IN THE HIGH COURT OF THE DOMINION OF CANADA
(ON APPEAL FROM THE BRITISH COLUMBIA COURT OF APPEAL)

BETWEEN:

ALLAN CHAUDHRY

APPELLANT

-AND-

HER MAJESTY THE QUEEN

RESPONDENT

FACTUM OF THE RESPONDENT

TEAM 6

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PART I – OVERVIEW

1. Protecting individual rights, ensuring public safety, and maintaining confidence in the administration of justice are imperative goals in a free and democratic country. The law of bail requires a delicate balancing between the accused's right to reasonable bail and the maintenance of public safety and faith in a functioning criminal justice system.

2. Conditions of release must address the grounds for detention under s. 515(10) of the *Criminal Code* (the "*Code*"): flight risks, public safety, and maintenance of confidence in the criminal justice system. In determining whether to deny bail or impose conditions on release in a manner consistent with the presumption of innocence, the Supreme Court of Canada has endorsed the "ladder principle", which requires that the least onerous form of release be chosen unless a more restrictive form is necessary to achieve the goals of s. 515(10) (*Antic*).

> *Criminal Code*, RSC 1985, c C-46, s 515(10) [*Criminal Code*].
> *R v Antic*, 2017 SCC 27 [*Antic*].

3. The bail conditions (the "Conditions") do not infringe the Appellant's rights to reasonable bail and equality under ss. 11(e) and 15 of the *Charter*. The Conditions are a tailored and individualized form of release that accommodate his alcohol use disorder, while protecting the public from the dangers associated with the Appellant's drinking and subsequent criminal behaviour. While the Crown accepts that alcohol use disorder is a disability under s. 15(1), the Conditions play no part in exacerbating, reinforcing, or perpetuating the Appellant's disadvantage.

> *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982*(UK), 1982, c 11, ss 15, 11(e) [*Charter*].

4. If this Court finds that the Appellant's ss. 11(e) or 15 *Charter* rights have been infringed, any infringement is justified in a free and democratic society under s. 1 of the *Charter*.

PART II – STATEMENT OF FACTS

<u>Factual Background</u>

5. The Appellant is a 39-year-old man and an alcoholic. He has a 16-year history of charges and criminal convictions all related to his alcohol abuse.

Official Problem, Wilson Moot 2021 at paras 1, 12 [Official Problem].

6. On August 1, 2019 at 1:18am, the Vancouver Police responded to reports of a fight at The Gambler, a bar in East Vancouver. The police found the Appellant sitting outside The Gambler in his vehicle. They observed that his face was flushed, and he smelt of alcohol. After an eyewitness identified the Appellant as the perpetrator of the fight, he was charged with assault with a weapon contrary to s. 267(a) of the *Code* and being in care or control of a vehicle while intoxicated, contrary to s. 320.14(1).

Official Problem, *supra* para 5 at paras 4, 2, 5.
Criminal Code, *supra* para 2, ss 267(a), 320.14(1).

1. The Appellant's criminal history

7. The Appellant's history of criminal conduct linked to his alcohol abuse dates back some 16 years. In 2004, the Appellant was convicted of driving while intoxicated after blowing 0.09 on a breathalyzer test at a routine traffic stop. In 2012, the Appellant was convicted a second time for possession of cocaine after he was arrested for being drunk and disorderly outside his then-boyfriend's residence. The Appellant's third criminal conviction came in 2017 when he was found guilty of assault causing bodily harm towards his then-boyfriend. Again, the Appellant was drunk at the time of his arrest. During that period, the Appellant was arrested an additional three times for disturbances he caused while drunk. In the circumstances of each of the Appellant's convictions and arrests, his misconduct arose from public intoxication and endangered himself and others.

Official problem, *supra* para 5 at paras 12(i), (l).

2. The Conditions

8. At the Appellant's bail hearing, due to his criminal history and likelihood of reoffending, the Crown opposed his release. However, the justice of the peace granted the Appellant interim judicial release with conditions pursuant to s. 515 of the *Code,* tailored to the Appellant's circumstances and limitations as an alcoholic. Notably, the bail conditions (the "Conditions") prohibited the Appellant from attending any licenced establishment that serves alcohol (Condition 3) and from possessing or consuming alcohol outside his home (Condition 4).

Official Problem, *supra* para 5 at paras 6, 8.

9. The Appellant sought review of the Conditions under s. 520 of the *Code*. On review, the judge found that the Appellant had failed to show cause to set aside the Conditions.

Clarifications to Official Problem, Wilson Moot 2021 at para 5 [Clarifications].

10. After his release, the Appellant's mother came to stay with him, with the intention of ensuring he complied with his bail conditions, however she "forbade [the Appellant] from drinking while she was in the house." The Appellant's long-term boyfriend also moved in following the Appellant's release to provide stability and emotional support.

Official Problem, *supra* para 5 at paras 13, 12(o).

3. The Appellant breaches the Conditions

11. In October 2019, the Appellant was arrested and charged for failing to comply with a condition of a release order without lawful excuse under s. 145(5) of the *Code*.

Official Problem, *supra* para 5 at para 1.

12. On October 28, 2019, police responded to reports of a fight at The Gambler, identifying the Appellant as matching the description of a suspect. As the Appellant was holding a beer and appeared intoxicated, the police arrested him for failing to comply with the conditions of his release which prohibited him from attending licenced establishments and required that he abstain from

alcohol outside of his home. The police later determined that the Appellant was not involved in the fight and only charged him under s. 145(5).

Official Problem, *supra* para 5 at para 9.

13. In December 2019, the original charges against the Appellant laid in August were dropped.

Official Problem, *supra* para 5 at para 10.

Procedural History

1. The trial

14. At trial, the Appellant pleaded not guilty to failing to comply with the Conditions. He argued that they infringed his ss. 7, 15, and 11(e) *Charter* rights. The British Columbia Provincial Court found the Appellant not guilty on the grounds that Conditions 3 and 4 violated the Appellant's ss. 15 and 11(e) rights and were not justified under s. 1.

Official Problem, *supra* para 5 at paras 11, 18.

2. Court of Appeal

15. The Crown appealed. The British Columbia Court of Appeal found no *Charter* breach. The Court found the Conditions were necessary to address the risks detailed in s. 515(10) of the *Code* and were designed to target and mitigate the Appellant's risk of re-offending in light of his addiction.

Official Problem, *supra* para 5 at para 19.

16. Justice Seymour Krelborn dissented in part, agreeing there was no s. 11(e) breach, but found s. 15 was infringed because alcoholism is a disability, and the Conditions arbitrarily perpetuate disadvantage.

Official Problem, *supra* para 5 at para 20.

PART III – STATEMENT OF POINTS IN ISSUE

17. There are 3 issues on appeal:

Issue 1: Does the decision infringe the Appellant's s. 11(e) rights of the *Charter*?

18. No. The Conditions are necessary and reasonable in light of the objective of furthering valid bail purposes outlined in ss. 515(10)(a)–(c) of the *Code*. In the absence of conditions, the Appellant poses a risk to public safety under s. 515(10)(b) due to his repeated history of violent and dangerous criminal behavior when he consumes alcohol outside his home. The Conditions are tailored to the Appellant, and are necessary, reasonable, and the least onerous in the circumstances.

Issue 2: Does the decision infringe the Appellant's s. 15 rights of the *Charter*?

