

**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

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**FACTUM OF THE APPELLANT**

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## PART I – OVERVIEW

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[1] This case is about the injustices – and, ultimately, the infringements of the *Canadian Charter of Rights and Freedoms* [the *Charter*] – that result from imposing alcohol-related bail conditions on Allan Chaudhry, a man who lacks the ability to make a fully autonomous choice to drink as a result of his disability, Alcohol Use Disorder [AUD].

[2] The Conditions imposed on Mr. Chaudhry [the Conditions] put him in a position where he is forced to choose between, on the one hand, maintaining his wellbeing and on the other, breaching the Conditions. In particular, by prohibiting Mr. Chaudhry from attending any licensed establishment and from drinking outside of his home, Conditions 3 and 4 impose what is, in effect, a complete ban on Mr. Chaudhry’s consumption of alcohol. This is because, in exchange for the crucial live-in support, his mother provides, Mr. Chaudhry must abstain from consuming alcohol at home – the only place that the Conditions permit him to drink. This adversely effects Mr. Chaudhry’s mental and physical wellbeing as someone with AUD. The consequence is an untenable choice: Mr. Chaudhry can adhere to the Conditions and abstain from alcohol but suffer serious symptoms of withdrawal, or he can manage his AUD but lose the critical live-in support his mother provides. This is not a choice that he should have to make.

[3] The world is often unfair to those with disabilities, but the law should not be. Bail conditions should not reflect and perpetuate harmful stereotypes about those with alcohol-related disabilities – but Mr. Chaudhry’s do. On the basis of these stereotypes, the Conditions restrict Mr. Chaudhry’s freedom of movement, his ability to participate in everyday life, and his likelihood of breach and imprisonment. As a result, the Conditions are unreasonable and discriminatory. They infringe Mr. Chaudhry’s rights under ss. 15(1) and 11(e) of the *Charter* and cannot be demonstrably justified in a free and democratic society.

## PART II – FACTS

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### **Mr. Chaudhry struggles with Alcohol Use Disorder**

[4] Mr. Chaudhry, like many Canadians, has struggled with alcohol dependence for most of his life. That struggle worsened when he moved away from home – and away from his mother – to attend university. Without supervision, he began binge-drinking in large quantities, often spending entire weekends deeply inebriated. Over time, his struggles spiralled into a medically recognized disability, AUD.

Official Problem, Wilson Moot 2021 at paras 14(p)-(q) [Official Problem].

[5] AUD is a disability, as recognized by Justice Hooper of the British Columbia Provincial Court. In addition, Dr. Yamane’s expert evidence supports this characterization. Dr. Yamane testified that Mr. Chaudhry meets all eleven diagnostic criteria for AUD enumerated in the American Psychiatric Association’s Diagnostic and Statistical Manual of Mental Disorders [the DSM]. Dr. Yamane found that Mr. Chaudhry suffers from severe AUD, the most serious form of the disorder. Mr. Chaudhry’s addiction “triggers chemical changes in [his] brain, which result in a transition from voluntary to compulsive” alcohol use. As a result, he has a compulsion to drink that in some circumstances overrides his ability to make a fully autonomous choice. This theory of dependence is recognized by the world’s foremost health authority, the World Health Organization [the WHO], which recognizes that AUD disorders the brain in the same way any other neurological or psychiatric illness does. Mr. Chaudhry cannot simply *will* himself to ‘get better’. As with any disability, remedying AUD’s physical dependence on alcohol requires treatment.

Official Problem, *supra* para 4 at paras 14(v), (y) and 15.

[6] Mr. Chaudhry has had three criminal convictions over the span of fifteen years. In 2004, he was charged with operating a motor vehicle while impaired, to which he pled guilty. In 2012, he was convicted of possession of a prohibited substance, to which he also pled guilty. In 2017, Mr. Chaudhry was arrested and charged with assaulting his then-boyfriend after they got into a physical altercation outside a Vancouver bar. Mr. Chaudhry was found guilty, and he served an 18-month conditional sentence. He has also been arrested three times in the last fifteen years for causing a disturbance by being drunk, but no convictions arose from those incidents.

Official Problem, *supra* para 4 at paras 12(i)-(k).

[7] Mr. Chaudhry knows his that struggles with alcohol have been difficult for those he loves, and he has made efforts to manage his disability. He has sought treatment on five separate occasions, with some assistance of professional help. In 2011, Mr. Chaudhry also attempted to achieve sobriety on his own by going “cold turkey”. He experienced dramatic symptoms of withdrawal including vomiting, tremors, insomnia, and migraines that were too severe for him to attend work, let alone lead a normal life. The severity of withdrawal led him to relapse entirely.

Official Problem, *supra* para 4 at paras 12(m)(b), 13.

### **Mr. Chaudhry’s Conditions set him up for failure**

[8] A similar attempt at self-treatment led Mr. Chaudhry to the predicament he currently finds himself in. On August 1, 2019, Mr. Chaudhry was arrested after he was allegedly involved in a fight outside of a Vancouver bar. He was granted bail, but two of the bail conditions in particular put onerous limits on his ability to consume alcohol. Condition 3 prohibited Mr. Chaudhry from attending any licensed establishment that serves alcohol. Condition 4 prohibited him from possessing or consuming any alcohol except within his home. Notably, the underlying assault

charge has since been dropped after the Crown’s eyewitness recanted his testimony – only a charge for being in care or control of a vehicle while intoxicated remains.

Official Problem, *supra* para 4 at paras 2, 5, and 8.

[9] Following his conditional release, Mr. Chaudhry’s mother and long-term boyfriend came to live with him to offer support and help ensure that he complied with the Conditions. His mother assisted Mr. Chaudhry in meeting his curfew, cleaned the apartment, and cooked meals for him. However, she forbade Mr. Chaudhry from drinking while she was in the house. This left Mr. Chaudhry with no safe place to treat his addiction. The court forbade him from drinking outside the house, and his mother forbade him from drinking inside the house. This effectively forced Mr. Chaudhry to once again go “cold turkey”. Mr. Chaudhry made best efforts to comply with the Conditions until the severe effects of withdrawal became too much for him to bear. He did what he had to do.

