Supplement to Roach, Berger, Cunliffe, and Kiyani *Criminal Law and Procedure 12th ed*

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Table of Contents

Insert at* p. 14 *to replace the Reference re Firearms Act

***Reference re Genetic Non-Discrimination Act,* 2020 SCC 17**

The reasons of Abella, Karakatsanis and Martin JJ. were delivered by

KARAKATSANIS J. —

[1] Parliament criminalized compulsory genetic testing and the non-voluntary use or disclosure of genetic test results in the context of a wide range of activities — activities that structure much of our participation in society. This Court must decide whether Parliament could validly use its broad criminal law power to do so.

[2] In particular, we must decide whether s. 91(27) of the *Constitution Act, 1867* empowers Parliament to prohibit forcing an individual to take a genetic test or to disclose genetic test results, or to prohibit using an individual's genetic test results without consent, by way of ss. 1 to 7 of the *Genetic Non-Discrimination Act*, S.C. 2017, c. 3. Answering that question turns on whether Parliament enacted the challenged prohibitions for a valid criminal law purpose. I find that it did.

[3] The Government of Quebec referred the constitutionality of ss. 1 to 7 of the *Act* to the Quebec Court of Appeal, which concluded that those provisions fell outside Parliament's authority to make criminal law. The appellant, the Canadian Coalition for Genetic Fairness, appeals to this Court as of right.

[4] I would allow the appeal and conclude that Parliament had the power to enact ss. 1 to 7 of the *Genetic Non-Discrimination Act* under s. 91(27). As I explain below, the "matter" (or pith and substance) of the challenged provisions is to protect individuals' control over their detailed personal information disclosed by genetic tests, in the broad areas of contracting and the provision of goods and services, in order to address Canadians' fears that their genetic test results will be used against them and to prevent discrimination based on that information. This matter is properly classified within Parliament's s. 91(27) power over criminal law. The provisions are supported by a criminal law purpose because they respond to a threat of harm to several overlapping public interests traditionally protected by the criminal law. The prohibitions in the *Act* protect autonomy, privacy, equality and public health, and therefore represent a valid exercise of Parliament's criminal law power.

I. Genetic Non-Discrimination Act

[5] In December 2015, Senator James S. Cowan introduced Bill S-201, *An Act to prohibit and prevent genetic discrimination*, 1st Sess., 42nd Parl., 2017, which would eventually become the *Genetic Non-Discrimination Act*, in the Senate. The Senate passed the bill by unanimous vote. The House of Commons passed it with 222 members of Parliament voting in favour and 60 against. Although the government opposed the bill, it did not require its backbenchers to vote against it. The bill came into force on royal assent as the *Genetic Non-Discrimination Act*: see *Interpretation Act*, R.S.C. 1985, c. I-21, s. 5(2).

…

[7] Thus, individuals and corporations cannot force individuals to take genetic tests or disclose genetic test results and cannot use individuals' genetic test results without their written consent in the areas of contracting[1] and the provision of goods and services.

[8] Section 7 provides that doing anything prohibited by ss. 3, 4 or 5 is an offence punishable on summary conviction by a fine of up to $300,000 or imprisonment of up to 12 months, or both, and on indictment by a fine of up to $1 million or imprisonment of up to 5 years, or both.

[9] Section 6 provides that the prohibitions established by ss. 3 to 5 do not apply to a physician, pharmacist or other health care practitioner "in respect of an individual to whom they are providing health services" and also do not apply to "a person who is conducting medical, pharmaceutical or scientific research in respect of an individual who is participating in the research".

[10] Sections 8, 9 and 10 of the *Act* amended the *Canada Labour Code*, R.S.C. 1985, c. L-2, and the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6.[2] None of those amendments is at issue in this appeal, but, as I explain below, they may help illuminate the purpose of ss. 1 to 7 of the *Act*.

II. Quebec Court of Appeal's Opinion, 2018 QCCA 2193, 2019 CLLC ¶230-020

[11] The Government of Quebec referred the following question to the Quebec Court of Appeal under the *Court of Appeal Reference Act*, CQLR, c. R-23, s. 1:

> Is the *Genetic Non-Discrimination Act* enacted by sections 1 to 7 of the *Act to prohibit and prevent genetic discrimination* (S.C. 2017, c. 3) *ultra vires* to the jurisdiction of the Parliament of Canada over criminal law under paragraph 91(27) of the *Constitution Act, 1867*? [para. 1]

[12] The Court of Appeal held that, in pith and substance, the *Act* aims to "encourage the use of genetic tests in order to improve the health of Canadians by supressing the fear of some that this information could eventually serve discriminatory purposes in the entering of agreements o[r] in the provision of goods and services, particularly insurance and employment contracts": para. 11. In the Court of Appeal's view, despite its title, nothing in the challenged provisions of the *Act* prohibits or even addresses genetic discrimination. The only mention of genetic discrimination is found in the amendments to the *Canadian Human Rights Act*.

[13] With that characterization in mind, the Court of Appeal concluded that the provisions do not pursue a valid criminal law purpose. In the Court of Appeal's view, the prohibitions created by ss. 3, 4 and 5 of the *Genetic Non-Discrimination Act* govern the type of information available for employment and insurance purposes, which is not a valid criminal law purpose. Moreover, the Court of Appeal reasoned that merely promoting health by encouraging more people to take genetic tests is not a criminal purpose because it does not attack a "real public health evil", in contrast to legislation that concerns tobacco and illegal drugs, both of which "intrinsically present a threat to public health": para. 24.

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[1] The provisions refer to entering into and continuing both contracts and agreements. Although the notion of an agreement is broader than that of a contract in a private law sense, I will refer simply to "contracting" and "entering into contracts" throughout these reasons.

[2] Section 11 of the *Genetic Non-Discrimination Act*, which coordinated the amendments to the *Canadian Human Rights Act* made by ss. 9 and 10(1) of the *Genetic Non-Discrimination Act* with those made by *An Act to amend the Canadian Human Rights Act and the Criminal Code*, S.C. 2017, c. 13, came into force in June 2017.

[14] Accordingly, the Court of Appeal answered the reference question in the affirmative, concluding that ss. 1 to 7 of the *Act* exceed Parliament's authority over criminal law.

III. Issue

[15] The only issue before this Court is whether Parliament had the power under s. 91(27) to enact ss. 1 to 7 of the *Genetic Non-Discrimination Act*. The wisdom of Parliament's decision to criminalize the conduct the provisions prohibit is not in issue. Nor is it this Court's task to consider whether the policy objectives advanced by the provisions could be better achieved by other means, such as provincial legislation....

…

[18] The respondents, the Attorneys General of Canada and of Quebec, both take the position that the *Act* is beyond Parliament's authority. The Attorney General of Canada argues that the pith and substance of ss. 1 to 7 of the *Act* is to regulate contracts and the provision of goods and services with the aim of promoting health. The Attorney General of Quebec submits that, in pith and substance, the *Act* seeks to regulate the use of genetic information by insurance companies and employers under provincial jurisdiction. Accordingly, the Attorneys General submit that the challenged provisions in pith and substance relate primarily to matters properly classified as falling within the provinces' jurisdiction over property and civil rights under s. 92(13) of the *Constitution Act, 1867*.

[19] While the Court pays respectful attention to the submissions of attorneys general, they remain just that — submissions — even in the face of agreement between attorneys general. This Court's reference to agreement between federal and provincial attorneys general in the past has been in the context where they agree that the legislation at issue *is* constitutional: see, for example, *OPSEU v. Ontario (Attorney General)*, [1987] 2 S.C.R. 2, at pp. 19-20; *Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture)*, 2002 SCC 31, [2002] 2 S.C.R. 146, at paras. 72-73. More fundamentally, agreement of the attorneys general that legislation is unconstitutional is not, in itself, persuasive. Parliament enacted the challenged provisions. The sole issue before us is whether it had the power to do so.

…

IV. Analysis

[20] The Constitution of Canada is fundamentally defined by its federal structure; the organizing principle of federalism infuses and breathes life into it: *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, at paras. 32 to 49. This Court has held that the principle of federalism runs through the political and legal systems of Canada, and that the division of powers effected mainly by ss. 91 and 92 of the *Constitution Act, 1867* is the "primary textual expression" of the federalism principle in the Constitution: *Re Resolution to amend the Constitution*, [1981] 1 S.C.R. 753, at pp. 905-9; *Secession Reference*, at para. 47.

[21] The division of powers assigns spheres of jurisdiction to a central Parliament and to the provincial legislatures, distributing the whole of legislative authority in Canada. Within their respective spheres, the legislative authority of the Parliament and the provincial legislatures is supreme (subject to the constraints established by the Constitution, including the *Canadian Charter of Rights and Freedoms* and s. 35 of the *Constitution Act, 1982*): *Hodge v. The Queen* (1883), 9 App. Cas. 117 (P.C.), at p. 132; *Reference re Pan-Canadian Securities Regulation*, 2018 SCC 48, [2018] 3 S.C.R. 189, at paras. 56-57. The principle of

federalism and the division of powers are aimed at reconciling diversity with unity: *Secession Reference*, at para. 43. They protect the autonomy of the provinces to pursue their own unique goals within their spheres of jurisdiction, while allowing the federal government to pursue common goals within its spheres.

…

[26] To determine whether a law falls within the authority of Parliament or a provincial legislature, a court must first characterize the law and then, based on that characterization, classify the law by reference to the federal and provincial heads of power under the Constitution: *Reference re Firearms Act (Can.)*, 2000 SCC 31, [2000] 1 S.C.R. 783, at para. 15; *Reference re Securities Act*, at para. 63; *Reference re Pan-Canadian Securities Regulation*, at para. 86.

[27] Accordingly, I begin by characterizing the provisions of the *Genetic Non-Discrimination Act*, then proceed to determine whether they are properly classified as coming within Parliament's criminal law power.

A. *Characterization*

…

[30] Identifying a law's pith and substance requires considering both the law's purpose and its effects: *Firearms Reference*, at para. 16. Both Parliament's or the provincial legislature's purpose and the legal and practical effects of the law will assist the court in determining the law's essential character.

…

[33] I now turn to characterizing ss. 1 to 7 of the *Act*, considering first the provisions' purpose before turning to their effects.

(1) Purpose

[34] To determine a law's purpose, a court looks to both intrinsic and extrinsic evidence. Intrinsic evidence includes the text of the law, and provisions that expressly set out the law's purpose, as well as the law's title and structure. Extrinsic evidence includes statements made during parliamentary proceedings and drawn from government publications: *Firearms Reference*, at para. 17.

…

[39] … [T]he *Act* aims to combat discrimination based on genetic test results. Health-related genetic tests reveal highly personal information — details that individuals might not wish to know or share and that could be used against them. The prohibitions target a broad range of conduct that creates the opportunity for genetic discrimination based on intimate personal information revealed by health-related tests. Parliament saw genetic test results relating to health as particularly vulnerable to abuse and discrimination. The intrinsic evidence suggests that the purpose of the provisions is to combat discrimination based on information disclosed by genetic tests by criminalizing compulsory genetic testing, compulsory disclosure of test results, and non-consensual use of test results in a broadly-defined context (the areas of contracting and the provision of goods and services). The extrinsic evidence points largely in the same direction.

[40] The main source of extrinsic evidence of purpose is the parliamentary debates on the bill that became the *Genetic Non-Discrimination Act*. ...

…

[45] … The mischief in parliamentarians' minds was the "gap" in the laws, which left individuals vulnerable to genetic discrimination and grounded the fear of genetic discrimination. Those concerns correspond to the title of the *Act* and the text of the prohibitions.

[46] In addition to enacting substantive provisions, the *Act* also amended the *Canada Labour Code* to protect employees from forced genetic testing or disclosure of test results, and from disciplinary action on the basis of genetic test results, and amended the *Canadian Human Rights Act* to add "genetic characteristics" as a prohibited ground of discrimination and to create a deeming provision relating to refusal to undergo genetic testing or disclose test results: see *Canada Labour Code*, ss. 247.98 and 247.99, as amended by s. 8 of the *Act*; *Canadian Human Rights Act*, s. 3(1) and (3), as amended by ss. 9 to 11 of the *Act*.

[47] Parliament's decision to make these amendments to the *Canada Labour Code* and the *Canadian Human Rights Act* in conjunction with its enactment of the *Act*'s substantive provisions suggests that Parliament was looking to take a coordinated approach to tackling genetic discrimination based on test results, using different tools. It was not only targeting genetic discrimination directly through human rights and labour legislation, but was also targeting precursors to such discrimination, namely forced genetic testing and disclosure of the results of such testing. The fact that Parliament did not criminalize genetic discrimination does not belie Parliament's purpose of combatting genetic discrimination in this context. The relative breadth, directness or efficacy of the means Parliament chooses to address a problem is not the court's concern in its pith and substance inquiry.

…

[49] The title of the *Act* and the text of the prohibitions provide strong evidence that the prohibitions have the purpose of combatting genetic discrimination based on test results, and that the more precise mischief they are intended to address is the lack of legal protection for the results of genetic testing. The *Act* does what its title says it does: it prevents genetic discrimination by directly targeting that mischief. The parliamentary debates also provide strong evidence to support this. I find that the purpose of the challenged provisions is to combat genetic discrimination and the fear of genetic discrimination based on the results of genetic tests by prohibiting conduct that makes individuals vulnerable to genetic discrimination in the areas of contracting and the provision of goods and services.

[50] As I will explain, the effects of ss. 1 to 7 of the *Act* are consistent with their purpose.

(2) Effects

[51] Both legal and practical effects are relevant to identifying a law's pith and substance. Legal effects "flow[] directly from the provisions of the statute itself", whereas practical effects "flow from the application of the statute [but] are not direct effects of the provisions of the statute itself": *Kitkatla*, at para. 54, citing *Morgentaler* (1993), at pp. 482-83.

[52] Starting with legal effects, ss. 3 to 5 of the *Genetic Non-Discrimination Act* prohibit genetic testing requirements and non-consensual uses of genetic test results in a broad range of circumstances. Section 7 imposes significant penalties for contravening these prohibitions.

