 257; *R. v. Sheppard*, [2002] 1 S.C.R. 869, 2002 SCC 26; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817; *United States v. Forness*, 125 F.2d 928 (1942); *R. v. Morrissey* (1995), 22 O.R. (3d) 514; *R. v. Braich*, [2002] 1 S.C.R. 903, 2002 SCC 27; *R. v. Gagnon*, [2006] 1 S.C.R. 621, 2006 SCC 17; *Hill v. Hamilton-Wentworth Regional Police Services Board*, [2007] 3 S.C.R. 129, 2007 SCC 41; *R. v. Dinardo*, [2008] 1 S.C.R. 788, 2008 SCC 24; *R. v. W. (D.)*, [1991] 1 S.C.R. 742; *R. v. Walker*, [2008] 2 S.C.R. 245, 2008 SCC 34; *R. v. Burns*, [1994] 1 S.C.R. 656; *H.L. v. Canada (Attorney General)*, [2005] 1 S.C.R. 401, 2005 SCC 25; *Harper v. The Queen*, [1982] 1 S.C.R. 2.

Authors Cited

Broom, Herbert. *Constitutional Law Viewed in Relation to Common Law, and Exemplified by Cases*, 2nd ed. London: Maxwell, 1885.

Denning, Sir Alfred. *The Road to Justice*. London: Stevens & Sons, 1955.

Laskin, Bora. "A Judge and His Constituencies" (1976), 7 *Man. L.J.* 1.

Liston, Mary. "'Alert, alive and sensitive': *Baker*, the Duty to Give Reasons, and the Ethos of Justification in Canadian Public Law", in David Dyzenhaus, ed., *The Unity of Public Law*. Portland, Oregon: Hart, 2004, 113.

Macmillan, Lord. "The Writing of Judgments" (1948), 26 *Can. Bar Rev.* 491.

Taggart, Michael. "Should Canadian judges be legally required to give reasoned decisions in civil cases" (1983), 33 *U.T.L.J.* 1.

APPEAL from a judgment of the British Columbia Court of Appeal (Rowles, Donald and

a examiné l'affaire de ce point de vue, se demandant s'il ressortait des motifs que le juge du procès avait appliqué correctement la norme du doute raisonnable. Ce faisant, elle n'a pas tenu compte de l'avantage dont jouit le juge du procès du fait qu'il observe et entend les témoins, et elle a substitué sa propre appréciation de la crédibilité à celle du juge du procès en critiquant les motifs du jugement parce qu'ils n'expliquaient pas pourquoi aucun doute raisonnable n'avait été soulevé. [68]

Jurisprudence

Arrêts mentionnés : *R. c. Inhabitants of Audly* (1699), 2 Salk. 526, 91 E.R. 448; *Swinburne c. David Syme & Co.*, [1909] V.L.R. 550, conf. pour d'autres motifs par [1910] V.L.R. 539; *Macdonald c. La Reine*, [1977] 2 R.C.S. 665; *Glennie c. McD. & C. Holdings Ltd.*, [1935] R.C.S. 257; *R. c. Sheppard*, [2002] 1 R.C.S. 869, 2002 CSC 26; *Baker c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, [1999] 2 R.C.S. 817; *United States c. Forness*, 125 F.2d 928 (1942); *R. c. Morrissey* (1995), 22 O.R. (3d) 514; *R. c. Braich*, [2002] 1 R.C.S. 903, 2002 CSC 27; *R. c. Gagnon*, [2006] 1 R.C.S. 621, 2006 CSC 17; *Hill c. Commission des services policiers de la municipalité régionale de Hamilton-Wentworth*, [2007] 3 R.C.S. 129, 2007 CSC 41; *R. c. Dinardo*, [2008] 1 R.C.S. 788, 2008 CSC 24; *R. c. W. (D.)*, [1991] 1 R.C.S. 742; *R. c. Walker*, [2008] 2 R.C.S. 245, 2008 CSC 34; *R. c. Burns*, [1994] 1 R.C.S. 656; *H.L. c. Canada (Procureur général)*, [2005] 1 R.C.S. 401, 2005 CSC 25; *Harper c. La Reine*, [1982] 1 R.C.S. 2.

Doctrine citée

Broom, Herbert. *Constitutional Law Viewed in Relation to Common Law, and Exemplified by Cases*, 2nd ed. London : Maxwell, 1885.

Denning, Sir Alfred. *The Road to Justice*. London : Stevens & Sons, 1955.

Laskin, Bora. « A Judge and His Constituencies » (1976), 7 *Man. L.J.* 1.

Liston, Mary. « "Alert, alive and sensitive" : *Baker*, the Duty to Give Reasons, and the Ethos of Justification in Canadian Public Law », in David Dyzenhaus, ed., *The Unity of Public Law*. Portland, Oregon : Hart, 2004, 113.

Macmillan, Lord. « The Writing of Judgments » (1948), 26 *R. du B. can.* 491.

Taggart, Michael. « Should Canadian judges be legally required to give reasoned decisions in civil cases » (1983), 33 *U.T.L.J.* 1.

POURVOI contre un arrêt de la Cour d'appel de la Colombie-Britannique (les juges Rowles, Donald

Saunders J.J.A.) (2007), 238 B.C.A.C. 176, 393 W.A.C. 176, 218 C.C.C. (3d) 446, [2007] B.C.J. No. 518 (QL), 2007 CarswellBC 547, 2007 BCCA 154, reversing in part a decision of Romilly J., [2004] B.C.J. No. 2896 (QL), 2004 CarswellBC 3313, 2004 BCSC 1679. Appeal allowed.

Alexander Budlovsky, Q.C., for the appellant.

J. M. Brian Coleman, Q.C., and *Lisa Jean Helps*, for the respondent.

M. David Lepofsky and *Amanda Rubaszek*, for the intervener the Attorney General of Ontario.

David C. Marriott, for the intervener the Attorney General of Alberta.

The judgment of the Court was delivered by

[1] THE CHIEF JUSTICE — This case requires the Court to consider the adequacy of reasons of a trial judge on the credibility of witnesses in a criminal trial. The Court of Appeal faulted the trial judge for not explaining why conflicting evidence failed to raise a reasonable doubt as to the accused's guilt, and ordered a new trial on the basis that the trial judge's reasons were insufficient. The Crown appeals to this Court, arguing that the Court of Appeal, under the guise of faulting the sufficiency of the reasons, in fact substituted its own view of the facts without showing error by the trial judge.

[2] I conclude that the appeal must be allowed. Although his reasons may not have been ideal, the trial judge provided adequate reasons to explain why he reached the verdicts of guilt and to form a basis for appellate review.

I. Factual and Judicial History

[3] The accused, R.E.M., was charged with various sexual offences involving the complainant, who is the accused's stepdaughter, and K.A.P., who is the

et Saunders) (2007), 238 B.C.A.C. 176, 393 W.A.C. 176, 218 C.C.C. (3d) 446, [2007] B.C.J. No. 518 (QL), 2007 CarswellBC 547, 2007 BCCA 154, qui a infirmé en partie une décision du juge Romilly, [2004] B.C.J. No. 2896 (QL), 2004 CarswellBC 3313, 2004 BCSC 1679. Pourvoi accueilli.

Alexander Budlovsky, c.r., pour l'appelante.

J. M. Brian Coleman, c.r., et *Lisa Jean Helps*, pour l'intimé.

M. David Lepofsky et *Amanda Rubaszek*, pour l'intervenant le procureur général de l'Ontario.

David C. Marriott, pour l'intervenant le procureur général de l'Alberta.

Version française du jugement de la Cour rendu par

[1] LA JUGE EN CHEF — Dans le présent pourvoi, la Cour est appelée à déterminer si un juge de première instance a donné des motifs suffisants relativement à la crédibilité des témoins dans un procès criminel. La Cour d'appel a reproché au juge du procès de ne pas avoir expliqué pourquoi les éléments de preuve contradictoires ne soulevaient pas un doute raisonnable quant à la culpabilité de l'accusé et elle a ordonné la tenue d'un nouveau procès en raison de l'insuffisance de ses motifs. Le ministère public se pourvoit devant notre Cour, faisant valoir que, sous le couvert de reproches au sujet de l'insuffisance des motifs, la Cour d'appel a en fait substitué sa propre appréciation des faits à celle du juge du procès sans avoir établi que celui-ci avait commis une erreur.

[2] Je conclus qu'il y a lieu d'accueillir le pourvoi. Les motifs du juge du procès n'étaient peut-être pas parfaits, mais ils étaient suffisants pour expliquer pourquoi il a prononcé les verdicts de culpabilité et pour fournir matière à examen en appel.

I. Faits et historique des procédures judiciaires

[3] L'accusé, R.E.M., a été inculpé de diverses infractions d'ordre sexuel concernant la plaignante, sa belle-fille, et K.A.P., la fille d'un ami de

daughter of a family friend. The offences involving the complainant were alleged to have been committed when the complainant was between 9 and 17 years old. When the complainant was 16 years old, she gave birth to a baby who had been conceived with the accused.

[4] The accused admitted to having sex with his stepdaughter, but claimed that the relationship only became sexual when she was 15 and that the intercourse was consensual. (The age for minor consent at the time was 14.) He denied all the other allegations against him.

[5] The charges involving K.A.P. were dismissed. The trial focused on the charges involving the accused's stepdaughter.

[6] The evidence dealt with 11 incidents relating to 4 counts respecting the complainant. At trial, the accused admitted the essential elements of one offence and denied the three other charges, and was ultimately acquitted of one of those. The trial judge found the complainant to be a very credible witness, that much of her testimony was not seriously challenged, and that she was not prone to embellishment or vindictiveness. The trial judge largely disbelieved the accused's evidence, although at some points found that it was not seriously challenged. The trial judge did not clearly explain which of the offences were proved by which of the 11 incidents on which evidence had been led ([2004] B.C.J. No. 2896 (QL), 2004 BCSC 1679).

[7] The British Columbia Court of Appeal (*per* Saunders J.A.) allowed the appeal with respect to the two unadmitted counts, based on its view that the reasons for judgment did not sufficiently show that the trial judge properly applied the principle of reasonable doubt ((2007), 238 B.C.A.C. 176, 2007 BCCA 154). In particular, the court found that the trial judge failed to mention some of the accused's evidence, failed to make general comments about the accused's evidence, and failed to reconcile his generally positive findings on the complainant's

la famille. Les infractions concernant la plaignante auraient été commises lorsqu'elle avait entre 9 et 17 ans. À 16 ans, la plaignante a donné naissance à un bébé conçu avec l'accusé.

[4] L'accusé a reconnu avoir eu des rapports sexuels avec sa belle-fille, mais a soutenu que leur relation n'avait pris une tournure sexuelle qu'au moment où elle avait atteint l'âge de 15 ans et qu'il s'agissait de rapports consensuels. (L'âge du consentement était alors fixé à 14 ans.) Il a nié toutes les autres allégations formulées contre lui.

[5] Les accusations concernant K.A.P. ont été rejetées. Le procès a porté principalement sur celles concernant la belle-fille de l'accusé.

[6] La preuve portait sur 11 incidents ayant trait à 4 chefs d'accusation concernant la plaignante. Au procès, l'accusé a admis avoir commis les éléments essentiels d'une infraction et a nié les trois autres accusations; il a finalement été acquitté de l'une d'elles. Le juge du procès a estimé que la plaignante était un témoin fort crédible, qu'une grande partie de son témoignage n'était pas sérieusement mis en doute et qu'elle n'était pas encline à enjoliver son récit ni à se venger. Le juge du procès n'a guère cru le témoignage de l'accusé, bien qu'il ait conclu que, sur certains points, il n'était pas sérieusement mis en doute. Le juge du procès n'a pas indiqué clairement lesquels des 11 incidents mis en preuve avaient démontré la perpétration de chacune des infractions ([2004] B.C.J. No. 2896 (QL), 2004 BCSC 1679).