Official Problem, *supra* para 4 at para 13.

[10] On October 28, 2019, Mr. Chaudhry’s compulsion to drink overwhelmed him and he went to the Gambler, a Vancouver bar. Police found him there, drink in hand and appearing mildly intoxicated. They approached Mr. Chaudhry merely because he resembled a suspect in an ongoing investigation; not because, in actual fact, he had done anything wrong. Nonetheless, they arrested Mr. Chaudhry under s. 145(5) of the *Criminal Code* for violating Conditions 3 and 4 of his bail.

Official Problem, *supra* para 4 at para 9.

### **The procedural history of Mr. Chaudhry’s case**

[11] Mr. Chaudhry pleaded not guilty to his charge and was tried in March 2020. Justice Hooper of the British Columbia Provincial Court held that Mr. Chaudhry’s bail conditions violated his rights under ss. 15 and 11(e) of the *Charter*. Justice Hooper made a finding of fact that AUD is a

recognized medical disorder, and that it is a disability for the purposes of s. 15. He held that the Conditions perpetuated Mr. Chaudhry's disadvantage through criminalizing behaviour to which Mr. Chaudhry was predisposed on account of his disability. Justice Hooper also found that the Conditions, by criminalizing Mr. Chaudhry's addiction everywhere but in his home, were not demonstrably necessary under s. 11(e). Finally, he held that neither infringement could be justified under s. 1.

Official Problem, *supra* para 4 at para 18.

[12] The Court of Appeal for British Columbia reversed the lower court in a split decision. Writing for the majority, Justice Schaefer found that Mr. Chaudhry failed to adequately demonstrate that the Conditions infringed either ss. 15 or 11(e) of the *Charter*. Justice Schaefer found that the Conditions were both reasonable and sufficiently linked to protecting the public and rejected that addiction to alcohol was a disability for the purposes of s. 15.

Official Problem, *supra* para 4 at para 19.

[13] Justice Krelborn agreed with the majority on s. 11(e) but dissented on the question of s. 15 and would have found an infringement for substantially similar reasons to Justice Hooper in the court below. He would not have saved the s. 15 infringement under s. 1.

Official Problem, *supra* para 4 at para 20.

### **PART III – STATEMENT OF POINTS IN ISSUE**

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[14] This appeal raises the following constitutional issues, which the Appellant answers as summarized below:

**1. Do the Conditions infringe s. 15(1) of the *Charter*?**

Yes. Conditions 3 and 4 infringe Mr. Chaudhry's equality rights under s. 15(1) right of the *Charter*. Mr. Chaudhry's disability, AUD, is protected under s. 15. The Conditions draw a distinction insofar as they have an adverse impact on Mr. Chaudhry as a consequence of his disability and circumstances. They perpetuate, reinforce, and exacerbate his disadvantage by employing stereotypes that increase the likelihood of breach and subsequent imprisonment. As applied to Mr. Chaudhry, the Conditions are discriminatory.

**2. Do the Conditions infringe s. 11(e) of the *Charter*?**

Yes. Conditions 3 and 4 infringe Mr. Chaudhry's right to reasonable bail conditions in light of his diagnosis with AUD. These conditions are not sufficiently related to the bases for denying bail in s. 515(10) of the *Criminal Code*. They unreasonably exacerbate Mr. Chaudhry's suffering as a result of his condition and they unduly restrict his freedom of movement. Overall, the Conditions effectively criminalize Mr. Chaudhry's disability in a way that is unreasonable.

**3. Are these infringements justified under s. 1 of the *Charter*?**

No. The Conditions are not rationally connected to their purpose, are not minimally impairing of the rights at stake, and the salutary effects are not proportionate to the deleterious effects. They are, however, prescribed by law and they have a pressing and substantial objective.



## PART IV – ARGUMENT

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### **Issue 1: The Conditions infringe s. 15(1) of the Charter**

[15] The Conditions imposed on Mr. Chaudhry discriminate against him because of his AUD. As a recognized medical disorder, AUD falls squarely within the enumerated ground of mental disability or, in the alternative, it satisfies the test for an analogous ground. The Conditions have an adverse impact on Mr. Chaudhry insofar as they increase the likelihood of breach and incarceration in a disproportionate manner. This differential treatment reinforces, perpetuates, and exacerbates disadvantage for Mr. Chaudhry on the basis of harmful stereotypes that do not reflect the lived reality of those with AUD. Consequently, Mr. Chaudhry’s likelihood of breaching the Conditions and facing imprisonment is increased and he suffers discrimination.

### **The Test for finding discrimination under s. 15(1)**

[16] Section 15 is rooted in substantive – not formal – equality. *Fraser* confirmed that is the “philosophical premise” and “animating norm” of the s. 15(1) right (*Withler, Kapp, Taypotat, Alliance*). Understanding the complete context of the claimant’s circumstances is essential to the inquiry, as well as any persistent systemic disadvantages that have limited opportunities for a claimant group’s members (*Fraser, Withler*). *Fraser* makes clear that these assessments should be based in evidence that includes broader human rights concerns, as well as relevant jurisprudence, in order to unmask the actual effects a state action has on the claimant. Finally, *Fraser* clarifies the arbitrariness analysis should be considered under s. 1, as the burden ought to lie on the government to show that the law, policy, or state action is *not* arbitrary.

*Fraser v Canada (Attorney General)*, 2020 SCC 28 at para 38, 40, 42, and 80 [*Fraser*].

*Withler v Canada (Attorney General)*, 2011 SCC 12 at para 2, 34 [*Withler*].

*R v Kapp*, 2008 SCC 41 at para 14 [*Kapp*].

*Kahkewistahaw First Nation v Taypotat*, 2015 SCC 30 at para 17 [*Taypotat*].