…

[54] The most significant practical effect of the *Act* is that it gives individuals control over the decision of whether to undergo genetic testing and over access to the results of any genetic testing they choose to undergo. ...

[55] Choices about genetic testing are deeply personal in nature and the reasons for making them vary widely from one individual to another. Just as one individual may wish to be aware of every possible predisposition or risk that a genetic test might reveal, another may prefer not to know. And the individual who wants to know may not want others to know. The *Act* protects those choices.

[56] By protecting choices about who has access to such information, the legislation reduces the risk of genetic discrimination. And by removing the fear of some of the negative consequences that could flow from genetic testing, the *Act* may encourage individuals to undergo genetic testing. Additional testing may in turn produce health benefits, including by enabling earlier detection of health problems or predispositions, providing for more accurate and sometimes life-saving diagnoses and improving the health care system's ability to provide maximally beneficial care.[3]

[57] The legislation may also affect the insurance industry and, potentially, insurance premiums. By preventing insurers from using genetic test results without an individual's consent in making decisions about what policies to underwrite, the provisions at issue may result in increased insurance premiums. Since insurers will not be able to adjust individual premiums (or decline to insure an individual) based on genetic test results without written consent, they may be more likely to insure individuals who may be at risk of future health problems, or to insure those individuals at lower premiums than they would otherwise charge. Individuals who know they are at higher risk of future health problems may also be more likely to purchase insurance. This may in turn increase the amounts the insurer will be required to pay out. To make sure that they will be able to meet those potential increased future liabilities, insurers may need to raise premiums overall.

…

[60] The prohibitions in question are of general application, and do much more than prevent insurance companies from requiring individuals to disclose genetic test results when they contain relevant medical information. They give individuals control over their genetic testing results, allowing them to protect themselves against genetic discrimination. They respond to the mischief that is the lack of legal protection of genetic testing information in Canada across all sectors in which the specified activities take place — both private and public. They apply to a broad and growing array of circumstances. They may well apply, for instance, when a person is seeking to adopt a child, to use consumer genetic testing services, to access government services, to purchase any kind of good or service, or to obtain housing, insurance or employment.

…

[62] Though there is no doubt that parliamentarians were concerned about genetic discrimination in the insurance context, it does not follow that the prohibitions are essentially about insurance. A characterization narrowly focused on insurance reflects an impoverished view of the *Act* and fails to capture the broad purpose and effects of the legislation.

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[3] See House of Commons, Standing Committee on Justice and Human Rights, *Evidence*, No. 37, 1st Sess., 42nd Parl., November 24, 2016, at p. 2 (Dr. Gail Graham).

(3) Conclusion

…

[65] I accordingly conclude that, in pith and substance, ss. 1 to 7 of the *Act* protect individuals' control over their detailed personal information disclosed by genetic tests in the areas of contracting and the provision of goods and services in order to address fears that individuals' genetic test results will be used against them and to prevent discrimination based on that information.

B. *Classification*

[66] … [T]he only question the Court must answer in this part of the division of powers analysis is whether the provisions at issue come within Parliament's s. 91(27) criminal law power.

(1) The Criminal Law Power

[67] Section 91(27) of the *Constitution Act, 1867* gives Parliament the exclusive authority to make laws in relation to "[t]he Criminal Law". Sections 1 to 7 of the *Genetic Non-Discrimination Act* will be valid criminal law if, in pith and substance: (1) it consists of a prohibition (2) accompanied by a penalty and (3) backed by a criminal law purpose: *Firearms Reference*, at para. 27; *Reference re Validity of Section 5(a) of the Dairy Industry Act*, [1949] S.C.R. 1, at pp. 49-50 (*Margarine Reference*), aff'd [1951] A.C. 179 (P.C.).

[68] There is no dispute that the challenged provisions meet the first two requirements. They prohibit specific conduct and impose penalties for violating those prohibitions. The only issue is whether the matter of ss. 1 to 7 of the *Act* is supported by a criminal law purpose. [A] law is backed by a criminal law purpose if the law, in pith and substance, represents Parliament's response to a threat of harm to a public interest traditionally protected by the criminal law, such as peace, order, security, health and morality, or to another similar interest. I conclude that the prohibitions established by ss. 1 to 7 of the *Act* have a criminal law purpose, protecting several public interests traditionally safeguarded by the criminal law.

[69] Parliament's criminal law power is broad and plenary…. The criminal law must be able to respond to new and emerging matters, and the Court "has been careful not to freeze the definition [of the criminal law power] in time or confine it to a fixed domain of activity….

[70] But the use of the criminal law power to respond to those new and emerging matters must also be limited. This Court has rejected a purely formal approach that would have allowed Parliament to bring virtually any matter within s. 91(27), so long as it used prohibition and penalty as its vehicle….

[71] To that end, the Court in the *Margarine Reference* established the substantive criminal law purpose requirement. Rand J. famously stated that a criminal law prohibition must be "enacted with a view to a public purpose which can support it as being in relation to criminal law" and identified "[p]ublic peace, order, security, health, morality" as the typical but not exclusive "ends" served by the criminal law: p. 50. Rand J. also stated that criminal prohibitions are properly directed at "some evil or injurious or undesirable effect upon the public", and represent Parliament's attempt "to suppress the evil or to safeguard the interest threatened": p. 49….

[72] Rand J.'s statements in the *Margarine Reference* demonstrate that a law with a valid criminal law purpose has two features. First, it should be directed at some evil, injurious or undesirable effect on the public. Second, it should serve one or more of the "public purpose[s]" or "ends" Rand J. enumerated, or another similar purpose. Rand J.'s notion of public purpose refers to the public interests traditionally safeguarded by the criminal law, and other similar interests….

…

[74] [T]he *Margarine Reference*'s first criminal law purpose requirement (that the law target an evil, injurious or undesirable effect) is linked to the second (that the law protect a public interest that can properly ground criminal law). A law will have a criminal law purpose if it addresses an evil, injurious or undesirable effect on a public interest traditionally protected by the criminal law, or another similar public interest.

[75] [*Karakatsanis J. explained Court's role with respect to the harm principle, explored in further detail in chapter 2 of your casebook, and applied that principle to this legislation.*]

…

[79] Taken together, the requirements established in the *Margarine Reference* and subsequently applied in this Court's jurisprudence mean that a law will have a criminal law purpose if its matter represents Parliament's response to a threat of harm to public order, safety, health or morality or fundamental social values, or to a similar public interest. As long as Parliament is addressing a reasoned apprehension of harm to one or more of these public interests, no degree of seriousness of harm need be proved before it can make criminal law. The court does not determine whether Parliament's criminal law response is appropriate or wise. The focus is solely on whether recourse to criminal law is *available* under the circumstances.

(2) Application

[80] As stated above, the only classification issue concerning ss. 1 to 7 of the *Act* is whether the provisions are supported by a criminal law purpose. In my view, the essential character of the prohibitions represents Parliament's response to the risk of harm that the prohibited conduct, genetic discrimination and the fear of genetic discrimination based on genetic test results pose to several public interests traditionally protected by the criminal law: autonomy, privacy and the fundamental social value of equality, as well as public health.

…

(a) *Autonomy, Privacy and Equality*

[82] This Court has consistently recognized that individuals have powerful interests in autonomy and privacy, and in dignity more generally, protected by various *Charter* guarantees: see, for example, *R. v. Morgentaler*, [1988] 1 S.C.R. 30, at p. 166, per Wilson J. It has specifically recognized individuals' clear and pressing interest in safeguarding information about themselves — the ability to do so is "closely tied to the dignity and integrity of the individual, [and] is of paramount importance in modern society": *R. v. Jarvis*, 2019 SCC 10, [2019] 1 S.C.R. 488, at para. 66; *R. v. Dyment*, [1988] 2 S.C.R 417, at p. 429.

[83] Parliament has often used its criminal law power to protect these vital interests, acting to protect human dignity by safeguarding autonomy and privacy. The prohibitions on voyeurism in s. 162(1) of the *Criminal Code*, R.S.C. 1985, c. C-46, and on wilfully intercepting private communications in s. 184, for example, both protect individuals' well-established interests in privacy and autonomy, while the prohibition on voyeurism also protects sexual integrity: *Jarvis*, at paras. 48 and 113. Safeguarding autonomy and privacy are established uses of the criminal law power.

[84] The conduct prohibited by ss. 1 to 7 of the *Act* poses a risk of harm to two facets of autonomy and personal privacy because individuals have an interest in deciding whether or not to access the detailed genetic information revealed by genetic testing and whether or not to share their test results with others.

[85] In particular, forced genetic testing (prohibited in s. 3 of the *Act*) poses a clear threat to autonomy and to an individual's privacy interest in not finding out what their genetic makeup reveals about them and their health prospects. People may not want to learn about their "genetic destiny", or risk the psychological harm that can result from obtaining unfavourable genetic test results: Office of the Privacy Commissioner of Canada, *The Potential Economic Impact of a Ban on the Use of Genetic Information for Life and Health Insurance*, by M. Hoy and M. Durnin (2012), at p. 11 (Hoy and Durnin). Forced disclosure of genetic test results (prohibited in s. 4) and the collection, use or disclosure of genetic test results without written consent (prohibited in s. 5) threaten autonomy and privacy by compromising an individual's control over access to their detailed genetic information. Such threats to autonomy and personal privacy are threats to human dignity.

[86] The prohibitions target this autonomy- and privacy-threatening conduct in the contexts of the provision of goods and services and the conclusion of contracts. The risk of harm to dignity-related interests in these contexts is neither narrow nor trivial: individuals meaningfully participate in society by way of goods, services and contracts. The prohibitions in the *Act* target a wide swath of conduct.

…

[90] Protecting fundamental moral precepts or social values is an established criminal law purpose: [citations omitted]. Parliamentarians considered discrimination on the basis of health-related genetic test results to be morally wrong. They viewed such genetic discrimination to be antithetical to the values of equality and human dignity. It is easy to see why. Such genetic discrimination threatens the fundamental social value of equality by stigmatizing and imposing adverse treatment on individuals because of their inherited, immutable genetic characteristics, and, in particular, the characteristics that may help to predict disease or disability. In acting to suppress a threat of that nature, Parliament acted with a criminal law purpose.

…

(b) *Public Health*

[93] Health is an "amorphous" field of jurisdiction, featuring overlap between valid exercises of the provinces' general power to regulate health and Parliament's criminal law power to respond to threats to health: see *RJR-MacDonald*, at para. 32; *PHS*, at para. 60. The criminal law authority that Parliament exercises in the area of health does not prevent the provinces from regulating extensively in relation to health: *Hydro-Québec*, at para. 131. Indeed, the two levels of government "frequently work together to meet common concerns": para. 131.

…

[96] Parliament is entitled to use its criminal law power to respond to a reasoned apprehension of harm, including a threat to public health.

[97] Genetic discrimination and the fear of genetic discrimination are not merely theoretical concerns. Testimony before Parliament demonstrated that fear of genetic discrimination leads patients to forego beneficial testing, results in wasted health care dollars and may deter patients from participating in

research that could advance medical understanding of their conditions.[4] Genetic discrimination is a barrier to accessing suitable, maximally effective health care, to preventing the onset of certain health conditions and to participating in research and other initiatives serving public health. Parliament accordingly apprehended individuals' vulnerability to and fear of genetic discrimination based on test results as a threat to public health.

…

(3) Conclusion

[103] Parliament took action in response to its concern that individuals' vulnerability to genetic discrimination posed a threat of harm to several public interests traditionally protected by the criminal law. Parliament enacted legislation that, in pith and substance, protects individuals' control over their detailed personal information disclosed by genetic tests in the areas of contracting and the provision of goods and services in order to address Canadian's fears that their genetic test results will be used against them and to prevent discrimination based on that information. It did so to safeguard autonomy, privacy and equality, along with public health. The challenged provisions fall within Parliament's criminal law power because they consist of prohibitions accompanied by penalties, backed by a criminal law purpose.

V. Costs

…

The reasons of Moldaver and Côté JJ. were delivered by

MOLDAVER J. —

I. Overview

[109] The decision to undergo or forego genetic testing is one of the most intimate personal health decisions that individuals now face. Some people decide that they would rather not know what their genetic makeup reveals. Others decide that they want to know so that they can take steps to protect their own health and the health of their families. Parliament recognized that individuals should have the autonomy to make this profoundly personal choice without having to fear how the information revealed by genetic testing will be used. However, there was ample evidence before Parliament that many did not feel free to make this choice. The parliamentary record demonstrated that people were choosing to "stay in the dark" about their genetic makeup — to the detriment of their health, the health of their families, and the greater public health system — due to their concerns that they would not be able to control the uses to which the information revealed by genetic testing would be put. Sections 1 to 7 of the *Genetic Non-Discrimination Act*, S.C. 2017, c. 3 ("*Act*"), represent Parliament's attempt to address this serious threat to health.

[110] In the result, I agree with my colleague Justice Karakatsanis that ss. 1 to 7 of the *Act* represent a valid exercise of Parliament's power over criminal law set out at s. 91(27) of the *Constitution Act, 1867*.

[4] See Standing Committee on Justice and Human Rights, *Evidence*, No. 37, at p. 2 (Dr. Gail Graham); see also p. 1 (Dr. Cindy Forbes). Dr. Ronald Cohn, of the Hospital for Sick Children in Toronto, testified that more than a third of families he approached to participate in a genetic study refused for fear of genetic discrimination, in spite of the opportunity the study would have provided to find an explanation for the children's severe medical conditions: Standing Committee on Justice and Human Rights, *Evidence*, No. 36, at p. 12.

However, and with respect, I arrive at this result in a different manner because I see the pith and substance of the impugned provisions differently from her, as well as from my colleague Justice Kasirer.

[111] In my view, the pith and substance of ss. 1 to 7 of the *Act* is to protect health by prohibiting conduct that undermines individuals' control over the intimate information revealed by genetic testing. By giving people control over the decision to undergo genetic testing and over the collection, disclosure and use of the results of such testing, Parliament sought to mitigate their fears that their genetic test results could be used against them in a wide variety of contexts. Parliament had ample evidence before it that this fear was causing grave harm to the health of individuals and their families, and to the public healthcare system as a whole.