19. No. The Crown accepts that alcohol use disorder is a "disability" under s. 15 of the *Charter*. However, although the Conditions create a distinction based on the Appellant's disability, they do not perpetuate, reinforce, or exacerbate his disadvantage, and therefore, are not discriminatory. Moreover, the Appellant has failed to meet his onus of showing that any adverse impacts were the result of state conduct.

Issue 3: If the answer to question 1 or 2 is "yes", is the infringement demonstrably justified in a free and democratic society under s. 1 of the *Charter*?

20. Yes. The infringement is a reasonable limit under both the *Oakes* and *Doré* framework, making it demonstrably justified under s. 1 of the *Charter*. As the lower courts only made judgments on the constitutionality of Conditions 3 and 4, those conditions will be emphasized in determining these issues.

PART IV – ARGUMENT

<u>Issue 1: The Conditions do not infringe the Appellant's s. 11(e) *Charter* rights</u>

21. The Conditions do not deprive the Appellant of his right to reasonable bail under s. 11(e). First, in the absence of conditions, the Appellant would pose a risk to public protection and safety, contrary to s. 515(10)(b) of the *Code*. Second, the Conditions were necessary to address the statutory criteria for detention. Third, the Conditions were reasonable because they were clear, minimally intrusive, and proportionate to any risk posed by the Appellant. Finally, the Conditions were sufficiently linked to the grounds of detention under s. 515(10)(c) of the *Code.* The Conditions were tailored to the Appellant's circumstances, consistent with the principles from *Zora*, and are therefore compliant with s. 11(e).

> *R v Zora*, 2020 SCC 14 at paras 83–89 [*Zora*].
> *Criminal Code*, *supra* para 2, ss 515(10)(b), 515(10)(c).

1. The s. 11(e) analysis

22. Section 11(e) is a procedural right comprising to two constituent rights: the right to reasonable bail, and the right not to be denied bail without just cause (*Antic; Pearson*).

> *Charter*, *supra* para 3, s 11(e).
> *Antic*, *supra* para 2 at paras 32–38.
> *R v Pearson*, [1992] 3 SCR 665 at p. 689, 12 CRR (2d) 1 [*Pearson*].

23. To abide by s. 11(e), bail conditions must be reasonable, necessary, and linked to the bases for denying bail outlined in s. 515(10) of the *Code*: to ensure attendance at court, to ensure public safety, or to maintain confidence in the administration of justice (*Zora*). Bail judges must practice restraint when imposing conditions and must reject *all* less onerous forms of release before imposing a more restrictive form (*Zora*). They must abide by the ladder principle: "that the form of release imposed on an accused be no more onerous than necessary" (*Antic*; *Zora*; *Tunney*). Bail judges must also adhere to the principle of review at the release stage, by carefully scrutinizing conditions, regardless of whether the hearing is contested (*Zora*).

Zora, *supra* para 21 at paras 21, 89, 6.
Antic, *supra* para 2 at paras 44, 67.
R v Tunney, 2018 ONSC 961 at para 37 [*Tunney*].

A. *If released without conditions, the Appellant would pose a risk to the safety and protection of the public*

24. The first step in the s.11(e) analysis is to determine "whether a need for any condition has been demonstrated," by considering the risks the Appellant would pose if released without conditions (*Zora*). When non-enumerated conditions are set under s.515(4)(h) of the *Code*, such as those the Appellant challenges, they must be sufficiently connected to the grounds for detention outlined in s. 515(10) (*Zora*). Where an accused poses a "substantial likelihood" of committing another offence that would endanger public safety, particularized conditions are necessary to prevent these dangers (*Morales*). It is "sufficient that the bail system establish a likelihood of dangerousness," but "exact predictions about future dangerousness" are not required (*Morales*). The Appellant is one such accused – based on his addiction and past criminal behavior, there is strong reason to believe he would endanger the public if released without conditions.

Zora, *supra* para 21 at paras 83–84, 91–92.
Criminal Code, *supra* para 2, ss 515(4)(h), 515(10).
R v Morales, [1992] 3 SCR 711 at pp. 736–7, 739, 738, 12 CRR (2d) 31 [*Morales*].

25. The Appellant's long-standing history of violent and dangerous criminal behaviour is tied to his public alcohol consumption. All the Appellant's previous criminal convictions – operation of a motor vehicle while impaired, possession of a prohibited substance, and assault causing bodily harm – concern threats to public safety. Further, the Appellant has been arrested an additional three times for causing disturbances while drunk. The Appellant's public alcohol consumption is the common thread running through each of his convictions and arrests.

Official Problem, *supra*, para 5 at paras 12(i)–(l).

26. Social science evidence demonstrates that the likelihood that the Appellant will commit another criminal offence is linked to and exacerbated by his substance abuse. A 2015 study by

Corrections Canada found that 44% of individuals struggling with severe substance abuse were re-admitted into custody. An offender's risk of recidivism was further increased when their crimes were directly linked to their substance abuse. Thus, there is reason to believe that the Appellant is substantially likely to commit another dangerous offence if conditions were not imposed.

Official Problem, *supra* para 5 at paras 17(f), (g).

2. The Conditions were necessary

27. Terms of release imposed under s. 515(4)(h) of the *Code* are justified only to the extent that they are necessary to address the grounds for detention under s. 515(10) (*Antic*; *Zora*). Short of detention, the Conditions were the *only* way to ensure the protection of the public. The Appellant has repeatedly engaged in criminal conduct while consuming alcohol in public. By restricting where the Appellant can consume alcohol, the Conditions mitigated this risk while providing a safe outlet for him to attend to his addiction.

Zora, *supra* para 21 at paras 85–87.
Antic, *supra* para 2 at para 67.
Official Problem, *supra* para 5 at paras 12(i)–(l).

28. The necessity of the Conditions is further demonstrated by empirical evidence. Studies published in the *Journal of Criminal Justice* and *Drug and Alcohol Dependence* concluded that alcohol problems are the strongest predictor of recidivism, and that DUIs can be strongly predicted by an offender's previous conviction. Given the Appellant's 2004 DUI conviction, the Conditions were necessary to mitigate the risk of harm to public safety.

Official Problem, *supra* para 5 at para 17(e), 12(i).

3. The Conditions were reasonable

29. The Conditions were reasonable – they were clear, minimally intrusive, and proportionate to the risk the Appellant posed to public safety (*Zora*). They were specifically tailored to the Appellant's circumstances and patterns of behaviour to eliminate most issues of self-control, while ensuring his ability to comply (*Zora*; *Wright*).

Zora, *supra* para 21 at paras 87, 25.
Wright v College and Association of Registered Nurses of Alberta (Appeals Committee), 2012 ABCA 267 at paras 65–68 [*Wright*].

A. The Conditions were the least onerous in the circumstances

30. In accordance with the ladder principle, the Appellant's form of release was not more onerous than necessary (*Antic*). By allowing alcohol consumption at home, the bail judge ensured that compliance was both attainable and reasonable (*Omeasoo*; *Penunsi*; *Zora*). Given that the Crown initially opposed the Appellant's release, the Conditions were dramatically less burdensome than other reasonable and realistic alternatives.

Antic, *supra* para 2 at para 44.
R v Omeasoo, 2013 ABPC 32 at para 33 [*Omeasoo*].
Zora, *supra* para 21 at para 92.
R v Penunsi, 2019 SCC 39 at para 80 [*Penunsi*].
Official Problem, *supra* para 5 at para 6.