[7] La Cour d'appel de la Colombie-Britannique, sous la plume de la juge Saunders, a accueilli l'appel relativement aux deux infractions non avouées, parce que, à son avis, il ne ressortait pas suffisamment des motifs du jugement que le juge du procès avait appliqué correctement le principe du doute raisonnable ((2007), 238 B.C.A.C. 176, 2007 BCCA 154). La cour a conclu notamment que le juge du procès avait omis de mentionner une partie de la preuve offerte par l'accusé, de faire des commentaires généraux sur le témoignage de l'accusé

credibility with the rejection of some of her evidence. The court found that the trial judge's failure to explain why he rejected the accused's plausible denial of the charges placed the reasons for judgment beyond the reach of meaningful appellate review. Finding that conviction was not inevitable and that the accused was entitled to the benefit of any reasonable doubt raised by his evidence, the court concluded that the minimal standard for sufficiency of reasons was not met and ordered a new trial.

II. Analysis

A. *When Are Reasons Required?*

[8] The common law historically recognized no legal duty upon a tribunal to disclose its reasons for a decision or to identify what evidence has been believed and what disbelieved: see e.g. *R. v. Inhabitants of Audly* (1699), 2 Salk. 526, 91 E.R. 448; *Swinburne v. David Syme & Co.*, [1909] V.L.R. 550 (S.C.), aff'd on other grounds, [1910] V.L.R. 539 (H.C. Aust.); *Macdonald v. The Queen*, [1977] 2 S.C.R. 665. In the words of a former Chief Justice of this Court, Laskin C.J.:

A recurring question [in] non-jury trials and at the appellate level is whether reasons should be given. There is no legal requirement of this kind, and it is quite unnecessary in a great many cases that come to trial before a Judge alone, and equally unnecessary in a great many cases where the appellate Court's judgment affirms the trial Judge.

(B. Laskin, "A Judge and His Constituencies" (1976), 7 *Man. L.J.* 1, at pp. 3-4)

[9] Judicial reasons of the 19th and early 20th century, when given, tended to be cryptic. One searches in vain for early jurisprudence on the duty to give reasons, for the simple reason, one suspects, that such reasons were not viewed as required unless a statute so provided. This absence of such a duty is undoubtedly related to the long-standing common law principle that an appeal is based on

et de concilier ses conclusions généralement positives sur la crédibilité de la plaignante avec le rejet d'une partie de son témoignage. Elle a estimé que l'omission du juge du procès d'expliquer pourquoi il avait écarté la dénégation plausible des accusations par l'accusé empêchait un véritable examen en appel. Étant d'avis que la déclaration de culpabilité n'était pas inévitable et que l'accusé avait droit au bénéfice du moindre doute raisonnable soulevé par son témoignage, la cour a conclu que les motifs ne répondaient pas à la norme minimale en ce qui a trait à leur suffisance et il a ordonné la tenue d'un nouveau procès.

II. Analyse

A. *Dans quelles circonstances une décision doit-elle être motivée?*

[8] La common law ne reconnaissait autrefois aucune obligation légale pour un tribunal de dévoiler les motifs d'une décision ou de préciser quelle preuve il avait crue ou non : voir, p. ex., *R. c. Inhabitants of Audly* (1699), 2 Salk. 526, 91 E.R. 448; *Swinburne c. David Syme & Co.*, [1909] V.L.R. 550 (C.S.), confirmé pour d'autres motifs, [1910] V.L.R. 539 (H.C. Austr.); *Macdonald c. La Reine*, [1977] 2 R.C.S. 665. Pour reprendre les termes utilisés par un ancien juge en chef de notre Cour, le juge chef Laskin :

[TRADUCTION] La question de savoir si des motifs doivent être fournis revient souvent dans les procès sans jury et en appel. Il n'existe aucune obligation légale de ce genre, et c'est pour ainsi dire inutile dans de très nombreuses affaires tranchées lors d'un procès devant un juge seul, ainsi que dans bon nombre d'affaires où la Cour d'appel confirme la décision du juge du procès.

(B. Laskin, « A Judge and His Constituencies » (1976), 7 *Man. L.J.* 1, p. 3-4)

[9] Les motifs exprimés par les tribunaux, le cas échéant, aux 19^e et 20^e siècles tendaient à être obscurs. On cherchera en vain des décisions anciennes sur l'obligation de fournir des motifs pour la simple raison, croit-on, que de tels motifs n'étaient pas jugés nécessaires à moins qu'une loi ne le prévoie. Cette absence d'obligation est sans doute reliée au principe de common law, établi de longue date,

the judgment of the court, not on the reasons the court provides to explain or justify that judgment: see e.g. *Glennie v. McD. & C. Holdings Ltd.*, [1935] S.C.R. 257, at p. 268.

[10] The law, however, has evolved. There is no absolute rule that adjudicators must in all circumstances give reasons. In some adjudicative contexts, however, reasons are desirable, and in a few, mandatory. As this Court stated in *R. v. Sheppard*, [2002] 1 S.C.R. 869, 2002 SCC 26, at para. 18, quoting from *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at para. 43 (in the administrative law context), “it is now appropriate to recognize that, in certain circumstances, the duty of procedural fairness will require the provision of a written explanation for a decision”. A criminal trial, where the accused’s innocence is at stake, is one such circumstance.

[11] The authorities establish that reasons for judgment in a criminal trial serve three main functions:

1. Reasons tell the parties affected by the decision why the decision was made. As Lord Denning remarked, on the desirability of giving reasons, “by so doing, [the judge] gives proof that he has heard and considered the evidence and arguments that have been adduced before him on each side: and also that he has not taken extraneous considerations into account”: *The Road to Justice* (1955), at p. 29. In this way, they attend to the dignity interest of the accused, an interest at the heart of post-World War II jurisprudence: M. Liston, “‘Alert, alive and sensitive’: *Baker*, the Duty to Give Reasons, and the Ethos of Justification in Canadian Public Law”, in D. Dyzenhaus, ed., *The Unity of Public Law* (2004), 113, at p. 121. No less important is the function of explaining to the Crown and to the victims of crime why a conviction was or was not entered.

2. Reasons provide public accountability of the judicial decision; justice is not only done, but

voulant qu’un appel soit fondé sur le jugement du tribunal, et non sur les motifs que le tribunal donne pour expliquer ou justifier ce jugement : voir, p. ex., *Glennie c. McD. & C. Holdings Ltd.*, [1935] R.C.S. 257, p. 268.

[10] Le droit a cependant évolué. Aucune règle absolue n’exige qu’une décision soit motivée en toutes circonstances. En revanche, dans certains contextes juridictionnels, des motifs sont souhaitables et, dans de rares cas, obligatoires. Comme notre Cour l’a affirmé dans *R. c. Sheppard*, [2002] 1 R.C.S. 869, 2002 CSC 26, par. 18, citant le par. 43 de l’arrêt *Baker c. Canada (Ministre de la Citoyenneté et de l’Immigration)*, [1999] 2 R.C.S. 817 (dans un contexte de droit administratif), « il est maintenant approprié de reconnaître que, dans certaines circonstances, l’obligation d’équité procédurale requerra une explication écrite de la décision ». Un procès criminel, où l’innocence de l’accusé est en jeu, figure parmi ces circonstances.

[11] La doctrine et la jurisprudence établissent que les motifs du jugement dans un procès criminel remplissent trois fonctions principales :

1. Les motifs révèlent aux parties touchées par la décision pourquoi cette décision a été rendue. Comme lord Denning l’a fait remarquer au sujet de l’opportunité de fournir des motifs, [TRADUCTION] « ce faisant, [le juge] prouve qu’il a entendu et examiné la preuve et les arguments qui lui ont été présentés de chaque côté : et aussi qu’il n’a pas tenu compte de facteurs extrinsèques » : *The Road to Justice* (1955), p. 29. Les motifs servent ainsi le droit à la dignité de l’accusé, un droit qui est au cœur de la jurisprudence postérieure à la Seconde Guerre mondiale : M. Liston, « “Alert, alive and sensitive” : *Baker*, the Duty to Give Reasons, and the Ethos of Justification in Canadian Public Law », dans D. Dyzenhaus, dir., *The Unity of Public Law* (2004), 113, p. 121. Ils ont aussi pour fonction, tout aussi importante, d’expliquer au ministère public et aux victimes d’infractions criminelles pourquoi une déclaration de culpabilité a été ou non prononcée.

2. Les motifs constituent un moyen de rendre compte devant le public de l’exercice du pouvoir

is seen to be done. Thus, it has been said that the main object of a judgment “is not only to do but to seem to do justice”: Lord Macmillan, “The Writing of Judgments” (1948), 26 *Can. Bar Rev.* 491, at p. 491.

3. Reasons permit effective appellate review. A clear articulation of the factual findings facilitates the correction of errors and enables appeal courts to discern the inferences drawn, while at the same time inhibiting appeal courts from making factual determinations “from the lifeless transcript of evidence, with the increased risk of factual error”: M. Taggart, “Should Canadian judges be legally required to give reasoned decisions in civil cases” (1983), 33 *U.T.L.J.* 1, at p. 7. Likewise, appellate review for an error of law will be greatly aided where the trial judge has articulated her understanding of the legal principles governing the outcome of the case. Moreover, parties and lawyers rely on reasons in order to decide whether an appeal is warranted and, if so, on what grounds.

[12] In addition, reasons help ensure fair and accurate decision making; the task of articulating the reasons directs the judge’s attention to the salient issues and lessens the possibility of overlooking or under-emphasizing important points of fact or law. As one judge has said: “Often a strong impression that, on the basis of the evidence, the facts are thus-and-so gives way when it comes to expressing that impression on paper” (*United States v. Forness*, 125 F.2d 928 (2d Cir. 1942), at p. 942). Finally, reasons are a fundamental means of developing the law uniformly, by providing guidance to future courts in accordance with the principle of *stare decisis*. Thus, the observation in H. Broom’s *Constitutional Law Viewed in Relation to Common Law, and Exemplified by Cases* (2nd ed. 1885), at pp. 147-48: “A public statement of the reasons for a judgment is due to the suitors and to the community at large — is essential to the establishment of fixed intelligible rules, and for the development of law as a science.” In all these ways, reasons instantiate the

judiciaire; non seulement justice est rendue, mais il est manifeste qu’elle est rendue. C’est pourquoi on a affirmé que l’objet principal d’un jugement [TRADUCTION] « est non seulement de rendre justice mais de montrer que justice a été rendue » : Lord Macmillan, « The Writing of Judgments » (1948), 26 *R. du B. can.* 491, p. 491.

3. Les motifs permettent un examen efficace en appel. Un énoncé clair des conclusions de fait facilite la correction des erreurs et permet aux tribunaux d’appel de discerner les inférences tirées, tout en les empêchant de tirer des conclusions de fait [TRADUCTION] « fondées sur une terne transcription de la preuve, avec le risque accru d’erreurs de fait que cela comporte » : M. Taggart, « Should Canadian Judges be legally required to give reasoned decisions in civil cases » (1983), 33 *U.T.L.J.* 1, p. 7. De même, la révision en appel d’une erreur de droit sera grandement facilitée si le juge du procès a exposé son interprétation des principes de droit sur lesquels repose l’issue de la cause. En outre, les parties et leurs avocats se fondent sur les motifs pour décider s’il y a lieu d’interjeter appel et, dans l’affirmative, quels moyens invoquer.

