

IN THE HIGH COURT OF THE DOMINION OF CANADA

(ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA)

BETWEEN

ALLAN CHAUDHRY

Appellant

- AND -

HER MAJESTY THE QUEEN

Respondent

FACTUM OF THE RESPONDENT

Counsel for the Respondent

Team 8

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PART I – OVERVIEW

[1] To ensure that the bail system functions properly, the court must impose conditions that protect the public, mitigate the risk of re-offending, and maintain confidence in the administration of justice. The ladder principle ensures that the court may only impose the least restrictive form of release necessary to address these concerns. Additionally, the individual circumstances of the accused inform each of the bail conditions imposed.

[2] The bail conditions imposed on the Appellant were appropriately tailored to both the public safety risk he poses and to his individual circumstances. Moreover, they are consistent with the Appellant's substantive equality interest under the *Canadian Charter of Rights and Freedoms (Charter)*. The Appellant has demonstrated a pattern of committing crimes while under the influence of alcohol. His bail conditions thus require that he refrain from attending any licenced establishment that serves alcohol and restrict the possession or consumption of alcohol outside of his home. By avoiding a complete prohibition on alcohol, these conditions strike an appropriate balance between public safety and the accused's constitutionally protected liberty and equality interests.

[3] The bail conditions do not limit the Appellant's ss. 11(e) or 15 rights under the *Charter*. The bail conditions are based on a set of contextual factors, informed by the Appellant's prior convictions, current charges, and his individual circumstances. Therefore, they do not limit his right to reasonable bail under s. 11(e) or his right to substantive equality under s. 15.

[4] If this Court finds that the bail conditions limit these *Charter* rights, these limitations are reasonable and demonstrably justified under s. 1. This appeal should therefore be dismissed.

PART II – STATEMENT OF FACTS

1. The Appellant's propensity for criminality while under the influence

[5] The Appellant has a serious history of criminality, which led to the most recent breach of his bail conditions that are currently at issue. Each of his prior offences occurred while he was intoxicated. In addition to three arrests for causing public disturbances while under the influence, the Appellant has been convicted of three further criminal offences while intoxicated. These convictions include operating a motor vehicle while impaired, possession of a prohibited substance (cocaine), and, most recently, assault causing bodily harm in 2017.

The 2021 Wilson Moot Problem, at paras 12 (i)-(l) [Official Problem].

[6] The Appellant is 39 years old and suffers from alcoholism. This disability dates back to the time he was 25 and continues to have significant impacts on his daily life. The Appellant regularly consumes two to three 26-ounce bottles of vodka over the course of a single weekend. He was terminated from his first job for drinking at his desk and estimates that he has been fired from four to five other jobs as a result of similar self-destructive behaviour. He has entered rehabilitation five times but has been unable to maintain his sobriety.

Official Problem, *supra* para 5 at paras 1, 12 (g)-(h), (m).

[7] Dr. Kyohei Yamane, a psychiatrist and researcher at the Centre for Addiction and Mental Health in Toronto, gave expert evidence at trial that the Appellant meets the criteria for Alcohol Use Disorder (AUD). Dr. Yamane testified that AUD has “an observable neurochemical impact on the brain”. However, he agreed that AUD does not result in a total loss of control but involves choice and learned behaviours.

Official Problem, *supra* para 5 at paras 14-16.

2. The events leading up to the Appellant's breach of his bail conditions

[8] On August 1st, 2019, the Appellant was arrested for a seventh time while under the influence. The allegation on arrest was that he had an argument with another patron at a Vancouver bar, the Gambler. The Appellant allegedly threw a glass beer bottle at the patron and attacked them with his fists. Police apprehended the Appellant parked near the bar and detected an odour of alcohol coming from his person. The Appellant was charged with assault with a weapon under section 267(a) of the *Criminal Code*, and with being in care or control of a vehicle while intoxicated contrary to section 320.14(1).

Official Problem, *supra* para 5 at paras 2-5.
Criminal Code, RSC 1985, c C-46, ss 267(a), 320.14(1) [*Criminal Code*].

[9] Following a contested bail hearing, the Appellant was granted interim release subject to five conditions. Conditions 3-4 prohibited him from consuming alcohol in public and attending any licenced establishments. The Appellant knowingly breached both of these conditions on October 28th, 2019, when he decided to once again go to the Gambler to drink. The police were called to investigate a fight and, upon arrival, discovered the Appellant holding a beer bottle and appearing mildly intoxicated. The Appellant was arrested under s. 145(5) of the *Criminal Code* for attending a licenced establishment and consuming alcohol in public, in breach of his bail order.

Official Problem, *supra* para 5 at paras 1, 8-9.
Criminal Code, *supra* para 8 at s 145(5).

[10] The trial for the Appellant was conducted in March 2020. The Appellant agreed that he had been drinking at the Gambler, and that in doing so failed to comply with his conditions of release. However, he pled not guilty. In his defence, the Appellant challenged the constitutionality of his bail order under ss. 7, 11(e), and 15 of the *Charter*.

Official Problem, *supra* para 5 at para 11.
Canadian Charter of Rights and Freedoms, ss 7, 11(e), 15, Part 1 of the
Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982,
c 11 [*Charter*].

3. Procedural history

[11] At trial, Justice Hooper found that conditions 3-4 of the Appellant's bail did not limit his rights under s. 7. However, Justice Hooper did find in favour of the Appellant on ss. 15 and 11(e). Under s. 15, Justice Hooper found that the bail conditions had a disproportionate effect on the Appellant as a result of his alcoholism disability. Under s. 11(e), Justice Hooper held that these conditions were not demonstrably necessary. His Honour found that the limitations placed on the Appellant's ss. 11(e) and 15 rights could not be justified under s. 1.