31. The bail judge designed the Conditions with full knowledge of the Appellant's background, including his alcohol use disorder. The Appellant has a degree in advanced computer science. He is undoubtedly capable of ordering alcohol for delivery online to comply with Condition 4. Alternatively, the Appellant could have enlisted the help of others, such as his partner, to bring alcohol to him. Given the availability of these options and the risk the Appellant poses to public safety, it was not more onerous than necessary to prohibit him from attending licensed establishments or possessing alcohol outside of his home.

Official Problem, *supra* para 5 at para 12(e), (g), 13.

32. In *Zora*, the Supreme Court explicitly approved conditions that prohibit public alcohol consumption where both the alleged and any previous offences occurred while the accused was drunk in public (*Omeasoo*; *Zora*). In contrast, complete alcohol prohibitions "simply [invite] a breach" (*Atchooay*), setting the accused up for failure and ensuring they will be jailed (*Coombs*). As the Appellant's history of criminal behavior emanates from his public alcohol consumption, the Conditions were the most reasonable and least onerous form of release in the circumstances.

Omeasoo, *supra* para 30 at para 42.
Zora, *supra* para 21 at para 92.
R v Atchooay, 2003 BCCA 218 at para 6 [*Atchoogy*].
R v Coombs, 2004 ABQB 21 at para 8 [*Coombs*].

B. Conditions that allowed public consumption of alcohol would have been more invasive and invited breach

33. More permissive terms of release would set the appellant up to fail, require more invasive enforcement measures, and not adequately protect the public. Unlike the accused in *Forrest*, the Appellant has alcohol use disorder. A condition prohibiting his intoxication in a public place would be nearly impossible for the Appellant to self-regulate. It would require that the Appellant control his intoxication levels, contrary to his demonstrated capabilities. Enforcement of such a condition would also likely require more frequent check-ins or breathalyzer tests, making the terms of release more onerous and invasive.

R v Forrest, 1992 CarswellBC 936 at para 14, [1992] BCWLD 811 (CA) [*Forrest*].
Official Problem, *supra* para 5 at para 12(m)(b).

34. Finally, allowing public consumption of alcohol short of intoxication runs contrary to the specific risk the Appellant poses to public safety. Putting the Appellant in a situation where he would have to regulate his alcohol consumption, which he has proven unable to do, creates an undue risk to the public (*Zora*). The Conditions were designed to ensure personal and public safety by mitigating most issues of self-control. Therefore, allowing alcohol consumption at home was the least impairing condition that accommodated the Appellant's disability.

Official Problem, *supra* para 5 at paras 19, 12(m)(b).
Zora, *supra* para 21 at para 84.

C. Any additional burdens on the Appellant were created through his own volition

35. The Appellant created additional burdens on his physical health by inviting his mother to live with him *after* the bail judge set the terms of release. Although the Conditions allowed him to drink at home, his mother forbade it. In deciding to abide by his mother's rules, the Appellant knowingly risked his health – a risk not required by the Conditions.

Official Problem, *supra* para 5 at paras 12(n), 13.

36. It is not the court's duty to predict the intricacies of the Appellant's relationship with his mother. The Appellant was capable of meeting the Conditions – in fact, he had "every intention of meeting [his] bail conditions" and knew he "could have had a drink at the house legally." The Appellant was not subject to a problematic condition that required him to follow his mother's house rules (*Zora*). It was the Appellant's own desire not to disappoint his mother that made compliance difficult, not the Conditions themselves.

Official Problem, *supra* para 5 at para 13.
Zora, *supra* para 21 at para 95.

4. The Conditions were sufficiently linked to the grounds for detention under s. 515(10)(c) of the *Code*

37. The Conditions align with the grounds of detention under s. 515(10)(c) of the *Code*. As designed by the bail judge, the Conditions address the "specific risk posed by the accused's release" (*Zora*). Pursuant to s. 515(3) of the *Code*, justices are expected to consider the accused's prior criminal record and whether the charged offence is violent. The Appellant was arrested and charged with assault with a weapon and for being in the care or control of a vehicle while intoxicated. These are substantially grave offences such that it would have been imprudent for the bail judge to release the Appellant without safeguards protecting the public and their confidence in the administration of justice.

Criminal Code, *supra* para 2 at ss 515(10)(c)(ii), 515(3).
Zora, *supra* para 21 at para 89.
Official Problem, *supra* para 5 at paras 5, 12(i)–(l).

5. Taken together, the Conditions are the fewest and least onerous required in the circumstances

38. The ladder principle is linked to the number and content of bail conditions imposed (*Zora*). The Appellant's terms of release included 6 conditions that were narrowly and specifically tailored to his circumstances (*Zora*). They were limited in number and designed to accommodate the

Appellant's disability. The Conditions were aimed at maintaining public safety, and they were reasonable, necessary, and the least onerous in the circumstances. The Conditions did not breach the Appellant's right to reasonable bail.

> *Zora*, *supra* para 21 at paras 24, 86.
> Official Problem, *supra* para 5 at paras 8, 19.

Issue 2: The Conditions do not infringe the Appellant's s. 15(1) rights

39. The Conditions are not discriminatory. The Crown accepts that the Conditions make a distinction based on the Appellant's alcohol use disorder, which falls under the enumerated ground of disability (*Handfield*). The Conditions may impact the Appellant differently as a member of a protected group; however, any distinction is not discriminatory. The Conditions do not impose or deny a benefit that has the effect of reinforcing, perpetuating, or exacerbating his disadvantage (*Fraser*).

> *Handfield v North Thompson School District*, [1995] BCCHRD No 4 at para 40 [*Handfield*].
> *Fraser v Canada*, 2020 SCC 28 at paras 30, 27 [*Fraser*].

40. Further, this Court should restore arbitrariness to the s. 15(1) test. Bail judges are constitutionally required to make formal distinctions between accused offenders that contemplate their individual circumstances, including membership in enumerated or analogous groups (*Fraser*). It would be incongruous if well-tailored, proportional conditions, which abide by the ladder principle (*Antic*), were found to infringe s. 15(1) based on their differential impact.

> *Zora*, *supra* para 21 at para 25.
> *Antic*, *supra* para 2 at para 67.

1. The section 15 test (*Fraser*)

41. To establish a *prima facie* violation of s. 15(1), the Appellant must demonstrate that the state action: (1) on its face or in its impact, creates a distinction based on an enumerated or analogous ground; and (2) imposes a burden or denies a benefit in a manner that has the effect of

reinforcing, perpetuating, or exacerbating disadvantage (*Fraser*; *Alliance*; *Centrale*). This test applies to allegations of both direct and indirect discrimination (*Fraser*; *Withler*).

> *Fraser*, *supra* para 39 at paras 27, 48.
> *Quebec (Attorney General) v. Alliance du personnel professionnel et technique de la santé et des services sociaux*, 2018 SCC 17 at para 25 [*Alliance*].
> *Centrale des syndicats du Québec v Quebec (Attorney General)*, 2018 SCC 18 at para 22 [*Centrale*].
> *Withler v Canada*, 2011 SCC 12 at paras 61–62, 64 [*Withler*].