[112] The provisions in issue represent a valid exercise of Parliament's power over the criminal law because they contain prohibitions accompanied by penalties, and are backed by the criminal law purpose of suppressing a threat to health. In particular, they target the detrimental health effects occasioned by people foregoing genetic testing out of fear as to how the information revealed by such testing could be used.

…

II. Analysis

A. *Characterization*

[114] As indicated, I take the view that the pith and substance of ss. 1 to 7 of the *Act* is to protect health by prohibiting conduct that undermines individuals' control over the intimate information revealed by genetic testing. This is borne out by the purpose and effects of these provisions.

[115] … I do not agree with Justice Karakatsanis that preventing discrimination forms part of the pith and substance of the challenged provisions. While I accept that ss. 1 to 7 of the *Act* reduce the opportunities for discrimination based on one's genetic test results, thereby mitigating individuals' fear of genetic discrimination, they do so by giving people control over the information revealed by genetic tests in furtherance of the purpose of protecting health. With respect, preventing or combating genetic discrimination is not the "'dominant purpose or true character'" of these provisions [citations omitted].

[116] Nor can I agree with Justice Kasirer that the pith and substance of the provisions is "to regulate contracts and the provision of goods and services, in particular contracts of insurance and employment, by prohibiting some perceived misuses of one category of genetic tests, the whole with a view to promoting the health of Canadians" (para. 154). As I see it, what is at stake here is not the *promotion* of beneficial health practices but the *protection* of individuals from a serious threat to health. Further, I have no doubt that the impugned provisions affect contracting and the provision of goods and services. However, with respect, I believe that the manner in which my colleague characterizes them "confuse[s] the law's purpose with 'the means chosen to achieve it'" (*Quebec v. Canada*, at para. 29, quoting *Ward v. Canada (Attorney General)*, 2002 SCC 17, [2002] 1 S.C.R. 569, at para. 25). Although the means chosen by Parliament engage aspects of contracting and the provision of goods and services, as I see it, "the regulation of contracts and the provision of goods and services" is, at best, peripheral to the dominant purpose or true character of the legislation. Indeed, as Justice Kasirer himself recognizes, "health dominates the discussion" (para. 221).

…

B. *Classification*

[137] As my colleagues have noted, the classification stage of this appeal turns on whether ss. 1 to 7 of the *Act* are backed by a criminal law purpose. ...

…

[139] Sections 1 to 7 of the *Act* are backed by a criminal law purpose because they are directed at suppressing a threat to health. People were choosing to put themselves at risk of preventable death and disease because they were concerned that they would not have control over the information revealed by genetic tests in a wide variety of contexts that govern how they interact with and in society. Parliament sought to mitigate these concerns by prohibiting conduct — namely, compulsory genetic testing, and compulsory disclosure and non-consensual collection, disclosure, and use of genetic test results — that undermined individuals' control over the information revealed by genetic testing. By giving people control over that information, Parliament sought to mitigate their fears that it would be used against them, thereby curbing the injurious effect on health.

[140] The threat to health that Parliament targeted by enacting ss. 1 to 7 of the *Act* was real — in every sense of the word. Parliament had ample evidence before it that people were refraining from undergoing genetic testing out of fear as to how their genetic test results could be used, thereby suffering significant harm or putting themselves at risk of significant and avoidable harm. The debates and committee testimony are saturated with examples of the life-saving, life-extending, and life-enhancing potential of genetic testing — all of which individuals felt they had to forego because they could not control the ways in which the results of such testing would be used in various contexts.

…

[142] The debates and committee testimony are also replete with discussions of genes that can indicate a predisposition to breast and/or ovarian cancer (the BRCA1 and BRCA2 genes), and the impact that testing for these genes has on women's health care choices.[5]...

…

[150] In sum, as I see it, by enacting ss. 1 to 7 of the *Act*, Parliament targeted conduct that was having an injurious effect on health. Canadians choosing to forego genetic testing and thereby dying preventable deaths and suffering other preventable health-related harms for no reason other than the fear that their genetic test results could be used against them is a threat to health that Parliament was constitutionally entitled to address, pursuant to s. 91(27) of the *Constitution Act, 1867*. Sections 1 to 7 of the *Act*, which prohibit conduct that undermines individuals' control over the information revealed by genetic testing in a wide variety of contexts that govern how people interact with and in society, accordingly represent a valid exercise of Parliament's power to enact laws in relation to the criminal law.

III. Conclusion

[151 For these reasons, I would dispose of the appeal in the manner proposed by Justice Karakatsanis (see para. 108).

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[5] See, e.g., *Debates of the Senate*, vol. 150, No. 8, at pp. 146-47 and 149-50; *House of Commons Debates*, vol. 148, No. 77, at pp. 4889-90 and 4892-94; *House of Commons Debates*, vol. 148, No. 97, at pp. 6126-27.

The reasons of Wagner C.J. and Brown, Rowe and Kasirer JJ. were delivered by

KASIRER J. —

I. Introduction

[152] I begin these reasons by noting that I find the explanations of the method for determining the constitutionality of ss. 1 to 7 of the *Genetic Non-Discrimination Act*, S.C. 2017, c. 3 ("*Act*"), offered by my colleagues Justice Moldaver and Justice Karakatsanis most helpful. With great respect, however, I do not share their view that the impugned provisions were enacted within the constitutional authority of the Parliament of Canada over the criminal law pursuant to s. 91(27) of the *Constitution Act, 1867*.

[153] We disagree on the characterization — the pith and substance, in constitutional terms — of ss. 1 to 7 of the *Act* and, at the end of the day, how these provisions should be classified within the heads of power enumerated in ss. 91 and 92 of the *Constitution Act, 1867*.

[154] On my understanding, the pith and substance of ss. 1 to 7 is to regulate contracts and the provision of goods and services, in particular contracts of insurance and employment, by prohibiting some perceived misuses of one category of genetic tests, the whole with a view to promoting the health of Canadians. The *Act* has certain incidental purposes and effects, but when the dominant character of the impugned provisions is identified, they cannot be classified as a valid exercise of Parliament's constitutional power over criminal law. These provisions do not prohibit what is often styled, in language archaic but telling, an "evil" associated with the criminal law. Instead, ss. 1 to 7 fall within the provinces' constitutional authority over property and civil rights conferred by s. 92(13) of the *Constitution Act, 1867*. In the main, I find myself in broad agreement with the report of the Court of Appeal in the reference.

[155] Many of the spirited submissions made in support of the impugned legislation's constitutionality stressed what might be understood, in some circles, as noble public policy: to encourage government action that would combat genetic discrimination so that Canadians can, without fear, undergo genetic testing if they so desire. Whether or not this Court feels it is appropriate to recognize what the appellant referred to as the deeply personal character of the decision to undertake a genetic test is not the question before us. The task of the courts — perforce in a constitutional reference such as this one — is not to measure the suitability of public policy but to determine the validity of legislation pursuant to the division of powers under the Constitution. The urgings in favour of what counsel supporting the law see as sound policy would be best done before the appropriate legislative powers that be, acting within their right spheres of constitutional jurisdiction.

…

II. Analysis

…

A. *Characterization: What is the Pith and Substance of Sections 1 to 7 of the Act?*

…

[170] The wide range of characterization in this case suggests strongly to me that not all of the interpretative efforts at this stage have followed the cardinal rule that it is the *dominant* purpose and

effect of ss. 1 to 7 that should concern us. In fairness, part of the mischief comes from Parliament's choice for the *Act*'s short title (*Genetic Non-Discrimination Act*). This title may have put some readers of the impugned provisions on the wrong path by stressing what may have been an aspiration of parliamentarians — legitimate or not, be that as it may — that does not find expression in the statute's leading purpose or effects. Moreover, another part of the mischief appears to come from the wide-ranging and disparate character of the legislative debates, which offer a number of often conflicting accounts of the purposes and effects of the *Act*. This makes the identification of pith and substance difficult, especially given the absence of a statutory preamble or clearly-stated objective in the contested portion of the *Act* itself.

…

(1) The Purpose of the Impugned Provisions

...

[Justice Kasirer criticized the majority's use of intrinsic evidence of the pith and substance of the *Act,* noting that Parliament sometimes uses the long and short title of a statute for political ends and identifying that ss. 1 – 7 of the *Act* 'stop well short' of prohibiting, or even wholly preventing, discrimination on genetic grounds. Because the *Act* allows the possibility of misuse of genetic information, Kasirer J also concluded that Parliament's dominant purpose could not properly be said to be privacy and autonomy. Rather, in Kasirer J's view, the dominant purpose of the *Act* is to regulate the provision of goods and services by prohibiting certain preconditions to entering a contract. Similarly, Kasirer J concluded that the extrinsic evidence supports the view that Parliament did not intend to criminalize discrimination based on genetic characteristics, but only to regulate certain behaviours in the provision of goods and services.]

…

(a) *Conclusion*

[203] When considering the whole of the record, and giving appropriate weight to intrinsic and extrinsic evidence of purpose, it is plain that the main goal of ss. 1 to 7 is not to combat discrimination based on genetic characteristics. Genetic discrimination may have been on the mind of parliamentarians, but it is not prohibited in the impugned provisions. Nor is their objective to control the use of private information revealed by genetic testing, which is secondary to the true purpose of the provisions. Rather, the true aim of the provisions is to regulate contracts, particularly contracts of insurance and employment, in order to encourage Canadians to undergo genetic tests without fear that those tests will be misused so that their health can ultimately be improved.

(2) The Effects of the Impugned Provisions

…

[205] In my view, the dominant effects of the impugned provisions concern the regulation of insurance and the promotion of health rather than the protection of privacy and autonomy or the prevention of genetic discrimination.

…

(3) …

[221] I agree with the Court of Appeal that the aim of the impugned provisions is to remove the fear that information from genetic tests could serve discriminatory purposes in the provision of goods and services, in particular in insurance contracts, in order to encourage Canadians to avail themselves of those tests, should they so wish. This is done with a view to improve health by making people aware of their pre-existing medical conditions and hoping that they take precautionary steps. On my reading of her opinion, my colleague Justice Karakatsanis appears to agree that health dominates the discussion, given that health is at the heart of her analysis on the classification of the impugned provisions. Similarly, my colleague Justice Moldaver also considers health to be central to this case.

[222] In terms of whether the pith and substance is to combat discrimination based on the results of genetic tests, I must respectfully disagree with my colleague Justice Karakatsanis. While Parliament could have chosen to directly target discrimination in ss. 1 to 7 of the *Act*, those provisions instead tolerate discrimination on the basis of genetic characteristics so long as the genetic testing and disclosure of the results thereof were made lawfully or so long as tests are undertaken for non-health reasons. This is particularly obvious when ss. 1 to 7 are contrasted with the amendments to the *CLC* and to the *CHRA*. Genetic discrimination therefore cannot be at the centre of ss. 1 to 7's pith and substance.

[223] I must also respectfully disagree with Justice Moldaver that the pith and substance is focused on the control that individuals have over the information revealed by genetic tests. The protection of privacy and autonomy granted in the impugned provisions is only present as a necessary corollary of the promotion of health, since they apply only to a narrow health-based definition of genetic tests. As such, the control granted to individuals over the information revealed by genetic testing stands second — both in terms of purpose and effects — to Parliament's overarching objective of encouraging the well-being of Canadians. As a result, and recalling that genetic information revealed through other means is not protected, it also cannot form part of the pith and substance of the impugned provisions.

[224] Finally, the regulation of contracts and the provision of goods and services appropriately forms part of the pith and substance. The impugned prohibitions focus solely on situations concerning a "contract or agreement" or "providing goods or services": indeed, ss. 3(1) and (2), 4(1) and (2), and 5 all refer explicitly to these concepts. As such, the regulation of contracts and the provision of goods and services is an integral part of the legislation in that it is the heart of what the impugned provisions do.

[225] I would add that even if the regulation of contracts and of the provision of goods and services was merely the "means" used by Parliament, those means would be so intimately tied to the objective to improve health that they would rightly form part of the pith and substance (Moldaver J.'s reasons, at para. 116). While courts must of course be careful not to confuse the law's purpose with the means chosen to achieve it, this caution does not lead to the conclusion that any reference to "means" is problematic ...

…

[227] As a result of the foregoing, in my view, the pith and substance of ss. 1 to 7 of the *Act* is to regulate contracts and the provision of goods and services, in particular contracts of insurance and employment, by prohibiting some perceived misuses of one category of genetic tests, the whole with a view to promoting the health of Canadians.

B. *Classification: Does the Pith and Substance of the Impugned Provisions Fall Under the Section 91(27) Criminal Law Power?*

…

(1) Scope of the Criminal Law Power

...

(2) Criminal Law Purpose

…

[232] I disagree with the appellant that the word "evil" — the traditional measure of the criminal law in this context — is unhelpful in the classification analysis. Rather, the concept of "evil" is necessary to remind Parliament that mere undesirable effects are not sufficient for legislation to have a criminal purpose, contrary to my colleague's suggestion (see Karakatsanis J.'s reasons, at para. 76). In my view, discarding this concept from the core of the criminal law purpose inquiry would be a dramatic change of course from this Court's past jurisprudence. While the word "evil" may echo language drawn from another time, it has been used frequently in the modern law and it remains conceptually useful for courts to search for an evil before the criminal law purpose requirement is satisfied. Furthermore, to my ear, the French equivalent "*mal*" is perfectly current as a choice of word and I observe that other equivalent words such as "*fléau*" are also used for "evil" in the decided cases (see, e.g., *R. v. Malmo-Levine*, 2003 SCC 74, [2003] 3 S.C.R. 571, at para. 33).

[233] The words "some evil or injurious or undesirable effect upon the public against which the law is directed" point to a more precise idea than the protection of central moral precepts, in a broad sense: Parliament cannot act unless it seeks to suppress some threat. This threat itself must be well-defined and have ascertainable contours to constitute the valid subject-matter of criminal law pursuant to s. 91(27) of the *Constitution Act, 1867*. It must also be real, in the sense that Parliament has a concrete basis and a reasoned apprehension of harm. To suggest otherwise would be to render the substantive requirement so vague as to be impractical as a measure of what amounts to criminal law for constitutional purposes.