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

[12] A majority of a panel of the Court of Appeal for British Columbia allowed the Crown's Appeal of Justice Hooper's findings under ss. 11(e) and 15. The majority found no breach under s. 11(e). The conditions were reasonable given the Appellant's history of committing criminal acts while under the influence of alcohol. Further, the majority of the panel noted that these conditions were not a complete prohibition against alcohol. The Appellant could still indulge in his home without any criminal consequence.

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

[13] Under s. 15, the majority found that there was no adverse effects discrimination. The majority agreed that the Appellant may face a greater risk of breaching conditions 3-4 as a result of his alcoholism. However, this demonstrated the necessity of the conditions to address the risks enumerated under s. 515(10) of the *Criminal Code*.

Official Problem, *supra* para 5 at para 19.
Criminal Code, *supra* para 8 at s 515(10).

[14] Justice Krelborn agreed with the majority's findings under s. 11(e) but dissented on the issue of the Appellant's equality rights under s. 15. In light of the scientific evidence of alcoholism before the court, Justice Krelborn argued that conditions 3-4 arbitrarily disadvantaged the Appellant. Justice Krelborn held that this limit could not be saved by s. 1.

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

PART III – STATEMENT OF POINTS IN ISSUE

[15] The present appeal raises the following three constitutional questions:

Issue 1: Do the bail conditions limit the Appellant's rights under s. 11(e)?

[16] The Appellant's bail conditions, including conditions 3-4 that prohibit his ability to attend licenced establishments and consume alcohol in public, do not limit his right to reasonable bail under s. 11(e) of the *Charter*. Because these conditions are necessary, sufficiently linked to the secondary ground of detention enumerated in s. 515(10)(b) of the *Criminal Code*, and reasonable, they may be imposed without any *Charter* limitation.

Issue 2: Do the bail conditions limit the Appellant's rights under s. 15?

[17] The Appellant's bail conditions do not limit his right to equality under s. 15 of the *Charter*. The conditions of his release do not create a distinction based on his disability, either explicitly or through adverse impact. The Appellant's conditions were informed by his previous convictions and current charges, not his disability. Alternatively, if the conditions do create a distinction, their impact is not discriminatory. The Appellant's bail conditions do not exacerbate or perpetuate his disadvantage because they do not criminalize his alcohol consumption nor subject him to socio-economic exclusion.

Issue 3: If the court finds limitation under either ground, is the limit reasonable?

[18] In the alternative, if the bail conditions do limit the Appellant's rights under either s. 11(e) or s. 15, these limitations are demonstrably justified in a free and democratic society under s. 1 of the *Charter*. Limitations under both *Charter* rights serve the pressing and substantial objective of protecting public safety. The limits are both minimally impairing and proportionate as they do not completely prohibit the Appellant from consuming alcohol. They only prohibit consumption where doing so serves their objective - in public.

PART IV – ARGUMENT

Issue 1: The bail conditions do not limit the Appellant’s rights under s. 11(e) of the Charter

[19] The Appellant’s bail conditions do not limit his rights under s. 11(e), which provides that an accused person shall not be denied reasonable bail without “just cause” (*St-Cloud*). Section 11(e)(ii) guarantees the right not to be held in pre-trial detention when a less restrictive form of release is appropriate. As the Appellant was granted a conditional release, this provision is not at issue. Section 11(e)(i) guarantees the right to reasonable bail which includes the right to reasonable conditions. Here, the Appellant was granted the least onerous form of release possible in accordance with the “ladder principle” (*Antic*). He was released with the least onerous conditions possible in the circumstances, and each individual condition is itself reasonable.

Charter, supra para 10 at s 11(e).
R v St-Cloud, 2015 SCC 27 at para 27 [*St-Cloud*].
R v Antic, 2017 SCC 27 at para 4 [*Antic*].

1. The Appellant’s bail conditions are reasonable under s. 11(e)(i)

[20] The Supreme Court of Canada (“Supreme Court”) in *R v Zora* recently established general principles delineating which bail conditions a court may set in any given case. These principles hold that each bail condition must be necessary, sufficiently linked to the grounds of detention in s. 515(10) of the *Criminal Code*, and reasonable (*Zora*). The Appellant’s bail conditions satisfy each of these requirements.

Criminal Code, supra para 8 at s 515(10).
R v Zora, 2020 SCC 14 at paras 83-89 [*Zora*].
Charter, supra para 10 at s 11(e).

a. The bail conditions are necessary

[21] Conditions which explicitly address the enumerated risks under s. 515(10) of the *Criminal Code* are necessary (*Zora*). More specifically, necessary conditions must be tailored

to alleviate an enumerated risk presented by the particular circumstances of the accused (*Zora*). Section 515(10) sets out the following three risks: whether the accused is a flight risk, whether their release will pose a risk to public protection and safety, and finally, whether their release is likely to result in a public loss of confidence in the administration of justice (*Criminal Code*). Once the specific risk posed by the accused is identified, only those bail conditions which function to reduce *that* risk on *that* accused are necessary (*SK*). Any remaining conditions will be unnecessary and therefore unreasonable under s. 11(e).

Criminal Code, supra para 8 at s 515(10).

Zora, supra para 20 at paras 83-85.

R v SK, [1998] SJ No 863 at para 16, 1998 CanLII 13344 [*SK*].

