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 9

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PART I – OVERVIEW

[1] Canada's system of judicial interim release is designed to delicately balance the rights of accused persons with broader societal interests in safety, security, and the proper administration of justice. In order to achieve this balance, the *Criminal Code* (the "*Code*") mandates a process for granting judicial interim release that is flexible and discretionary. When an accused person poses a risk to public safety, s. 515(4) of the *Code* gives judges the discretion to impose interim release conditions to prevent an accused from engaging in harmful behaviour.

[2] The Appellant has repeatedly endangered and assaulted others while intoxicated. On this basis, the bail judge appropriately exercised her discretion to authorize bail conditions which prohibited the Appellant from entering licensed establishments and possessing or consuming alcohol outside his home. The conditions are tailored to target the demonstrated risk the Appellant poses to public safety while accommodating his difficulty abstaining from alcohol.

The 2021 Wilson Moot Problem at paras 3, 6–8, 12 [Official Problem].

[3] The Conditions do not infringe the Appellants' rights under s. 11(e) or s. 15 of the *Canadian Charter of Rights and Freedoms* ("*Charter*"). The Supreme Court of Canada ("SCC") recently held that requiring persons with alcohol dependence who pose public safety risks to comply with conditions of abstinence outside the home balances the principles of liberty and public safety (*Zora*). The Conditions are also not discriminatory. Restricting the location of the Appellant's alcohol use to curtail the risk to public safety does not undermine his inherent worth or violate his right to equal protection under the law. Even if the Appellant establishes infringement of his *Charter* rights, the infringement is justified in a free and democratic society.

R v Zora, 2020 SCC 14 at para 92 [*Zora*].
PHS Community Services Society v Canada (Attorney General), 2011 SCC 44 at para 100 [*PHS*].

PART II – STATEMENT OF FACTS

1. Factual Background

a. The Appellant's criminal history

[4] On October 28, 2019, the Appellant was charged under s. 145(5) of the *Code* for failing to comply with the bail conditions that he "not attend any licensed establishment that serves alcohol" and "not possess or consume alcohol ... except within the confines of his home" (the "Conditions"). The Conditions stem from the Appellant's August 1, 2019 charges of assault with a weapon under s. 267(a) of the *Code* and being in care or control of a vehicle while intoxicated contrary to s. 320.14(1).

Official Problem, *supra* para 2 at paras 2–5, 8–9.

[5] These charges are the latest in a fifteen-year criminal history related to alcohol intoxication. In 2003, the Appellant was convicted of operating a vehicle while impaired. In 2012, he was arrested for drunk and disorderly conduct. In 2017, he was convicted of assault causing bodily harm to his then-boyfriend at a bar while intoxicated, a pattern of behaviour similar to the assault in 2019 which gave rise to the Conditions. The Appellant has been arrested another three times for causing a disturbance and endangering the public while drunk.

Official Problem, *supra* para 2 at paras 1, 5–6, 12.

b. The statutory scheme

[6] Section 515(10) of the *Code* justifies denying bail where necessary to secure the accused's attendance in court, ensure public safety, or maintain confidence in the administration of justice (Official Problem). Granting bail is only appropriate where the accused does not pose the risks identified in s. 515(10) of the *Code*.

Official Problem, *supra* para 2 at para 17.

[7] A middle ground between pre-trial detention and release on an undertaking to attend trial is release with conditions. Pursuant to s. 515(4) of the *Code*, judges can grant bail with any reasonable conditions necessary in order to curtail the risks listed in s. 515(10) (Official Problem). Bail conditions are particularized standards of behaviour tailored to curb the risks posed by an individual accused (Official Problem). If an accused person breaches one of their bail conditions, then they are charged under s. 145(5) of the *Code*.

Official Problem, *supra* para 2 at para 17.

[8] If the risk posed by a particular accused person relates to the consumption of drugs or alcohol, a bail condition requiring abstinence from substance use may be necessary (Official Problem). The potential necessity of an abstinence condition is especially pronounced where an alleged offence relates directly to the accused person's drug or alcohol dependence. Statistics show that the rate of recidivism of those on release is nearly double in persons with substance abuse issues who relapse while on release (Official Problem). As such, restricting substance use can be vital to curtailing the risk of reoffending while on release.