...

(3) Application

...

[254] In my view, Parliament did not target a threat within the purview of the criminal law through the impugned provisions. Quite simply, the prohibitions target certain practices related to contracts and the provision of goods and services, and more specifically, to insurance and employment. There is nothing on the record suggesting that the prohibited conduct is a threat to Canadians.

…

[257] Moreover, I respectfully disagree with the view that just because the impugned law "'target[s] conduct that Parliament reasonably apprehends as a threat to our central moral precepts'", this means that the impugned provisions are validly backed by a criminal law purpose (Karakatsanis J.'s reasons, at para. 73, citing with approval *AHRA Reference*, at para. 50, per McLachlin C.J.). It bears emphasizing that McLachlin C.J. went on to state that "[t]he role of the courts is to ensure that such a criminal law in pith

and substance relates to conduct that Parliament views as contrary to our central moral precepts" and upheld the legislation because "[i]t targets conduct that Parliament has found to be reprehensible" (para. 51; see also para. 30 (emphasis added)). Yet, as LeBel and Deschamps JJ. explained, while "the criminal law often expresses aspects of social morality or, in broader terms, the fundamental values of society . . . . care must be taken not to view every social, economic or scientific issue as a moral problem" (*AHRA Reference*, at para. 239). In other words, "Parliament's wisdom" cannot trump the requirement to identify a real evil, even from the standpoint of morality (paras. 76 and 250). To do otherwise has the potential to amplify the scope of s. 91(27) beyond any constitutional precedent (paras. 43 and 239).

…

[271] From the foregoing, I conclude that the contested provisions do not satisfy the substantive component of criminal law. While they do relate to a public purpose, Parliament has neither articulated a well-defined threat that it intended to target, nor did it provide any evidentiary foundation of such a threat. It matters little to the present task whether the impugned provisions constitute good policy: they are *ultra vires* Parliament's criminal law power.

[272] In my view, ss. 1 to 7 of the *Act* rather fall within provincial jurisdiction over property and civil rights conferred by s. 92(13) of the *Constitution Act, 1867*. As explained above, the impugned provisions substantially affect the substantive law of insurance as well as human rights and labour legislation in all provinces. There is no question that the provinces could enact the impugned provisions in their own jurisdiction, if they so desired (see *Citizens Insurance Co. v. Parsons* (1881), 7 App. Cas. 96 (P.C.)).

...

III. Disposition

[274] In my respectful view, the reference question should be answered affirmatively. The *Genetic Non-Discrimination Act* enacted by ss. 1 to 7 of the *Act to prohibit and prevent genetic discrimination*, S.C. 2017, c. 3, is *ultra vires* to Parliament's jurisdiction over criminal law under s. 91(27) of the *Constitution Act, 1867*.

[275] For these reasons, I would dismiss the appeal without costs.

Insert at* p. 174*, immediately after the discussion of the McLachlin J dissent in R v Barnes

How does entrapment interact with the idea of reasonable suspicion as articulated in *R v Chehil*, 2013 SCC 49? In *Chehil*, the Court held that a reasonable suspicion is individualized (para 40) in the sense that police cannot merely rely on whether a person fits a drug courier "profile" to conduct a warrantless search, but must also point to specific objective facts about the individual before conducting the search (see Part IV.C, Chapter 3). How does this fit with the Court's interpretation of the concept in *Barnes*, where a "reasonable suspicion" was found over a place, the Granville Mall? See *R v Ahmad; Williams*, 2020 SCC 11 (dissenting reasons of Moldaver J).

Insert at* p. 175*, immediately before "IV. Search and Seizure"

While the standard for finding an abuse of process in terrorism cases seems quite high, is the standard as high when applied to other cases? In *R v Ahmad; Williams*, a majority of the Court held that Ahmad had not been entrapped, while Williams had been entrapped. In both cases, the officers involved received unsubstantiated tips that a phone number was associated with drug dealing. An officer called the number, briefly conversed with the people who answered the call, and then arranged to buy drugs. The distinction in the case appears to be that the undercover officer who called Ahmad waited for Ahmad to say "What do you need?" before asking for a specific amount of powder cocaine (which Ahmad agreed to provide). Williams also agreed to provide the requested amount of cocaine after being contacted by the undercover officer. However, a stay of proceedings was issued for the abuse of process (entrapment) that resulted from the officer stating "I need 80" (about 1 gram of cocaine) whilst introducing himself, and without waiting for Williams to agree to sell. Is this distinction sustainable? Does the officer conduct in either case rise to the level of an abuse of process?

Insert at* p 225*, immediately after OIPRD report on strip searches:

When there is evidence of systemic breaches of Charter rights, should courts explore remedies other than excluding evidence in individual cases? See *R v Reilly*, 2020 SCC 27 (reversing the Alberta Court of Appeal's decision to order a new trial (2019 ABCA 212) and affirming the trial judge's decision to issue a stay of proceedings (2018 ABPC 85, 411 CRR (2d) 10) when the evidence showed that the failure to hold the accused's bail hearing within 24 hours was part of "a systemic and ongoing problem" (para 63)).

Insert at* p. 310*, immediately after discussion of 2019 amendments

***R v Zora*, 2020 SCC 14**

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

[*The appellant had been convicted of breaching his bail conditions by twice failing to appear at the door of his residence when police officers came to check if he was home. In determining that the offence under s 145(3) of the Criminal Code was a subjective mens rea offence – contrary to the decisions of the trial and appellate courts – the Court expanded upon the Antic principles and the legislative framework governing bail.*]

The judgment of the Court was delivered by

MARTIN J. –

…

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

…

[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….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).

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

[26] Many intervenors drew attention to the widespread problems which continue to exist, even after this Court's decision in *Antic*, with the ongoing imposition of bail conditions which are unnecessary,

unreasonable, unduly restrictive, too numerous, or which effectively set the accused up to fail. Any such practice offends the principle of restraint which has always been at the core of the law governing the setting of bail conditions. Restraint has a constitutional dimension, a legislative footing, and is not only recognized in case law, but was also recently expressly reinforced by the amendments that came into force on December 18, 2019. Section 493.1 now explicitly sets out a "principle of restraint" for any interim release decisions, requiring a peace officer or judicial official to "give primary consideration" to imposing release on the "least onerous conditions that are appropriate in the circumstances, including conditions that are reasonably practicable for the accused to comply with." Section 493.2 requires judicial officials making bail decisions to give particular attention to the circumstances of accused persons who are Indigenous or who belong to a vulnerable population that is overrepresented in the criminal justice system and disadvantaged in obtaining release.

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

…

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

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

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

[75] I do not accept this line of reasoning. This proposition is premised on a false dichotomy which assumes that a focus on the individual accused may occur only at one stage or the other. Conceptually, there is no reason why the rights and interests of the accused should be bargained away in an either/or

formulation. Nothing prevents an individualized focus both at the time when the conditions are imposed and at the time of breach. The ethos of *Antic* favours a consistent and complementary approach under which the relevant rights in the *Charter* and the salient protections in the *Code* animate all aspects of the bail system: from imposition to breach. Requiring a subjective *mens rea* reinforces, mirrors, and respects the individualized approach mandated for the impositions of any bail conditions.

[76] I would also reject the position put forward by the AGBC because of the prevalence of bail conditions that fail to reflect the requirements for bail under the *Charter*, the *Code*, and this Court's principles in *Antic*. In practice, the number of unnecessary and unreasonable bail conditions, and the rising number of breach charges, undercut the claim that there is sufficient individualization of bail conditions. Many intervenors described how, despite the fact that the default form of release should be an undertaking without conditions under s. 515(1), studies across the country have shown that the majority of bail orders include numerous conditions of release, which often do not clearly address an individual accused's risks in relation to failing to attend their court date, public safety, or confidence in the administration of justice (citations omitted)….

[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 (citations omitted). In [*R. v. Tunney*, 2018 ONSC 961, 44 C.R. (7th) 221], Di Luca J. emphasized that this culture continues despite the directions of *Antic.* He rightly noted, in my view, that "the culture of risk aversion must be tempered by the constitutional principles that animate the right to reasonable bail" (para. 29).

[78] The expeditious nature of bail hearings also generates a culture of consent, which aggravates the lack of restraint in imposing excessive bail conditions. This is the practical reality of bail courts, which must work efficiently to minimize the time accused persons spend unnecessarily in pre-trial detention. As this Court has previously recognized, the timing and speed of bail hearings impacts accused persons by making it difficult to find counsel, resulting in many accused who are self-represented or reliant on duty counsel who are often given little time to prepare (*St-Cloud*, at para. 109). This process encourages accused persons to agree to onerous terms of release rather than run the risk of detention both before and after a contested bail hearing (citations omitted). Where joint submissions are made, some observers have gone so far as to suggest that the Crown is rarely asked to justify the proposed conditions of release, which is "arguably a key contributing factor to the higher number of conditions imposed in consent release cases than would be expected based on the law" (C. Yule and R. Schumann, "Negotiating Release? Analysing Decision Making in Bail Court" (2019), 61 *Can. J. Crimin. & Crim. Just*. 45, at pp. 57-60).

[79] A third reality of bail is that onerous conditions disproportionately impact vulnerable and marginalized populations (CCLA Report at pp. 72-79). Those living in poverty or with addictions or mental illnesses often struggle to meet conditions by which they cannot reasonably abide (see, e.g., *Schab*, at paras. 24-5; *Omeasoo*, at paras. 33 and 37; *R. v. Coombs*, 2004 ABQB 621, 369 A.R. 215, at para. 8; M. B. Rankin, "Using Court Orders to Manage, Supervise and Control Mentally Disordered Offenders: A Rights-Based Approach" (2018), 65 *C.L.Q.* 280). Indigenous people, overrepresented in the criminal justice system, are also disproportionately affected by unnecessary and unreasonable bail conditions and resulting breach charges (citations omitted). 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] …Bail conditions cannot be assumed to be sufficiently individualized and the Court will not pretend that the bail scheme is function perfectly, when it clearly is not.

…

A. *General Principles Governing Bail Conditions*

…

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

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

- <u>If released without conditions, would the accused pose any specific statutory risks that justify imposing any bail conditions</u>? 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?

- <u>Is this condition necessary?</u> 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?

- <u>Is this condition reasonable?</u> 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?

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

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

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

[90] When considering the appropriateness of bail conditions, the criminal offence created by s. 145(3) not only counsels restraint and review, but provides an additional frame of reference which incorporates considerations of proportionality into the assessment. Given the direct relationship between imposition and breach, the assessments of necessity and reasonableness discussed in *Antic* should also take into account that failures to comply with imposed conditions become separate crimes against the administration of justice. Accordingly, the question becomes: is it necessary and reasonable to impose this condition as a personal source of potential criminal liability knowing that a breach may result in a deprivation of liberty because of a charge or conviction under s. 145(3)? In short, when considering whether a proposed condition meets a demonstrated and specific risk, is it proportionate that a breach of this condition would be a criminal offence or become a reason to revoke the bail?

B. *Specific Conditions*

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

[92] First, judicial officials should be wary of conditions that may be directed to symptoms of mental illness. This includes alcohol and drug abstinence conditions for an accused with an alcohol or drug addiction. If an accused cannot possibly abide by such a condition, then it will not be reasonable (*Penunsi*, at para. 80; *Omeasoo*, at para. 37-38). In addition, rehabilitating or treating an accused's addiction or other illness is not an appropriate purpose for a bail condition — a condition will only be appropriate if it is necessary to address the accused's specific risks. Subjecting individuals who are presumed innocent to abstention conditions may effectively punish them for what are recognized health concerns, "if that individual is suffering from an alcohol addiction, an absolute abstention may present substantial risk to the health and well-being of that person" and even "give rise to potentially lethal withdrawal effects" (*R. v. Denny*, 2015 NSPC 49, 364 N.S.R. (2d) 49, at paras. 14-15; see also John Howard Society of Ontario, at pp. 12-13). If an abstinence condition is necessary, the condition must be fine-tuned to target the actual risk to public safety, for example, by prohibiting the accused from drinking alcohol outside of their home if their alleged offences occurred when they were drunk outside of their house (*Omeasoo*, at para. 42). Those seeking and imposing bail conditions should also be aware that an accused's substance use disorder, or any other mental illness, may yet be undiagnosed. And, where necessary, liberal use should be made of the bail review and variation provisions under ss. 520, 521 and 523 to accommodate these circumstances. Bail is a dynamic, ongoing assessment, a joint enterprise among all parties involved to craft the most reasonable and least onerous set of conditions, even as circumstances evolve.

[93] Second, other behavioural conditions that are intended to rehabilitate or help an accused person will not be appropriate unless the conditions are necessary to address the risks posed by the accused. As described by Cheryl Webster in her report for the Department of Justice, "conditions such as 'attend school' or 'attend counselling/treatment' may serve broader social welfare objectives but are [usually] unrelated to the actual offence alleged to have been committed" (Webster Report, at p. 7). There may be exceptions, such as in *S.K.*, where the judge found that an "attend school" condition was sufficiently linked to the accused's risks. However, even if a condition seems sufficiently linked to an accused's risks, the question is also whether the condition is proportional: imposing such conditions means that the accused could be convicted of a criminal offence for skipping a day of school.

[94] Third, the condition to "keep the peace and be of good behaviour" is a required condition in probation orders, conditional sentence orders, and peace bonds, but is not a required condition for bail (*S.K.*, at para. 39). It should be rigorously reviewed when proposed as a condition of bail. This generic condition is usually understood as prohibiting the accused from breaching the peace or violating any federal, provincial, or municipal statute (citations omitted). 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 (citations omitted). Given the breadth of the condition, it is difficult to see how imposing an additional prohibition on the accused for violating any substantive law, whether a traffic ticket or failure to licence a dog, could be reasonable, necessary, least onerous, and sufficiently linked to an accused's flight risk, risk to public safety and protection, or risk to maintaining confidence in the administration of justice (see *S.K.*, at para. 39).