*Quebec (Attorney General) v Alliance du personnel professionnel et technique de la santé et des services sociaux*, 2018 SCC 17 at para 25 [*Alliance*].

[17] Canadian law follows a two-stage test for infringements under s. 15(1), which was most recently articulated in *Fraser*. Under the first stage of the test, the state action under scrutiny must create a distinction based on an enumerated or analogous ground, which can arise in one of two ways: it may draw a *direct* distinction between groups or it may draw an *indirect* distinction based on adverse effects. With respect to the latter, distinctions become manifest where a state action has disproportionate impacts on members of a protected group.

*Fraser, supra* para 16 at paras 47-50.

[18] Two types of evidence are especially helpful in demonstrating disproportionate impacts. First, evidence related to the situation of the claimant group – which contemplates physical, social, and cultural characteristics, among other factors; and second, evidence about the results of the law. Evidence related to the situation of the claimant. In relation to both types of evidence, the courts need to be mindful of the fact that claimants in contexts of adverse impact discrimination “may have to rely more heavily on their own evidence” as opposed to evidence from expert or academic sources.

*Fraser, supra* para 16 at para 52.

[19] Once a distinction is found (either direct or through disproportionate impact), the second stage of the test proceeds to ask whether that distinction is discriminatory.. A distinction will be discriminatory where it “imposes burdens or denies a benefit in a manner that has the effect of reinforcing, perpetuating, or exacerbating the disadvantage” of the claimant (*Withler, Fraser*). Discrimination may be found where a disadvantage imposed by state action is based on a stereotype that does not truly reflect the claimant (*Withler*).

*Fraser, supra* para 16 at paras 47-50 and 189.

*Withler, supra* para 16 at para 36.

[20] The entirety of the two-stage test is “flexible and contextual,” and no “ameliorative purpose” can protect the state action in question from s. 15(1) scrutiny (*Fraser*). While, for example, protection of the public is an important objective in bail processes, the perpetuation of disadvantage is no less serious under s. 15(1) merely because it is relevant to that legitimate state objective.

*Quebec (Attorney General) v A*, 2013 SCC 5 at para 331 [*Quebec v A*].  
*Fraser*, *supra* para 16 at paras 69 and 70.  
Official Problem, *supra* para 4 at paras 17(e)-(g).

### **AUD is a disability for the purposes of s. 15**

#### ***a) AUD falls within the enumerated ground of disability***

[21] AUD is a mental disability for the purposes of s. 15. As a psychiatric disorder codified in the DSM, AUD goes beyond a mere “lifestyle choice” akin to a “taste for marijuana” (*Malmö-Levine*). In *Eaton*, the Supreme Court of Canada [the SCC] held that within the s. 15(1) inquiry, there exists a broad range of what may be considered a disability. To this end, alcoholism has been held by a lower court to fall within the enumerated ground of disability in *Pickup*. *Pickup* is consistent with the Court of Appeal for Ontario’s ruling in *Tranchemontagne* that alcoholism is a disability and coheres more broadly with the SCC’s characterization of addiction as a disability in *Boudreault*. Finally, alcoholism is understood as a mental disability in human rights legislation in Ontario (*Human Rights Code*), which informs the s. 15(1) analysis (*Fraser*).

Official Problem, *supra* para 4 at paras 14(v)-(w).  
*R v Malmö-Levine*; *R v Caine*, 2003 SCC 74 at para 185 [*Malmö-Levine*].  
*Eaton v Brant County Board of Education*, [1997] 1 SCR 241 at para 69 [*Eaton*].  
*R v Pickup*, 2009 ONCJ 608 at para 32 [*Pickup*].  
*Ontario (Director of Disability Support Program) v Tranchemontagne*, 2010 ONCA 593 at para 121 [*Tranchemontagne*].  
*R v Boudreault*, 2018 SCC 58 at para 70 [*Boudreault*].  
*Human Rights Code*, RSO 1990, c H19, s 5(1) [*Human Rights Code*].  
*Fraser*, *supra* para 16 at para 37.

[22] The first stage of the s. 15(1) analysis is not meant to be an “onerous hurdle designed to weed out claims on technical bases” (*Alliance*). Justice Schaefer erred in law by holding that s. 15(1) only covers characteristics that are “immutable or changeable only at unacceptable cost to personal identity”. This is the standard relevant to expanding the s. 15(1) right to new analogous grounds (*Corbiere*), not to finding discrimination under an enumerated ground. Since Mr. Chaudhry’s protection is rooted in the enumerated ground of mental disability there is no requirement of immutability.

*Alliance, supra* para 16 at para 26.

Official Problem, *supra* para 4 at para 19.

*Corbiere v Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203 at para 13 [*Corbiere*].

***b) Alternatively, AUD is an analogous ground***

[23] In the alternative, if this Court finds that AUD does not fall within an enumerated ground, then it should nonetheless constitute an analogous ground. AUD is a personal characteristic insofar as it is constructively immutable due to the neurochemical and psychological changes that cause it. Like the analogous ground of sexual orientation, having AUD is not just a “status” that an individual may hold; it is deeply embedded and is something that is reflected in the individual’s conduct (*Egan*). In the context of AUD, that conduct manifests as a neurochemical compulsion.

*Egan v Canada*, [1995] 2 SCR 513 at para 518.

Official Problem, *supra* para 4 at para 14(y).

**The Conditions adversely impact Mr. Chaudhry**

[24] The Conditions create a distinction on the basis of Mr. Chaudhry’s disability by virtue of their adverse impact. In particular, Conditions 3 and 4 disproportionately disadvantage Mr. Chaudhry by making it substantially more difficult for him to comply with them than for someone

without AUD. As Justice Hooper summarized, the Conditions “criminaliz[e] behaviour to which he is predisposed due to disability”.

Official Problem, *supra* para 4 at para 18.