[12] De plus, les motifs favorisent le prononcé de décisions équitables et exactes; la tâche d’énoncer les motifs attire l’attention du juge sur les points saillants et diminue le risque qu’il laisse de côté des questions de fait ou de droit importantes ou ne leur accorde pas l’importance qu’elles méritent. Un juge a déjà dit : [TRADUCTION] « Souvent, la forte impression que les faits sont clairs, selon la preuve, s’estompe lorsque vient le temps d’exprimer cette impression sur papier » (*United States c. Forness*, 125 F.2d 928 (2d Cir. 1942), p. 942). Enfin, les motifs constituent un outil essentiel d’élaboration uniforme du droit en ce qu’ils guident les tribunaux dans leurs décisions futures conformément à la règle du *stare decisis*. D’où l’observation suivante formulée dans H. Broom, *Constitutional Law Viewed in Relation to Common Law, and Exemplified by Cases* (2^e éd. 1885) : [TRADUCTION] « Les parties au litige et la collectivité en général ont droit à un énoncé public des motifs du jugement — lequel est essentiel à l’établissement de règles fixes

rule of law and support the legitimacy of the judicial system.

[13] The critical functions of reasons in letting the parties know the reasons for conviction, in providing public accountability and in providing a basis for appeal were emphasized in *Sheppard*. At the same time, *Sheppard* acknowledged the constraints of time and the general press of business in criminal trial courts and affirmed that the degree of detail required may vary with the circumstances and the completeness of the record.

[14] In summary, the law has progressed to the point where it may now be said with confidence that a trial judge on a criminal trial where the accused's innocence is at stake has a duty to give reasons. The remaining question is more difficult: What, in the context of a particular case, constitutes *sufficient* reasons?

B. *The Test for Sufficient Reasons*

[15] This Court in *Sheppard* and subsequent cases has advocated a functional context-specific approach to the adequacy of reasons in a criminal case. The reasons must be sufficient to fulfill their functions of explaining why the accused was convicted or acquitted, providing public accountability and permitting effective appellate review.

[16] It follows that courts of appeal considering the sufficiency of reasons should read them as a whole, in the context of the evidence, the arguments and the trial, with an appreciation of the purposes or functions for which they are delivered (see *Sheppard*, at paras. 46 and 50; *R. v. Morrissey* (1995), 22 O.R. (3d) 514 (C.A.), at p. 524).

intelligibles et au développement du droit en tant que science » (p. 147-148). De toutes ces façons, les motifs constituent une manifestation concrète de la primauté du droit et renforcent la légitimité du processus judiciaire.

[13] Les fonctions essentielles des motifs — révéler aux parties les raisons de la déclaration de culpabilité, rendre compte devant le public et fournir matière à examen en appel — ont été soulignées dans *Sheppard*. Cet arrêt a, par ailleurs, reconnu la nécessité de tenir compte des délais et du volume des affaires à traiter dans les cours criminelles de première instance et affirmé que les motifs devront être plus ou moins détaillés selon les circonstances et la mesure dans laquelle le dossier est complet.

[14] Bref, le droit a progressé au point qu'il est maintenant possible d'affirmer sans l'ombre d'un doute que le juge qui préside un procès criminel, où l'innocence de l'accusé est en jeu, a l'obligation de motiver sa décision. La question qui demeure irrésolue est plus difficile à trancher : Que doit-on entendre, dans le contexte d'une affaire donnée, par des motifs *suffisants*?

B. *L'appréciation du caractère suffisant des motifs*

[15] Dans *Sheppard*, et dans des arrêts subséquents, notre Cour a préconisé une approche fonctionnelle et contextuelle pour l'appréciation du caractère suffisant des motifs en matière criminelle. Les motifs doivent être suffisants pour remplir leurs fonctions qui consistent à expliquer pourquoi l'accusé a été déclaré coupable ou acquitté, rendre compte devant le public et permettre un examen efficace en appel.

[16] Par conséquent, lorsqu'un tribunal d'appel examine les motifs pour déterminer s'ils sont suffisants, il doit les considérer globalement, dans le contexte de la preuve présentée, des arguments invoqués et du procès, en tenant compte des buts ou des fonctions de l'expression des motifs (voir *Sheppard*, par. 46 et 50; *R. c. Morrissey* (1995), 22 O.R. (3d) 514 (C.A.), p. 524).

[17] These purposes are fulfilled if the reasons, read in context, show why the judge decided as he or she did. The object is not to show *how* the judge arrived at his or her conclusion, in a “watch me think” fashion. It is rather to show *why* the judge made that decision. The decision of the Ontario Court of Appeal in *Morrissey* predates the decision of this Court establishing a duty to give reasons in *Sheppard*. But the description in *Morrissey* of the object of a trial judge’s reasons is apt. Doherty J.A. in *Morrissey*, at p. 525, puts it this way: “In giving reasons for judgment, the trial judge is attempting to tell the parties what he or she has decided and why he or she made that decision” (emphasis added). What is required is a logical connection between the “what” — the verdict — and the “why” — the basis for the verdict. The foundations of the judge’s decision must be discernable, when looked at in the context of the evidence, the submissions of counsel and the history of how the trial unfolded.

[18] Explaining the “why” and its logical link to the “what” does not require the trial judge to set out every finding or conclusion in the process of arriving at the verdict. Doherty J.A. in *Morrissey*, at p. 525, states:

A trial judge’s reasons cannot be read or analyzed as if they were an instruction to a jury. Instructions provide a road map to direct lay jurors on their journey toward a verdict. Reasons for judgment are given after a trial judge has reached the end of that journey and explain why he or she arrived at a particular conclusion. They are not intended to be, and should not be read, as a verbalization of the entire process engaged in by the trial judge in reaching a verdict. [Emphasis added.]

[19] The judge need not expound on matters that are well settled, uncontroversial or understood and accepted by the parties. This applies to both the law and the evidence. Speaking of the law, Doherty J.A. states in *Morrissey*, at p. 524:

Where a case turns on the application of well-settled legal principles to facts as found after a consideration

[17] Ces buts seront atteints si les motifs, considérés dans leur contexte, indiquent pourquoi le juge a rendu sa décision. Il ne s’agit pas d’indiquer *comment* le juge est parvenu à sa conclusion, ou d’une invitation à « suivre son raisonnement », mais plutôt de révéler *pourquoi* il a rendu cette décision. La Cour d’appel de l’Ontario a prononcé l’arrêt *Morrissey* avant que notre Cour confirme l’obligation de fournir des motifs dans *Sheppard*. L’arrêt *Morrissey* décrit toutefois bien l’objet des motifs du juge de première instance. Le juge Doherty affirme, à la p. 525 : [TRADUCTION] « En motivant sa décision, le juge de première instance essaie de faire comprendre aux parties le résultat et le pourquoi de sa décision » (je souligne). L’essentiel est d’établir un lien logique entre le « résultat » — le verdict — et le « pourquoi » — le fondement du verdict. Il doit être possible de discerner les raisons qui fondent la décision du juge, dans le contexte de la preuve présentée, des observations des avocats et du déroulement du procès.

[18] Le juge peut expliquer le « pourquoi » de sa décision et son lien logique avec son « résultat » sans nécessairement énoncer chacune des constatations ou conclusions qui l’ont amené au verdict. Pour reprendre les propos tenus par le juge Doherty à la p. 525 de l’arrêt *Morrissey* :

[TRADUCTION] Les motifs d’un juge de première instance ne sauraient être considérés ni analysés comme s’il s’agissait d’instructions au jury. Les instructions au jury indiquent à des non-juristes le chemin à suivre pour parvenir à un verdict. Les motifs d’un jugement sont exprimés une fois le juge de première instance parvenu à la fin de ce cheminement et expliquent pourquoi il est arrivé à telle ou telle conclusion. Ils ne sont pas censés et ne doivent pas être interprétés comme l’énonciation de chacune des étapes du processus que le juge a suivi pour parvenir à un verdict. [Je souligne.]

[19] Le juge n’est pas tenu d’expliquer des points bien établis, non controversés ou compris et acceptés par les parties. Cela vaut à la fois pour les règles de droit et pour les éléments de preuve. En ce qui a trait au droit, le juge Doherty a ajouté ce qui suit, dans *Morrissey*, p. 524 :

[TRADUCTION] Lorsque l’issue d’une affaire tient à l’application de principes de droit bien établis aux faits

of conflicting evidence, the trial judge is not required to expound upon those legal principles to demonstrate to the parties, much less to the Court of Appeal, that he or she was aware of and applied those principles.

[20] Similarly, the trial judge need not expound on evidence which is uncontroversial, or detail his or her finding on each piece of evidence or controverted fact, so long as the findings linking the evidence to the verdict can be logically discerned.

[21] This is what is meant by the phrase in *Sheppard* “the path taken by the trial judge through confused or conflicting evidence” (para. 46). In *Sheppard*, it was not possible to determine what facts the trial judge had found. Hence, it was not possible to conclude *why* the trial judge had arrived at *what* he concluded — the verdict.

[22] The charge in *Sheppard* was the theft of two windows. The only evidence connecting the accused to the windows came from an estranged girlfriend who had vowed to “get him”. The trial judge convicted with these formulaic words:

Having considered all the testimony in this case, and reminding myself of the burden on the Crown and the credibility of witnesses, and how this is to be assessed, I find the defendant guilty as charged.

[23] The reasons said nothing about the facts. They said nothing about the credibility of the witnesses. And they said nothing about the law on the offence. They repeated stock phrases of what a trial judge is expected to do, but did not show that he had done it. There was nothing in the reasons to tell the accused why the trial judge was convicting him. There was nothing to tell the public why the conviction had been entered. And there was nothing to tell the Court of Appeal whether the trial judge’s findings and reasoning were sound. The reasons were clearly inadequate from a functional perspective.

constatés après l’examen d’éléments de preuve contradictoires, le juge du procès n’est pas obligé d’exposer ces principes de droit pour démontrer aux parties, et encore moins au tribunal d’appel, qu’il les connaissait et qu’il les a appliqués.

[20] De même, le juge de première instance n’est pas tenu de traiter de la preuve non contestée, ni d’expliquer en détail sa conclusion sur chaque élément de preuve ou fait controversé, dans la mesure où il est possible de discerner logiquement les conclusions qui relient la preuve au verdict.

[21] C’est ce à quoi renvoie l’arrêt *Sheppard*, lorsqu’il y est question du « raisonnement qu’a suivi le juge du procès pour démêler des éléments de preuve embrouillés ou litigieux » (par. 46). Dans *Sheppard*, il était impossible de déterminer quels faits le juge de première instance avait jugés avérés. Il était donc impossible de savoir *pourquoi* le juge était arrivé au *résultat* obtenu — c’est-à-dire au verdict.

[22] Dans *Sheppard*, l’accusé était inculpé du vol de deux fenêtres. La seule preuve reliant l’accusé aux fenêtres émanait d’une ex-petite amie qui avait juré [TRADUCTION] « d’avoir sa peau ». Le juge du procès avait employé une formule toute faite pour le déclarer coupable :

[TRADUCTION] Après avoir examiné l’ensemble des témoignages en l’espèce et me rappelant le fardeau qui incombe au ministère public et la crédibilité des témoins, et la façon dont le tout doit être apprécié, je conclus que le défendeur est coupable des actes reprochés.

[23] Les motifs ne parlaient pas des faits. Ils ne disaient rien au sujet de la crédibilité des témoins. Ni au sujet du droit applicable à l’infraction. Ils répétaient des phrases stéréotypées sur ce que le juge du procès est censé faire, mais n’indiquaient pas qu’il l’avait fait. Rien dans les motifs ne disait à l’accusé pourquoi le juge du procès le déclarait coupable. Rien ne révélait au public pourquoi la déclaration de culpabilité avait été prononcée. Et rien ne permettait à la Cour d’appel de savoir si les conclusions et le raisonnement du juge du procès étaient valables. Les motifs étaient clairement insuffisants d’un point de vue fonctionnel.