42. Section 15(1) applies to legislation, policies, and actions of government authorities carried out under lawful authority (*Eldridge*). As the Appellant challenges the bail judge's decision, rather than the provisions of the *Code,* the Appellant must demonstrate that the alleged breach stemmed from the exercise of the bail judge's statutorily granted discretion (*Eldridge*).

> *Eldridge v British Columbia (Attorney General)*, [1997] 3 SCR 624 at paras 22, 34, 151 DLR (4th) 577 [*Eldridge*].

2. The first step of the s. 15(1) test is met

43. The Crown accepts that the first step of the s. 15(1) test is met. As found by Hooper J., the Appellant suffers from alcohol use disorder, a disability for the purposes of s. 15(1) of the *Charter*. Canadian human rights legislation and jurisprudence establish that alcohol use disorder is a mental or physical disability (*CHRA; Handfield*). In their impact, the Conditions make a distinction based on the Appellant's disability (*Andrews*).

> Official Problem, *supra* para 5 at para 18.
> *Canadian Human Rights Act*, RSC 1985, c H-6 at s 3(1), 25 [*CHRA*].
> *Handfield*, *supra* para 39 at para 40.
> *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143, at p. 165, 56 DLR (4th) 1 [*Andrews*].

3. The Conditions are not discriminatory

44. At the second step of the s. 15(1) test, the Appellant bears the onus of demonstrating that the Conditions have a disproportionate impact which perpetuate, reinforce, or exacerbate his disadvantage (*Fraser*). As he cannot do so, his claim under s. 15(1) must fail.

> *Fraser*, supra para 39 at paras 50–53.

45. The Conditions are not discriminatory merely because the Appellant experiences disadvantages as a person with a disability (*Law*). There is no evidence that the Conditions widen the gap between the Appellant, as an alcoholic, and the rest of society (*Fraser,* Brown and Rowe JJ., dissenting; *QC v A*). The Conditions were designed to enable the Appellant to continue life as normally as possible prior to trial. Furthermore, even if arbitrariness is not restored to the s. 15(1) test, the Appellant has failed to prove that the Conditions perpetuate historical or systemic disadvantages such as economic exclusion, social exclusion, or psychological harms (*Fraser*).

> *Law v Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497 at para 67, 170 DLR (4th) 1 [*Law*].
> *Fraser*, *supra* para 39 at paras 177, 76.
> *Quebec (Attorney General) v A*, 2013 SCC 5 at para 332 [*QC v A*].
> Official Problem, *supr*a para 5 at para 6.

A. This Court should restore arbitrariness to the s. 15(1) test

46. In her majority reasons in *Fraser,* Abella J. eliminates any consideration of arbitrariness or unfairness from the second step of the s. 15(1) test, limiting such inquiries to s. 1 (*Fraser*). Respectfully, this Court must reinstate these elements of the s. 15(1) test. To hold otherwise would impermissibly widen the scope of s. 15(1) and risk the validation of spurious discrimination claims.

> *Fraser*, *supra* para 39 at paras 79, 194.

47. As found by Brown and Rowe JJ. in their dissenting reasons, substantive discrimination has *always* required an element of arbitrariness or unfairness (*Fraser*). Traditionally, arbitrariness has been expressed as a failure to respond to an individuals' actual capacities, needs, and circumstances (*Fraser*; *Andrews*; *Law*; *Withler*; *Taypotat*). To rely on the framework as revised by Abella J. would reduce substantive discrimination to a question of whether a historically disadvantaged group is unequally impacted by the law (*Fraser*).

> *Fraser*, *supra* para 39 at paras 191, 190.
> *Andrews*, *supra* para 43 at pp.174–175.
> *Law*, *supra* para 45 at para 70.
> *Withler*, *supra* para 41 at paras 32, 65.

Kahkewistahaw First Nation v Taypotat, 2015 SCC 30 at para 20 [*Taypotat*].

48. In her majority reasons in *Fraser*, Abella J. confirms that substantive equality, the "animating norm" of the s. 15(1) framework, requires consideration of the "full context of the claimant group's situation" (*Fraser*; *Withler*). Thus, reducing substantive discrimination to the historical disadvantage faced by a group precludes the highly contextual analysis *required* to evaluate substantive equality. Abella J.'s framework skips the essential analysis of "whether the unequal impact corresponds with a group's actual circumstances or needs" (*Fraser*, Brown and Rowe JJ., dissenting). A contextual approach to substantive equality cannot and should not neglect to examine whether the Conditions are arbitrary.

Fraser, *supra* para 39 at paras 42, 190.
Withler, *supra* para 41 at para 43.

49. The Conditions are not arbitrary – they were carefully designed to enable the Appellant to continue his life as normally as possible, while reducing the risks associated with his drinking. As established in *Law*, avoiding discrimination and accommodating disability will frequently require distinctions that account for the actual characteristics of disabled persons (*Law*). In exercising her discretion, the bail judge was entitled, and expected, to tailor the conditions of release to the Appellant's actual circumstances, including his addiction (*Zora*). Full abstention from alcohol would have been virtually impossible for the Appellant (*Denny*). Instead, Conditions 3 and 4 were responsive to public alcohol consumption being the common denominator in all the Appellant's criminal activity, while being sensitive to his actual needs as a person with a disability.

Law, *supra* para 45 at para 69.
Zora, *supra* para 21 at para 25.
R v Denny, 2015 NSPC 49 at paras 14–15 [*Denny*].
Official Problem, *supra* para 5 at paras 8, 12(h)–(l), 18.

B. Any adverse effects experienced by the Appellant are not a result of state conduct

50. Even if arbitrariness no longer factors into the s. 15(1) test, the Conditions do not perpetuate, reinforce, or exacerbate the Appellant's disadvantage (*Fraser*; *Alliance*). The true source of the Appellant's complaint lies with his fractured relationship with his mother and his desire "not to disappoint her, by bringing alcohol home against her wishes."

> *Fraser*, *supra* para 39 at para 81.
> *Alliance*, *supra* para 41 at para 25.
> Official Problem, *supra* para 5 at para 13.

51. Not every difference in treatment will result in inequality, and conversely, identical treatment might produce serious inequality (*Andrews*). Only *state conduct* that widens the gap between a "historically disadvantaged group and the rest of society rather than narrowing it…is discriminatory" (*Fraser*, Brown and Rowe JJ., dissenting; *QC v A*). The Conditions directly account for the Appellant's "unique constellation" of circumstances and limitations (*Fraser*).

> *Andrews*, *supra* para 43 at p. 164.
> *QC v A*, *supra* para 45 at para 332.
> *Fraser*, *supra* para 39 at paras 177, 34.

52. Any "adverse effects" experienced by the Appellant do not arise from state conduct. His desire not to disappoint his mother led the Appellant to attempt a complete abstention from alcohol, despite the legitimate risks to his well-being and his previous failed attempts at going "cold turkey." This was not required by the Conditions – the Appellant was free to self-medicate while at home and, if he so pleased, to seek treatment.

> Official problem, *supra* para 5 at paras 13, 12(m)(b).

i. <u>The Appellant's choice to abstain from drinking while at home is not protected by s. 15(1)</u>

53. Differential treatment can be discriminatory even where it stems from choices made by the affected individual (*Fraser*). However, the Appellant's choice not to drink at home to avoid disappointing his mother is not at all analogous to the protected choices found in the s. 15(1)

jurisprudence. By his own admission, the Appellant knew he had legitimate, viable options that were compliant with the Conditions.