[22] In the present case, the Appellant's bail conditions are necessary to address the risk he poses to public protection and safety. At the Court of Appeal, Justices Hudson and Schaefer noted that the Appellant's "criminal history demonstrates a propensity for committing crimes while under the influence of alcohol". This history consists of three prior convictions, each of which occurred while the Appellant was intoxicated. These criminal acts have increased in severity over time. Most recently, the Appellant was found guilty of assault causing bodily harm. This violent crime, committed under the influence, occurred only two years prior to the events of the present charge. In addition to these convictions, he has been arrested three other times for causing a public disturbance while intoxicated. Taken together, this demonstrates a "substantial likelihood" that the Appellant would commit further offences while intoxicated, surpassing the mere possibility that he would endanger public protection and safety during his bail (*Morales, Criminal Code*).

Official Problem, *supra* para 5 at paras 12 (i)-(l), 18-20.

R v Morales, [1992] 3 SCR 711 at para 39, SCJ No 98 [*Morales*].

Criminal Code, supra para 8 at s 515(10).

[23] There is a strong correlation between alcohol addiction and criminal recidivism. The scientific evidence presented at trial suggests that as an offender's relationship with alcoholism

continues, so too will their relationship with criminal behaviour. Studies published in the *Journal of Criminal Justice* and *Drug and Alcohol Dependence* concluded that alcohol problems are the strongest predictor of recidivism.

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

[24] These findings were further supported by recidivism studies conducted in New Zealand and Canada. A study conducted in New Zealand between 2005 and 2015 found that “19% of persons released on bail committed another offence while on release”, with the rate of recidivism “nearly double [nearly 40%] in persons with substance abuse issues who relapse while on release”. A 2015 study by Corrections Canada made similar findings. This study concluded that “the risk of criminal recidivism was further increased where the offender’s crimes are directly linked to their substance abuse”.

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

[25] The Appellant’s pattern of relapse, in light of the scientific community’s consensus on recidivism, creates a real and substantial risk to public safety. Consequently, conditions 3-4, which prohibit the Appellant from consuming alcohol in public, are necessary.

b. The bail conditions are sufficiently linked to the enumerated risks in s. 515(10)

[26] Each of the Appellant’s bail conditions is sufficiently linked to the risk to public safety under s. 515(10)(b) of the *Criminal Code*. Each is defined as narrowly as possible to address only the risk to public safety that the Appellant poses, relative to his history of behaviour in the community while publicly intoxicated (*DA*).

Criminal Code, *supra* para 8 at s 515(10)(b).
R v DA, 2014 ONSC 2166 at para 14 [*DA*].

[27] Conditions 3-4 meet that risk because they are specifically aimed at minimizing the possibility of the Appellant consuming alcohol in public. Condition 3 prohibits the Appellant from attending licenced establishments, while condition 4 allows the Appellant to drink in his home, but not in public. This creates the “clear linkage” required between the behaviour the

bail conditions prohibit and the statutory risk the Appellant poses to public safety upon release (*Shoker, Zora*).

Official Problem, *supra* para 5 at para 8.
R v Shoker, 2006 SCC 44 at para 13 [*Shoker*].
Zora, *supra* para 20 at para 86.

[28] The Appellant improperly contends that these conditions are insufficiently linked to serving the risk to public safety. No link will exist between a condition and the risk where an accused person is unable to meet the condition (*Penunsi*). Consequently, it is true that no link exists for conditions which completely prohibit alcohol consumption for alcoholics (*Omeasoo*). Complete prohibition, however, is simply not imposed by either condition.

Official Problem, *supra* para 5 at paras 8 (3)-(5).
R v Penunsi, 2019 SCC 39 at para 80 [*Penunsi*].
R v Omeasoo, 2013 ABPC 328 at para 42 [*Omeasoo*].

[29] Condition 3 is sufficiently linked to public safety precisely because it does not amount to the complete prohibition contemplated by *Omeasoo*. Instead, condition 3 is defined as narrowly as possible to meet the risk the severity of the Appellant's alcohol addiction poses. It prohibits his attendance at any licenced establishment that serves alcohol. According to the Appellant's own evidence, he has entered rehabilitation five times for alcohol addiction and has relapsed on each occasion. He believes his addiction will never disappear entirely. This differentiates the Appellant from someone suffering from a less severe substance abuse disorder for whom a less restrictive condition might satisfy the risk to public safety.

Official Problem, *supra* para 5 at paras 8, 12 (m), 13.

[30] To allow the Appellant to attend any licenced establishments, knowing his criminal history when intoxicated, is to knowingly put owners and patrons of those establishments at risk. The choice to simply attend any licenced establishment and not order and consume an alcoholic beverage is not available to the Appellant because of his past pattern of behaviour. As the Appellant himself testified, where he is presented with this choice, the temptation to

drink is too strong. He testifies that it is a constant physical and mental struggle for him to resist alcohol. Consequently, this condition cannot be narrowed any further. It cannot exclude any establishments where the accused is faced with the near impossible choice of whether to have a drink. This would put him at risk of breaching his bail and set him up for failure.

Official Problem, *supra* para 5 at para 13.

[31] Condition 4 is also not a complete prohibition. It explicitly allows the Appellant to consume alcohol, within the confines of his home. Condition 4 contemplates the Appellant's particular capacities and does not criminalize the existence of his addiction. It recognizes that it is impossible for the Appellant to not be allowed to drink anywhere for the entire duration of his bail. It only prohibits consumption of alcohol where it presents a risk to public safety, namely, in public.