[24] The Court of Appeal in this case took the phrase “the path taken by the trial judge through confused or conflicting evidence” to mean that the trial judge must detail the precise path that led from disparate pieces of evidence to his conclusions on credibility and guilt. In other words, it insisted on the very “verbalization of the entire process engaged in by the trial judge in reaching a verdict” rejected in *Morrissey* (p. 525). *Sheppard* does not require this. The “path” taken by the judge must be clear from the reasons read in the context of the trial. But it is not necessary that the judge describe every landmark along the way.

[25] The functional approach advocated in *Sheppard* suggests that what is required are reasons sufficient to perform the functions reasons serve — to inform the parties of the basis of the verdict, to provide public accountability and to permit meaningful appeal. The functional approach does not require more than will accomplish these objectives. Rather, reasons will be inadequate only where their objectives are not attained; otherwise, an appeal does not lie on the ground of insufficiency of reasons. This principle from *Sheppard* was reiterated thus in *R. v. Braich*, [2002] 1 S.C.R. 903, 2002 SCC 27, at para. 31:

The general principle affirmed in *Sheppard* is that “the effort to establish the absence or inadequacy of reasons as a freestanding ground of appeal should be rejected. A more contextual approach is required. The appellant must show not only that there is a deficiency in the reasons, but that this deficiency has occasioned prejudice to the exercise of his or her legal right to an appeal in a criminal case” (para. 33). The test, in other words, is whether the reasons adequately perform *the function* for which they are required, namely to allow the appeal court to review the correctness of the trial decision. [Emphasis in original.]

[26] *Braich* was decided together with *Sheppard*. Unlike in *Sheppard*, the factual record was detailed. Binnie J., writing for the Court, adopted a flexible approach that took into account the fact that

[24] En l’espèce, la Cour d’appel a interprété les mots le « raisonnement qu’a suivi le juge du procès pour démêler des éléments de preuve embrouillés ou litigieux » comme signifiant que le juge du procès devait décrire en détail le raisonnement précis qui l’avait mené, à partir d’éléments de preuve disparates, à ses conclusions sur la crédibilité et la culpabilité. En d’autres termes, elle a insisté précisément sur [TRADUCTION] « l’énonciation de chacune des étapes du processus que le juge a suivi pour parvenir à un verdict » rejetée dans *Morrissey* (p. 525). L’arrêt *Sheppard* n’exige pas cela du juge. Certes, le « raisonnement » suivi par le juge doit ressortir clairement des motifs, considérés dans le contexte du procès. Mais il n’est pas nécessaire que le juge décrive chacune des étapes de son raisonnement.

[25] L’approche fonctionnelle préconisée dans *Sheppard* indique que les motifs doivent être suffisants pour remplir leurs fonctions — informer les parties du fondement du verdict, rendre compte devant le public et permettre un véritable examen en appel. L’approche fonctionnelle n’exige rien de plus que ce qui permet d’accomplir ces objectifs. En fait, les motifs ne seront insuffisants que s’ils n’atteignent pas leurs objectifs; dans le cas contraire, l’insuffisance des motifs ne pourra justifier un appel. Ce principe tiré de *Sheppard* a été réitéré dans *R. c. Braich*, [2002] 1 R.C.S. 903, 2002 CSC 27, par. 31 :

Le principe général confirmé dans *Sheppard* est le suivant : « il faut repousser toute tentative de faire de l’absence de motifs ou de leur insuffisance un moyen d’appel distinct. Une approche plus contextuelle s’impose. L’appelante doit établir non seulement que les motifs comportent des lacunes, mais également que ces lacunes lui ont causé un préjudice dans l’exercice du droit d’appel que lui confère la loi en matière criminelle » (par. 33). En d’autres termes, le critère applicable consiste à savoir si les motifs jouent bien *le rôle* qui constitue leur raison d’être, soit permettre à la cour d’appel d’apprécier la justesse de la décision de première instance. [En italique dans l’original.]

[26] L’arrêt *Braich* a été prononcé en même temps que l’arrêt *Sheppard*. Contrairement à l’affaire *Sheppard*, il s’agissait d’un cas où le dossier factuel était détaillé. S’exprimant au nom de la Cour,

inferences could be drawn from that record, and found the reasons to be sufficient.

[27] The appellate court had found the trial judge's reasons inadequate because they failed to weigh evidentiary frailties properly in assessing identification evidence. In overturning this ruling, Binnie J. adopted a functional approach. He found that the accused was able to articulate informed disagreement with the trial judge and to formulate an arguable ground of appeal on the facts of the case (paras. 21 and 24). Warning against a formalistic approach, he stated, "[t]he insistence on a 'demonstration' of a competent weighing of the frailties elevates the alleged insufficiency of reasons to a stand-alone ground of appeal divorced from the functional test, a broad proposition rejected in *Sheppard*" (para. 38). He concluded that the trial judge met the functional test for sufficiency of reasons.

[28] In *R. v. Gagnon*, [2006] 1 S.C.R. 621, 2006 SCC 17, this Court allowed a Crown appeal of an appellate decision in which an error of law had been found on the basis of insufficiency of reasons. The majority, *per* Bastarache and Abella JJ., found that the appellate court had ignored the trial judge's unique position to see and hear witnesses. It had instead substituted its own assessment of credibility for the trial judge's view by impugning the reasons for judgment for not explaining why a reasonable doubt was not raised. Bastarache and Abella JJ. observed, at para. 20:

Assessing credibility is not a science. It is very difficult for a trial judge to articulate with precision the complex intermingling of impressions that emerge after watching and listening to witnesses and attempting to reconcile the various versions of events. That is why this Court decided, most recently in *H.L.*, that in the absence of a palpable and overriding error by the trial judge, his or her perceptions should be respected.

le juge Binnie a adopté une approche souple, qui tenait compte du fait que des inférences pouvaient être tirées de ce dossier, et il a jugé que les motifs étaient suffisants.

[27] La cour d'appel avait conclu que les motifs du juge du procès étaient insuffisants parce qu'ils n'analysaient pas convenablement les faiblesses de la preuve d'identification. En infirmant cette décision, le juge Binnie a adopté une approche fonctionnelle. Il a conclu que l'accusé était en mesure d'exprimer un désaccord éclairé avec le juge de première instance et de formuler un moyen d'appel défendable à partir des faits de l'espèce (par. 21 et 24). Mettant en garde contre une approche formaliste, il a affirmé : « L'importance accordée à la "démonstration" d'une appréciation compétente des faiblesses élève l'insuffisance alléguée des motifs au rang de moyen d'appel distinct indépendant du critère fonctionnel. Or, cette proposition de portée étendue a été rejetée dans *Sheppard* » (par. 38). Il a conclu que les motifs du juge du procès répondaient au critère fonctionnel quant à savoir s'ils étaient suffisants.

[28] Dans *R. c. Gagnon*, [2006] 1 R.C.S. 621, 2006 CSC 17, notre Cour a accueilli un pourvoi du ministère public contre une décision en appel qui concluait à une erreur de droit pour cause d'insuffisance des motifs. Sous la plume des juges Bastarache et Abella, la majorité a conclu que la cour d'appel avait fait fi de l'avantage dont jouit le juge du procès du fait qu'il observe et entend les témoins. Elle avait plutôt choisi de substituer sa propre appréciation de la crédibilité à celle de la juge du procès et d'écarter ses motifs parce que la juge n'avait pas expliqué en quoi la preuve ne soulevait pas un doute raisonnable. Les juges Bastarache et Abella ont fait observer ceci au par. 20 :

Apprécier la crédibilité ne relève pas de la science exacte. Il est très difficile pour le juge de première instance de décrire avec précision l'enchevêtrement complexe des impressions qui se dégagent de l'observation et de l'audition des témoins, ainsi que des efforts de conciliation des différentes versions des faits. C'est pourquoi notre Cour a statué — la dernière fois dans l'arrêt *H.L.* — qu'il fallait respecter les perceptions du juge de première instance, sauf erreur manifeste et dominante.

[29] In *Hill v. Hamilton-Wentworth Regional Police Services Board*, [2007] 3 S.C.R. 129, 2007 SCC 41, the appellant contended that the trial judge's reasons were insufficient. This ground of the appeal was rejected. Writing for the majority, I held at para. 101:

In determining the adequacy of reasons, the reasons should be considered in the context of the record before the court. Where the record discloses all that is required to be known to permit appellate review, less detailed reasons may be acceptable. This means that less detailed reasons may be required in cases with an extensive evidentiary record, such as the current appeal. On the other hand, reasons are particularly important when "a trial judge is called upon to address troublesome principles of unsettled law, or to resolve confused and contradictory evidence on a key issue", as was the case in the decision below: *Sheppard*, at para. 55. In assessing the adequacy of reasons, it must be remembered that "[t]he appellate court is not given the power to intervene simply because it thinks the trial court did a poor job of expressing itself": *Sheppard*, at para. 26.

[30] Viewed in the context of the entire record, the trial judge's reasons sufficiently informed the appellant why the case was decided against him, and permitted meaningful appellant review: *Hill*, at para. 103.

[31] More recently, in *R. v. Dinardo*, [2008] 1 S.C.R. 788, 2008 SCC 24, the Court, per Charron J., rejected a formalistic approach. The case turned on credibility. The trial judge's reasons failed to articulate the alternatives to be considered in determining reasonable doubt as set out in *R. v. W. (D.)*, [1991] 1 S.C.R. 742. Charron J. stated that only the substance, not the form, of *W. (D.)* need be captured by the trial judge, then went on to say:

In a case that turns on credibility, such as this one, the trial judge must direct his or her mind to the decisive question of whether the accused's evidence, considered in the context of the evidence as a whole, raises a reasonable doubt as to his guilt. [para. 23]

[29] Dans l'arrêt *Hill c. Commission des services policiers de la municipalité régionale de Hamilton-Wentworth*, [2007] 3 R.C.S. 129, 2007 CSC 41, l'appelant a soutenu que les motifs du juge du procès étaient insuffisants. Ce moyen d'appel a été écarté. M'exprimant au nom de la majorité, j'ai statué ceci, au par. 101 :

Pour statuer sur leur caractère suffisant, il faut considérer les motifs à la lumière du dossier présenté à la cour. Lorsque le dossier renferme tous les éléments nécessaires à la révision en appel, les motifs peuvent être brefs. Des motifs succincts peuvent donc être justifiés lorsque la preuve versée au dossier est abondante, comme en l'espèce. Par contre, les motifs revêtent une importance particulière lorsque « le juge doit se prononcer sur des principes de droit qui posent problème et ne sont pas encore bien établis, ou démêler des éléments de preuve embrouillés et contradictoires sur une question clé », comme c'était le cas en première instance : *Sheppard*, par. 55. Pour juger du caractère suffisant des motifs, il faut se rappeler que « [l]a cour d'appel n'est pas habilitée à intervenir simplement parce qu'elle estime que le juge du procès s'est mal exprimé » : *Sheppard*, par. 26.

[30] Considérés dans le contexte de l'ensemble du dossier, les motifs du juge du procès étaient suffisants pour permettre à l'appelant de savoir pourquoi une décision défavorable avait été rendue contre lui, et pour permettre un véritable examen en appel : *Hill*, par. 103.