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

[96] Fifth, certain conditions may cause perverse consequences or unintended negative impacts on the safety of the accused or the public. These unintended effects underscore the need for careful and rigorous review of each bail condition. For example, a condition that prevents an accused person from using a cellphone may prevent them from calling for help in the event of an emergency or inhibit their ability to work or care for dependents (*Prychitko*, at paras. 19-25; Trotter, at pp. 6-44 to 6-45). Other conditions may hinder the administration of justice by punishing accused persons who are otherwise the victims of crime. In *Omeasoo*, police responded to a complaint of domestic assault where Ms. Omeasoo was the victim. However, she was arrested and charged for failure to comply because she had consumed alcohol contrary to her bail condition (para. 6). She was therefore charged for the offence of being intoxicated while being the victim of an assault. While one hopes that prosecutorial discretion would help prevent these types of unintended consequences, such conditions may become a disincentive to reporting serious crime and significantly increase the vulnerability of certain people.

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

flight risk, public safety, or confidence in the administration of justice, otherwise the condition may have negative unintended consequences on the accused and the public.

[98] Finally, I note that some bail conditions may impact additional *Charter* rights of the accused, beyond their right to be presumed innocent, liberty rights (s. 7), and right to reasonable bail (s. 11(*e*)). Principles of restraint and review require that judicial officials rigorously examine these conditions and determine whether they do infringe the *Charter*. For example, some accused are subject to bail conditions that require them to submit to searches of their person, vehicle, phone, or residence on demand without a warrant (citations omitted). As noted by this Court in *Shoker*, in the context of probation conditions, a judge does not have jurisdiction to impose a condition that subjects an accused to a lower standard for a search than would otherwise be required, unless Parliament creates a *Charter*-compliant statutory scheme for the search or the accused consents to the search (citations omitted). These types of conditions are effectively enforcement mechanisms that "facilitate the gathering of evidence", "do not simply monitor the [accused's] behaviour", and are not linked to an accused's risk under s. 515(10) (*Shoker*, at para. 22). As such conditions are not supported by the enumerated conditions for bail in s. 515, nor is there a scheme set by Parliament for the searches, they are constitutionally suspect.

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

C. *Responsibilities*

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

[101] All participants in the bail system also have a duty to uphold the presumption of innocence and the right to reasonable bail (see Berger and Stribopolous, at pp. 323-24). This is because the "automatic imposition of bail conditions that cannot be connected rationally to a bail-related need is not in harmony with the presumption of innocence" (*R. v. A.D.M.*, 2017 NSPC 77, at para. 29 (CanLII), citing *Antic*). The Crown, defence, and the court all have obligations to respect the principles of restraint and review. Other than in reverse onus situations, the Crown should understand, and if asked, be able to explain why proposed bail conditions are necessary, reasonable, least onerous, and sufficiently linked to the risks in s. 515(10). This prosecutorial responsibility of restraint when considering bail conditions is reflected in both Crown counsel policy documents put before us by interveners (Ontario, Ministry of the Attorney General, *Ontario Prosecution Directive*, "Judicial Interim Release (Bail)" (November 2017) (online); and British Columbia, Prosecution Service, *Crown Counsel Policy Manual*, "Bail — Adult" (April 2019) (online)).

Defence counsel also should be alive to bail conditions that are not minimal, necessary, reasonable, least onerous, and sufficiently linked to an accused's risk for both contested and consent release, especially when a client may simply be prepared to agree to excessive and overbroad conditions to gain release. That said, it is not uncommon for counsel to agree to a condition that may seem somewhat onerous but does not warrant turning the matter into a contested hearing, which could result in the accused having to stay in custody for a few more days. In such cases, counsel can also seek a review of the condition after a reasonable length of time and ask that it be altered.

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

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

[104] These obligations carry over to consent releases, where special considerations apply. There are many compelling reasons a person in custody would "accept" suggested restrictions to secure release, even if such restrictions were overbroad. In addition to the universal human impulse towards freedom, individuals are concerned with the effects continued detention would have on their families, their income, their employment, their ability to keep their home, and their ability to access medication and necessary services, as described above. When presented with a promise of release on what may appear to be "take it or leave it conditions" many accused simply acquiesce to avoid continued detention and/or a contested bail hearing. This is why alcohol-addicted persons would agree to a bail term which prohibits them from drinking alcohol, knowing full well that they have previously been unable to overcome their addiction. These factors, and others, exert pressure and have contributed to a culture of consent in which accused persons, who often represent themselves at bail hearings, frequently agree to be bound by conditions which are unnecessary, unreasonable, and even potentially unconstitutional.

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

> Too often, as is evident from some transcripts of show cause hearings coming before this court, counsel conduct themselves as though a "consent" bail governs the release/detention result with all that is required of the court is a signature. At times, outright hostility is exhibited toward a presiding justice of the peace who dares to make inquiries, to require

> more information, or to reasonably challenge the soundness of the submission. This is fundamentally wrong. [para. 24 (QL)]

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

[*The Court then explained the proper interpretation of the mens rea for s 145(3). The appeal was granted, and a new trial was ordered on the basis that the trial judge improperly applied an objective mens rea rather than a subjective mens rea standard.*]

***Insert at* p. 318**

***R v Chouhan*, 2021 SCC 26**

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

[*The Supreme Court decided 8: 1 that Parliament could abolish peremptory challenges without infringing ss.11(d) and (f) of the Charter but the judges in the majority articulated different views about other recent reforms to jury selection including making the trial judge the trier of challenges of cause and allowing trial judges to stand aside prospective jurors in order to increase public confidence in the administration of justice*.]

The reasons of Wagner C.J. and Moldaver and Brown JJ. were delivered by

MOLDAVER AND BROWN JJ. —

…

[2] Although peremptory challenges were a long-standing example of what Blackstone described as the "tenderness and humanity to prisoners, for which our English laws are justly famous", they have drawn significant controversy in recent decades (*Commentaries on the Laws of England* (16th ed. 1825), Book IV, at p. 353). While peremptory challenges permitted the Crown and the accused to exclude prospective jurors for suspected bias, they also had a darker side — a side which allowed for the arbitrary exclusion of jurors, as well as discriminatory practices born of prejudice and stereotypes, deployed by one side or the other to secure *not* an *impartial* jury, but a *favourable* jury. This quiet discrimination had palpable and well-documented effects on the composition of juries.

…

II. Legislative Context

…

C. *The Abolition of Peremptory Challenge*

[25] Faced with mounting criticisms about the use and value of peremptory challenges, Parliament chose to act. A number of entities and individuals, many of whom have intervened in this appeal, variously urged Parliament to abolish peremptory challenges, to leave them unchanged, or to regulate them. These policy alternatives are represented in various reports that have considered peremptory challenges over the years. For example, the 1991 Manitoba Public Inquiry recommended an outright abolition, while the Iacobucci Report recommended an amendment to the *Criminal Code* that would prevent the use of peremptory challenges to discriminate against First Nations people serving on juries, potentially through judicial supervision.

[26] Parliament chose outright abolition….

[27] In crafting the new legislation, Parliament bolstered the role of the trial judge in supervising the jury selection process. First, Bill C-75 relies on the trial judge to adjudicate challenges for cause, while the previous legislation relied on lay triers. Second, Bill C-75 enhances the power of trial judges to stand aside jurors pursuant to s. 633 of the *Criminal Code*. While trial judges could previously stand aside prospective jurors "for reasons of personal hardship or any other reasonable cause", the amended provision also

allows trial judges to stand aside jurors in order to "maintai[n] public confidence in the administration of justice". The Justice Minister explained that these amendments aimed to promote "fairness and transparency" in the jury selection process (*House of Commons Debates*, at p. 19605). She also stated that the amended stand-aside power would enable judges to "make room for a more diverse jury".

…

III. Analysis

…

A. *The Constitutional Issues*

…

(1) Section 11 (d): The Right to an Independent and Impartial Tribunal

…

[37] … we acknowledge that the abolition of peremptory challenges comes at a time of heightened public awareness of the role of racial prejudice in the criminal justice system. It is in these circumstances that the interveners before this Court spoke of the impact that the abolition of peremptory challenges would have on the diversity of the jury, and on the public's confidence in the integrity of its deliberations. Despite differences in their ultimate stance on peremptory challenges, each intervener came before this Court to advance the same core submission: diversity is fundamental to achieving a jury that is impartial to the accused and free from discrimination toward jurors and victims.

[38] As a constitutional matter, the jurisprudence has consistently declined to interpret the imperatives of jury representativeness and impartiality as requiring diversity among members of the jury (…*Kokopenace*, at para. 42…). Nor has the concept of impartiality ever rested on the accused's subjective confidence in each individual juror or on jurors sharing an aspect of their identity — including visible and non-visible characteristics — with the accused or victim (*Gayle*, at p. 38; *Biddle*, at para. 60, per McLachlin J. (as she then was)).

…

[40] Respectfully, we cannot endorse a view of jury selection which measures a juror's impartiality by whether that juror shares a characteristic of their identity with the accused or the victim. We also observe that absolute diversity on a jury is unattainable, as no group of 12 could ever represent the "innumerable characteristics existing within our diverse and multicultural society" (*Kokopenace*, at para. 43; see also *Biddle*, at para. 58, per McLachlin J.).

[41] In any event, the abolition of peremptory challenges will go far to minimizing the occurrence of homogenous juries. The in-court jury selection process, and in particular the peremptory challenge, has long undermined the provincial governments' efforts to compile jury rosters that bring together a "representative cross-section of society, honestly and fairly chosen" (*Sherratt*, at p. 524; see also *Kokopenace*, at paras. 39-40). An example of this is presented by the trial which prompted Parliament to abolish peremptory challenges — the trial of Gerald Stanley, who was charged with the murder of Colten Boushie, a young Indigenous man. During the jury selection process, Mr. Stanley used peremptory challenges to exclude five Indigenous prospective jurors from the jury. Absent peremptory challenges,

that trial almost certainly would have had a more racially diverse jury, since Mr. Stanley could not have objected peremptorily to the five Indigenous persons who were drawn from the jury panel.

[*Moldaver and. Brown JJ. approved the use of anti-bias instructions of the type discussed in R.v. Barton, infra casebook at pp. 674-75. They next examined challenges for cause*.]

…

(a) *Jury Instructions*

…

(b) *The Challenge for Cause Procedure*

…

[63] In our view, the challenge for cause procedure is itself a vehicle for promoting active self-consciousness and introspection that militate against unconscious biases. The prospective juror, who, when empanelled, steps into an adjudicative role must bring to bear a degree of impartiality similar to that of judges. Impartiality requires active and conscientious work. It is not a passive state or inherent personality trait. It requires jurors to be aware of their own personal beliefs and experiences, and to be "equally open to, and conside[r] the views of, all parties before them" (*R. v. S. (R.D.)*, [1997] 3 S.C.R. 484, at para. 40). Given these principles, the questioning on a challenge for cause ought to be able to explore the juror's willingness to identify unconscious bias and strive to cast it aside when serving on the jury (*Find*, at para. 40).

[64] Appropriate questions on a challenge for cause will ask prospective jurors for their opinion as it relates to salient aspects of the case. For instance, counsel may point to characteristics of the accused, complainant or victim, such as race, addiction, religion, occupation, sexual orientation or gender expression, and ask prospective jurors whether, in light of such characteristics, they would have difficulty judging the case solely on the evidence and the trial judge's instructions, because they hold an opinion about such characteristics that on careful reflection, they do not believe they could put aside. Before posing that question to jurors, trial judges ought to call each individual juror's attention to the possibility of unconscious bias and impartiality. It should be stressed that the mischief is not in acknowledging a difficulty setting aside unconscious bias, but in failing to acknowledge such a difficulty where one exists.

...

[66] Our colleague Abella J. suggests that "[t]he new robust challenge for cause process will require more probing questions than have traditionally been asked to properly screen for subconscious stereotypes and assumptions" and will necessitate "a more sophisticated manner of questioning" (paras. 160-61). While we agree that the *Parks* question was never intended to be *the only* question available on a challenge for cause (*R. v. Parks* (1993), 15 O.R. (3d) 324 (C.A.)), we caution that trial judges who permit questions beyond the *Parks* formulation must be mindful of the fundamental principle of respect for jurors' privacy upon which our system of jury selection has "long been based" (*Kokopenace*, at para. 74, per Moldaver J.; at para. 155, per Karakatsanis J.; and at para. 227, per Cromwell J. (dissenting but not on this point)). The *Parks* question itself permits only limited incursions into juror privacy, and further developments in the challenge for cause process must continue to balance "the accused's right to a fair trial by an impartial jury, while also protecting the privacy interests of prospective jurors" (*Williams*, at para. 53…).

...

(c) *The Stand-Aside Power Under Section 633 of the Criminal Code*

...

[74] … we respectfully reject our colleague Abella J.'s suggestion that trial judges use the stand-aside power to "actively promote jury diversity" and to approximate "Canada's kaleidoscope of human diversity" (para. 164). Parliament did *not* write into law that the stand-aside power is to be used to bolster jury diversity as our colleague has conceived of it, but, again, for "maintaining public confidence in the administration of justice". As a matter of law, we cannot accept that public confidence in the administration of justice depends on achieving a jury that approximates the diversity of Canadian society.

…

[81] ... the reasonable, informed observer would lose confidence in a jury selection process that requires trial judges to sacrifice the vital principle of randomness on the altar of diversity and select individual jurors merely on the basis of their race or other aspects of their identity. Reductionist premises, racial or otherwise, have no place in jury selection. This, in turn, calls into question the statement of the then-Minister of Justice that the amended stand-aside power would enable judges to "make room for a more diverse jury".

[*Rowe J. wrote a separate judgment concurring with the judgment by Moldaver and Brown JJ. that stressed the need for deference by the Court to Parliament's choices in jury selection.*]

…

The reasons of Karakatsanis, Martin and Kasirer JJ. were delivered by

MARTIN J. —

[105] For the reasons of my colleagues Justices Moldaver and Brown, I agree that the Crown's appeal should be allowed, the cross-appeal dismissed and Mr. Chouhan's conviction restored. With respect, I part ways with my colleagues to the extent they suggest limits on how stand asides and challenges for cause may be developed under the new jury selection regime, particularly since we heard no submissions on those limits in the appeal. At this early stage in the development of the regime, and given that the proper use of these tools is not relevant to the outcome of the appeal, I would refrain from deciding their scope.