Official Problem, *supra* para 2 at para 17.

c. The Conditions accommodate the Appellant's alcohol use disorder

[9] The Conditions were ordered to ensure the protection of public safety, as required under s. 515(10) of the *Code*. The Appellant has an impaired ability to function without consuming alcohol, to the point of experiencing physical withdrawals, which is characteristic of Alcohol Use Disorder ("AUD") (Official Problem) – a distinct form of addiction. The bail judge was sensitive to this and tailored the Conditions to allow him to consume alcohol while on release. Given the Appellant's "extensive history of criminal activity and alcoholism," as well as the data

linking substance use to reoffending while on release, the Appellant's particular risk profile warranted a partial abstinence condition for reasons of public protection (Official Problem).

Official Problem, *supra* para 2 at paras 1, 6, 14, 17.

2. Procedural History

a. British Columbia Provincial Court

[10] In March 2020, the Appellant applied to the British Columbia Provincial Court ("BCPC") for a declaration that the Conditions violated his ss. 7, 11(e) and 15 *Charter* rights. Justice Hooper held that the Conditions violated the Appellant's s. 15 rights by drawing a discriminatory distinction based on disability. Further, though the s. 7 argument was deemed redundant, Justice Hooper held that the Conditions breached s. 11(e). These *Charter* infringements were held unjustifiable in a free and democratic society.

Official Problem, *supra* para 2 at para 18.

b. Court of Appeal for British Columbia

[11] Justice Schaefer, writing for the majority of the Court of Appeal for British Columbia ("BCCA"), reversed the BCPC's decision. The Conditions were found reasonable given the Appellant's demonstrated "propensity for committing crimes while under the influence of alcohol." As such, the Conditions did not violate the Appellant's s. 11(e) rights. Further, the BCCA held that addiction is not, and should not be, protected by s. 15 because "addiction is a temporary condition which many people voluntarily overcome" (Official Problem). The adverse effects discrimination claim was rejected on the basis that "abusers of alcohol are not an identifiable group suffering social, political and legal disadvantage in our society" and the Conditions targeted the Appellant's actual risk of reoffending.

Official Problem, *supra* para 2 at para 19.

PART III – STATEMENT OF POINTS IN ISSUE

[12] The present appeal raises the following constitutional questions

Issue 1: Do the conditions of release infringe the Appellant's rights under section 11(e) of the *Charter*?

No. The Conditions do not infringe the Appellant's s. 11(e) rights. The Conditions are reasonable given the nature of the offence and the Appellant's criminal history. The Conditions are necessary, least onerous and sufficiently linked to the statutory objective of public safety in s. 515(10).

Issue 2: Do the conditions of release infringe the Appellant's rights under section 15 of the *Charter*?

No. The Conditions do not infringe the Appellant's s. 15 rights. They do not create a distinction based on an enumerated or analogous ground. Even if they do, the impact of the Conditions is not discriminatory. The Conditions respond to the Appellant's actual capacities and circumstances and accommodate his addiction by allowing him to consume alcohol.

Issue 3: If the answer to either of questions 1 or 2 is "yes," can the infringement be demonstrably justified in a free and democratic society?

Yes. If there is any infringement of s. 11(e), it is reasonable under both the s. 11(e) Internal Justification test and the *Doré* framework. Any infringement of s. 15 is reasonable under the *Doré* framework. The judge proportionally balanced the ss. 11(e) and 15 interests engaged by the Conditions with the purpose of public protection.

PART IV – ARGUMENT

Issue 1: The release conditions do not infringe the Appellant's section 11(e) Charter rights.

[13] *Charter* jurisprudence recognizes two distinct elements to s. 11(e): the right not to be denied bail without just cause and the right to reasonable bail (*Pearson*). The bail judge's decision does not infringe either element. First, because bail was granted, the constitutionally protected principle of liberty was upheld (*Bail Reform Act*). Second, the Conditions are reasonable given the nature of the offence and the Appellant's criminal history. In addition, the Conditions uphold the statutorily codified ladder principle in s. 515(1–3), and the constitutional principles used to interpret the presumption of innocence.

> *R v Pearson*, [1992] 3 SCR 665 at paras 47–8, 17 CR (4th) 1 [*Pearson*].
> *Bail Reform Act*, SC 1970–72, c 37 [Bail Reform Act].
> *Zora*, *supra* para 3 at para 21.

[14] In order for bail conditions to be reasonable under s. 11(e), they must be "necessary, ... least onerous in the circumstances, and sufficiently linked to the accused's risks regarding the statutory grounds for detention in s. 515(10)" of the *Code (Zora)*. The bail judge discharged her obligation to impose reasonable conditions to which the Appellant can comply.

> *Zora*, *supra* para 3 at para 87.