[31] Plus récemment, dans l'arrêt *R. c. Dinardo*, [2008] 1 R.C.S. 788, 2008 CSC 24, rédigé par la juge Charron, la Cour a écarté une approche formaliste. L'issue de la cause reposait sur la crédibilité. Les motifs du juge du procès ne précisaient pas toutes les possibilités à envisager avant de tirer une conclusion sur l'existence d'un doute raisonnable comme l'exige l'arrêt *R. c. W. (D.)*, [1991] 1 R.C.S. 742. Après avoir affirmé que seule la substance, et non la forme, de l'arrêt *W. (D.)* doit être respectée par le juge du procès, la juge Charron a ajouté ceci :

Dans une cause dont l'issue repose sur la crédibilité, comme en l'espèce, le juge du procès doit répondre à la question déterminante de savoir si la preuve offerte par l'accusé, appréciée au regard de l'ensemble de la preuve, soulève un doute raisonnable quant à sa culpabilité. [par. 23]

[32] Charron J. went on to state that where credibility is a determinative issue, deference is in order and intervention will be rare (para. 26). While the reasons must explain why the evidence raised no reasonable doubt, “there is no general requirement that reasons be so detailed that they allow an appeal court to retry the entire case on appeal. There is no need to prove that the trial judge was alive to and considered all of the evidence, or answer each and every argument of counsel” (para. 30).

[33] The Court found that the trial judge’s reasons fell short of even this flexible standard. There was evidence that the complainant was mentally challenged, with a history of making up stories to get attention, and her testimony had wavered on the core issue of whether the accused had committed the assault in question. The trial judge’s failure to avert to these critical matters left the Court in doubt that he had directed his mind to the central issue of credibility.

[34] In *R. v. Walker*, [2008] 2 S.C.R. 245, 2008 SCC 34, the issue was whether the trial judge’s reasons had adequately detailed the path to the verdict. Binnie J., writing for the Court, held that while the reasons “fell well short of the ideal”, they were not so impaired that the Crown’s right of appeal was impaired (para. 27). He stated: “Reasons are sufficient if they are responsive to the case’s live issues and the parties’ key arguments. Their sufficiency should be measured not in the abstract, but as they respond to the substance of what was in issue” (para. 20).

[35] In summary, the cases confirm:

(1) Appellate courts are to take a functional, substantive approach to sufficiency of reasons, reading them as a whole, in the context of the evidence, the arguments and the trial, with an appreciation of

[32] La juge Charron a ensuite affirmé que, lorsque la question de la crédibilité est déterminante, la déférence est de mise et une intervention rarement justifiée (par. 26). S’il est vrai que les motifs doivent expliquer pourquoi la preuve ne soulevait pas un doute raisonnable, « aucune règle générale n’exige que les motifs soient suffisamment détaillés pour permettre à la juridiction d’appel d’instruire toute l’affaire à nouveau. Il n’est pas nécessaire d’établir que le juge du procès avait conscience et a tenu compte de tous les éléments de preuve, ou encore qu’il a répondu à chaque argument soulevé par les avocats » (par. 30).

[33] La Cour a conclu que les motifs du juge du procès ne respectaient même pas cette norme souple. La preuve indiquait que la plaignante était atteinte d’une déficience intellectuelle, qu’elle avait déjà inventé des histoires pour attirer l’attention et qu’elle s’était contredite dans ses réponses sur la principale question en litige, soit celle de savoir si l’accusé avait commis l’agression. L’omission du juge du procès de mentionner ces éléments cruciaux a laissé un doute dans l’esprit de la Cour quant à savoir s’il s’était arrêté à la question fondamentale de la crédibilité.

[34] Dans l’arrêt *R. c. Walker*, [2008] 2 R.C.S. 245, 2008 CSC 34, la question était de savoir si les motifs du juge du procès décrivaient de façon suffisamment détaillée le raisonnement qui l’avait mené au verdict. S’exprimant au nom de la Cour, le juge Binnie a statué que, bien que les motifs « soient loin de la perfection », ils n’étaient pas insuffisants au point de porter atteinte au droit d’appel du ministère public (par. 27). Il a affirmé : « Les motifs sont suffisants s’ils répondent aux questions en litige et aux principaux arguments des parties. Leur suffisance doit être mesurée non pas dans l’abstrait, mais d’après la réponse qu’ils apportent aux éléments essentiels du litige » (par. 20).

[35] En résumé, ces arrêts confirment ceci :

(1) Pour déterminer si des motifs sont suffisants, les cours d’appel doivent adopter une approche fonctionnelle, substantielle et considérer les motifs globalement, dans le contexte de la preuve

the purposes or functions for which they are delivered (see *Sheppard*, at paras. 46 and 50; *Morrissey*, at p. 524).

(2) The basis for the trial judge's verdict must be "intelligible", or capable of being made out. In other words, a logical connection between the verdict and the basis for the verdict must be apparent. A detailed description of the judge's process in arriving at the verdict is unnecessary.

(3) In determining whether the logical connection between the verdict and the basis for the verdict is established, one looks to the evidence, the submissions of counsel and the history of the trial to determine the "live" issues as they emerged during the trial.

This summary is not exhaustive, and courts of appeal might wish to refer themselves to para. 55 of *Sheppard* for a more comprehensive list of the key principles.

[36] Against this background, I turn to a more detailed discussion of four differences between the positions advanced by the defence and the Crown in this case: (1) the degree to which context informs the assessment of the sufficiency of reasons; (2) the degree of detail required in connecting particular pieces of evidence to the verdict or explaining propositions of law; (3) how much need be said on findings of credibility; and (4) the role of appellate courts.

1. Reasons in Context

[37] As we have seen, the cases confirm that a trial judge's reasons should not be viewed on a stand-alone, self-contained basis. The sufficiency of reasons is judged not only by what the trial judge has stated, but by what the trial judge has stated *in the context of the record, the issues and the submissions of counsel at trial*. The question is whether, viewing the reasons in their entire context, the foundations for the trial judge's conclusions — the "why" for the verdict — are discernable. If so, the functions of reasons for judgment are met. The

présentée, des arguments invoqués et du déroulement du procès, en tenant compte des buts et des fonctions de l'expression des motifs (voir *Sheppard*, par. 46 et 50; *Morrissey*, p. 524).

(2) Le fondement du verdict du juge du procès doit être « intelligible », ou pouvoir être discerné. En d'autres termes, il doit être possible de relier logiquement le verdict à son fondement. Il n'est pas nécessaire de décrire en détail le processus suivi par le juge pour arriver au verdict.

(3) Lorsqu'il s'agit de déterminer si le lien logique entre le verdict et son fondement est établi, il faut examiner la preuve, les observations des avocats et le déroulement du procès pour identifier les questions « en litige » telles qu'elles sont ressorties au procès.

Ce résumé n'est pas exhaustif et les tribunaux d'appel voudront peut-être se reporter au par. 55 de *Sheppard* pour une liste plus complète des grands principes.

[36] Sur cette toile de fond, j'examinerai maintenant de façon plus approfondie quatre points sur lesquels les thèses de la défense et de la poursuite diffèrent en l'espèce : (1) le rôle du contexte dans l'évaluation du caractère suffisant des motifs; (2) l'obligation d'expliquer en détail les propositions juridiques ou le lien entre des éléments de preuve précis et le verdict; (3) l'ampleur de l'obligation de traiter des conclusions sur la crédibilité; (4) le rôle des tribunaux d'appel.

1. Les motifs considérés dans leur contexte

[37] Comme nous l'avons vu, la jurisprudence confirme que les motifs du juge du procès ne doivent pas être considérés isolément, comme formant un tout autonome. Le caractère suffisant des motifs ne dépend pas seulement de ce que le juge du procès a dit, mais de ce qu'il a dit *dans le contexte du dossier, des questions en litige et des observations des avocats au procès*. Il s'agit de savoir si, en lisant les motifs dans leur contexte global, il est possible de discerner le fondement des conclusions du juge du procès — le « pourquoi » du verdict. Si

parties know the basis for the decision. The public knows what has been decided and why. And the appellate court can judge whether the trial judge took a wrong turn and erred. The authorities are constant on this point.

[38] This important role played by the record was recognized in *Macdonald*. The majority of the Court explained, *per* Laskin C.J., at p. 673, that a question of law will only be raised if an examination of the record indicates that “there is a rational basis for concluding that the trial judge erred in appreciation of a relevant issue or in appreciation of evidence that would affect the propriety of his verdict”; mere failure to give reasons, without more, does not raise a question of law.

[39] In *Sheppard*, Binnie J. affirmed the need to look at the record: “Where it is plain from the record why an accused has been convicted or acquitted, and the absence or inadequacy of reasons provides no significant impediment to the exercise of the right of appeal, the appeal court will not on that account intervene” (para. 46). In point 2 of his summary (at para. 55), he stated: “Reasons for judgment may be important to clarify the basis for the conviction but, on the other hand, the basis may be clear from the record.” Similarly, with respect to the need for lawyers to know the basis of the judgment for appellate purposes, he stated at point 3, after saying that they may require reasons: “On the other hand, they may know all that is required to be known for that purpose on the basis of the rest of the record.” Throughout the reasons in *Sheppard*, Binnie J. emphasizes the functional and relative nature of the question of whether a trial judge’s reasons for judgment are adequate.

[40] *Hill*, citing *Sheppard*, confirms that “the reasons should be considered in the context of the record before the court. Where the record discloses all that is required to be known to permit appellate

oui, les motifs du jugement remplissent bien leurs fonctions. Les parties connaissent le fondement de la décision. Le public sait ce qui a été décidé et pourquoi. Et la cour d’appel peut déterminer si le juge du procès a suivi la mauvaise voie et commis une erreur. La jurisprudence et les auteurs s’entendent sur ce point.

[38] Ce rôle important du dossier a été reconnu dans *Macdonald*. La majorité de la Cour a expliqué, à la p. 673, sous la plume du juge en chef Laskin, qu’une question de droit n’est soulevée que si le dossier indique qu’« on peut logiquement conclure que le juge s’est trompé dans l’appréciation d’une question pertinente ou d’un élément de preuve de nature à influencer sur la justesse de son verdict »; la simple omission de donner des motifs, sans plus, ne soulève pas une question de droit.

[39] Dans *Sheppard*, le juge Binnie a confirmé la nécessité d’examiner le dossier : « Lorsque la raison pour laquelle un accusé a été déclaré coupable ou acquitté ressort clairement du dossier, et que l’absence de motifs ou leur insuffisance ne constitue pas un obstacle important à l’exercice du droit d’appel, le tribunal d’appel n’interviendra pas » (par. 46). Au point 2 de son résumé (par. 55), il a affirmé : « Il peut être important d’exprimer les motifs du jugement pour clarifier le fondement de la déclaration de culpabilité, mais il se peut que ce fondement ressorte clairement du dossier. » De même, en ce qui concerne la nécessité que les avocats connaissent le fondement du jugement pour évaluer l’opportunité d’un appel, il a reconnu que les motifs peuvent s’avérer essentiels, puis il a ajouté au point 3 : « Par contre, il est possible que les autres éléments du dossier leur apprennent tout ce qu’ils doivent savoir à cette fin. » Tout au long de sa décision dans *Sheppard*, le juge Binnie met l’accent sur le caractère fonctionnel et relatif de la question de savoir si le juge du procès a suffisamment motivé sa décision.

[40] L’arrêt *Hill*, qui cite *Sheppard*, confirme qu’« il faut considérer les motifs à la lumière du dossier présenté à la cour. Lorsque le dossier renferme tous les éléments nécessaires à la

review, less detailed reasons may be acceptable” (para. 101).

[41] The contextual approach to assessing the sufficiency of reasons recognizes that the trial process, including the trial judge’s reasons, is a dynamic process, in which the evidence, counsel and the judge play different but imbricated roles. Whether the trial judge’s reasons for judgment are sufficient must be judged in the full context of how the trial has unfolded. The question is whether the reasons, viewed in light of the record and counsel’s submissions on the live issues presented by the case, explain why the decision was reached, by establishing a logical connection between the evidence and the law on the one hand, and the verdict on the other.