[25] The Conditions force Mr. Chaudhry to choose between the critical live-in support provided by mother and his own wellbeing. Accordingly, they amplify Mr. Chaudhry’s prospect of breach and imprisonment. Mr. Chaudhry’s mother’s support is critical to the management of his disability. She cooks, cleans, and more broadly assists as he tries to get his life back on track. “Problem drinking” can lead to illnesses, social problems, accidents, and even death, and that support helps shield Mr. Chaudhry from these harms. In exchange, Mr. Chaudhry’s mother forbids him from drinking while she is home and would be disapproving if he even brought alcohol into the house. By precluding Mr. Chaudhry from drinking anywhere but within his home, the Conditions provide him with only two legal options: to drink at home and upend the critical support his mother provides, or to go “cold turkey” and suffer the harms of withdrawal. The former option would devastate Mr. Chaudhry’s management of his disability, and the latter would entail the painful experience of withdrawal. This impossible junction that manifests on account of the Conditions sets Mr. Chaudhry up for failure.

Official Problem, *supra* para 4 at paras 13, 14(r) and 18.

***a) Evidence of adverse effect related to the situation of the claimant group***

[26] The severity of Mr. Chaudhry’s disability potentiates immense physical pain, exacerbates social isolation, and necessitates robust support. For Mr. Chaudhry, the neurochemical compulsion to drink alcohol entailed by AUD is at the root of this dire situation. Mr. Chaudhry’s disability can be managed, but it would be incredibly difficult for him to fully alleviate its effects. His past

attempts to quit drinking invoked painful withdrawal symptoms, and that these attempts put him at risk of hospitalization.

Official Problem, *supra* para 4 at para 13.

[27] The particularities of the situation in which Mr. Chaudhry finds himself are fundamental to the s. 15(1) inquiry. As a neurochemical disorder, AUD may affect different individuals differently. As the SCC affirmed in *Fraser*, however, an impugned state action need not affect all members of a claimant group in the same way in order for a court to find an adverse impact.

*Fraser*, *supra* para 16 at para 72.

[28] As someone with AUD, Mr. Chaudhry's situation is worse than the already poor situations of heavy drinkers and "problem drinkers". Medical evidence supports Mr. Chaudhry's painful past experiences related to his disability, including his experience of substantial withdrawal symptoms. In 2011, when Mr. Chaudhry first went "cold turkey" the resulting symptoms of withdrawal meant that he could not even attend work, let engage in social and community events. The effects of his disability, in this sense, are profoundly isolating. The solution, for Mr. Chaudhry, is a robust relationship of support, which is exactly what his mother provides. Yet, in the context of that support, Mr. Chaudhry's disability nonetheless compels him to consume alcohol. As a result of the Condition, Mr. Chaudhry found himself in a situation wherein managing his disability through the consumption of alcohol was impossible; he could not drink at home and he could not drink away from home.

Official Problem, *supra* para 4 at paras 12, 14(q)-(r), (t) and (y).

***b) Evidence of adverse effect related to the results of the Conditions***

[29] The second type of evidence shows the extent of the adverse impacts by focusing on the results of the Conditions. Like in *Fraser*, there are direct links between the unfavourable situation

of the claimant and the results of the Conditions. This is underlined by the fact that complying with the Conditions nearly landed Mr. Chaudhry in the hospital on account of seizure-like withdrawal symptoms. Indeed, given that the side effects of going “cold turkey” include harmful symptoms of withdrawal, it is not surprising that he ultimately failed to comply with the Conditions because he “could not take it anymore”.

*Fraser, supra* para 16 at paras 58 and 97.

Official Problem, *supra* para 4 at paras 12(m)(b) and 13.

[30] The Conditions were harmful and ineffective because they forced Mr. Chaudhry to make an impossible choice: to upend the critical live-in support of his mother or to go “cold turkey”. He finds himself in this position because while having a drink might be a choice for persons without AUD, it is not one for Mr. Chaudhry. In *Fraser*, Justice Abella was clear: courts need to be cautious not to over-emphasise “choice” in contexts where, in practice, it does not truly exist. Justice Abella provided the example that “[d]eciding to work part-time, for many women, is a ‘choice’ between either staying above or below the poverty line”. In other words, some choices are choices in name only. This is true for Mr. Chaudhry and his compulsion to drink. As he put it, “what others see as a simple choice is for me a constant struggle”. By giving him an impossible choice and preventing him from managing his disability, the Conditions increase the likelihood of breach and subsequent incarceration.

*Fraser, supra* para 16 at paras 91-2.

Official Problem, *supra* para 4 at para 13.

### **The distinction created by the Conditions is discriminatory**

[31] The Conditions reinforce, perpetuate, and exacerbate Mr. Chaudhry’s disadvantage as a person with AUD. The Conditions perpetuate and reinforce the stereotypical assumptions that those with AUD are somehow inherently dangerous in all circumstances, that they have complete

autonomy in determining whether to consume alcohol, and ultimately that they can voluntarily choose to rid themselves of their disability. In turn, the Conditions are discriminatory because they amplify Mr. Chaudhry's likelihood to breach the Conditions and face imprisonment on the basis of these stereotypes. The record, however, clarifies that none of these stereotypes are true. Mr. Chaudhry, though unable to choose to make his disability go away, is nonetheless capable of managing it so long as he has adequate support, like that which his mother provides. This does not mean, however, that he can simply flip a switch to rid himself of AUD. The disability is neurochemical in nature and the composition of Mr. Chaudhry's brain has been altered. His record further clarifies that his neurochemical compulsion does not make him inherently dangerous in all areas of community and social life. It is discriminatory to increase the likelihood of breach and imprisonment for those with AUD on the basis of these harmful – and incorrect – stereotypes. Doing so widens the already expansive gap between those with AUD and the rest of society (*Quebec v A*).

*Quebec v A, supra* para 20 at para 332.