> *Fraser*, *supra* para 39 at para 86.
> Official Problem, *supra* para 5 at para 13.

54. Section 15(1) protects claimants from enumerated and analogous groups where their "choices" are illusory or constrained by social factors outside of their control (*QC v A*; *Miron*). Further, s. 15(1) guards against "choices" that have the effect of perpetuating claimants' disadvantage (*Fraser*). For example, a decision that dictates whether or not an individual stays above the poverty line cannot be viewed as a "true choice" (*Fraser*; *QC v A*).

> *QC v A*, *supra* para 45 at paras 334, 336.
> *Miron v Trudel*, [1995] 2 SCR 418 at para 153, 124 DLR (4th) 693 [*Miron*].
> *Fraser*, *supra* para 39 at paras 27, 91.

55. The Appellant was not faced with similarly constrained choices, nor was his decision connected to the discrimination he alleges. The Conditions were designed to *avoid* this by allowing him to consume alcohol from home. The Appellant's relationship with his mother does explain his decision not to drink at home. Unlike barriers faced by *de facto* spouses or job-sharing RCMP officers, the Conditions do not strip the Appellant of a "true choice" (*Fraser*; *QC v A*). Thus, the Appellant's choice to drink outside his home is not protected by s. 15(1).

> Official Problem, supra para 5 at para 8.
> *Fraser*, *supra* para 39 at paras 91.
> *QC v A*, *supra* para 45 at para 336.

C. Conditions that accommodate the Appellant's disability should not be found discriminatory

56. Reasonable accommodation accounts for the differences between individuals and will sometimes require formal distinctions to produce substantive equality (*Law*; *Andrews*). While the Conditions may affect the Appellant differently than a non-addicted accused, they accommodate the Appellant's disability by allowing him to attend to his addiction while at home, allowing for a less onerous form of release.

Law, *supra* para 45 at para 25
Andrews, *supra* para 43 at pp.164–169.

57. The Conditions operate to prevent, rather than to perpetuate, the cycle of imprisonment and re-imprisonment faced by those within the criminal justice system who have been incarcerated due to too onerous bail conditions (*Zora*).

Zora, *supra* para 21 at para 57.

Issue 3: Any infringement of the Appellant's rights under s. 15 or 11(e) are justified under s. 1 of the *Charter*

1. The Collateral Attack Doctrine precludes the Appellant from bringing this challenge

58. The Appellant is precluded from bringing this challenge by reason of the Collateral Attack Doctrine (the "CAD"). Complaints about the validity of the release conditions are not a justification for breach, nor a defence to a charge under s. 145 of the *Code* (*Gaudreault*; *Taylor*). Courts orders cannot be attacked "in proceedings other than those whose specific object is the reversal, variation, or nullification of the order" (*Wilson*). The review process in the *Code* is the appropriate avenue for challenging the Conditions (*Gaudreault*; *Litchfield*; *Taylor*; *Zora*).

R v Gaudreault, 1995 CarswellQue 102 at para 37, 30 WCB (2d) 12 (CA) [*Gaudreault*].
Canada v Taylor, [1990] 3 SCR 892 at paras 184–86, 181, 184, 75 DLR (4th) 577 [*Taylor*].
R v Wilson, [1983] 2 SCR 594 at para 8, 4 DLR (4th) 577 [*Wilson*].
R v Litchfield, [1993] 4 SCR 333, 86 CCC (3d) 97 [*Litchfield*].
Zora, *supra* para 21 at paras 64, 100.

59. The CAD maintains the rule of law and confidence in the administration of justice by ensuring that court orders are binding unless properly reversed on appeal (*Litchfield*). An accused seeking to challenge release conditions ought to go through the appropriate review process before breaching or incurring charges (Trotter). The Supreme Court has confirmed that a person is bound by a court order regardless of how flawed or unconstitutional they consider it to be as "[p]ublic order demands that it be negated by due process of the law not by disobedience" (*Taylor*; *Bird*).

Litchfield, *supra* para 58 at para 22.
Gary Trotter, *The Law of Bail in Canada* (Toronto: Thomson Reuters, 2017) (loose-leaf updated 2017, release 2), ch 6 at 52.

Taylor, *supra* para 58 at para 90.
R v Bird, 2019 SCC 7 at paras 20, 22 [*Bird*].

60. As noted by McLachlin J. in *Taylor* and adopted by the majority of the Supreme Court in *Liberty Net*, "[i]f people are free to ignore court orders because they believe that their foundation is unconstitutional, anarchy cannot be far behind" (*Taylor*; *Liberty Net*; *Bird*). The Appellant's unsuccessful attempts at review do not negate his obligation to comply with the Conditions. Pursuant to the CAD, the Appellant's qualms concerning his bail conditions are more appropriately addressed through the legislated review process outlined in the *Code*.

Taylor, *supra* para 58 at para 184, McLachlin J (dissenting in part).
C*anada (Human Rights Commission) v Canada Liberty Net*, [1998] 1 SCR 626 at para 51, 157 DLR (4th) 385 [*Liberty Net*].
Bird, *supra* para 59 at para 22.
Clarifications, *supra* para 9 at para 5.

2. Justifying limits on rights: the *Oakes* test

61. Should this Court find an infringement of either ss. 11(e) or 15 of the *Charter*, any infringement is justified under s. 1. The Conditions serve the pressing and substantial goal of public safety. They are rationally connected to this goal, minimally impairing and the benefits to public safety outweigh any deleterious effects on the Appellant.

62. A limitation of a *Charter* right is demonstrably justified where it is established on a balance of probabilities that the objective is pressing and substantial and the means chosen to pursue its objective are proportionate. Proportionality requires: (a) a rational connection between the infringing law or government action and its objective; (b) that the law or action is minimally impairing of the right; and (c) an overall balance between the salutary and deleterious effects of the *Charter* infringement (*Oakes*).

R v Oakes, [1986] 1 SCR 103, 26 LR (4th) 200 [*Oakes*].

63. Analysis under s. 1 is highly contextual and flexible, taking into account the factual and social context (*RJR*, McLachlin J; *Lucas*). The *Doré Charter* values approach for administrative

decisions applies an equally robust standard as the *Oakes* analysis (*Doré*; *TWU*). Both *Oakes* and *Doré* call for a "margin of appreciation", or deference, to be afforded to bodies that must balance *Charter* rights or values against broader societal objectives (*Doré*). As detailed below, certain *Doré* principles of deference ought to apply to bail judges due to the discretionary nature of their decision-making authority. Since *Doré* is satisfied when the minimal impairment and balancing stages of *Oakes* are met, any limit on the Appellant's ss. 11(e) or 15 rights is justified under s. 1.

> *RJR-MacDonald Inc v Canada (Attorney General)*, [1995] 3 SCR 199 at para 62, 127 DLR (4th) 1 [*RJR*].
> *R v Lucas*, [1998] 1 SCR 493 at para 33, [1999] 4 WWR 589 [*Lucas*].
> *Doré v Barreau du Québec*, 2012 SCC 12 at paras 5–6 [*Doré*].
> *Law Society of British Columbia v Trinity Western University*, 2018 SCC 32 at para 180 [*TWU*].