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

[32] In this way, condition 4 has clear linkage to the risk to public safety under s. 515(10)(b) (*Criminal Code*). Any further narrowing, such as to allow his consumption in *some* public places would break the link, by allowing *some* members of the public to be in close proximity to the danger the Appellant poses while intoxicated. Any public place where his consumption is allowed, the risk to public safety persists.

Criminal Code, supra para 8 at s 515(10)(b).

c. The bail conditions are reasonable

[33] Conditions 3-4 are also reasonable. Under this final prong of the framework set out in *Zora*, “reasonable” means that conditions must be “clear, minimally intrusive, and proportionate to any risk” (*Zora*).

Zora, supra para 20 at para 87.

i. The bail conditions are clear

[34] There is no suggestion that the bail conditions are unclear. Conditions 3-4 make explicit where the Appellant will be in breach for alcohol consumption, in public, and where he will not, in his home.

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

[35] The conditions were sufficiently clear for the Appellant to know that his offending behaviour was in breach. As per his plea, the Appellant admits that he knowingly breached conditions 3-4 when he attended the Gambler and ordered a drink. Although he did not want to breach his bail, his recklessness meets the subjective standard set out in *Zora*.

Zora, *supra* para 20 at para 117.

Official Problem, *supra* para 5 at para 13.

ii. The bail conditions are minimally intrusive

[36] Conditions 3-4 are minimally intrusive because they are realistic for the Appellant to meet (*Zora*). As specifically contemplated in *Omeasoo* and affirmed by the Supreme Court in *Zora*, where an accused suffers from alcohol addiction, any condition prohibiting consumption “must be fine-tuned... for example, by prohibiting the accused from drinking alcohol outside of their home”. Condition 4 follows this example to the letter. The Appellant is only barred from consuming alcohol where he has previously offended while under the influence: in public. As such, the condition is minimally intrusive.

Zora, *supra* para 20 at para 92.

Omeasoo, *supra* para 28 at para 42.

[37] The Appellant argues that despite this fine-tuning, condition 4 remains overly intrusive because of his living situation. Currently, he lives with his mother. She offers the Appellant support and assistance with the goal of helping him get his life back on track. In exchange, she forbids her son from drinking in his home while she is living there. The Appellant argues that,

consequently, the condition is tantamount to a complete prohibition because his mother does not want him to drink in the one place his bail allows him to consume alcohol.

Official Problem, *supra* para 5 at para 13.

[38] The Respondent recognizes the particular vulnerability the Appellant faces as a result of his alcoholism and the benefit he receives from his mother's live-in support. However, this in and of itself does not render the bail condition a complete prohibition on alcohol, for two reasons.

[39] First, the constitutionality of the bail condition should not stand or fall on the mother's preferred house rules. The Appellant testified that his mother's goal is to aid him in managing and mitigating his addiction. Condition 4 shares this goal, but differs from his mother's rules in recognizing that the practical realities of the Appellant's addiction make it unrealistic to demand his complete sobriety. While the Appellant may not have a meaningful choice whether or not to drink, he is empowered to choose not to put himself in an environment where drinking will breach his bail. His mother has both the choice and the ability to make his home a safe environment where any time the Appellant's addiction causes him to drink, he will not face criminal consequences.

Official Problem, *supra* para 5 at para 13.

[40] Secondly, if the court accepts that allowing the Appellant to consume alcohol in his home is tantamount to a complete prohibition, it follows that the court must consider the alternative - imposing no condition on his alcohol consumption. If there is no limit on the Appellant's alcohol consumption, the bail order as a whole is rendered incapable of addressing the public safety risk the Appellant poses when intoxicated. For the court to take no step towards protecting the public from a known risk of violence is to endorse putting the public in danger. This suggests that the only way to protect the public without conditions 3-4 is by denying the Appellant bail altogether.

[41] It could be argued that rather than doing away with any alcohol condition, the current condition should be narrowed further. One possibility might be to replace condition 4 with the condition the British Columbia Court of Appeal imposed in *Forrest*. In that case, a complete prohibition on alcohol was substituted by a condition not to be found intoxicated in public (*Forrest*).

R v Forrest, [1992] BCJ No 416 at 4, 10 BCAC 293 [*Forrest*].

[42] While it is public *intoxication*, rather than public *consumption* that poses the risk, this distinction is not useful as it relates to the Appellant. Due to the severity of the Appellant's alcoholism, it is unrealistic to expect that he would be able to comply with drinking alcohol in public without crossing the line into public intoxication. Therefore, further fine tuning is unlikely to do any meaningful work. At worst, this type of condition would encourage the Appellant to drink *some*, and consequently would set him up to fail, triggering his addiction to drink *more*, and ultimately, breach his bail.

iii. The bail conditions are proportional to the public safety risk

[43] The bail conditions are proportional to the public safety risk an unconditional release would have posed. As all of the Justices in the lower courts accepted, the accused has a history of "violence and criminal behaviour connected to his abuse of alcohol". At the contested bail hearing, it was determined that there is a risk of this behaviour continuing. However, this risk was not high enough to demand pre-trial detention. Rather, pre-trial detention was deemed to be unnecessary under the "ladder principle" set out in *Antic* and codified under s. 515 of the *Criminal Code* precisely because the risk could be managed by imposing conditions.

Official Problem, *supra* para 5 at paras 6, 18.

Antic, *supra* para 19 at para 4.

Criminal Code, *supra* para 8 at s 515.