[32] As someone with AUD, Mr. Chaudhry is a member of a group that has suffered historical disadvantage. Those with mental illnesses and disabilities, broadly understood and including AUD, have experienced a historical and enduring disadvantage including harmful stereotyping, exclusion, and marginalization (*G*). Collectively, the presence of these forces and their concomitant consequences – not to mention medical science and the weight of legal and scholarly opinion – militate against Justice Schaefer's finding that addiction is a "temporary" problem which "people voluntarily overcome". While AUD does not involve a "total loss of control", as Dr. Yamane opines, Justice Schaefer fails to fully appreciate the nature of the neurochemical compulsion for alcohol inherent to AUD. Characterizations of AUD as being temporary and



voluntary further entrench the already historically entrenched stereotypes about those with the disability and perpetuate their disadvantage.

*Ontario (Attorney General) v G*, 2020 SCC 38 at paras 62 and 161 [G].  
Official Problem, *supra* para 4 at paras 16 and 19.

[33] Playing into the stereotype, the Conditions effectively make Mr. Chaudhry's release "conditional upon ... emulation of able-bodied norms" (*Eldridge*). Given Mr. Chaudhry's circumstances, that emulation manifests in complete denial of his neurochemical compulsion to drink and gives rise to a range of painful symptoms of withdrawal that would accompany going "cold turkey". The false alternative that the Conditions provide – upending Mr. Chaudhry's relationship with his mother through drinking at home – would undermine a critical support for Mr. Chaudhry, and disrupt how he manages his AUD.

*Eldridge v British Columbia (Attorney General)*, [1997] 3 SCR 624 at para 56 [*Eldridge*].  
Official Problem, *supra* para 4 at para 12(m)(b).

[34] The Conditions further discriminate against Mr. Chaudhry by preventing him from attending a vast range of establishments – including, for example, licensed restaurants – in which his history presents no apparent risk. Without evidence related specifically to Mr. Chaudhry, banning him from all licensed establishments can only be rooted in *expectations* that Mr. Chaudhry, because of his AUD, would pose a risk within them (with the exception of bars and clubs). These expectations, in turn, are rooted in the same harmful stereotypes that have plagued and disadvantaged those with AUD for years; that they could simply choose not to have AUD and that they are inherently dangerous in all areas of social life. In these ways, the Conditions perpetuate the "historical disadvantage" and "invidious stereotyping" of persons with disabilities, which has been shaped by the stereotypical belief that "disability is an abnormality or flaw" (*Eldridge*). In doing so, they disproportionately increase Mr. Chaudhry's chance of breach and

imprisonment. The perpetuation of stereotypes remains a helpful indicator of discrimination (*Fraser*).

*Eldridge, supra* para 33.

*Fraser, supra* para 16 at para 78.

## **Issue 2: The Conditions infringe s. 11(e) of the Charter**

[35] The Conditions infringe Mr. Chaudhry's rights under s.11(e) of the *Charter*. In particular, Conditions 3 and 4 are overbroad and cause undue suffering by prohibiting his attendance at any licensed establishment and his consumption of alcohol outside of his home.

[36] In setting bail, the presumption is unconditional release on an undertaking unless the Crown can demonstrate why another order should be justifiably made (*Antic*). Where the Crown meets this onus, a condition on bail may only be imposed if it is clearly articulated, necessary, reasonable, the least onerous in the circumstances, and sufficiently linked to the grounds of detention under s. 515(10) of the *Criminal Code* (*Zora*). The relevant grounds are securing the accused's attendance in court, maintaining confidence in the administration of justice, and ensuring the protection or safety of the public (*Criminal Code*). In this case, only the latter applies. Importantly, a condition should not punish or seek to change an accused person's behaviour (*Antic*).

*R v Antic*, [2007] SCC 27 at paras 10 and 67 [*Antic*].

*R v Zora*, 2020 SCC 14 at paras 83-90 [*Zora*].

*Criminal Code*, RSC 1985, c C-46, s 515(10) [*Criminal Code*].

## **Conditions 3 and 4 are not necessary**

[37] Conditions 3 and 4 are not necessary because they are not sufficiently tailored to the *specific* risks that Mr. Chaudhry may pose to the public. Instead, they are overly general, and govern behaviour which bears no connection to any of his past criminal conduct. While he has a

history of offences linked to bars, there is no such link to other licensed establishments. Conditions 3 and 4, however, prohibit Mr. Chaudhry from attending *any* licensed establishment and from drinking alcohol outside his home on *any* occasion.

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

[38] Mr. Chaudhry has only had two convictions which involved an alcohol-related danger to the public: a drinking and driving related conviction that occurred sixteen years ago and an assault conviction that occurred thirteen years after that. As for the charges underlying the Conditions, while the charge regarding operating a vehicle while under the influence remains, the assault related charge was dropped. In the face of a debilitating addiction-related disability, two convictions with over a decade between them can hardly be considered a pattern of endangering the public. While Mr. Chaudhry has a more significant history of causing a disturbance while drunk in public, there is no evidence that any harm or threat to public safety arose out of any of these occasions, nor were there any criminal charges.

Official Problem, *supra* para 4 at paras 10, 12(j)-(i).

[39] Given Mr. Chaudhry's history, the Appellants would be more agreeable to conditions that prohibit Mr. Chaudhry's attendance and drinking at bars or clubs. However, there is no evidence that Mr. Chaudhry poses a threat to the public if he were merely able to attend the broad range of establishments prohibited by Condition 3. Condition 3 bans him from all licensed establishments, which includes most restaurants, wedding venues, sports complexes, theatres, and more. Similarly, Condition 4 is unnecessary because his history does not indicate that he would pose a risk to the public if he were able to drink outside his home during daytime hours at licensed establishments other than bars.

[40] The Appellant understands the Crown’s concern that the compulsive nature of Mr. Chaudhry’s drinking may, coupled with some particularly enabling environments, make him a danger to the public. The environments at bars and clubs pose unique risks for someone with AUD. There is an expectation that people will go to these environments primarily to drink and a tendency of patrons to over-consume. Supervision by trained staff is more difficult because patrons may not remain in the same seats like they do in restaurants. All of these factors could make bars and clubs higher risk environments for some people with AUD. The Conditions therefore go too far and should only be restricted to these types of establishments.