…

The following are the reasons delivered by

ABELLA J. —

…

Analysis

…

[156] … When introducing the legislation in Parliament, the Minister of Justice, the Hon. Jody Wilson-Raybould, described its purpose as follows:

> To bring more fairness and transparency to the process, the legislation would also *empower a judge to decide* whether to *exclude jurors challenged for cause* by either the defence or prosecution. The legislation will *strengthen* the power of judges to *stand aside some jurors* in order *to make room for a more diverse jury* that will in turn *promote confidence in the administration of justice*. Courts are already familiar with the concept of exercising their powers for this purpose. [Emphasis added.]
>
> (*House of Commons Debates*, vol. 148, No. 300, 1st Sess., 42nd Parl., May 24, 2018, at p. 19605)

…

[160] The new robust challenge for cause process will require more probing questions than have traditionally been asked to properly screen for subconscious stereotypes and assumptions (K. Roach, "Juries, Miscarriages of Justice and the Bill C-75 Reforms" (2020), 98 *Can. Bar Rev.* 315, at pp. 350-53; K. Roach, "The Urgent Need to Reform Jury Selection after the Gerald Stanley and Colton Boushie Case" (2018), 65 *Crim. L.Q.* 271, at p. 276; R. Schuller and N. Vidmar, "The Canadian Criminal Jury" (2011), 86 *Chicago-Kent L. Rev.* 497; R. Ruparelia, "Erring on the Side of Ignorance: Challenges for Cause Twenty Years after *Parks*" (2013), 92 *Can. Bar Rev.* 267; M. Henry and F. Henry, "A Challenge to Discriminatory Justice: The *Parks* Decision in Perspective" (1996), 38 *Crim. L.Q.* 333).

[161] A robust challenge for cause process will mean "a more sophisticated manner of questioning" (D. M. Tanovich, "The Charter of Whiteness: Twenty-Five Years of Maintaining Racial Injustice in the Canadian Criminal Justice System" (2008), 40 *S.C.L.R.* (2d) 655, at p. 683). It will require alternatives and modifications to the question proposed in *R. v. Parks* (1993), 15 O.R. (3d) 324 (C.A.), new questions, and new formats, with trial judges asking questions that they believe, based on their common sense and judicial experience, will assist in rooting out biases. The need for this new emphasis on judicial intervention is explained by the Canadian Association of Black Lawyers in its factum as follows:

> The commonly permissible challenge questions considered in only minutes fail to respect the importance of the task and cannot scratch the surface of attitudes or beliefs that are "elusive" and deeply ingrained in the subconscious. [para. 32]

[162] The legislative intent behind the new stand-aside power was to empower trial judges to ensure impartiality and "to make room for a more diverse jury", in order to maintain public confidence in the administration of justice (*House of Commons Debates*, at p. 19605). Its purpose is to "provide an opportunity for a judge to consider whether a jury appears to [be] sufficiently representative or appropriately empanelled to promote a just outcome, perhaps even considering whether racial bias could be a factor" (Library of Parliament, *Bill C-75: An Act to amend the Criminal Code, the Youth Criminal Justice Act and other Acts and to make consequential amendments to other Acts*, Legislative Summary 42-1-C75-E, by Laura Barnett et al., revised July 25, 2019). It is based on an understanding of representativeness which looks to the actual composition of the jury, as opposed to the randomness of the selection process (Coughlan, at p. 466; see also V. MacDonnell, "The Right to a Representative Jury: Beyond Kokopenace" (2017), 64 *Crim. L.Q.* 334; B. Kettles, "Impartiality, Representativeness and Jury Selection in Canada" (2013), 59 *Crim. L.Q.* 462).

[163] The enhanced stand-aside mechanism in s. 633 seeks to counteract systemic discrimination in jury selection and recognizes that public confidence in the administration of justice is undermined when

random selection routinely results in all-white juries. It gives trial judges the discretion "to make room for a more diverse jury" (*House of Commons Debates*, at p. 19605).

[164] While Canada's kaleidoscope of human diversity cannot realistically be mirrored on every jury, trial judges can use the legislative tools that they have been given in Bill C-75 to actively promote jury diversity on a case by case basis. The goal is the selection of a "representative cross-section of society, honestly and fairly chosen" (*R. v. Sherratt*, [1991] 1 S.C.R. 509, at p. 524). Actively promoting jury diversity is not reverse discrimination, it is *reversing* discrimination. As Blackmun J. famously observed in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), at p. 407, "to get beyond racism, we must first take account of race".

…

The following are the reasons delivered by

CÔTÉ J. —

I. Overview

…

[226] Peremptory challenges permit accused persons to strike at hidden, subtle and unconscious biases that are undoubtedly present in the jury array and that go unaddressed by challenges for cause. They also give accused persons the opportunity to try to obtain more representative and diverse juries. Finally, peremptory challenges allow accused persons to strike jurors whose life experiences are so acutely different to their own that they may be unable to deliver the benefit of trial by jury.

[227] There is a sad irony to this case. Parliament eliminated peremptory challenges because it saw them as an arbitrary tool used to perpetuate systemic racism and discriminate against jurors who are racialized or other marginalized persons. The reality is, however, that peremptory challenges are far from arbitrary. More particularly, for accused persons who are racialized or otherwise marginalized, they are a lifeline to combat unconscious biases and discrimination. In the words of one of the interveners, the Canadian Association of Black Lawyers:

> Parliament failed to give proper consideration to the impact of the abolition of peremptory challenges on Black accused, the result of which is the exacerbation of the very issue that it claimed to fix: systemic racism.
> (I.F., at para. 3)

[228] That intervener was not alone. Defence advocates representing a wide spectrum of organizations — including a number of racialized communities — implored us to understand and recognize the negative impact that the abolition of peremptory challenges would have on racialized and other marginalized persons. Their position is supported by the evidence before the trial judge.

[229] Peremptory challenges are not perfect. I acknowledge that they can be used in a discriminatory way. However, in attempting to combat the difficulties raised by peremptory challenges, Parliament had many options. It did not need to preserve peremptory challenges unchanged, but it did need to consider the interests of accused persons. The proper course of action for Parliament was not to abolish peremptory challenges but to regulate them. Its failure to do so is not minimally impairing. Therefore, s. 269 of the *Amending Act* infringes s. 11 (f) of the *Charter*, as it is not a reasonable limit that can be demonstrably justified in a free and democratic society (*Frank v. Canada (Attorney General)*, 2019 SCC 1,

[2019] 1 S.C.R. 3, at paras. 120-21). To the extent that it abolishes peremptory challenges, I would declare s. 269 of the *Amending Act* to be of no force or effect.

[*Côté J. concluded that challenges for cause, judicial instructions or judicial stand asides were all unlikely to be effective in dealing with racist stereotypes "buried deep in the human psyche" ibid at para 263. She also concluded that* Kokopenance *does not guarantee a fully representative jury pool in part because of the continued exclusion of those who have been sentenced to two years or more. Ibid at para 272*.]

Insert at* p. 419*, immediately before "III. Subjective Standards of Fault"

In 2020, the Supreme Court revisited the question of statutory interpretation and the presumption of subjective fault. As you read the following extract, consider whether the Court applies a "fully contextual" approach to statutory interpretation in the manner proposed by Cromwell J. Should the social and practical context of bail – the way in which conditions are imposed and reviewed, and impact marginalized groups – affect the interpretation of the mens rea of the offence? Of other offences?

R v Zora, 2020 SCC 14

[*The appellant was charged with three counts of possession for the purposes of trafficking contrary to s 19 of the Controlled Drugs and Substances Act. He was released on his own recognizance with 12 bail conditions. One condition was house arrest, and another was the obligation to 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. Over the Thanksgiving weekend, the appellant twice failed to present himself at the door when police visited. He did not know he had missed the police visits until two weeks later, when told he was being charged with two counts of breaching his curfew condition and two counts of breaching his condition to answer the door. Each of these four counts was charged under s 145(3) of the Criminal Code. The trial judge acquitted on the first two counts but convicted on the latter two. The summary convictions appeals judge, and four of the five members of the Court of Appeal for British Columbia panel that heard the subsequent appeal agreed that s 145(3) was an objective fault offence. The majority at the Court of Appeal held that objective fault is permissible in part because it permits a defence of lawful excuse (e.g. mistake of fact or some other defence). The Appellant's failure to present at the door demonstrated a marked departure from what a reasonable person would have done in the circumstances. A reasonably prudent person would have foreseen or appreciated the risk of not hearing or knowing the police were attending, or could have done something to prevent the breach. The appellant further appealed to the Supreme Court, which revisited the issue. As you will see, the Court's ruling depends in part on understanding the legislative framework governing bail, and you may find it helpful to review that part of Chapter 4*.]

…

The judgment of the Court was delivered by

MARTIN J. –

…

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

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

> 145 (3) Every person who is at large on an undertaking or recognizance given to or entered into before a justice or judge and is bound to comply with a condition of that undertaking or recognizance, and every person who is bound to comply with a direction under subsection 515(12) or 522(2.1) or an order under subsection 516(2), and who fails, without lawful excuse, the proof of which lies on them, to comply with the condition, direction or order is guilty of

> (a) an indictable offence and is liable to imprisonment for a term not exceeding two years; or
>
> (b) an offence punishable on summary conviction.

[37] I start by noting that the inclusion of the statutory defence of a "lawful excuse" in s. 145(3) plays no role in the interpretation of the *mens rea* of the offence. Lawful excuse provides an additional defence that would not otherwise be available to the accused (citations omitted). 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 (citations omitted). Therefore, it is not material to the issue of whether the *mens rea* element of the offence is subjective or objective.

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

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

[40] The Crown also argues that the legislative history of s. 145(3) supports this interpretation, since when it was enacted, the then Minister of Justice referred to the "responsibility" or "duty" of a person on bail to attend court and comply with conditions to ensure that the bail system can rely on voluntary appearance rather than pre-trial custody (citations omitted).

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

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

(C.A. Reasons, at para. 78)

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

[42] Second, there is a danger in putting too much weight on the word choice of one Minister, especially when his statement does not clearly evince an intention of Parliament to create an objective *mens rea* offence. For example, contemporaneous commentary described that the aim of these offences were to "ensure an accused [did] not disregard the new system with impunity", which seems to suggest a subjective *mens rea* (J. Scollin, Q.C., *The Bail Reform Act: An Analysis of Amendments to the Criminal Code Related to Bail and Arrest* (1972), at p. 19). There is no clear indication from the legislative history that Parliament intended to create an objective *mens rea* offence.

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

[44] Section 145(3) simply does not share the defining characteristics of those duty-based offences requiring objective fault that were at issue in *Naglik* and discussed in *A.D.H*. The points of distinction include the different nature of the relationships to which these legal duties attach, the varying levels of risk to the public when duties are not met, whether the duty must be defined according to a uniform, societal standard of conduct, and whether applying such a uniform standard is possible and appropriate in the circumstances.

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

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

conditions which address risks specific to the accused to ensure their attendance in court, protect public safety, or maintain confidence in the administration of justice. The bail order is expected to list personalized and precise standards of behavior. As a result, there is no need to resort to a uniform societal standard to make sense of what standard of care is expected of an accused in fulfilling their bail conditions and no need to consider what a reasonable person would have done in the circumstances to understand the obligation imposed by s. 145(3).

[47] In addition, the lack of a uniform standard from which to assess the breach of these conditions means that it is also not obvious what degree of breach would attract criminal liability if an objective standard applied to s. 145(3). Only a marked departure from the conduct of a reasonable person would draw criminal liability under an objective standard of *mens rea*. However, unlike an activity like driving where there is a spectrum of conduct ranging from prudent to careless to criminal based on the foreseeable risks of the conduct to a reasonable person, the highly individualized nature of bail conditions excludes the possibility of a uniform societal standard of conduct applicable to all potential failure to comply offences. Bail conditions may restrict normal activities like travelling and communicating with other people and are specifically tailored to address the *individual* risks posed by each accused. Bail conditions and the risks they address vary dramatically among individuals on release, so that it is not intelligible to refer to the concepts of a "marked" or "mere" departure from the standard of a reasonable person. In the absence of a bail condition, the regulated conduct would usually not be a departure from any uniform societal standard of behaviour. Without this ability to distinguish a marked departure from a mere departure, there is a risk that the objective fault standard slips into absolute liability for s. 145(3).

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

[49] Finally, reasonable bail is a right under s. 11 (*e*) of the *Charter* and cannot be compared to a regulated activity that is voluntarily entered into like driving or firearm ownership where an objective fault standard for related offences is further justified (*Hundal*, at p. 884). An accused person who is presumed innocent has a right to regain their liberty following their arrest subject to the least onerous measures to address their individual risk of not attending their court date, risk to public protection and safety, and risk to the administration of justice. The fact that accused persons consent to bail conditions in order to be released does not mean that they have chosen to enter into a regulated activity comparable to driving or owning firearms.

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

[50] This Court's jurisprudence requiring subjective *mens rea* for the breach of probation offence further supports a subjective *mens rea* for the failure to comply offence. The offences of breach of probation (s. 733.1) and failure to comply with bail conditions (s. 145(3)) are similar offences, which both arise from an accused's breach of conditions set out in a court order. In *R. v. Docherty*, [1989] 2 S.C.R. 941,

the Court determined that a subjective *mens rea* was required for the breach of probation offence. That offence used the words "wilfully" and "refuses", which reinforced the presumption of subjective fault, and are not in s. 145(3). However, even after the word "wilfully" was removed from the current breach of probation offence, most courts continue to interpret the offence to require subjective *mens rea*, based on this Court's reasoning in *Docherty* and the fact that the removal of the word "wilfully" does not on its own indicate an intent to create an objective *mens rea* offence (citations omitted).

[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).