[44] The risk to public safety must be assessed with reference to the Appellant's prior criminal convictions to determine what conditions are proportionate. To show why less

restrictive conditions are inadequate, the Crown may consider any relevant factors, including those enumerated under s. 515(3): “(a) whether the accused is charged with an offence in the commission of which violence was used, threatened or attempted against their intimate partner; or (b) whether the accused has been previously convicted of a criminal offence” (*Criminal Code*).

Criminal Code, supra para 8 at s 515(3).

[45] Conditions limiting his access to and consumption of alcohol are within the ambit of protecting public safety. The Appellant’s behavioural pattern and prior convictions indicate that he cannot make meaningful choices while intoxicated. Dr. Yamane’s expert evidence and the Appellant’s own testimony equally attest that his prior convictions occurred because of the neurological effect alcohol has on his brain. Alcohol is the driving force behind the Appellant’s criminal activity.

Official Problem, *supra* para 5 at paras 13-16.

[46] Conditions limiting the Appellant’s actions outside of his alcohol consumption, for example, those not allowing him to leave his primary residence except for work or the necessities of life, would be overly onerous. Such conditions would be disproportionate as they exceed the circumstances in which the Appellant poses a public safety risk. Conditions 3-4, on the other hand, specifically address the risk of the Appellant becoming intoxicated and causing harm to others. They do not target any other behaviour or restrict any other liberties.

[47] The bail system is designed to protect the presumption of innocence in accordance with the principle of restraint (*Zora, Antic, Criminal Code*). In this case, the conditions are proportionate to the statutory risk to public safety. Rather than detracting from the underlying values of Canada’s bail system, they reinforce them. The presumption of innocence and the principle of restraint are furthered by allowing the Crown to protect the public from knowable

risk without pre-trial detention. Consequently, conditions 3-4 do not limit the Appellant's rights under s. 11(e).

Zora, supra para 20 at paras 20, 24-26.
Antic, supra para 19 at para 4.
Criminal Code, supra para 8 at s 493.1.

Issue 2: The bail conditions do not limit the Appellant's equality rights under s. 15 of the

Charter

[48] To establish a limitation under s. 15 of the *Charter*, a claimant must demonstrate that: 1) the law creates a distinction based on an enumerated or analogous ground; and 2) that the law perpetuates, reinforces, or exacerbates disadvantage (*Fraser*).

Fraser v Canada (Attorney General), 2020 SCC 28 at para 50 [*Fraser*].

1. The bail conditions do not create a distinction based on an enumerated or analogous ground

[49] The Appellant has failed to establish that the conditions of his release create a distinction based on the enumerated ground of disability, either explicitly or through adverse impact (*Fraser*). The Respondent recognizes that Alcohol Use Disorder (AUD) is a disability. The Respondent concedes that the Appellant suffers from AUD. However, the Respondent maintains that the Appellant has not established a distinction based on his disability.

Fraser, supra para 48 at para 50.

a. The bail conditions do not create an explicit distinction based on disability

[50] The bail order does not create an explicit distinction based on disability. The bail conditions themselves, including conditions 3-4, make no mention of alcoholism, AUD, or disability. Instead, they were established according to the contextual set of factors enumerated in the *Criminal Code* and *Zora*. These principles hold that bail conditions must be imposed to curtail one or more of the risks enumerated in s. 515(10) of the *Criminal Code*: to ensure the accused's attendance in court, protect public safety, or maintain confidence in the

administration of justice. Bail conditions must always be informed by a person's previous convictions and the circumstances of the charges (*Zora*). There is no direct distinction in these principles on the basis of disability.

Zora, supra para 20 at paras 46, 83-89.
Criminal Code, supra para 8 at s 515(10).

b. The bail conditions do not create a distinction based on disability through adverse impact

[51] The Appellant has not established that the bail conditions indirectly create a distinction based on disability through adverse impact. The Supreme Court articulated the adverse impact inquiry in *Fraser* as examining whether a law has a disproportionate impact on the basis of an enumerated or analogous ground. In practice, for the conditions to disproportionately impact the Appellant, they must indirectly target him for differential treatment through their effects (*Fraser*).

Fraser, supra para 48 at paras 52-53.

[52] The Appellant has not established that the conditions indirectly target him for differential treatment because the adverse effects do not flow from his disability. Bail conditions limiting alcohol consumption may be appropriate for any accused who has committed a crime while intoxicated. Conditions 3-4, which prohibit the Appellant from frequenting licenced establishments and from possessing or consuming alcohol outside his home, were tailored to the Appellant in light of his offence and history of prior convictions.

Official Problem, supra para 5 at para 8.

[53] Bail conditions for all persons, including those without AUD, are determined according to the same principles. While *Withler* has excised mirror comparator groups from the s. 15 analysis, comparison still plays a role throughout. As the Supreme Court acknowledges in *Withler*, inherent in the word "distinction" is the idea that the claimant is treated differently than others. The Appellant's bail conditions were not imposed "because of his or her

membership in an enumerated or analogous group” (*Taypotat*). There is no distinction based on disability.

Withler v Canada (Attorney General), 2011 SCC 12 at paras 40, 61-62 [*Withler*].
Kahkewistahaw First Nation v Taypotat, 2015 SCC 30 at para 16 [*Taypotat*]
(emphasis in original).

[54] The present appeal is readily distinguishable from the very few cases where the Supreme Court has found an adverse impact, namely *Fraser* and *Eldridge*. Both dealt with the denial of a benefit provided by law to other persons. In *Fraser*, the majority held that an RCMP pension program under which job-sharing members were not eligible for full pensions had an adverse impact on women. The Supreme Court relied on statistical evidence to show that RCMP members who worked reduced hours in the job-sharing program were predominantly women with young children and most of them cited childcare as their reason for doing so (*Fraser*). The adverse impact flowed from the fact that the design of the pension plan indirectly disadvantaged women.