**The Conditions are not reasonable**

[41] Conditions 3 and 4 are not reasonable. At this stage, the Crown must demonstrate that a condition is proportional: it must be clear, minimally intrusive, and proportionate to any relevant risk (*Zora*). While the Conditions are clear, they are unreasonable because they do not satisfy the latter two requirements.

*Zora, supra* para 36 at paras 83-84.

[42] Prohibiting Mr. Chaudhry from drinking outside the home is not sufficiently fine-tuned to his unique circumstances to be reasonable. In *Zora*, the SCC held that a condition must be fine-tuned and sensitive to evolving circumstances. While the SCC said that limiting someone with an alcohol-related disability to drinking inside the home could be reasonable in some circumstances, this was said in *obiter*, and is not the case here (*Zora*). The severity of Mr. Chaudhry’s AUD necessitates live-in support from his mother. The combination of his mother’s aversion to his drinking and the Conditions, however, force him to make an impossible choice: he can give up essential live-in support or can go “cold turkey”. Such Conditions cannot be reasonable.

[43] *Zora, supra* para 36 at para 92.

*a) The conditions are not minimally intrusive*

[44] The onerousness of a condition is assessed in accordance with the “ladder principle”, which is codified in s. 515(3) of the *Criminal Code*. It requires a judge to impose the least onerous form of release possible in the circumstance (*Antic*). Bail conditions must therefore be fine-tuned to the individual context of the accused. The SCC has recognized that “onerous conditions disproportionately impact vulnerable and marginalized populations [and that people] with addictions or mental illnesses often struggle to meet conditions by which they cannot reasonably abide” (*Zora*). As a result, where the accused suffers from alcohol addiction, any condition prohibiting consumption of alcohol “must be fine-tuned to target the actual risk to public safety” (*Omeasoo*).

*Criminal Code, supra* para 36, at s. 515.

*Antic, supra* para 36, at para 4.

*Zora, supra* para 36, at para 79.

*R v Omeasoo*, 2013 ABPC 328 at para 92 [*Omeasoo*].

[45] Conditions 3 and 4 are not minimally intrusive. They *de facto* impose a complete ban on Mr. Chaudhry’s consumption of alcohol that cannot itself be reasonable given his disability. This sets Mr. Chaudhry up to fail given the compulsive nature of his drinking and the extreme side effects of experiencing withdrawal. By prohibiting Mr. Chaudhry from possessing or consuming alcohol except within the confines of his own home, Condition 4 ignores the reality of Mr. Chaudhry’s circumstances. Mr. Chaudhry lives with his mother, who provides essential care and assistance to him. She has a strong aversion to him drinking in the house. Condition 4 therefore forces Mr. Chaudhry to choose between continuing to live with his mother without drinking (and suffering serious withdrawal symptoms as a result) and foregoing essential familial care and support which helps him manage his AUD.

[46] Lower courts have found conditions unreasonable where an accused cannot or almost certainly will not be able to comply with them (*Denny, Omeasoo*). One example of an unreasonable condition is an abstinence requirement for an alcoholic. In *R v Omeasoo*, the judge compared imposing a bail condition on an alcoholic prohibiting the consumption of alcohol to telling a clinically depressed person to “just cheer up”. Both of these approaches, Justice Rosborough held, were unreasonable and unrealistic (*Omeasoo*). As, in effect, the Conditions resemble a complete prohibition on Mr. Chaudhry consuming alcohol, they are unreasonable.

*R v Denny*, [2015] NSPC 49 [*Denny*].  
*Omeasoo*, *supra* para 44, at para 37.

[47] The perilous situation in which Mr. Chaudhry finds himself is analogous to some of the concerns that the SCC raised in *Bedford*. At the time of *Bedford*, sex work was legal in Canada but the conditions the state put on related activities created a situation where legal sex work could only take place in dangerous circumstances. For example, a prohibition on living on the avails of prostitution meant that sex workers could not hire bodyguards or other security personnel, despite the inherent risks of sex work. In Mr. Chaudhry’s case, the Conditions mean that he cannot consume alcohol safely under supervision, despite the inherent risks of AUD. In both cases, the question is not whether one should be a sex worker, or how one should manage one’s AUD, but rather how these lived experiences and their concomitant choices can be respected by state action. By ignoring the reality of Mr. Chaudhry’s situation and the essential support he requires, the Conditions are unreasonable.

*Bedford v Canada*, 2013 SCC 72 [*Bedford*].

[48] Condition 3 and 4 do not satisfy the ladder principle because the same ends may be achieved through less onerous means. For example, a more tailored condition might allow Mr. Chaudhry to attend licensed venues with the exceptions of bars and clubs. Still more tailored

conditions might allow for visits to bars and clubs with an appropriate chaperone and with the use of a taxi or app-based car service when he attends a venue not within walking distance of his home.

***b) The conditions are not proportionate to any risk***

[49] The Conditions are not proportionate to any minimal risk that Mr. Chaudhry may pose to public safety without the Conditions. This is because the Conditions greatly impact his ability to participate in society and may cause him extreme suffering, such as through withdrawal symptoms.

[50] Condition 3 is not proportionate because it is not specifically tailored to Mr. Chaudhry's circumstances, yet it severely limits his freedom of movement and ability to engage in daily life. Condition 3 is a wide-ranging exclusion that prevents Mr. Chaudhry from attending *any* licenced establishment – an exceedingly broad class of locations. It would prevent him from going to most restaurants, movie theatres, sports complexes, and other semi-public or public places. Such a condition therefore restricts Mr. Chaudhry's mobility to a drastically reduced proportion of public and semi-public space, making Condition 3 unreasonably restrictive.