2. The Degree of Detail Required

[42] In this case, the Court of Appeal faulted the trial judge principally for not giving sufficiently precise reasons for accepting the complainant’s evidence and rejecting the accused’s evidence, as well as for not stating precisely what evidence he accepted and rejected in respect of each of the counts on which he found the accused guilty. Similarly, in *Dinardo*, the reasons of the trial judge were criticized for failing to engage in a detailed discussion of the process of assessing reasonable doubt recommended in *W. (D.)*. In both cases, the issue was how much detail the trial judge’s reasons are required to provide — in this case on the facts, in *Dinardo* on the law.

[43] The answer is provided in *Dinardo* and *Walker* — what is required is that the reasons, read in the context of the record and the submissions on the live issues in the case, show that the judge has seized the substance of the matter. Provided this is done, detailed recitations of evidence or the law are not required.

[44] The degree of detail required may vary with the circumstances. Less detailed reasons may be required in cases where the basis of the

révision en appel, les motifs peuvent être brefs » (par. 101).

[41] L’approche contextuelle de la question de savoir si les motifs sont suffisants reconnaît que le processus judiciaire en première instance — y compris les motifs du juge du procès — est un processus dynamique dans lequel la preuve, les avocats et le juge jouent des rôles différents, mais étroitement reliés. La question de savoir si le juge du procès a suffisamment motivé sa décision doit être tranchée au regard du contexte global du déroulement du procès. Il faut se demander si les motifs, à la lumière du dossier et des observations des avocats sur les questions en litige, expliquent pourquoi le juge a rendu cette décision, en faisant ressortir un lien logique entre, d’une part, la preuve et le droit et, d’autre part, le verdict.

2. Le niveau de détails requis

[42] En l’espèce, la Cour d’appel a principalement reproché au juge du procès de ne pas avoir expliqué de façon suffisamment précise pourquoi il avait retenu le témoignage de la plaignante et écarté celui de l’accusé, et de ne pas avoir indiqué précisément quelle preuve il avait retenue ou écartée relativement à chacune des infractions dont l’accusé avait été déclaré coupable. De même, dans *Dinardo*, le juge du procès a été critiqué pour ne pas avoir exposé en détail le processus d’appréciation du doute raisonnable conformément à l’approche recommandée dans *W. (D.)*. Dans les deux cas, la question était de savoir combien de détails le juge du procès devait fournir — en l’espèce, sur les faits, dans *Dinardo*, sur le droit.

[43] On trouve la réponse dans les arrêts *Dinardo* et *Walker* — ce qui compte, c’est qu’il ressorte des motifs, considérés dans le contexte du dossier et des observations sur les questions en litige, que le juge a compris l’essentiel de l’affaire. Si c’est le cas, une description détaillée des éléments de preuve ou du droit n’est pas nécessaire.

[44] Le niveau de détails requis peut varier selon les circonstances. Des motifs moins détaillés peuvent être suffisants lorsque le fondement de la

trial judge's decision is apparent from the record, even without being articulated. More detail may be required where the trial judge is called upon "to address troublesome principles of unsettled law, or to resolve confused and contradictory evidence on a key issue": *Sheppard*, at para. 55, point 6.

[45] Just as it is reasonable to infer that the trial judge seized the import of the evidence, it is generally reasonable to infer that the trial judge understands the basic principles of criminal law at issue in the trial. Indeed, for this reason it has repeatedly been held that "[t]rial judges are presumed to know the law with which they work day in and day out": *R. v. Burns*, [1994] 1 S.C.R. 656, at p. 664, where the Court rejected the notion of a positive duty on trial judges to demonstrate that they have appreciated every aspect of the relevant evidence. The trial judge is not required to recite pages of "boilerplate" or review well-settled authorities in detail, and failure to do so is not an error of law. As Binnie J. pointed out in *Sheppard*, at para. 55, point 7:

Regard will be had to the time constraints and general press of business in the criminal courts. The trial judge is not held to some abstract standard of perfection. It is neither expected nor required that the trial judge's reasons provide the equivalent of a jury instruction.

[46] Similarly, in *Dinardo*, the Court, *per* Charron J., held that the trial judge was not required to recite the rule set out in *W. (D.)*, provided the reasons demonstrated he had seized the substance of the critical issue of a reasonable doubt in the context of a credibility assessment.

[47] This said, the presumption that trial judges are presumed to know the law with which they work on a day-in day-out basis does not negate the need for reasons to show that the law is correctly applied in the particular case (*Sheppard*, at para. 55, point 9), nor the need for reasons to deal

décision du juge ressort du dossier, même sans être exprimé. Des motifs plus détaillés peuvent être nécessaires lorsque le juge du procès est appelé à « se prononcer sur des principes de droit qui posent problème et ne sont pas encore bien établis, ou démêler des éléments de preuve embrouillés et contradictoires sur une question clé » : *Sheppard*, par. 55, point 6.

[45] Tout comme il est raisonnable d'inférer que le juge du procès a saisi l'importance de la preuve, il est généralement raisonnable d'inférer qu'il comprend les principes fondamentaux du droit criminel en cause dans le procès. C'est d'ailleurs pour cette raison qu'on a statué à plusieurs reprises que « [l]es juges du procès sont censés connaître le droit qu'ils appliquent tous les jours » : *R. c. Burns*, [1994] 1 R.C.S. 656, p. 664, où la Cour a refusé l'idée d'imposer au juge du procès l'obligation positive de démontrer qu'il a apprécié chaque aspect de la preuve pertinente. Le juge du procès n'est pas tenu de réciter des pages de « formule standard » ni de revoir en détail la jurisprudence et la doctrine bien établies, et l'omission de le faire ne constitue pas une erreur de droit. Comme le juge Binnie l'a souligné dans *Sheppard*, par. 55, point 7 :

Il faut tenir compte des délais et du volume des affaires à traiter dans les cours criminelles. Le juge du procès n'est pas tenu à une quelconque norme abstraite de perfection. On ne s'attend pas et il n'est pas nécessaire que les motifs du juge du procès soient aussi précis que les directives adressées à un jury.

[46] De même, dans *Dinardo*, la Cour a statué, sous la plume de la juge Charron, que le juge du procès n'était pas tenu de réciter la règle énoncée dans l'arrêt *W. (D.)* s'il ressortait des motifs qu'il avait saisi l'essentiel de la question fondamentale du doute raisonnable dans le contexte de l'appréciation de la crédibilité.

[47] Cela dit, la présomption selon laquelle les juges du procès sont censés connaître le droit qu'ils appliquent tous les jours n'écarte pas la nécessité qu'il ressorte des motifs que le droit a été appliqué correctement dans l'affaire en particulier (*Sheppard*, par. 55, point 9), ni que les motifs traitent des « principes

with “troublesome principles of unsettled law” (*Sheppard*, at para. 55, point 6).

3. Findings on Credibility

[48] The sufficiency of reasons on findings of credibility — the issue in this case — merits specific comment. The Court tackled this issue in *Gagnon*, setting aside an appellate decision that had ruled that the trial judge’s reasons on credibility were deficient. *Bastarache and Abella JJ.*, at para. 20, observed that “[a]ssessing credibility is not a science.” They went on to state that it may be difficult for a trial judge “to articulate with precision the complex intermingling of impressions that emerge after watching and listening to witnesses and attempting to reconcile the various versions of events”, and warned against appellate courts ignoring the trial judge’s unique position to see and hear the witnesses and instead substituting their own assessment of credibility for the trial judge’s.

[49] While it is useful for a judge to attempt to articulate the reasons for believing a witness and disbelieving another in general or on a particular point, the fact remains that the exercise may not be purely intellectual and may involve factors that are difficult to verbalize. Furthermore, embellishing why a particular witness’s evidence is rejected may involve the judge saying unflattering things about the witness; judges may wish to spare the accused who takes the stand to deny the crime, for example, the indignity of not only rejecting his evidence and convicting him, but adding negative comments about his demeanor. In short, assessing credibility is a difficult and delicate matter that does not always lend itself to precise and complete verbalization.

[50] What constitutes sufficient reasons on issues of credibility may be deduced from *Dinardo*, where Charron J. held that findings on credibility must be made with regard to the other evidence in the case (para. 23). This may require at least some reference to the contradictory evidence. However, as *Dinardo*

de droit qui posent problème et ne sont pas encore bien établis » (*Sheppard*, par. 55, point 6).

3. Les conclusions relatives à la crédibilité

[48] Le caractère suffisant des motifs concernant les conclusions sur la crédibilité — la question en litige en l’espèce — mérite des précisions. Dans l’arrêt *Gagnon*, la Cour s’est attaquée à cette question et a annulé la décision d’un tribunal d’appel portant que les motifs du juge du procès sur la crédibilité étaient déficients. Les juges Bastarache et Abella ont fait observer, au par. 20 : « Apprécier la crédibilité ne relève pas de la science exacte. » Ils ont ajouté qu’il peut être difficile pour le juge du procès « de décrire avec précision l’enchevêtrement complexe des impressions qui se dégagent de l’observation et de l’audition des témoins, ainsi que des efforts de conciliation des différentes versions des faits », et ils ont mis les tribunaux d’appel en garde contre la tentation de faire fi de l’avantage dont jouit le juge du procès du fait qu’il observe et entend les témoins et de substituer leur propre appréciation de la crédibilité à celle du juge du procès.

[49] Bien qu’il soit utile que le juge tente d’exposer clairement les motifs qui l’ont amené à croire un témoin plutôt qu’un autre, en général ou sur un point en particulier, il demeure que cet exercice n’est pas nécessairement purement intellectuel et peut impliquer des facteurs difficiles à énoncer. De plus, pour expliquer en détail pourquoi un témoignage a été écarté, il se peut que le juge doive tenir des propos peu flatteurs sur le témoin. Or, le juge voudra peut-être épargner à l’accusé, qui a témoigné pour nier le crime, la honte de subir des commentaires négatifs sur son comportement, en plus de celle de voir son témoignage écarté et d’être déclaré coupable. Bref, l’appréciation de la crédibilité est un exercice difficile et délicat qui ne se prête pas toujours à une énonciation complète et précise.

[50] Ce qu’on entend par des motifs suffisants concernant la crédibilité peut se déduire de l’arrêt *Dinardo*, dans lequel la juge Charron a statué que les conclusions sur la crédibilité doivent être tirées au regard des autres éléments de preuve (par. 23). Il faut peut-être pour cela que la preuve

makes clear, what is required is that the reasons show that the judge has seized the substance of the issue. “In a case that turns on credibility . . . the trial judge must direct his or her mind to the decisive question of whether the accused’s evidence, considered in the context of the evidence as a whole, raises a reasonable doubt as to his guilt” (para. 23). Charron J. went on to dispel the suggestion that the trial judge is required to enter into a detailed account of the conflicting evidence: *Dinardo*, at para. 30.

[51] The degree of detail required in explaining findings on credibility may also, as discussed above, vary with the evidentiary record and the dynamic of the trial. The factors supporting or detracting from credibility may be clear from the record. In such cases, the trial judge’s reasons will not be found deficient simply because the trial judge failed to recite these factors.

4. The Role of Appellate Courts in Assessing the Sufficiency of Reasons

[52] In *Sheppard*, the Court, *per* Binnie J. enunciated this “simple underlying rule”: “[I]f, in the opinion of the appeal court, the deficiencies in the reasons prevent meaningful appellate review of the correctness of the decision, then an error of law [under s. 686 of the *Criminal Code*] has been committed” (para. 28).

[53] However, the Court in *Sheppard* also stated: “The appellate court is not given the power to intervene simply because it thinks the trial court did a poor job of expressing itself” (para. 26). To justify appellate intervention, the Court makes clear, there must be a functional failing in the reasons. More precisely, the reasons, read in the context of the evidentiary record and the live issues on which the trial focussed, must fail to disclose an intelligible basis for the verdict, capable of permitting meaningful appellate review.

contradictoire soit à tout le moins mentionnée. Cependant, comme l’arrêt *Dinardo* le dit clairement, ce qui compte, c’est qu’il ressorte des motifs que le juge a saisi l’essentiel de la question en litige. « Dans une cause dont l’issue repose sur la crédibilité, [. . .] le juge du procès doit répondre à la question déterminante de savoir si la preuve offerte par l’accusé, appréciée au regard de l’ensemble de la preuve, soulève un doute raisonnable quant à sa culpabilité » (par. 23). La juge Charron a ensuite écarté la proposition voulant que le juge du procès doive s’engager dans un compte rendu détaillé des éléments de preuve contradictoires : *Dinardo*, par. 30.