3. Public safety and protection are pressing and substantial objectives

64. The Appellant's bail conditions were set to address the purposes of pre-trial detention as outlined in s. 515(10) of the *Code*. The purposes of denying bail or imposing conditions are both clear and constitutionally valid, as the objectives of s. 515(10) are necessary for promoting a functional bail system (*Morales*; *Antic*; *St-Cloud*). The Appellant's criminal history demonstrates a propensity for committing violent crimes when he consumes alcohol in public. The Conditions protect the public by reducing the risk the Appellant will reoffend.

> *Morales*, *supra* para 24 at para 46.
> *Antic*, *supra* para 2 at para 3.
> *R v St-Cloud*, 2015 SCC 27 at paras 5, 7 [*St-Cloud*].

65. The bail judge stated the Conditions furthered the objectives of the bail system pursuant to s. 515(10) of the *Code*. The protection of public safety, as expressed in s. 515(10)(b) of the *Code* is evidently pressing and substantial (*Safarzadeh*; *Goodwin*; *Multani*).

> Clarifications, *supra* para 9 at para 5.
> *R v Safarzadeh-Markhali*, 2016 SCC 14 at para 59 [*Safarzadeh*].
> *Goodwin v British Columbia (Superintendent of Motor Vehicles)*, 2015 SCC 46 [*Goodwin*].
> *Multani v Marguerite-Bourgeoys (Commission Scolaire)*, 2006 SCC 6 at paras 45, 47 [*Multani*].

4. The Conditions are proportionate

A. The Conditions are rationally connected to their public protection objective

66. A rational connection can be established through evidence or logic and common sense (*RJR*; *Lucas*). This is not a high threshold – it simply requires a "reasonable prospect" that the statutory goal will be furthered to some extent by limiting the *Charter* right (*Michaud*; *Hutterian*).

> *RJR*, *supra* para 63 at para 85.
> *Lucas*, *supra* para 63 at para 53.
> *R v Michaud*, 2015 ONCA 585 at para 117 [*Michaud*].
> *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37 at para 48 [*Hutterian*].

67. The Conditions are rationally connected to the objective of public safety. The Appellant has a history of criminal activity tied to his alcohol consumption, including three previous convictions involving public intoxication. The Appellant's convictions for driving while intoxicated and assault are well-established threats to public safety (*Orbanski*; *Dedman*). Further, studies have found that alcohol problems are the "strongest predictor of future recidivism." The Conditions restricting the Appellant's ability to consume and possess alcohol in public are a rational means of reducing the risk of recidivism and harm to public safety.

> *R v Orbanski*, 2005 SCC 37 at para 56 [*Orbanski*].
> *R v Dedman*, [1985] 2 SCR 2 at para 17, 51 OR (2d) 703 [*Dedman*].
> Official Problem, *supra* para 5 at paras 12(k), 17(e).

B. The Conditions are minimally impairing as they fall within a range of reasonable alternatives

68. If the High Court finds that the Conditions were not the absolute least onerous in the circumstances, they are still justified under s. 1. The minimal impairment inquiry asks whether alternative means with less detrimental effects would achieve the legislated objectives to the same degree (*Edwards*). Minimal impairment simply requires that the intrusion falls within a "range of reasonable alternatives" (*RJR*). Legislators and decision-makers must "reasonably tailor" laws and decisions to the particular context (*Hutterian*), but they are not held to a standard of perfection (*Carter*; *Hutterian*; *RJR*; *Keegstra*). Decision makers can employ a more restrictive measure when

it furthers the statutory goal in a manner that a less impairing one could not (*Keegstra*; *RJR*; *Hutterian*; *Edwards*).

> *RJR*, *supra* para 63 at para 160.
> *Carter v Canada (Attorney General)*, 2015 SCC 5 at para 91 [*Carter*].
> *Hutterian*, *supra* para 66 at paras 54, 53.
> *R v Keegstra*, [1990] 3 SCR 697 at para 135, 61 CCC (3d) 1 [*Keegstra*].
> *R v Edwards Books and Art Ltd.*, [1986] 2 SCR 713, 35 DLR (4th) 1 [*Edwards*].

69. The Conditions minimally impair the Appellant's *Charter* rights. The Conditions are the least onerous means of ensuring that the Appellant did not commit more violent offences while intoxicated, while accommodating his disability (*Zora*).

> *Zora*, *supra* para 21 at para 87.

70. The Conditions do not deny the Appellant, as a person with a disability, opportunities for social interaction (*Eldridge*). The Appellant was not detained, nor did the conditions impose undue constraints such as confinement to his home, abstinence, or rehabilitation, contrary to *Zora*. It is well established that abstention orders are too onerous for alcoholics and can lead to lethal side effects (*Coombs*; *Denny*). The Supreme Court explicitly approved of conditions similar to the Appellant's as reasonable alternatives to abstinence for an addict (*Zora*; *Omeasoo*). The Appellant's decision to abstain from drinking in his home was a conscious choice made with full knowledge of the possible effects of withdrawal. The Conditions cause no significant negative impacts on the Appellant's liberty or health: he is free to pursue meaningful relationships, employment, seek treatment, and otherwise live normally while limiting his drinking to his home.

> *Eldridge*, *supra* para 42 at para 56.
> *Zora*, *supra* para 21 at paras 92–93, 92.
> *Coombs*, *supra* para 32 at para 8.
> *Denny*, *supra* para 49 at paras 14–15.
> *Omeasoo*, *supra* para 30 at para 42.
> Official Problem, *supra* para 5 at para 13.

71. Moreover, the Appellant had reasonable options to address his withdrawal symptoms which complied with the Conditions. The Appellant was free to consume alcohol in his home. If the Appellant wished to stop drinking, he could have sought medical assistance, as he has done in the past. Further, the Appellant was free to consult a medical professional if his withdrawal symptoms became too severe. The Conditions were designed to ensure the Appellant had adequate access to alcohol to alleviate the health risks of alcohol withdrawal.

72. While the Conditions may impact alcoholics differently than the average non-disabled person, the Appellant's alcohol use disorder was a key source of the danger he posed to the community (*Zora*; *Antic*). The Supreme Court has accepted that addicts have an impaired ability to control or stop their consumption, despite knowing the consequences (*PHS*). The Court has further acknowledged the relationship between crime and alcohol consumption (*Daviault*; *Leary*).

> *Zora*, *supra* para 21 at para 25.
> *Antic*, *supra* para 2 at para 66.
> Official Problem, *supra* para 5 at paras 17(e), (g), 14(y).
> *Canada (Attorney General) v PHS Community Services Society*, 2011 SCC 44 at para 101 [*PHS*].
> *R v Daviault*, [1994] 3 SCR 63 at para 39, 118 DLR (4th) 469 [*Daviault*].
> *R v Leary*, [1977] 3 WWR 628, [1978] 1 SCR 29 [*Leary*].

73. As the Appellant has a history of violent offences and alcohol problems are the strongest predictor of recidivism, there were no less impairing means of achieving the goal of public safety. Similar to *Reid*, allowing the accused to drink outside his home would doom him to fail, contrary to the public safety goal. The Conditions were tailored specifically to the Appellant, contemplating his previous convictions, patterns of behaviour, and disability.

> *R v Reid*, 2012 NLTD(G) 10 (SC) at paras 34–36, [2012] NJ No 176 [*Reid*].

i. <u>Review mechanisms ensure the Conditions are minimally impairing</u>

74. The Conditions are also minimally impairing because there are readily available paths for the Appellant to review the Conditions before breaching them. The *Code* sets out a detailed

procedure for challenging bail conditions, which can be made any time prior to (ss. 520(1); 521(1)) or during trial (s. 523(2)(a)). Reviewing judges may confirm, vary, or substitute the bail decision (s. 680; *Nutbean*; *Perry*).