Fraser, supra para 48 at para 97.
Eldridge v British Columbia (Attorney General), [1997] 3 SCR 624, 151 DLR (4th) 577 [*Eldridge*].

[55] *Eldridge* is also distinguishable on its facts from the present appeal. In *Eldridge*, the disadvantage was established because the quality of health care received by those with hearing loss was inferior to that available to hearing persons. Under the health care scheme in that case, all patients lacked access to sign language interpreters, but this lack of access had a disproportionate impact on those who had hearing loss and required interpreters to meaningfully communicate with health care providers. Here, the Appellant is not being denied a benefit of the bail system because of his disability.

Eldridge supra para 54 at paras 71-72.

[56] The conditions do not disadvantage the Appellant as a result of his AUD because they do not prevent him from consuming alcohol altogether. To assess the adverse impact of a law,

one is to look beyond the facially neutral criteria on which it is based and examine whether it had the effect of placing members of protected groups at a disadvantage (*Moreau*). The Respondent acknowledges that the Appellant is predisposed to consuming alcohol due to his disability. The bail conditions would have created a disproportionate impact had they imposed a complete prohibition, rendering the Appellant unable to comply (*Zora*). However, rather than preventing consumption of alcohol altogether, the bail conditions recognize the Appellant's reliance on alcohol and allow him to drink at home. The conditions were specifically tailored to the circumstances of the Appellant.

Sophia Moreau, "The Moral Seriousness of Indirect Discrimination" in Hugh Collins and Tarunabh Khaitan, eds, *Foundations of Indirect Discrimination Law* (Portland, Or.: Hart Publishing 2018) 123 at 125 [*Moreau*].
Zora, supra para 20 at para 92.

2. The bail conditions do not have the effect of reinforcing, perpetuating, or exacerbating disadvantage

[57] In the alternative that the bail conditions create a distinction based on disability, the conditions do not reinforce, perpetuate, or exacerbate any disadvantage faced by the Appellant as a result of his AUD (*Fraser*). At the second step of the s. 15 inquiry, there is no "rigid template" of factors to consider (*Fraser*). *Fraser* instructs us to examine the impact of the harm using the following factors: economic exclusion or disadvantage, social exclusion, psychological harm, physical harm, or political exclusion. These must be viewed "in light of any systemic or historical disadvantages faced by the claimant group" (*Fraser*).

Fraser, supra para 48 at paras 50, 76.

[58] The bail conditions do not impose economic exclusion or disadvantage on the Appellant as a result of his addiction. The Appellant is allowed to hold a job and practice in his chosen field, computer science.

[59] The bail conditions do not exacerbate any social disadvantage faced by the Appellant as a result of his addiction. The Crown acknowledges the unfortunate reality that persons with

addiction face stigmatization and social isolation in today's society. However, the bail conditions do not impose restrictions on whom he can socialize with or drink with, provided he drinks with them inside his home. The conditions do not require the Appellant to drink alone, nor in secret. Additionally, the bail conditions do not prevent the Appellant from interacting with the community. The conditions allow him to frequent unlicensed establishments, such as parks and unlicensed eateries. The conditions of release do not exacerbate the Appellant's social exclusion.

[60] The bail conditions do not exacerbate any psychological or physical harm. They do not amount to a prohibition on alcohol. Rather, they provide for a safe place in which the Appellant can consume alcohol without criminal consequence. The Respondent recognizes that the Appellant's mother has imposed a rule preventing him from drinking at home. However, this particular circumstance does not engage the concerns of substantive inequality and systemic disadvantage that s. 15 is meant to address. Any psychological or physical consequences resulting from being told not to drink at home flow from the Appellant's mother's rules, not the bail conditions.

[61] Consequently, conditions 3 and 4 do not limit the Appellant's rights under s. 15.

Issue 3: Any limitation on the Appellant's rights under ss. 11(e) or 15 is demonstrably justified under s. 1 of the Charter

[62] Should this Court find that the conditions of the Appellant's bail order limit his rights under either ss. 11(e) or 15, that limitation is demonstrably justified under s. 1 of the *Charter*.

[63] The limit the bail order imposes has the pressing and substantial objective of protecting public safety. The chosen means to accomplish that objective, namely conditions 3-4, are proportionate (*Oakes*). These conditions are rationally connected to the public safety objective; they are minimally impairing; and finally, the salutary effects of the measures outweigh any deleterious effects (*Oakes*).

R v Oakes, [1986] 1 SCR 104 at paras 69-71, 26 DLR (4th) 200 [*Oakes*].

1. There is a pressing and substantial objective

[64] The Appellant's bail conditions were imposed to address the pressing and substantial objective of public safety, as enumerated under s. 515(10)(b) of the *Criminal Code*. There are two components to public safety under s. 515(10)(b). The first is "to prevent those who have been arrested from committing criminal offences" (*Morales*). The second is to "prevent those who have been arrested from interfering with the administration of justice" (*Morales*). The Supreme Court in *Morales* held that the combined effect of both amounts to an "objective of preventing crime by those who have already been accused of criminal conduct". This objective is "sufficiently important to warrant overriding a constitutionally protected right" (*Morales*, *Big M*).

Criminal Code, *supra* para 8 at s 515(10)(b).

Morales, *supra* para 22 at para 29.