[15] The bail system imposes risk-based individualized sources of liability (*Zora*). If the imposition of personal liability for otherwise legal behaviour were deemed unreasonable, it would undermine the entire premise of bail. The fact that the Appellant may be more likely to breach the Conditions because of his AUD points to their very necessity (*Budreo*, Official Problem). The Conditions do not impose excessive liability any more than criminalizing arson excessively punishes pyromaniacs (*H(K)*), criminalizing theft punishes kleptomaniacs (*Swanson*) or criminalizing sexual assault punishes sex addicts (*Steppan*).

> Official Problem, *supra* para 2 at para 19.

Zora, *supra* para 3 at paras 25, 90.
R v Budreo, 1996 27 OR (3d) 347 at para 117, 45 CR (4th) 133 (Ont Gen Div), leave to appeal to SCC refused, [2001] SCR vii [*Budreo*].
R v H. (K.), (1994) 146 NBR (2d) 372 at para 7, [1994] WDFL 955 (NBCA) [*H(K)*].
R v Swanson, (November 29 1988) 333/88 (MBCA) [*Swanson*].
R v Steppan, 2010 MBPC 9 at paras 38, 136 [*Steppan*].

1. The Conditions are reasonable

[16] In order for bail to be reasonable, conditions must be necessary, least onerous, and linked to public safety (*Zora*). Section 515(10) strikes a balance between the right to liberty, the presumption of innocence and the need to protect the public and maintain confidence in the administration of justice. The statutory framework surrounding bail is engineered toward release pending trial as the general rule and detention as the exception.

Zora, *supra* para 3 at para 87.
Gary T. Trotter, The Law of Bail in Canada, 3rd ed. (Toronto: Carswell, 2015) at 1–2.
R v St. Cloud, 2015 SCC 27 at para 70 [*St. Cloud*].

[17] The challenged Conditions are necessary given the Appellant's history of violence when intoxicated and his AUD (Official Problem). They are least onerous as they properly balance the Appellant's hardships and AUD with his safety, and that of the public. They are sufficiently linked to the public safety objective because they effectively prohibit the very act for which he is charged. The bail judge correctly ordered the Conditions given the Appellant's AUD, propensity for violence, and the ladder principle's spirit of "liberal and enlightened bail" (*Pearson*).

Official Problem, *supra* para 2 at paras 3, 8, 12.
Pearson, *supra* para 13 citing *R v Bray*, 2006 2 C.C.C. (3d) 325 (ONCA) at para 10.

a. *The Conditions are necessary*

[18] Releasing the Appellant without the Conditions would have posed too great a risk of harm to the public, given his criminal history. The Conditions are therefore *necessary* to address concerns relating to the statutory grounds for detention set out under s. 515(10)(b) of the *Code*.

R v Antic, 2017 SCC 27 at paras 48, 56, 67(j) [*Antic*].

[19] The BCCA has held that a probation condition excluding the accused from establishments where the primary commodity for sale is alcohol was necessary given the accused's alcohol addiction, past criminal behaviour associated with alcohol consumption and history of violence (*Hardenstine*). Notably, probation conditions are imposed for substantially longer periods than bail conditions, and therefore require higher necessity thresholds. Given the lower threshold for bail conditions and the Appellant's comparable history, the exclusion Condition is necessary.

R v Hardenstine, 2008 BCCA 474 at para 16 [*Hardenstine*].

[20] The Appellant has been charged with control of a vehicle while intoxicated on at least two occasions. On another two occasions, he was charged with assault while intoxicated. The underlying offences share a commonality: intoxication. Nearly 40% individuals on bail with substance abuse issues reoffend, with AUD being the strongest predictor of recidivism (Official Problem). Given statistical trends and the Appellant's past history, the Conditions were necessary to mitigate his risk of recidivism and protect public safety.

Official Problem, *supra* para 2 at para 17.

[21] No other conditions would adequately ensure public safety in light of the Appellant's violence and dangerous driving while intoxicated. For example, imposing an allowable limit on the Appellant's alcohol consumption outside his home was not a viable option. The fact that the Appellant drinks two or three 26-ounce bottles of vodka in a single 48-hour period and experiences physical withdrawal symptoms when he ceases consumption is evidence that his ability to ration his alcohol use is impaired (Official Problem). Requiring the Appellant to monitor his own consumption is akin to requiring an intravenous drug user to inject only half of their syringe (*PHS*). Since the Appellant is unable to monitor the quantity he consumes, limiting

rather than prohibiting alcohol consumption outside his home would have made a breach more likely. Further, the Appellant has a habit of impaired driving. Allowing any consumption outside the home would be ineffective in protecting the public and himself from impaired driving (*Buckle*). The current conditions are thus necessary to ensure public safety under s. 515(10).