[*The Court then noted that a subjective fault requirement was consistent with the penalties and consequences that resulted from conviction under s 145(3); the role of s 145(3) in the legislative framework governing bail conditions; and the restrained and individualized approach to bail*. *The serious consequences noted by the Court include: up to two years imprisonment for the breach (even if acquitted of the underlying charge); the imposition of further conditions as part of the sentence; extending the criminal record of the person (with the associated stigma and difficulties that can result for employment, housing and family obligations). Charges under s 145(3) place a reverse onus on the individual in any future bail hearings, and convictions under s 145 may affect bail hearings for future offences unrelated to the current charges. The Court noted that the Department of Justice's own study showed that accused with a prior history of s 145 convictions were more likely to be denied bail than accused with no history, and accused with a history of convictions for violent or sexual offences. This, the Court said, can 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. According to the Court, these serious consequences presuppose that the person knowingly (rather than unwittingly) breaches their bail conditions.*]

…

[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.

…

[68] If detention is the proportionate result for the accused's breach of bail then revocation under s. 524 is the appropriate avenue. Bail revocation was the process designed for determining

whether a person's risk factors are such that their failure to abide by bail conditions means they ought to be detained rather than released on different conditions. Revocation can therefore address negligent and careless breaches of bail conditions without creating additional criminal liability. While revocation carries the threat of detention and should be sought only when the negative impacts that can arise from detention are justified, it can address risks arising from breaches of bail conditions without adding offences against the administration of justice to the criminal record of the accused.

[69] …Section 145(3) adds criminal liability on top of the possibility of an accused losing their ability to be out on bail prior to trial. Therefore criminal charges are intended as a means of last resort to punish harmful behaviors when other risk management tools have not served their purposes.

[*The Court then noted that the requirement of subjective mens rea is supported by the understanding that bail is an individualized decision and must be tailored to the individual characteristics of the accused. The Attorney General of British Columbia argued that individualization was only necessary at the time of determining bail conditions, but the Court argued that individualization was required both when conditions are imposed and when breached. The Court said a number of features of the bail system supports the conclusion that subjective mens rea is required. These features include: "the number of unnecessary and unreasonable bail conditions, and the rising number of breach charges" [para 76]; the imposition of excessive bail conditions due to "a culture of risk aversion" [para 77]; the pace at which bail hearings proceed, which leads to less contestation of excessive conditions; and, the disproportionate impact of bail conditions on members of marginalized groups.*]

...

[80] The presence of too many unnecessary conditions and the prevalence of breach charges resulting from the imposition of excessive and onerous conditions is part of the relevant legislative context in interpreting s. 145(3) (Sullivan, at pp. 648-49). It is the same context to which Parliament has recently responded by amending the bail scheme. Bail conditions cannot be assumed to be sufficiently individualized and the Court will not pretend that the bail scheme is functioning perfectly, when it clearly is not. There is no basis in theory or practice to accept that an individualized imposition of bail conditions at the front end shows a clear intent to displace the presumed subjective fault standard.

[*The Court addressed how s 145(3) allowed for the consideration of general bail principles, problems with commonly imposed bail conditions, and the responsibilities of all participants in the bail system to uphold principles of restraint and review. The Court then considered the specific components of the subjective mens rea for Section 145(3).*]

…

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

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

2. The accused knowingly failed to act according to their bail conditions, meaning that they knew of the circumstances requiring them to comply with the conditions of their order, or they were

wilfully blind to those circumstances, and failed to comply with their conditions despite that knowledge; or

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

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

…

[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: (citations omitted) 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* (citations omitted). I accept the position of the Court of Appeal for Ontario in *Smith*, which held that the fact that the accused misheard the terms of his recognizance and failed to review those terms meant that he did not knowingly breach his condition, nor was he wilfully blind. The accused must know the conditions of their release in order to possess the *mens rea* for the failure to comply offence.

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

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

[115] The conclusion that an accused must have knowledge of their conditions of bail, or be wilfully blind to their conditions, in order to have the requisite *mens rea* under s. 145(3), also accords with Wilson J.'s reasoning in *Docherty*, which emphasized the importance of knowledge in finding that an accused breached a condition. In that case, she found that proof of breach of a probation order requires evidence that an accused knew they were bound by the probation order, knew there was a term that would be breached by their proposed conduct, and went ahead and engaged in the conduct anyway (pp. 957-58). The reasoning is still helpful even though the condition breached in *Docherty* required that the accused knew he was committing a criminal offence, which meant the accused had to know of the legal

consequences of his actions (pp. 960-61). In contrast, s. 145(3) does not require that the accused must have knowledge of the legal consequences or scope of their condition, but they must know that they are bound by the condition. The purpose of s. 145(3), like the breach of probation offence, is to punish and deter failures to comply with bail conditions. As previously mentioned, knowledge and deterrence are linked: an accused will only be deterred from breaching their conditions if they know they are doing something wrong, meaning they must know that they are bound by a particular bail condition (*Docherty*, at pp. 951-52).

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

[117] This second component can also be met by showing that the accused was reckless. Where, as here, a higher requirement of "wilfulness" or "intent" is not indicated by the text or nature of an offence, recklessness is generally included in subjective *mens rea* (see *Sault Ste. Marie*, at pp. 1309-10; *R. v. Buzzanga* (1979), 25 O.R. (2d) 705 (C.A.), at p. 71). Recklessness requires that accused persons be aware of the risk of not complying with their condition and proceed in the face of that risk (*Josephie*, at para. 30; *Sansregret v. The Queen*, [1985] 1 S.C.R. 570, at p. 584). Knowledge of risk is key to recklessness. Therefore, the accused must still know of their bail conditions in order to be aware of any risk of non-compliance. The accused must also be aware of the risk that the factual circumstances requiring them to act (or refrain from acting) to comply with their bail conditions could arise and continue with their course of conduct despite the risk. Recklessness is not, and should not through misapplication, become the same as negligence. Recklessness has nothing to do with whether the accused *ought* to have seen the risk in question, but whether they subjectively saw the risk and continued to act with disregard to the risk.

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

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

[120] Finally, I do not accept that a subjective fault requirement would make it too difficult for the Crown to prove an accused's knowing or reckless failure to comply with bail conditions. If the Crown chooses to lay a criminal charge under s. 145(3), when the possibility of a bail variation and bail revocation also exist, it will do so only when it has a reasonable prospect of conviction based on a full appreciation of all constituent elements of the offence. Many crimes have a subjective fault standard and there are recognized ways to marshal sufficient evidence to convince a judge beyond a reasonable doubt that the accused acted knowingly or recklessly. Courts may infer subjective fault for failure to comply charges, whether or not the accused decides to testify. After considering all the evidence, the trier of fact may be able to conclude beyond a reasonable doubt that the accused had the state of mind required for conviction based on the common sense inference that individuals "intend the natural and probable consequences of their actions" (*R. v. Seymour*, [1996] 2 S.C.R. 252, at paras. 19 and 23; *Docherty*, at p. 958; *Loutitt*, at para. 18). As noted by the intervener Attorney General of Ontario a subjective fault requirement has not prevented convictions on s. 145(3) charges in Ontario.

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

[*The appeal was granted and a new trial was ordered*].

***Insert at* p. 870 *before Bouchard-Lebrun replacing first line on p. 870 with*:**

This is the first appellate case to consider the constitutionality of s.33.1.

***R. v. Sullivan,* 2020 ONCA 333**

Paciocco J.A.: (Watt J.A. concurring):

OVERVIEW

[1] Mr. Thomas Chan and Mr. David Sullivan share similar, tragic experiences. In separate incidents, while in the throes of drug-induced psychoses and without any discernible motive, both men attacked and stabbed loved ones. Mr. Chan, who became intoxicated after consuming "magic mushrooms", killed his father and grievously injured his father's partner. Mr. Sullivan, who had become intoxicated after consuming a heavy dose of a prescription drug in a suicide attempt, repeatedly stabbed his elderly mother. Both men allege that they were in a state of automatism at the time of the attacks.

[2] Automatism is defined as "a state of impaired consciousness, rather than unconsciousness, in which an individual, though capable of action, has no voluntary control over that action": *R. v. Stone*, 1999 CanLII 688 (SCC), [1999] 2 S.C.R. 290, at para. 156, *per* Bastarache J. Involuntariness is therefore the essence of automatism. The "mind does not go with what is being done": *Rabey v. The Queen*, 1980 CanLII 44 (SCC), [1980] 2 S.C.R. 513, at p. 518, citing *R. v. K.*, 1970 CanLII 431 (ON SC), [1971] 2 O.R. 401 (S.C.), at p. 401.

[3] Persons in a state of automatism may have the benefit of a "defence" when they engage in otherwise criminal conduct, even though automatism is not a justification or excuse: *R. v. Luedecke*, 2008 ONCA 716, 93 O.R. (3d) 89, at para. 56. Instead, automatism is treated as negating the crime. It is referred to as a defence because the accused bears the burden of establishing automatism. In *Luedecke*, at para. 56, Doherty J.A. explained the underlying principles:

> A person who is unable to decide whether to perform an act and unable to control the performance of the act cannot be said, in any meaningful sense, to have committed the act. Nor can it be appropriate in a criminal justice system in which liability is predicated on personal responsibility to convict persons based on conduct which those persons have no ability to control.

[4] There are two branches to the defence of automatism. The mental disorder defence, codified in s. 16 of the *Criminal Code*, R.S.C., 1985, c. C-46, applies where involuntariness is caused by a disease of the mind, since those who are in a state of automatism are incapable of appreciating the nature and quality of their acts or of knowing at the time of their conduct that it is morally wrong ["mental disorder automatism"]. If successful, a mental disorder automatism defence will result in a not criminally responsible verdict, with the likelihood of detention or extensive community supervision.

[5] The alternative branch, the common law automatism defence, applies where the involuntariness is not caused by a disease of the mind ["non-mental disorder automatism"]. Where a non-mental disorder automatism defence succeeds, the accused is acquitted.

[6] Mr. Chan and Mr. Sullivan each relied on non-mental disorder automatism as their primary defence. The hurdle they each faced is that their non-mental disorder automatism claims arose from their

intoxication, and each man was charged with violent offences. Yet, s. 33.1 of the *Criminal Code* ["s. 33.1"] removes non-mental disorder automatism as a defence where the state of automatism is self-induced by voluntary intoxication and the offence charged includes "as an element an assault or any other interference or threat of interference by a person with the bodily integrity of another person" [a "violence-based offence"]

...

[42] The trial judge was correct in finding s. 33.1 to be in *prima facie* violation of both ss. 7 and 11(d) of the *Charter*. Section 33.1 violates each of the constitutional principles that were identified by Cory J. for the majority in *R. v. Daviault*, 1994 CanLII 61 (SCC), [1994] 3 S.C.R. 63. In *Daviault*, the Supreme Court of Canada modified the common law rule that eliminated the defence of extreme intoxication because the common law rule was in breach of the *Charter* in three ways. I will describe these breaches as "the voluntariness breach", "the improper substitution breach", and "the *mens rea* breach." Although there has been some variation in articulation and emphasis, virtually all the judges who have considered this issue have found that the legislation breaches the *Charter* in one or more of these respects.

…

(a) The Voluntariness Breach: Section 33.1 infringes ss. 7 and s. 11(d) of the *Charter*, as it is contrary to the voluntariness principle of fundamental justice and permits conviction without proof of voluntariness

[64] Section 33.1 provides expressly that "[i]t is not a defence to [a violence-based offence] that the accused, by reason of self-induced intoxication, lacked general intent or the voluntariness required to commit the offence" (emphasis added). The principles of fundamental justice require that voluntariness is an element of every criminal offence. It is therefore contrary to the principle of fundamental justice affirmed in *Daviault*, at p. 91, to remove the voluntariness element from an offence. It is also contrary to s. 11(d) to convict someone where there is a reasonable doubt about voluntariness.

[65] The Crown does not dispute the importance of voluntariness. It argues instead that the voluntariness inherent in voluntary intoxication supplies the required voluntariness element for the violence-based charges. With respect, the Crown's reliance on the voluntariness of intoxication is misplaced. The purpose of the principle of voluntariness is to ensure that individuals are convicted only of conduct they choose. What must be voluntary is the conduct that constitutes the criminal offence charged, in this case, the assaultive acts by Mr. Chan. Without those assaultive acts, his voluntary intoxication would be benign. The converse is not so. It is an offence to engage in assaultive acts, even without voluntary intoxication. Clearly, the prohibited conduct that constitutes the offences Mr. Chan is charged with are the assaults, not the self-induced intoxication, and it is the assaults to which voluntariness must attach to satisfy the *Charter*.

…

(b) The Improper Substitution Breach: Section 33.1 infringes the presumption of innocence guaranteed by s. 11(d) of the *Charter* by permitting conviction without proof of the requisite elements of the offence

…

[77] As *Daviault* recognizes, at p. 91, substituting voluntary intoxication for the required elements of a charged offence violates s. 11(d) because doing so permits conviction where a reasonable doubt remains about the substituted elements of the charged offence. As the trial judge pointed out in this case, that is the unconstitutional effect of s. 33.1 on Mr. Chan. It purports to permit Mr. Chan to be convicted of manslaughter and aggravated assault without proof of the mental state required by those offences, namely, the intention to commit the assaults.

[78] Of course, if everyone who becomes voluntarily intoxicated necessarily has the intention to commit the charged offences, this constitutional problem would not arise. By proving Mr. Chan's voluntary intoxication, the Crown would inexorably or inevitably also be proving his intention to commit the assaults that supported his manslaughter and aggravated assault convictions. Permitting the Crown to rely on voluntary intoxication in these circumstances would not leave a reasonable doubt about the required elements of the charged offences: *R. v. Vaillancourt*, 1987 CanLII 2 (SCC), [1987] 2 S.C.R. 636, at p. 656; *R. v. Whyte,* 1988 CanLII 47 (SCC), [1988] 2 S.C.R. 3, at pp. 18-19; *Daviault*, at pp. 90-91; and *Morrison*, at paras. 52-53. This argument is not available to the Crown, since proving voluntary intoxication does not necessarily or even ordinarily prove the intention to commit assaults, let alone the assaults charged. The materials before us from the Standing Committee that was considering Bill C-72 emphasize the correlation between intoxication (particularly alcohol intoxication) and violence, and that link cannot be questioned. However, that link falls far short of showing that those who become intoxicated intend to commit assaults. By enabling the Crown to prove voluntary intoxication instead of intention to assault, s. 33.1 relieves the Crown of its burden of establishing all the elements of the crimes for which Mr. Chan was prosecuted, contrary to s. 11(d) of the *Charter*.