[51] Comme nous l’avons vu plus haut, le niveau de détails requis pour expliquer les conclusions relatives à la crédibilité peut aussi varier selon la preuve versée au dossier et la dynamique du procès. Il se peut que les facteurs en faveur ou en défaveur de la crédibilité ressortent clairement du dossier. En pareil cas, les motifs du juge du procès ne peuvent être jugés déficients simplement parce qu’il ne les a pas énumérés.

4. Le rôle des cours d’appel dans l’appréciation de la suffisance des motifs

[52] Dans *Sheppard*, le juge Binnie a énoncé, au nom de la Cour, la « règle fondamentale » suivante : « [L]orsque la cour d’appel estime que les lacunes des motifs font obstacle à un examen valable en appel de la justesse de la décision, une erreur de droit a été commise [au sens de l’art. 686 du *Code criminel*] » (par. 28).

[53] Cependant, la Cour y a également affirmé ceci : « La cour d’appel n’est pas habilitée à intervenir simplement parce qu’elle estime que le juge du procès s’est mal exprimé » (par. 26). Comme l’indique clairement la Cour, les motifs ne justifient une intervention en appel que s’ils ne remplissent pas leurs fonctions. Il faut plus précisément que les motifs, considérés dans le contexte de la preuve versée au dossier et des questions en litige sur lesquelles était axé le procès, ne révèlent pas de fondement intelligible qui sous-tende le verdict et permette un véritable examen en appel.

[54] An appellate court reviewing reasons for sufficiency should start from a stance of deference toward the trial judge's perceptions of the facts. As decided in *H.L. v. Canada (Attorney General)*, [2005] 1 S.C.R. 401, 2005 SCC 25, and stated in *Gagnon* (at para. 20), "in the absence of a palpable and overriding error by the trial judge, his or her perceptions should be respected". It is true that deficient reasons may cloak a palpable and overriding error, requiring appellate intervention. But the appellate court's point of departure should be a deferential stance based on the propositions that the trial judge is in the best position to determine matters of fact and is presumed to know the basic law.

[55] The appellate court, proceeding with deference, must ask itself whether the reasons, considered with the evidentiary record, the submissions of counsel and the live issues at the trial, reveals the basis for the verdict reached. It must look at the reasons in their entire context. It must ask itself whether, viewed thus, the trial judge appears to have seized the substance of the critical issues on the trial. If the evidence is contradictory or confusing, the appellate court should ask whether the trial judge appears to have recognized and dealt with the contradictions. If there is a difficult or novel question of law, it should ask itself if the trial judge has recognized and dealt with that issue.

[56] If the answers to these questions are affirmative, the reasons are not deficient, notwithstanding lack of detail and notwithstanding the fact that they are less than ideal. The trial judge should not be found to have erred in law for failing to describe every consideration leading to a finding of credibility, or to the conclusion of guilt or innocence. Nor should error of law be found because the trial judge has failed to reconcile every frailty in the evidence or allude to every relevant principle of law. Reasonable inferences need not be spelled out. For example if, in a case that turns on credibility, a trial judge explains that he or she has rejected the accused's evidence, but fails to state that he or she has a reasonable doubt, this does not constitute

[54] La cour d'appel doit entreprendre l'examen du caractère suffisant des motifs avec déférence envers les perceptions de fait du juge du procès. Comme la Cour l'a décidé dans *H.L. c. Canada (Procureur général)*, [2005] 1 R.C.S. 401, 2005 CSC 25, et affirmé dans *Gagnon* (par. 20), « il [faut] respecter les perceptions du juge de première instance, sauf erreur manifeste et dominante ». Il est vrai que des motifs déficients peuvent dissimuler une erreur manifeste et dominante nécessitant une intervention, mais la cour d'appel doit adopter dès le départ une attitude empreinte de retenue en accord avec le postulat voulant que le juge du procès soit le mieux placé pour trancher les questions de fait et censé connaître les principes fondamentaux du droit.

[55] La cour d'appel doit se demander, en faisant preuve de retenue, si les motifs considérés avec la preuve versée au dossier, les observations des avocats et les questions en litige au procès font ressortir le fondement du verdict. Elle doit examiner les motifs dans leur contexte global. Elle doit déterminer si, de ce point de vue, le juge du procès semble avoir saisi l'essentiel des questions fondamentales en litige au procès. Si les éléments de preuve sont embrouillés ou contradictoires, la cour d'appel doit se demander si le juge du procès a manifestement relevé et résolu les contradictions. En présence d'une question de droit épineuse ou de droit nouveau, elle doit se demander si le juge du procès a relevé et résolu cette question.

[56] Si les réponses à ces questions sont affirmatives, les motifs ne sont pas déficients, malgré l'absence de détails et malgré le fait qu'ils soient loin d'être parfaits. On ne doit pas conclure que le juge du procès a commis une erreur de droit parce qu'il a omis de décrire chaque facteur qui l'a mené à une conclusion sur la crédibilité, ou à la conclusion de culpabilité ou d'innocence. On ne doit pas non plus conclure à l'erreur de droit parce que le juge du procès a omis de concilier chacune des faiblesses de la preuve ou de faire allusion à chaque principe de droit applicable. Nul n'est besoin d'énoncer les inférences raisonnables. Si, par exemple, dans une cause dont l'issue repose sur la crédibilité, le juge du procès explique avoir écarté la preuve offerte

an error of law; in such a case the conviction itself raises an inference that the accused's evidence failed to raise a reasonable doubt. Finally, appellate courts must guard against simply sifting through the record and substituting their own analysis of the evidence for that of the trial judge because the reasons do not comply with their idea of ideal reasons. As was established in *Harper v. The Queen*, [1982] 1 S.C.R. 2, at p. 14, "[a]n appellate tribunal has neither the duty nor the right to reassess evidence at trial for the purpose of determining guilt or innocence. . . . Where the record, including the reasons for judgment, discloses a lack of appreciation of relevant evidence and more particularly the complete disregard of such evidence, then it falls upon the reviewing tribunal to intercede."

[57] Appellate courts must ask themselves the critical question set out in *Sheppard*: Do the trial judge's reasons, considered in the context of the evidentiary record, the live issues as they emerged at trial and the submissions of counsel, deprive the appellant of the right to meaningful appellate review? To conduct meaningful appellate review, the court must be able to discern the foundation of the conviction. Essential findings of credibility must have been made, and critical issues of law must have been resolved. If the appellate court concludes that the trial judge on the record as a whole did not deal with the substance of the critical issues on the case (as was the case in *Sheppard* and *Dinardo*), then, and then only, is it entitled to conclude that the deficiency of the reasons constitute error in law.

5. Application of the Principles to This Case

[58] This was a case that turned on credibility. The complainant testified to 11 incidents of sexual assault by the accused, over a period of years when she was a child, between the ages of 9 and 17. The

par l'accusé, mais ne précise pas qu'il a un doute raisonnable, il ne s'agit pas d'une erreur de droit. En pareil cas, la déclaration de culpabilité permet en soi d'inférer que la preuve de l'accusé ne soulevait pas un doute raisonnable. Enfin, les cours d'appel doivent se garder de simplement passer le dossier en revue et substituer leur propre analyse de la preuve à celle du juge du procès parce que les motifs ne correspondent pas à l'idée qu'ils se font de motifs parfaits. Comme l'a établi l'arrêt *Harper c. La Reine*, [1982] 1 R.C.S. 2, p. 14, « [u]n tribunal d'appel n'a ni le devoir ni le droit d'apprécier à nouveau les preuves produites au procès afin de décider de la culpabilité ou de l'innocence. [. . .] S'il se dégage du dossier, ainsi que des motifs de jugement, qu'il y a eu omission d'apprécier des éléments de preuve pertinents et, plus particulièrement, qu'on a fait entièrement abstraction de ces éléments, le tribunal chargé de révision doit alors intervenir. »

[57] Les cours d'appel doivent se poser la question cruciale formulée dans l'arrêt *Sheppard* : les motifs du juge du procès, considérés dans le contexte de la preuve versée au dossier, des questions en litige telles qu'elles sont ressorties au procès et des observations des avocats, privent-ils l'appelant du droit à un véritable examen en appel? Pour procéder à un véritable examen en appel, la cour doit pouvoir discerner le fondement de la déclaration de culpabilité. Les conclusions essentielles sur la crédibilité doivent avoir été tirées, et les questions de droit fondamentales doivent avoir été résolues. Si la cour d'appel arrive à la conclusion que, compte tenu de l'ensemble du dossier, le juge du procès n'a pas tranché sur le fond les questions essentielles en litige (comme ce fut le cas dans *Sheppard* et *Dinardo*), elle peut alors, mais seulement alors, conclure que la déficience des motifs constitue une erreur de droit.

5. Application des principes à la présente affaire

[58] Il s'agissait d'une cause dont l'issue reposait sur la crédibilité. La plaignante a témoigné relativement à 11 incidents, répartis sur de nombreuses années de son enfance, où l'accusé l'aurait agressée

accused testified. He admitted to having sexual intercourse with the complainant, but claimed that the relationship only became sexual after she was 15 and that the intercourse was consensual.

[59] The trial judge found the complainant to be a credible witness and accepted most of her evidence, while rejecting some portions that had been contradicted by other evidence. He discussed the reasons for these conclusions in some detail, noting that the complainant was a child at the time of most of the incidents, and that they had occurred a long time before. Some errors in her evidence were understandable, he concluded.

[60] The trial judge largely disbelieved the accused's evidence, although he found that on some points, it was not challenged. Again he gave reasons, although less extensive than he had in the case of the complainant's evidence.

[61] In summary, the reasons for judgment show that on most points, the trial judge accepted the evidence of the complainant and rejected that of the accused. This said, there were aspects of the complainant's evidence that he did not accept and aspects of the accused's evidence that he accepted. In the end, the trial judge convicted the accused of three offences: (1) having intercourse with a minor; (2) indecent assault; and (3) having illicit intercourse with his stepdaughter. He acquitted the accused on the count of gross indecency.

[62] The Court of Appeal found the trial judge's reasons to be deficient on the following grounds:

(1) The trial judge did not clearly explain which of the offences were proved by which of the 11 incidents on which evidence had been led;

(2) The trial judge failed to mention some of the accused's evidence;

sexuellement alors qu'elle avait entre 9 et 17 ans. L'accusé a témoigné. Il a reconnu avoir eu des rapports sexuels avec la plaignante, mais il a soutenu qu'elle avait 15 ans lorsque leur relation a pris une tournure sexuelle et qu'il s'agissait de rapports consensuels.

[59] Le juge du procès a estimé que la plaignante était un témoin crédible et il a retenu la plupart de son témoignage, en rejetant néanmoins certaines parties contredites par d'autres éléments de preuve. Il a exposé de façon assez détaillée les motifs de ces conclusions, faisant observer que la plaignante était encore une enfant au moment de la plupart des incidents, survenus longtemps auparavant. Il était compréhensible, a-t-il conclu, que des erreurs se soient glissées dans son témoignage.

[60] Le juge du procès n'a guère cru le témoignage de l'accusé, bien qu'il ait conclu que, sur certains points, il n'était pas mis en doute. Encore une fois, il a exprimé des motifs, bien que moins détaillés que ses motifs concernant le témoignage de la plaignante.