[51] Condition 4 is also not proportionate because of the extreme harm that it causes Mr. Chaudhry. Mr. Chaudhry's adverse experience of the Conditions must be considered in relation to his particular disability and circumstances. The Conditions operate as a *de facto* ban on alcohol given his mother's aversion to his drinking in the house and his need for her support to manage his disability. This has effectively forced him to go "cold turkey", rather than forego his mother's critical support. The physical and psychological harm to Mr. Chaudhry as a result of the ensuing withdrawal are extreme. These effects include vomiting, tremors, insomnia, and migraines – all of which impact his ability to work and isolate him from much of social and community life.

[52] The broad restrictions in Conditions 3 and 4 are disproportionate because they are not more effective than less-impairing means, yet they have drastic consequences for Mr. Chaudhry. Any

risk that Mr. Chaudhry poses to the public is not linked to the broad category of “all licensed establishments”, and there is no evidence that Mr. Chaudhry would be dangerous to the public were he able to drink in a licensed establishment other than a bar or club. Since the same benefits could be achieved by more tailored conditions, the Conditions are disproportionate, and reach too far into Mr. Chaudhry’s life.

*c) The Conditions are not sufficiently linked to the bases for denying bail*

[53] Bail conditions must also be sufficiently linked to the bases for denying bail in s. 515(10) of the *Criminal Code*. Where a condition is not demonstrably connected to the specific purpose or alleged danger, “it may merely set the defendant up for breach, especially where the defendant is known to have a substance use disorder” (*Penunsi*). In this case, the relevant basis is to protect the public’s safety.

*R v Penunsi*, 2019 SCC 39 at para 80 [*Penunsi*].

[54] The Conditions are not sufficiently linked to the grounds for denying bail. While Mr. Chaudhry’s history shows he may pose a danger to the public if he drinks at a bar or drinks and operates a motor vehicle, the evidence shows no such danger in other circumstances. Therefore, the Conditions that prevent Mr. Chaudhry from attending or drinking at *any* licensed establishment are not sufficiently linked to the goal of protecting the public.

**Issue 3: The Conditions cannot be upheld under s. 1 of the Charter**

[55] The Conditions infringe ss. 15 and 11(e) and cannot be demonstrably justified in a free and democratic society. While the Conditions are prescribed by law and are related to a pressing and substantial objective, they are not proportionate to their impact on Mr. Chaudhry’s rights and therefore cannot be saved under s. 1. Since the Conditions were imposed under s. 515(10) of the *Criminal Code*, they must be evaluated in light of the objectives of bail conditions: ensuring the



accused will attend court, maintaining confidence in the administration of justice, and protecting the public. Only the latter objective is relevant in this case.

*R v Oakes*, [1986] SCJ No 7 [*Oakes*].

### **The Conditions are not rationally connected to their objective**

[56] A measure must not be "arbitrary, unfair or based on irrational considerations" (*Oakes*). In meeting this burden, the government must show – on a balance of probabilities – a causal link between the impugned measure and the pressing and substantial objective of the state action (*Butler*). In this case, this burden has not been met.

*Oakes*, *supra* para 55, at para 70.

*R v Butler*, [1991] 1 SCR 452, at para 106 [*Butler*].

[57] The Conditions are not rationally connected to the objective of protecting public safety because the Respondent has failed to demonstrate why a *full* prohibition on Mr. Chaudhry's mere attendance or having a drink at *any* licensed establishment furthers public safety. While the existing evidence suggests that bars may be a potentially dangerous place for Mr. Chaudhry to go, there is no evidence of past criminal convictions resulting from drinking at restaurants, theatres, or other licensed establishments. The far-reaching restrictions in Conditions 3 and 4 appear to be based more on harmful stereotypes about those with AUD than on Mr. Chaudhry's real and specific circumstances.

### **The Conditions are not minimally impairing of the rights affected**

[58] The Conditions must impair the infringed right or freedom "as little as possible" (*Oakes*). If the Conditions are deemed to be overbroad then they cannot stand. The government must demonstrate that among the range of reasonable alternatives available, there is no other less-impairing means of achieving the Conditions' objectives in a real and substantial manner

(*Hutterian Brethren*). In the context of criminal liability, the margin of appreciation given to the state in doing so must be minimal (*Zora*).

*Oakes, supra* at para 55 at para 70.

*Hutterian Brethren of Wilson Colony v Alberta*, 2009 SCC 37 at para 55 [*Hutterian Brethren*].

*Zora, supra* para 16 at para 6.

[59] Conditions 3 and 4 are not minimally impairing of Mr. Chaudhry's rights under ss. 15(1) and 11(e) of the *Charter*. Condition 3 is a wide-ranging prohibition on Mr. Chaudhry's mere attendance at any place that is a licensed establishment. This restricts his freedom of movement in a significant way, likely prohibiting his attendance at most restaurants, weddings, movie theatres, sports complexes, and more. Restrictions that prohibit his attendance only at higher risk establishments such as bars and clubs would be more tailored to his situation and would achieve the same result, as would further-tailored restrictions giving him the option of attending these venues with a court-approved chaperone.

[60] Condition 4 is also not minimally impairing because, in Mr. Chaudhry's context, it potentially functions as a total ban on alcohol consumption. This is because Mr. Chaudhry is forced to go "cold turkey" for fear of losing the critical live-in support offered by his mother. A condition that *de facto* functions as a full prohibition on alcohol consumption cannot be minimally impairing, especially when Mr. Chaudhry suffers from AUD – a recognized disability. This dichotomy makes breach and imprisonment more likely for Mr. Chaudhry as a direct effect of his disability and circumstances. Condition 4, in this sense, is the opposite of a minimally impairing condition; instead of facilitating the greatest extent of freedom possible for Mr. Chaudhry, it pivots his compulsion so as to work against him. As demonstrated, there are other, less impairing alternatives that could account for Mr. Chaudhry's disability and circumstances.

### **The deleterious effects of the Conditions outweigh any salutary effects**

[61] Finally, the benefits to the collective good resulting from the measure must be weighed against the severity of the limitation of the right (*JTI-Macdonald*). The Conditions here do not yield sufficient benefits to outweigh the significant negative impact on Mr. Chaudhry's rights. Thus, even if Conditions 3 and 4 are necessary to prevent Mr. Chaudhry from recidivism or other harms to public safety, the harms caused by the Conditions are disproportionate in light of these benefits.