(c) The *Mens Rea* Breach: Section 33.1 infringes s. 7 of the *Charter* by permitting convictions where the minimum level of constitutional fault is not met

[79] Section 33.1 also infringes s. 7 of the *Charter* by enabling the conviction of accused persons who do not have the constitutionally required level of fault for the commission of a criminal offence. The Crown argues that the fault inherent in voluntary intoxication suffices where a person commits an act "that includes as an element an assault or any other interference or threat of interference by a person with the bodily integrity of another person". I do not agree.

[80] In *R. v. Creighton*, 1993 CanLII 61 (SCC), [1993] 3 S.C.R. 3, at pp. 61-62, the Supreme Court of Canada held that where an offence provides no other *mens rea* or "fault" requirement, the Crown must at least establish "penal negligence" to satisfy the principles of fundamental justice. Put otherwise, penal negligence is the minimum, constitutionally-compliant level of fault for criminal offences. The general intent offences Mr. Chan was charged with have never been found to require more than the minimum level of fault. Nor is there any reason to conclude that they fall within the "small group of offences" that require a purely subjective standard of fault: *Morrison*, at para. 75. The standard of penal negligence is therefore the appropriate measure for testing the constitutional validity of s. 33.1, which modifies the fault standard for violence-based offences committed while voluntarily intoxicated.

[86] ... the charged violent behaviour is not invariably going to be a foreseeable risk of voluntary intoxication, yet s. 33.1 will nonetheless enable conviction ...

[87] Mr. Chan's case illustrates the point. A reasonable person in Mr. Chan's position could not have foreseen that his self-induced intoxication might lead to assaultive behaviour, let alone a knife attack on his father and his step-mother, people he loved.

…

[91] Finally, even if moral fault can be drawn from voluntary intoxication, it is far from self-evident as a normative proposition that such intoxication is irresponsible enough to substitute for the manifestly more culpable mental states provided for in the general intent offences, such as intention or recklessness relating to sexual assault.

…

[93] I do not accept the submission made by the intervener, LEAF, that s. 33.1 satisfies minimum standards of constitutional fault because it describes an adequate standard of fault. Whether minimum standards of constitutional fault are met depends on the reach of the section, not the language Parliament uses to describe the level of fault it seeks to impose. For the reasons described, the reach of s. 33.1 does not comply with minimum standards of constitutional fault.

...

(1) Pressing and Substantial Purpose

…

[104] … since the Crown is obliged to demonstrate the need for the infringement under s. 1, the purpose it relies upon should relate to that infringement. Here, the infringing measure, s. 33.1, does not address the prosecution of intoxicated offenders generally. It applies only to those who commit violence-based offences while in a state of automatism due to self-induced intoxication. Properly stated, the object of s. 33.1 must be related to these offenders, and not to intoxicated violent offenders generally.

…

[111] Properly stated, the underlying purposes or objectives of s. 33.1 are: (1) to hold individuals who are in a state of automatism due to self-induced intoxication accountable for their violent acts [the "accountability purpose"]; and (2) to protect potential victims, including women and children, from violence-based offences committed by those who are in a state of automatism due to self-induced intoxication [the "protective purpose"].

…

(b) Only the protective purpose is pressing and substantial

(i) The accountability purpose cannot serve as a purpose under s. 1

[112] The accountability purpose is an improper "purpose" for s. 1 evaluation. Therefore, it cannot serve as a pressing and substantial purpose.

[113] The reason can be stated simply. The constitutional principles at issue define when criminal accountability is constitutionally permissible, given entrenched, core values. To override principles that deny accountability, for the purpose of imposing accountability, is not a competing reason for infringing core constitutional values. It is instead a rejection of those values. It cannot be that a preference for other values over constitutionally entrenched values is a pressing and substantial reason for denying constitutional rights.

…

(ii) The protective purpose is pressing and substantial

[117] In *Daviault*, Cory J. concluded that the protective purpose is not a pressing and substantial basis for infringing *Charter* principles. Given the infrequency of non-mental disorder automatism, there is no pressing need to remove the defence. At pp. 92-93, he explained:

> The experience of other jurisdictions which have completely abandoned the *Leary* rule, coupled with the fact that under the proposed approach, the defence would be available only in the rarest of cases, demonstrate that there is no urgent policy or pressing objective which need to be addressed.

[118] However, this analysis from *Daviault* is not binding because it addressed the state of the common law, not the constitutionality of s. 33.1.[4] The "pressing and substantial purpose" holding is, therefore, open for reconsideration, and I am persuaded by my colleague that the existence of a pressing and substantial purpose should not turn solely on the infrequency of the problem addressed. As the tragic outcome in the cases now before this court demonstrate, even though acts of violence may only rarely be committed by individuals in a state of intoxicated automatism, the consequences can be devastating. This is enough to satisfy me that seeking to protect potential victims, including women and children, from violence-based offences committed by those who are in a state of automatism due to self-induced intoxication is a pressing and substantial purpose.

(2) Proportionality

…

[121] As the Crown recognized, deterrence is the means s. 33.1 relies upon to achieve its protective purpose. The trial judge was unpersuaded, "as a matter of common sense, that many individuals are deterred from drinking, in the off chance that they render themselves automatons and hurt someone." I share that position. Effective deterrence requires foresight of the risk of the penal consequence. I am not persuaded that a reasonable person would anticipate the risk that, by becoming voluntarily intoxicated, they could lapse into a state of automatism and unwilfully commit a violent act. Even if this remote risk could be foreseen, the law already provides that reduced inhibitions and clouded judgment, common companions of intoxication, are no excuse if a violent act is committed. It is unlikely that if this message does not deter, removing the non-insane automatism defence will do so. Even bearing in mind the admonition in *R. v. Malmo-Levine; R. v. Caine,* 2003 SCC 74, [2003] 3 S.C.R. 571, at para. 177, to exercise caution in accepting arguments about the ineffectiveness of legislative measures, I am not persuaded that s. 33.1 furthers the public protection purpose.

…

(b) The minimal impairment test is not met

…

[124] The trial judge found s. 33.1 to be minimally impairing. He accepted the Crown's submissions that: (1) s. 33.1 is narrowly tailored because s. 33.1 is confined to violence-based, general intent offences involving self-induced intoxication; (2) Parliament had valid reasons for rejecting the only alternative that

would directly achieve the objective of the legislation in a less impairing way; and (3) he should defer to the choice of Parliament.

[125] I have concluded that the trial judge erred in making each of these decisions.

...

[127] By its terms, s. 33.1 is not confined to general intent offences. Section 33.1 prevents self-induced intoxication from being relied upon to establish that the accused "lacked the general intent or the voluntariness required to commit the [violence-based] offence" (emphasis added). On the face of s. 33.1, self-induced intoxicated automatism cannot be used to rebut voluntariness for any violence-based offence, regardless of whether it involves general or specific intent.

[128] Moreover, s. 33.1 was confined to violence-based offences not to confine its reach but because, as the Preamble and the history of the provision confirms, this is the problem that Parliament was addressing. The mischief Parliament set out to address is covered completely. There is therefore no realistic foundation for the suggestion that the reach of s. 33.1 has been curtailed to achieve restraint.

[129] Finally, and as already explained, the conception of the kind of self-induced intoxication that will undermine an automatism defence is aggressive in its scope. It is not confined to those who choose to become extremely intoxicated and to thereby court the remote risk of automatism. The Crown's position is that anyone consuming an intoxicant, including prescription medication that they know can have an intoxicating effect, is caught, as are those who become intoxicated in the course of suicide attempts.

...

[132] … I agree with the trial judge that the option of a stand-alone offence of criminal intoxication would achieve the objective of s. 33.1. Making it a crime to commit a prohibited act while drunk is the response Cory J. invited in *Daviault,* at p. 100, and that was recommended by the Law Reform Commission of Canada: see *Recodifying Criminal Law*, Report 30, vol. 1 (1986), at pp. 27-28. It is difficult to reject this option as a reasonable alternative given the impressive endorsements it has received.

[133] But would this new offence be equally effective as s. 33.1? Creating such an offence would arguably be more effective in achieving the Preamble objective of protecting against acts of intoxicated violence, as it would serve to deter voluntary intoxication directly and more broadly than s. 33.1 does. It would do so by making the act of intoxication itself the gravamen of the offence, and its reach would not be confined to those who are in a state of automatism because of self-induced intoxication. Instead, its reach would depend on whether the intoxication was dangerous, as demonstrated by the commission of a violence-based offence.

[134] Certainly, this option would also be less impairing than s. 33.1 since it does not infringe, let alone deny, the *Charter* rights that s. 33.1disregards. It would criminalize the very act from which the Crown purports to derive the relevant moral fault, namely, the decision to become intoxicated in those cases where that intoxication proves, by the subsequent conduct of the accused, to have been dangerous.

[135] I do not agree with the trial judge, or the Crown, that Parliament had valid reasons for choosing s. 33.1 instead of this option. Two of the reasons relied upon for doing so are legally invalid and it was an error for the trial judge to accept them. More specifically, the objections that such an offence would: (1) appear to create a sentencing discount for intoxicated offenders; or (2) undermine the object of accountability by suggesting that the accused is not guilty of the violence-based act, are accountability

concerns. As indicated, the desire to impose accountability cannot support a reasonable limit on *Charter* rights that exist to restrict the reach of accountability, such as the *Charter* rights denied by s. 33.1. In any event, it would not be the offence of intoxicated violence that suggests that the accused is not guilty of the violence-based act. It is the presumption of innocence and the principles of fundamental justice that produce this result.

…

[137] The alternative option that the Crown has not disproved is to simply permit the *Daviault* decision to operate. By design, the non-mental disorder automatism defence is difficult to access. As with other defences, if there is no air of reality to the defence based on the evidence, it should not be considered: *Stone*, at paras. 166-168. It is also a reverse onus defence, and it requires expert evidence: *Daviault*, at p. 101. If the defence is not established on the balance of probabilities, it fails: *Stone*, at para. 179. Indeed, it may well have failed for Mr. Daviault had the complainant not died before his retrial. According to evidence that Parliament has accepted, alcohol intoxication is not capable, on its own, of inducing a state of automatism: see Preamble of Bill C-72. Had similar evidence been presented and accepted at Mr. Daviault's retrial, he would have been convicted.

[138] Moreover, even in those few cases where the accused might succeed in demonstrating automatism as the result of the voluntary consumption of intoxicants, the accused may not be acquitted. If the accused is unable to establish that the cause of the automatism was not a disease of the mind, which it will be if the automatism is internally caused or there is a continuing danger of further episodes of automatism, the accused will not be acquitted, but found not criminally responsible on account of mental disorder: *Stone*, at paras. 197-217. The accused would then be subject to a disposition hearing driven by public safety considerations.

…

[151] The deleterious effects of s. 33.1 are profound. Specifically, s. 33.1 enables the conviction of individuals of alleged violence-based offences, even though the Crown cannot prove the requisite elements of those offences, which is contrary to the principles of fundamental justice and the presumption of innocence. It enables the conviction of individuals for acts they do not will. It enables the conviction of individuals of charged offences, even though those individuals do not possess the *mens rea* required by those offences, or even the minimum level of *mens rea* required for criminal fault. And it does so, predicated on a theory of moral fault linked to self-induced intoxication, expressed by the Crown before us in language captured in *R. v. Decaire*, [1998] O.J. No. 6339 (Ct. J. (Gen. Div.)), at para. 20: "People who consume alcohol should recognize that continuing to drink after they sense a loss of control of inhibitions, poses a danger to themselves and others." Yet, s. 33.1 is not confined to those who set out to become extremely intoxicated. It employs a definition of self-induced intoxication that catches anyone who has consumed an intoxicant, including with restraint or perhaps even for medically-indicated purposes.

[152] Moreover, as Cory J. recognized in *Daviault*, at p. 87, even leaving aside the other objections I have identified, it is not appropriate to transplant the mental element from the act of consuming intoxicants for the mental element required by the offence charged, particularly where the act of self-inducing intoxication is over before the *actus reus* of the offence charged occurs. This is what s. 33.1 seeks to do. This transplantation of fault is contrary to the criminal law principle of contemporaneity, which requires the *actus reus* and *mens rea* to coincide at some point: see *R. v. Williams*, 2003 SCC 41, [2003] 2 S.C.R. 134, at para. 35.

[153] Put simply, the deleterious effects of s. 33.1 include the contravention of virtually all the criminal law principles that the law relies upon to protect the morally innocent, including the venerable presumption of innocence.

[154] Only the most compelling salutary effects could possibly be proportional to these deleterious effects. Yet, s. 33.1 achieves little. If not entirely illusory, its contribution to deterrence is negligible. I have already explained that the protective purpose relied upon carries little weight.

[155] The Crown and supporting interveners argue that s. 33.1 has collateral salutary effects, such as: "(i) encouraging victims to report intoxicated violence, (ii) recognizing and promoting the equality, security, and dignity of crime victims, particularly women and children who are disproportionately affected by intoxicated violence, and (iii) avoiding normalizing and/or incentivizing intoxicated violence."

[156] I see no reasoned basis for concluding that victims who would have reported intoxicated violence would be unlikely to do so because of the remote possibility that a non-mental disorder automatism defence could be successfully raised, or that s. 33.1 plays a material role in preventing the normalization and incentivization of intoxicated violence. Section 33.1 addresses a miniscule percentage of intoxicated violence cases.

[157] As for recognizing and promoting the equality, security, and dignity of crime victims, it is obvious that those few victims who may see their offenders acquitted without s. 33.1 will be poorly served. They are victims, whether their attacker willed or intended the attack. However, to convict an attacker of offences for which they do not bear the moral fault required by the *Charter* to avoid this outcome, is to replace one injustice for another, and at an intolerable cost to the core principles that animate criminal liability.

Lauwers J.A. wrote separate concurring reasons.