> Official Problem, *supra* para 2 at paras 12, 13, 15.
> *PHS*, *supra* para 3.
> *R v Buckle*, [2005] 68 WCB (2d) 839 (Nfld Prov Ct) at para 32–4 [*Buckle*].

b. ***The Conditions are the least onerous form appropriate***

[22] Given that unconditional release would have failed to uphold the public safety objective, release with conditions was the least onerous form of bail available to the Appellant. The ladder principle, a statutory tool rooted in s. 515(3) of the *Code*, informs constitutional analysis through the requirement of restraint: "release imposed on an accused [can] be no more onerous than necessary" (*Antic*). The Appellant's Conditions are no more onerous than necessary because they foster compliance without "unintended negative impacts" (*Zora*).

> *Antic*, *supra* para 18 at para 44.
> *Zora*, *supra* para 3 at para 96.

<u>i. Any less onerous conditions would not uphold the objective of public safety</u>

[23] Cases have denied bail in circumstances similar to the Appellant's. In *Gill,* the Court denied bail where domestic violence occurred. Given the assault, the accused's heavy reliance on alcohol and the likelihood that he would not comply with conditions prohibiting alcohol, bail was not a viable option (*Gill*). The Appellant's assault charges, including one against his partner, and his heavy reliance on alcohol, evidenced by five unsuccessful rehabilitation efforts, suggests a similar risk of recidivism. The bail judge nonetheless authorized conditional release.

> *R v Gill*, [2002] NJ no 310 at para 34, 56 WCB (2d) 86 (Nfld Prov Ct) [*Gill*].

[24] The Alberta Court of Appeal has confirmed that bail conditions requiring alcohol abstinence are "not at all onerous" given charges of impaired driving causing death (*Olsen*). In *Olsen*, not only was abstinence required, but the accused was also required to wear an alcohol monitoring bracelet (*Outifrakh*). Here, rather than imposing similarly onerous abstinence conditions, the bail judge tailored the Appellant's Conditions to accommodate his AUD by allowing consumption within the home. The bail judge properly applied restraint and adhered to the ladder principle.

> *R v Olsen*, 2011 ABCA 308 at para 10 [*Olsen*].
> *R v Outifrakh*, 2014 ONCJ 589 at para 15 [*Outifrakh*].
> *R v Morales*, [1992] 3 SCR 711 at para 80, 144 NR 176 [*Morales*].

[25] The bail judge correctly concluded that less onerous conditions were not justifiable in light of public safety. For example, monitored consumption in a licenced establishment is ineffective. While establishments that sell alcohol have a duty to protect intoxicated individuals and the public, a plethora of case law shows that commercial enterprises disregard their duty and over-serve intoxicated patrons (*Hummel*; *Widdowson*; *Hansen*). The Court cannot discharge its duty to protect the public by delegating it to establishments with a history of non-compliance.

> *Hummel v Jantzi*, 2019 ONSC 3571 at paras 45–47, 308–9 [*Hummel*].
> *Widdowson v Rockwell*, 2017 BCSC 385 at paras 64, 67, 73 [*Widdowson*].
> *Hansen v Sulyma*, 2013 BCCA 349 at paras 1, 35–6 [*Hansen*].

[26] Despite bars' commercial duty not to serve intoxicated individuals and to ensure their patrons' conduct is not violent, this has had no actual effect on the Appellant's behaviour (*Liquor Control & Licensing Act*; *Occupier's Liability Act*). In 2017, he was charged with assaulting a patron while exiting a bar. Once again in 2019, he was intoxicated and charged with assault inside a bar (Official Problem). Commercial liability and monitoring of consumption have proven inadequate to prevent the Appellant's violent behavior. Because of the lack of meaningful

supervision, if the Appellant were permitted to enter licensed establishments, he would have to self-monitor. Given his challenges abstaining from alcohol, Conditions which require him to refuse alcohol in establishments where alcohol is easily accessible would invite a breach.

> *Liquor Control & Licensing Act*, RSBC 1996 c 267 [*Liquor Control & Licensing Act*].
> *Occupier's Liability Act*, RSBC 1996, c 337 [*Occupier's Liability Act*].
> Official Problem, *supra* para 2 at paras 5, 12.