> *Criminal Code*, *supra* para 2, ss 520, 521, 523, 496, 680.
> *R v Nutbean*, [1980] OJ No 1344 at para 6, 55 CCC (2d) 235, (Ont CA) [*Nutbean*].
> *R v Perry/Crocker*, [1997] NJ No 146 at para 2, 471 APR 181 (Nfld CA) [*Perry*].

75. After an unsuccessful review, an accused may re-argue his bail where new evidence arises or circumstances change (s. 523), or after a 30-day waiting period (*Saracino*; *Semenick*). Judges also have the discretion to allow subsequent reviews before 30 days (*Petrie*). Even after a condition is breached, bail reviews remain the primary method of challenging or changing bail conditions, not criminal charges (*Criminal Code*; *Zora*). The review mechanisms provide a reasonable and accessible method of challenging the Conditions, minimizing the impact of any infringements.

> *Criminal Code*, *supra* para 2, ss 520(8), 521(9), 523, 524, 145.
> *R v Saracino*, [1989] OJ No 28 at para 17, 47 CCC (3d) 185 (Ont HC) [*Saracino*].
> *R v Semenick*, [1985] 2 WWR 132, at para 10, 30 Man R (3d) 147 (CA) [*Semenick*].
> *R v Petrie*, [1985] 2 WWR 128 at para 10, 30 Man R (2d) 145 [*Petrie*].
> *Zora*, *supra* para 21 at paras 64, 27, 63.

C. Bail judges' determinations of minimal impairment are owed deference

76. In determining the least infringing method, courts should "accord the legislature a measure of deference" (*Carter*; *Hutterian*). Governments have expertise in choosing from a range of options to address complex social or policy problems and should therefore be afforded flexibility (*Hutterian*). The deference accorded to bail judges in the bail review process, the discretionary nature of their decisions, and the nature of bail hearings as summary proceedings dictate that deference also be afforded to bail decisions.

> *Carter*, *supra* para 68 at para 97.
> *Hutterian*, *supra* para 66 at para 37.

i. The reasons for deference in the bail review process justifies deference to bail judges in *Charter* challenges

77. Deference is afforded to bail judges in the bail review process (*Pemberton*; *Benson*; *Hall* 2012) and should equally apply to *Charter* challenges of bail decisions. As found by the Alberta Court of Queen's Bench, bail judges are highly experienced in their area of law and can "appropriately assess the various considerations required" (*Pemberton*).

> *R v Pemberton*, 2009 ABQB 107 at paras 28–31[*Pemberton*].
> *R v Benson*, 2013 ABQB 75 para 16 [*Benson*].
> *R v Hall*, 2012 ABQB 362 at paras 30–31 [*Hall* 2012].

78. This justification for deference is equally applicable to *Charter* challenges. Bail judges are experienced in weighing *Charter* issues and are in the best position to make decisions based on the facts before them. Further, a *Charter* challenge does not displace the need for efficiency and efficacy in the bail system. Excessive appeals and overly intrusive variations of bail decisions results in "mischief" and hinders the effectiveness of the bail system (*Hall* 2012).

> *Hall* 2012, *supra* para 77 at para 31.

79. Deference to bail judges is also justified by the realities of the bail system. The expedited nature of bail hearings ensures that individuals are not detained pre-trial for longer than necessary, thus protecting their liberty rights while presumed innocent (*Zora*). Moreover, the accused's right to be tried within a reasonable time, in accordance with *Jordan*, necessitates an expedient bail process.

> *R v Jordan*, 2016 SCC 27 [*Jordan*].
> *Zora*, *supra* para 21 at para 78.

80. Efficiency of pre-trial decisions is an essential part of "our criminal justice system's commitment to treat presumptively innocent accused persons in a manner that protects their interests in liberty, security of the person, and a fair trial" (*Jordan*). Overly scrutinous appeals of bail decisions may add to systemic delays, further impacting the rights of those who are presumed

innocent. Like s. 11(b), bail reviews based on *Charter* infringements were not intended to be a "sword [that] frustrate[s] the ends of justice" (*Jordan*; *Morin*).

> *Jordan*, *supra* para 79 at paras 20, 21, 19.
> *R v Morin*, [1992] 1 SCR 771 at para 57, 71 CCC (3d) 1 [*Morin*].

ii. Deference is given to discretionary decision makers in criminal law

81. Given the highly contextual and flexible nature of the *Oakes* test (*Oakes*; *Eldridge*), the deference accorded to similar discretionary decision makers is relevant to assessing the deference that ought to be afforded to bail judges.

> *Oakes*, *supra* para 62 at para 74.
> *Eldridge*, *supra* para 42 at para 85.

82. Similar to the grant of discretion found in s. 515 of the *Code,* considerable discretion is accorded to trial judges when excluding evidence under section 24(2) of the *Charter*, when making discretionary decisions to impose conditional sentences (*Proulx*) and when considering applications for bail pending appeal (*Oland*). All four situations involve an individualized and contextual analysis, the exercise of discretion, and require balancing competing *Charter* rights.

> *Criminal Code*, supra para 2, s 515.
> *R v Proulx*, [2000] 1 SCR 61 at paras 116, 123–125, 182 DLR (4th) 1 [*Proulx*].
> *R v Oland*, 2017 SCC 17 at paras 33, 62 [*Oland*].

83. When deciding whether to exclude evidence under s. 24(2), trial judges must balance the seriousness of any *Charter*-infringements, the impact on the accused, and society's interest in adjudicating the case on its merits (*Grant*). In reviewing these types of decisions, appeal judges afford considerable deference to trial judges in order to maintain the integrity of the justice system (*Grant*; *McGuffie*; *Harrison*).

> *R v Grant*, 2009 SCC 32 at paras 71, 86, 127, 71 [*Grant*].
> *R v McGuffie*, 2016 ONCA 365 at para 64 [*McGuffie*].
> *R v Harrison*, 2009 SCC 34 at para 65 [*Harrison*].

84. Bail judges must balance competing *Charter* rights and societal interests: the accused's right to reasonable bail, to trial within a reasonable time, their liberty rights, the public's interest in safety and security, and the integrity of the justice system. This type of balancing is afforded deference in other criminal contexts, such as in reviews of applications for bail pending appeal (*Oland*) and discretionary decisions to impose conditional sentences (*Proulx*), and should also apply to a bail judge's discretion in tailoring bail conditions to the circumstances of the accused.

> *Proulx*, *supra* para 82 at paras 116, 123–125.
> *Oland*, *supra* para 82 at paras 33, 62.

iii. Deference is afforded based on *Vavilov* and *Doré* principles

85. Just as deference is afforded to administrative decision makers under *Vavilov* and *Doré* principles, it should also be available to bail judges to the extent that they hold a similar discretionary power. Analogous to statutory grants of discretion that come before the Immigration and Refugee Board, parole boards, or Review Boards dealing with NCRMD offenders, the *Code* gives bail judges significant discretion to set any desirable, reasonable conditions. Similar to bail decisions, each of these agencies make decisions impacting individual liberty interests as an exercise of executive power.