[61] En résumé, il ressort des motifs du jugement que, sur la plupart des points, le juge du procès a retenu le témoignage de la plaignante et rejeté celui de l'accusé. Cela dit, il a écarté certains aspects du témoignage de la plaignante et retenu certains aspects du témoignage de l'accusé. Le juge du procès a finalement déclaré l'accusé coupable de trois infractions : (1) rapports sexuels avec une personne mineure; (2) attentat à la pudeur; et (3) rapports sexuels illicites avec sa belle-fille. Il l'a acquitté du chef de grossière indécence.

[62] La Cour d'appel a conclu que les motifs du juge du procès étaient déficients pour les raisons suivantes :

(1) le juge du procès n'a pas indiqué clairement lesquels des 11 incidents mis en preuve avaient démontré la perpétration de chacune des infractions;

(2) le juge du procès n'a pas mentionné une partie de la preuve offerte par l'accusé;

(3) The trial judge failed to make general comments about the accused's evidence;

(4) The trial judge failed to reconcile his generally positive findings on the complainant's evidence with the rejection of some of her evidence;

(5) The trial judge failed to explain why he rejected the accused's plausible denial of the charges.

[63] The trial judge's failure to clearly explain which of the three offences were grounded by which of the incidents must be considered in the context of the record as a whole. The three offences of which the accused was convicted found support in the evidence as to a number of the incidents. This gives rise to a reasonable inference that the trial judge accepted some or all of this evidence and grounded the convictions on that evidence. While reasons drawing a precise link between each count on which the accused was found guilty and the particular evidence that the trial judge accepted in support of that count might have been desirable, this omission did not render the reasons deficient on this record, as discussed more fully below.

[64] Nor did the trial judge's failure to mention some of the accused's evidence render the reasons for judgment deficient. The foregoing discussion of the law establishes that a trial judge is not obliged to discuss all of the evidence on any given point, provided the reasons show that he or she grappled with the substance of the live issues on the trial. It is clear from the reasons that the trial judge considered the accused's evidence carefully, and indeed accepted it on some points. In these circumstances, failure to mention some aspects of his evidence does not constitute error. This also applies to the third objection, that the trial judge failed to make general comments about the accused's evidence. As helpful as it might be in a given case, a trial judge is not required to summarize specific findings on credibility by issuing a general statement as to "overall" credibility. It is enough that the trial judge has demonstrated a recognition, where

(3) le juge du procès n'a pas fait de commentaires généraux sur le témoignage de l'accusé;

(4) le juge du procès n'a pas concilié ses conclusions généralement positives sur le témoignage de la plaignante avec le rejet d'une partie de son témoignage;

(5) le juge du procès n'a pas expliqué pourquoi il a écarté la dénégation plausible des accusations par l'accusé.

[63] L'omission du juge du procès d'indiquer clairement sur quels incidents se fondaient les trois infractions doit être appréciée dans le contexte de l'ensemble du dossier. Les trois infractions dont l'accusé a été déclaré coupable étaient étayées par la preuve relative à plusieurs incidents, d'où l'inférence raisonnable que le juge du procès a retenu cette preuve en totalité ou en partie et s'est appuyé sur elle pour prononcer les déclarations de culpabilité. Bien qu'il eût été souhaitable, que les motifs établissent un lien précis entre chacun des chefs d'accusation dont l'accusé a été déclaré coupable et la preuve que le juge du procès a retenue à l'appui de ce chef, cette omission ne rendait pas les motifs déficients en l'espèce, comme nous le verrons en détail plus loin.

[64] L'omission du juge du procès de mentionner une partie de la preuve offerte par l'accusé ne rendait pas non plus ses motifs de jugement déficients. L'analyse juridique qui précède établit que le juge du procès n'est pas tenu de traiter de tous les éléments de preuve sur un point donné, pourvu qu'il ressorte des motifs qu'il a saisi l'essentiel des questions en litige au procès. Il se dégage clairement des motifs que le juge du procès a examiné soigneusement la preuve de l'accusé, et qu'il l'a d'ailleurs acceptée sur certains points. Dans ces circonstances, l'omission de mentionner certains aspects de cette preuve ne constitue pas une erreur. Il en va de même de la troisième objection, selon laquelle le juge du procès n'a pas fait de commentaires généraux sur la preuve offerte par l'accusé. Aussi utile que cela puisse être dans certains cas, le juge du procès n'a pas à résumer ses conclusions relatives à la crédibilité en faisant une déclaration globale sur

applicable, that the witness's credibility was a live issue.

[65] The trial judge's alleged failure to reconcile his generally positive findings on the complainant's evidence with the rejection of some of her evidence did not render the reasons deficient. As juries are routinely instructed, it is open to the trier of fact to accept some of the evidence of a witness, while rejecting other evidence of the same witness. The trial judge explained that the fact that many of the incidents testified to happened many years before and the fact that the complainant was a child at the time might well explain certain inconsistencies. In fact, he did explain why he rejected some of her evidence.

[66] Finally, the trial judge's failure to explain why he rejected the accused's plausible denial of the charges provides no ground for finding the reasons deficient. The trial judge's reasons made it clear that in general, where the complainant's evidence and the accused's evidence conflicted, he accepted the evidence of the complainant. This explains why he rejected the accused's denial. He gave reasons for accepting the complainant's evidence, finding her generally truthful and "a very credible witness", and concluding that her testimony on specific events was "not seriously challenged" (para. 68). It followed of necessity that he rejected the accused's evidence where it conflicted with evidence of the complainant that he accepted. No further explanation for rejecting the accused's evidence was required. In this context, the convictions themselves raise a reasonable inference that the accused's denial of the charges failed to raise a reasonable doubt.

[67] It may have been desirable for the trial judge to explain certain matters more fully. In particular, it would have been preferable to relate the charges on which the accused was found guilty to the evidence of the specific incidents disclosed by the

la crédibilité « en général ». Il suffit qu'il démontre qu'il comprenait, le cas échéant, que la crédibilité du témoin était une question en litige.

[65] L'omission alléguée du juge du procès de concilier ses conclusions généralement positives sur le témoignage de la plaignante avec le rejet d'une partie de celui-ci ne rendait pas ses motifs déficients. Comme on l'explique habituellement aux jurés, le juge des faits peut accepter une partie de la déposition d'un témoin tout en écartant d'autres parties. Le juge du procès a indiqué que le fait que plusieurs incidents dont la plaignante avait témoigné s'étaient produits de nombreuses années auparavant, quand elle n'était qu'une enfant, pouvait expliquer certaines incohérences. En fait, il a bel et bien indiqué pourquoi il a écarté une partie de son témoignage.

[66] Enfin, l'omission du juge du procès d'expliquer pourquoi il a écarté la dénégation plausible des accusations par l'accusé ne permet pas de conclure à la déficience des motifs. Il ressort clairement des motifs du juge du procès que, de façon générale, lorsque les témoignages de la plaignante et de l'accusé se contredisaient, il a retenu celui de la plaignante. Cela explique pourquoi il a écarté la dénégation de l'accusé. Il a exposé les raisons pour lesquelles il a retenu le témoignage de la plaignante, ayant jugé qu'elle était généralement sincère et [TRADUCTION] « un témoin fort crédible », et il a conclu que son témoignage sur des événements précis n'était [TRADUCTION] « pas sérieusement mis en doute » (par. 68). Il s'ensuit, nécessairement, qu'il a écarté le témoignage de l'accusé lorsqu'il contredisait le témoignage de la plaignante qu'il avait retenu. Aucun autre motif n'était nécessaire pour justifier le rejet du témoignage de l'accusé. Dans ce contexte, les condamnations elles-mêmes permettent d'inférer raisonnablement que l'accusé n'a pas réussi à soulever un doute raisonnable en niant les accusations.

[67] Il eût peut-être été souhaitable que le juge du procès explique davantage certains points. Plus particulièrement, il eût été préférable d'établir un lien précis entre les infractions dont l'accusé a été déclaré coupable et la preuve se rapportant à chacun

evidence. Given the trial judge's mixed findings on credibility, the relationship between the 11 incidents to the convictions may not have been totally clear. However, on the law enunciated above, the question is whether the reasons, considered in the context of the record and the live issues at trial, failed to disclose a logical connection between the evidence and the verdict sufficient to permit meaningful appeal. The central issue at trial was credibility. It is clear that the trial judge accepted all or sufficient of the complainant's ample evidence as to the incidents, and was not left with a reasonable doubt on the whole of the evidence or from the contradictory evidence of the accused. From this, he concluded that the accused's guilt had been established beyond a reasonable doubt. When the record is considered as a whole, the basis for the verdict is evident.

[68] Instead of looking for this basis, the Court of Appeal focussed on omitted details and proceeded from a sceptical perspective. Having concluded that the accused's denial was plausible, it proceeded to examine the case from that perspective, asking whether the reasons disclosed that the trial judge had properly applied the reasonable doubt standard. In doing so, it fell into the trap identified in *Gagnon* of ignoring the trial judge's unique position to see and hear witnesses, and instead substituted its own assessment of credibility for the trial judge's view by impugning the reasons for judgment for not explaining why a reasonable doubt was not raised.

III. Conclusion

[69] I would allow the appeal and restore the verdicts of guilty.

Appeal allowed.

Solicitor for the appellant: Attorney General of British Columbia, Vancouver.

Solicitor for the respondent: J. M. Brian Coleman, Vancouver.

des incidents. Compte tenu des conclusions nuancées sur la crédibilité auxquelles est arrivé le juge du procès, le lien entre les 11 incidents et les déclarations de culpabilité n'était peut-être pas parfaitement clair. Cependant, selon l'état du droit exposé plus tôt, il s'agit de savoir si les motifs, considérés dans le contexte du dossier et des questions en litige au procès, faisaient ou non ressortir entre la preuve et le verdict un lien logique suffisant pour permettre un véritable appel. La principale question en litige au procès était la crédibilité. Il est manifeste que le juge du procès a retenu la totalité ou une partie suffisante du témoignage étoffé de la plaignante concernant les incidents et que ni l'ensemble de la preuve ni le témoignage contradictoire de l'accusé n'ont laissé subsister de doute raisonnable dans son esprit. Il en a conclu que la culpabilité de l'accusé avait été établie hors de tout doute raisonnable. Lorsqu'on considère le dossier globalement, le fondement du verdict est évident.

[68] Plutôt que de s'efforcer de découvrir ce fondement, la Cour d'appel s'est intéressée principalement aux détails omis et a fait preuve de scepticisme. Après avoir conclu que la dénégation de l'accusé était plausible, elle a examiné l'affaire de ce point de vue, se demandant s'il ressortait des motifs que le juge du procès avait appliqué correctement la règle du doute raisonnable. Elle est alors tombée dans le piège décrit dans l'arrêt *Gagnon*, en faisant fi de l'avantage dont jouit le juge du procès du fait qu'il observe et entend les témoins, et elle a substitué sa propre appréciation de la crédibilité à celle du juge du procès en critiquant les motifs du jugement parce qu'ils n'expliquaient pas pourquoi aucun doute raisonnable n'avait été soulevé.

III. Conclusion

[69] Je suis d'avis d'accueillir le pourvoi et de rétablir les verdicts de culpabilité.

Pourvoi accueilli.

Procureur de l'appelante : Procureur général de la Colombie-Britannique, Vancouver.

Procureur de l'intimé : J. M. Brian Coleman, Vancouver.

Solicitor for the intervener the Attorney General of Ontario: Attorney General of Ontario, Toronto.

Procureur de l'intervenant le procureur général de l'Ontario : Procureur général de l'Ontario, Toronto.

Solicitor for the intervener the Attorney General of Alberta: Attorney General of Alberta, Edmonton.

Procureur de l'intervenant le procureur général de l'Alberta : Procureur général de l'Alberta, Edmonton.