Canada (Attorney General) v JTI-Macdonald Corp., 2007 SCC 30, at para 45, [*JTI-Macdonald*]

[62] While the Conditions aim to protect the public, they have drastically disproportionate negative effects on Mr. Chaudhry and send a harmful message about how the legal system – and society more broadly – should treat those with disabilities. The Conditions limit Mr. Chaudhry's ability to live a normal life because of stereotypical assumptions about the inherent dangerousness of those with addiction-based disabilities. In so doing, they fail to account for the fact that disability can be managed and accommodated. Mr. Chaudhry's situation is one that requires support to guarantee his health and safety, and the proper management of his disability. This critical support is provided by Mr. Chaudhry's mother. Conditions that could intervene in this relationship will disproportionately impact those with disabilities who require this level of support, as opposed to those who do not. Additionally, the Conditions restrict his freedom of movement, his ability to participate in social life, and stigmatize him as a person with AUD – all for the nebulous goal of protecting the public.

[63] Conditions such as these set people like Mr. Chaudhry up for failure. They present them with a false choice of alienating their support-providing loved ones by drinking in their homes or violating the conditions of their bail to alleviate excruciating withdrawal symptoms. The

Conditions drastically reduce Mr. Chaudhry’s autonomy and freedom of movement, and bar him from attending relatively low-risk events and spaces merely because the host establishment is a licensed vendor. There is no dignity in the choices Mr. Chaudhry is forced to make by these Conditions, nor in the restrictions he faces as a result of their overbreadth. His ability to live a somewhat normal life, free from stigma and with his personhood, dignity, and autonomy intact is severely diminished by these Conditions. They therefore cannot be justified.

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**PART V – ORDER SOUGHT**

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[64] For all these reasons, the Appellant seeks an order:

- a. allowing this appeal; and
- b. for such other orders as this Court sees fit.

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

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Team 8  
Counsel for the Appellant

**PART VI – LIST OF AUTHORITIES AND STATUTES**

<b>LEGISLATION</b>	<b>PARAGRAPHS</b>
<i>Canadian Charter of Rights and Freedoms</i> , s 11(e), 15(1), being Part I of the Constitution Act, 1982, being Schedule B to the Canada Act, 1982 (UK), 1982, c.11 [ <i>Charter</i> ].	1
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<i>Human Rights Code</i> , RSO 1990, c H19, s 5(1).	21

<b>JURISPRUDENCE</b>	<b>PARAGRAPHS</b>
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<i>Corbiere v Canada (Minister of Indian and Northern Affairs)</i> , [1999] 2 SCR 203 [ <i>Corbiere</i> ].	22, 23
<i>Eaton v Brant County Board of Education</i> , [1997] 1 SCR 241 [ <i>Eaton</i> ].	21
<i>Egan v Canada</i> , [1995] 2 SCR 513.	23
<i>Eldridge v British Columbia (Attorney General)</i> , [1997] 3 SCR 624 [ <i>Eldridge</i> ].	33, 34
<i>Fraser v Canada (Attorney General)</i> , 2020 SCC 28 [ <i>Fraser</i> ].	16, 17, 18, 19, 20, 21, 25, 26, 28, 29, 30, 33
<i>Hutterian Brethren of Wilson Colony v Alberta</i> , 2009 SCC 37 [ <i>Hutterian Brethren</i> ].	58
<i>Kahkewistahaw First Nation v Taypotat</i> , 2015 SCC 30 [ <i>Taypotat</i> ].	16
<i>Ontario (Attorney General) v G</i> , 2020 SCC 38 [ <i>G</i> ].	30, 32
<i>Ontario (Director of Disability Support Program) v Tranchemontagne</i> , 2010 ONCA 593 [ <i>Tranchemontagne</i> ].	21
<i>Quebec (Attorney General) v A</i> , 2013 SCC 5 [ <i>Quebec v A</i> ].	20, 31

<i>Quebec (Attorney General) v Alliance du personnel professionnel et technique de la santé et des services sociaux</i> , 2018 SCC 17 [ <i>Alliance</i> ].	16, 22
<i>R v Antic</i> , [2007] SCC 27 [ <i>Antic</i> ].	36, 44
<i>R v Boudreault</i> , 2018 SCC 58 [ <i>Boudreault</i> ].	21
<i>R v Butler</i> , [1991] 1 SCR 452 [ <i>Butler</i> ].	56
<i>R v Denny</i> , [2015] NSPC 49 [ <i>Denny</i> ].	46
<i>R v Kapp</i> , 2008 SCC 41 [ <i>Kapp</i> ].	16
<i>R v Malmo-Levine; R v Caine</i> , 2003 SCC 74 [ <i>Malmo-Levine</i> ].	21, 23
<i>R v Oakes</i> , [1986] SCJ No 7 [ <i>Oakes</i> ].	55, 56, 58
<i>R v Omeasoo</i> , 2013 ABPC 328 [ <i>Omeasoo</i> ].	44, 46
<i>R v Penunsi</i> , 2019 SCC 39 [ <i>Penunsi</i> ].	53
<i>R v Pickup</i> , 2009 ONCJ 608 [ <i>Pickup</i> ].	21
<i>R v SK</i> , [1998] SJ No 863 [ <i>SK</i> ].	37
<i>R v Zora</i> , 2020 SCC 14 [ <i>Zora</i> ].	36, 41, 42, 44, 58
<i>Withler v Canada (Attorney General)</i> , 2011 SCC 12 [ <i>Withler</i> ].	16, 19

<b>OFFICIAL WILSON MOOT SOURCES</b>	<b>PARAGRAPHS</b>
Official Problem, Wilson Moot 2021 [Official Problem].	4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 20, 21, 22, 23, 24, 25, 26, 27, 29, 30, 32, 38