> *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*].

86. Parliamentary intent is a key justification for affording deference to administrative decision makers (*Vavilov*). Here, the *Code* clearly demonstrates Parliament's intent for bail judges to carry out the delicate balancing exercise embodied in s. 515.

> *Vavilov*, *supra* para 85 at para 10.

D. Final balancing: The benefits of the Conditions outweigh the deleterious effects

87. The Conditions are tailored to accommodate the Appellant's disability, have minimal deleterious effects, and evoke no disrespect to the Appellant's human dignity (*Oakes*). Weighed against the public's interest in safety and maintaining a functioning bail system, the Conditions

are proportionate. The Conditions provide significant public safety benefits and maintain faith in the criminal justice system, which outweighs any inconvenience experienced by the Appellant.

Oakes, *supra* para 62 at para 67.

88. Broader societal interests are important in assessing whether achieving the statutory objective outweighs the deleterious effects caused by the infringement of the right. This entails a broader assessment of whether the public good achieved by the infringement is out of proportion with the harms suffered by the Appellant (*Hutterian*; *Michaud*).

Hutterian, *supra* para 66.
Michaud, *supra* para 66.

89. Here, there is competing social science evidence on the effects of addiction. While the law is clear that bail conditions should be minimal, there is no precise formula on how to weigh contextual factors, such as the impact of addiction on a particular individual. Therefore, respectful deference ought to be given to the bail judge's decision (*Hutterian*; *Edwards*).

Hutterian, *supra* para 66.
Edwards, *supra* para 68.

i. Deleterious Effects on the Appellant

90. To outweigh significant public interests such as faith in the criminal justice system, the impact of the infringements must be more than a mere inconvenience (*Hutterian*). Unlike *Hutterian*, the Appellant was not required to alter or reject an immutable or deeply personal characteristic to comply with the Conditions. The evidence shows that substance abuse is directly linked to criminal behaviour and re-offending. While it is impossible to make exact predictions about the likelihood of recidivism, exact precision is not constitutionally required (*Morales*). The benefit to public safety of placing restrictions on the Appellant's drinking outweighs the minimal intrusion on the Appellant's liberty.

Hutterian, *supra* para 66 at paras 95, 96.
Official Problem, *supra* para 5 at para 17(f).

Morales, *supra* para 24 at para 43.

91. While the appellant is confined to drinking only within his own home, he is not required to abstain from drinking altogether. Should the Appellant choose to practice abstinence, he is free to seek medical assistance, as he has done in the past. The inconveniences experienced by the Appellant do not outweigh the real and proven threat he poses to public safety when he consumes alcohol in public. The cost to the Appellant of complying with his bail conditions is minimal and does not rise to the level of depriving his liberty to make meaningful decisions, as in *Hutterian*.

Hutterian, *supra* para 66.

92. The Conditions impose minimal hardship on the Appellant as they manifest no disrespect to his inherent human dignity (*Oakes*). The Conditions recognize that the Appellant faces pre-existing difficulties due to his alcohol use disorder and accommodate this by allowing him to consume liquor in his own home.

Oakes, *supra* para 62 at para 67.

ii. <u>The Benefit to the Public</u>

93. The Conditions are necessary to maintain the proper functioning of the bail system. A functioning bail system is one which prevents further offences, especially where the accused has a history of violence (*Morales*). Considering the Appellant's previous violent offences and high likelihood of re-offending, allowing him to drink outside his home would hinder the effectiveness of the bail system and diminish faith in the criminal justice system.

Morales, *supra* para 24 at paras 40–44.

94. Confidence in the administration of justice is a clear and constitutional ground for denying bail (*Hall* 2002; *St-Cloud*). Public confidence is also crucial to the proper functioning of the justice system as a whole, as it is inextricably intertwined with the concept of rule of law (*Gill*; *Valente*; *MacDougal*). The public loses faith in the criminal justice system when offenders are released into

the community without necessary restrictions to prevent them from endangering public safety. The Conditions mitigate the risk that the Appellant's behaviour poses to the safety of the community.

> *R v Hall*, 2002 SCC 64 [*Hall* 2002].
> *St-Cloud*, *supra* para 64 at para 6.
> *R v Gill*, [2002] NJ No 310 at para 27, 56 WCB (2d) 86 [*Gill*].
> *Valente v The Queen*, [1985] 2 SCR 673 at p. 689, 24 DLR (4th) 161 [*Valente*].
> *R v MacDougal*, 178 DLR (4th) 227 at p. 48, 138 CCC (3d) 38 [*MacDougal*].

95. The Appellant has struggled with alcohol use disorder for most of his adult life and attempted rehabilitation numerous times, without success. His addiction has resulted in violence towards others, including three criminal convictions and three additional arrests.

> Official Problem, *supra* para 5 at paras 12(a), 12(m).

96. The trial judge found as a fact that the Appellant's history of violence and criminal behaviour was connected to his alcohol use disorder, and this was accepted by the Court of Appeal. The lower courts accepted that the Appellant poses a risk to the safety of the community.

> Official Problem, *supra* para 5 at paras 12(g)–(l), 12(f), 18, 19.

97. The value of public safety and a proper functioning bail system outweigh any inconvenience to the Appellant. Therefore, any infringement of s. 11(e) or 15 is proportionate and demonstrably justified in a free and democratic society.

PART V – ORDERS SOUGHT

98. For these reasons, the Respondent submits that the appeal should be dismissed, and the decision of the Court of Appeal for British Columbia upheld.

All of which is respectfully submitted this 21st day of January 2021.

PART VI – LIST OF AUTHORITIES

JURISPRUDENCE	PARAGRAPHS
Alberta v Hutterian Brethren of Wilson Colony, 2009 SCC 37.	66, 68, 76, 88, 89, 90, 91
Andrews v Law Society of British Columbia, [1989] 1 SCR 143, 56 DLR (4th) 1.	43, 47, 51, 56
Canada (AG) v PHS Community Services Society, 2011 SCC 44.	72
Canada v Taylor, [1990] 3 SCR 892, 184, 75 DLR (4th) 577.	58, 59, 60
C*anada (Human Rights Commission) v Canada Liberty Net*, [1998] 1 SCR 626, 157 DLR (4th) 385.	60
Canada (Minister of Citizenship and Immigration) v Vavilov, 2019 SCC 65.	85, 86
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Centrale des syndicats du Québec v Quebec (Attorney General), 2018 SCC 18.	41
Doré v Barreau du Québec, 2012 SCC 12.	63
Eldridge v British Columbia (Attorney General), [1997] 3 SCR 624, 151 DLR (4th) 577.	42, 70, 81
Fraser v Canada, 2020 SCC 28.	39, 40, 41, 44, 45, 46, 47, 48, 50, 51, 53, 54, 55
Goodwin v British Columbia (Superintendent of Motor Vehicles), 2015 SCC 46.	65
Handfield v North Thompson School District, [1995] BCCHRD No. 4.	39, 43
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Law v Canada (Minister of Employment and Immigration), [1999] 1 SCR 497, 170 DLR (4th) 1.	45, 47, 49, 56
Law Society of British Columbia v Trinity Western University, 2018 SCC 32.	63
Miron v Trudel, [1995] 2 SCR 418, 124 DLR (4th) 693.	54
Multani v Marguerite-Bourgeoys (Commission Scolaire), 2006 SCC 6.	65
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