R v Big M Drug Mart Ltd, [1985] 1 SCR 295 at para 139, 18 DLR (4th) 321 [*Big M*].

2. The chosen means are rationally connected to the objective

[65] The first branch of proportionality under the *Oakes* test is met because the Appellant's bail conditions are rationally connected to protecting public safety (*Oakes*). This connection must be grounded in "reason or logic", demonstrating on a balance of probabilities that the restriction on the Appellant's rights under ss. 15 and 11(e) serves the intended purpose (*RJR-MacDonald*). What matters at this stage is the government's reasonable belief that the limit may further its goal, based on the evidence. It is not a heavy burden (*Quebec v A*). No proof is required that this limit in fact will further the goal in order for the rational connection to be made out (*Hutterian Brethren*).

Oakes, *supra* para 63 at para 70.

RJR-MacDonald Inc v Canada (Attorney General), [1995] 3 SCR 199 at para 153, 111 DLR (4th) 385 [*RJR-MacDonald*].

Quebec v A, 2013 SCC 5 at para 359 [*Quebec v A*].

Hutterian Brethren of Wilson Colony v Alberta, 2009 SCC 37 at para 48 [*Hutterian Brethren*].

[66] The Appellant’s criminal history while intoxicated “logically and reasonably” connects conditions 3-4 to the objective of protecting public safety (*RJR-MacDonald*). The risk to public safety posed by an accused person released on bail is determined by reference to “all the circumstances including any substantial likelihood that the accused will... commit a criminal offence or interfere with the administration of justice” (*Criminal Code*). The evidence before the court of first instance included the Appellant’s alcohol addiction and a pattern of criminal behaviour while under the influence. In light of the New Zealand study reporting recidivism in nearly 40% of persons with substance abuse issues who relapse on bail, these circumstances demonstrate that there can be little doubt, on a balance of probabilities, of the substantial likelihood that the Appellant would have committed a criminal offence on bail absent conditions 3-4.

RJR-MacDonald, *supra* para 65 at para 153.
Criminal Code, *supra* para 8 at s 515(10)(b).
Official Problem, *supra* para 5 at paras 17 (e)-(g).

3. The bail order is minimally impairing

[67] Conditions 3-4 limit the Appellant’s rights under ss. 11(e) and 15 “as little as reasonably possible in order to achieve the legislative objective” (*RJR-MacDonald*). Instead of minimal “in the ordinary sense”, the minimal impairment branch of the *Oakes* test asks if the limit to the relevant *Charter* rights falls within a range of reasonable options (*Hutterian Brethren*). Importantly, this leaves the state with a reasonable margin of action to achieve its objective, here public safety, in a real and substantial manner (*Hutterian Brethren*). Less restrictive conditions which compromise public safety do not qualify as reasonable alternatives considered at this stage (*Hutterian Brethren*).

RJR-MacDonald, *supra* para 65 at para 160.
Hutterian Brethren, *supra* para 65 at paras 194, 53-55.

[68] A bail order will be minimally impairing if both the form of release and the individual bail conditions interfere with the accused's *Charter* interests "as little as reasonably possible" (*RJR-MacDonald*).

RJR-MacDonald, *supra* para 65 at para 160.

[69] First, the Appellant's form of release is minimally impairing because it satisfies the ladder principle established in *Antic*. The default position on all bail matters is for the "unconditional release" of the accused "on an undertaking" (*Criminal Code*). However, more restrictive forms of release are permitted under ss. 515(2)-(3) when the Crown demonstrates that the less restrictive form of release, the lower "step of the ladder", is inappropriate in the circumstances (*Criminal Code*, *Antic*). Here, the lesser form of release would have been an unconditional release, or a release without conditions limiting the Appellant's consumption of alcohol. This would have been inappropriate in the circumstances because the restrictions imposed by conditions 3-4 are necessary to "promote the proper functioning of the bail system" (*Pearson*, *Antic*).

Antic, *supra* para 19 at para 4.

Criminal Code, *supra* para 8 at ss 515(2)-(3).

R v Pearson, [1992] 3 SCR 665 at para 58, 1992 CanLII 52 [*Pearson*].

[70] The bail system functions properly when an accused is denied bail in face of "a substantial likelihood that the accused will tamper with the administration of justice or commit an offence if released" (*Hall*). Under the same principle, less restrictive forms of release must be rejected if they interfere with public safety and the administration of justice. This places a duty on the Court to impose conditions of release that mitigate the risk of the Appellant endangering public safety while under the influence of alcohol.

R v Hall, 2002 SCC 64 at para 76 [*Hall*].

[71] Because the accused has no history of violent or criminal acts while sober, the risk he poses to public safety is insufficient to justify pre-trial detention. It is insufficient precisely

because his current less-restrictive conditional release manages that risk by imposing criminal consequences when he consumes alcohol in public. Anything less restrictive, such as conditions that do not limit the Appellant's consumption of alcohol in public, would not address the risk that he poses and would therefore be inappropriate in the circumstances (*Criminal Code*).

Criminal Code, supra para 8 at s 515(10)(b).

[72] Second, the conditions themselves are each minimally impairing. The Court defined conditions 3-4 as narrowly as possible while still fulfilling its statutory mandate of ensuring public safety. Any further broadening of conditions 3 or 4, for example, by prohibiting alcohol altogether, would be unreasonably restrictive. Any further narrowing of conditions 3 or 4, for example, by permitting the Appellant to consume alcohol at licenced establishments, would render the conditions ineffective at fulfilling the Court's mandate.

[73] Another less restrictive condition that may be suggested would be to allow the Appellant to frequent licenced establishments but prohibit him from drinking. This would compromise the state's objective to ensure public safety because it would set the Appellant up for failure. The Appellant would be placed in a position where he would be permitted to be around alcohol, where his addiction would entice him to drink, and yet where any indulgence would trigger criminal consequences. Such a condition would leave the Appellant without any meaningful choice over whether to breach his bail.

4. The salutary effects of the bail conditions outweigh any deleterious effects

[74] The overall impact of the Appellant's bail order is proportionate. The "salutary effects" achieved by pursuing the government's public safety objective outweigh any "deleterious effects" derived from the "seriousness of the limit" placed on the Appellant's *Charter* rights (*Hutterian Brethren*). This branch of proportionality demands a "broad assessment" of the benefits of the conditions and the costs of the ss. 11(e) and 15 limitations (*Michaud*).

Hutterian Brethren, *supra* para 65 at paras 100, 74.
R v Michaud, 2015 ONCA 585 at para 137 [*Michaud*].

[75] In the present case, the benefit is substantial. The bail system cannot function properly unless it is able to manage the risk to public safety posed by those who are granted pre-trial release despite having, in the words of Justice Hooper, “a history of violence and criminal behaviour”. Conditional bails are intended to prevent over-incarceration in pre-trial detention without facilitating or turning a blind eye to the risk of further criminal acts by the accused. The ability of the Crown to impose such conditions limits the need for pre-trial detention, a benefit that outweighs the limits those conditions impose on the freedom of accused persons released on bail.

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

[76] This same balance holds true for conditions 3-4. Instead of denying the Appellant bail, these conditions allowed him to await his trial in public because any risk he posed to the safety of others while intoxicated was managed.

[77] The limitation on the Appellant’s right to equality is not “serious” (*Hutterian Brethren*). He was not being prevented from consuming alcohol, nor was he being criminalized for his inability to refrain from drinking. The conditions merely limit where he can possess and consume alcohol. They do not dictate how often he can drink nor how much. Further, the conditions did not entirely prevent him from socializing or participating in mainstream society. It was still available to the Appellant to engage in society through work, recreation, and social gatherings with friends. The cost to the Appellant’s s. 15 rights, “while not trivial, fall[s] at the less serious end of the scale” (*Hutterian Brethren*).

Hutterian Brethren, *supra* para 65 at para 102.

[78] As a final point, it may be argued that the benefits derived from the bail order are “illusory” (*Harper*). It may be true that the Crown cannot be certain whether the Appellant would have committed a crime that endangered the public had he been released on an

unconditional bail or without conditions prohibiting alcohol. Such certainty, however, can never exist. Instead, the proper functioning and integrity of the bail system depend on the Crown's careful consideration of an accused's criminal history and personal characteristics to identify and mitigate risks to the public.

Harper v Canada (Attorney General), 2004 SCC 33 at para 41 [*Harper*].

[79] The Appellant's extensive criminal history while intoxicated presents a tangible risk. His conviction for assault causing bodily harm while under the influence aggravates that risk to a level which demands preventative measures. Conditions 3-4 are such measures. Their benefits both to public safety and to the integrity of the administration of justice outweigh the costs to the Appellant's rights under ss. 11(e) and 15.

PART V – ORDER SOUGHT

[79] For all these reasons, the Respondent seeks an order:

- (a) dismissing this appeal; and
- (b) granting such further and other relief as this Honourable Court may permit.

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

Team 8
Counsel for the Respondent

PART VI – LIST OF AUTHORITIES AND STATUTES

JURISPRUDENCE	PARAGRAPHS
<i>Eldridge v British Columbia (Attorney General)</i> , [1997] 3 SCR 624, 151 DLR (4th) 577.	54-55
<i>Fraser v Canada (Attorney General)</i> , 2020 SCC 28.	48-49, 51, 54, 57
<i>Harper v Canada (Attorney General)</i> , 2004 SCC 33.	78
<i>Hutterian Brethren of Wilson Colony v Alberta</i> , 2009 SCC 37.	65, 67, 74, 77
<i>Kahkewistahaw First Nation v Taypotat</i> , 2015 SCC 30.	53
<i>R v Antic</i> , 2017 SCC 27.	19, 43, 47, 69
<i>R v Big M Drug Mart Ltd.</i> , [1985] 1 SCR 295, 18 DLR (4th) 321.	64
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<i>R v Michaud</i> , 2015 ONCA 585.	74
<i>R v Morales</i> , [1992] 3 SCR 711, SCJ No 98.	22, 64
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<i>R v Pearson</i> , [1992] 3 SCR 665, 1992 CanLII 52.	69
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STATUTES	PARAGRAPHS
<i>Canadian Charter of Rights and Freedoms</i> , Part 1 of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11.	10, 19-20
<i>Criminal Code</i> , RSC 1985, c C-46	8-9, 13, 20-22, 26, 32, 43-44, 47, 50, 64, 66, 69, 71

OFFICIAL WILSON MOOT SOURCES	PARAGRAPHS
<i>The 2021 Wilson Moot Problem</i>	5-14, 22-24, 27-31, 34-35, 37, 39, 43, 45, 52, 66, 75

SECONDARY SOURCES	PARAGRAPHS
Moreau, Sophia “The Moral Seriousness of Indirect Discrimination” in Hugh Collins and Tarunabh Khaitan, eds., <i>Foundations of Indirect Discrimination Law</i> (Portland, Or.: Hart Publishing 2018) 123 [<i>Moreau</i>].	56