[27] The SCC has confirmed that abstinence from alcohol consumption outside the home is sufficiently individualized and accommodating for persons with AUD (*Zora*). The Appellant is free to consume at home to avoid the symptoms of withdrawal. He is also free to socialize. He is only required to do so in places that do not serve alcohol. The Conditions read together accommodate his need for consumption and his personal liberty while protecting public safety.

> *Zora*, *supra* para 3 at para 76.

ii. The Appellant is able to comply with the Conditions

[28] The SCC has held that requiring persons with AUD and a history of alcohol-induced violence to comply with conditions of non-consumption outside the home was both reasonable and fine-tuned (*Zora*). The abstinence requirement is prohibitive only when there is a *blanket ban*. Where, as in this case, there is no constructive prohibition on alcohol itself, there is no unreasonable abstinence requirement (*Omeasoo*; *Denny*). Addiction does not necessarily negate a person's power to control where they consume the substance to which they are addicted (*PHS*). The Appellant's addiction gives him the impulse to drink, but not the impulse to drink *in public*. The Conditions did not impose a constructive prohibition on alcohol; the Appellant was able to drink at home but chose to drink in public to not "disappoint" his mother (Official Problem).

> *R v Omeasoo*, 2013 ABPC 328 at paras 30, 37, 42 [*Omeasoo*]
> *R v Denny*, 2015 NSPC 49 at paras 14-18 [*Denny*].
> *Zora*, *supra* para 3 at para 92.

PHS, *supra* para 3 at para 100.
Official Problem, *supra* para 2 at para 13.

[29] Given the Appellant's new circumstances, the reviewing judge correctly upheld the Conditions (Clarifications). The bail regime provides review of release orders to accommodate new circumstances: s. 520 of the *Code* allows a reviewing judge to consider a material change, to correct errors of law, or to alter an inappropriate condition (*St. Cloud*; *Palmer*; *Lysyk*). Any constructive prohibition on alcohol consumption within the Appellant's home is imposed by himself and his mother. In 2019, the Appellant made a *rational* choice to drink at the Gambler, having weighed the consequences of breaching bail and disappointing his mother (Official Problem). Familial conditions of support are not, however, the subject of *Charter* scrutiny. Had the Court altered the Appellant's Conditions based on his mother's preference, it would effectively allow anyone to play judge and define reasonable bail. The ability to evade criminal liability due to personal circumstance presents dangers to the administration of justice and the bail system as a whole.

Clarifications of the 2021 Wilson Moot Problem at para 5 [Clarifications].
St. Cloud, *supra* para 15 at paras 128–131.
R v Palmer, [1980] 1 SCR 759 at para 32, 30 NR 181 [*Palmer*].
R v Lysyk, 2003 ABQB 256 at para 19 [*Lysyk*].
Official Problem, *supra* para 2 at paras 13–14.

<u>iii. The Conditions do not create unintended harms or negative impacts to the Appellant</u>

[30] The Conditions will not result in any "unintended negative impacts on the safety" of the Appellant (*Zora*). Unlike safe injection sites where drug users are supervised by medical professionals and are given safe paraphernalia, there is no evidence that the Appellant's alcohol use would be safer if the Conditions permitted him to consume in bars or outside his home (*PHS*). Case law confirms enterprises' practice of overserving patrons to the point of intoxication

(*Stewart*; *Hummel*). Notably, most of the charges relating to the Appellant's intoxication occurred after drinking at a bar under "supervision" (Official Problem).

> *Zora*, *supra* para 3 at para 96.
> *PHS*, *supra* para 3 at para 131.
> *Stewart v Pettie*, [1995] 1 SCR 131, [1995] SCJ No 3 [*Stewart*].
> *Hummel*, *supra* para 25 at paras 9,14–15.
> Official Problem, *supra* para 2 at para 12.

[31] There is no evidence that overconsumption or other unintended consequences will result from requiring the Appellant to consume alcohol in his home. While alcohol first became problematic to the Appellant when living alone, this was likely due to the newfound accessibility of alcohol at university, or the ease with which he could now purchase it being of age. He further relapsed into alcoholism after meeting "a new romantic partner," despite having sobered up on his own (Official Problem). The Appellant's propensity for alcohol does not increase when he is alone. Regardless, his mother and partner have both come to "support him and ensure he complies with the conditions of his release" (Official Problem).

> Official Problem, *supra* para 2 at paras 5, 12.

c. *The Conditions are sufficiently linked to public safety*

[32] The Conditions are sufficiently linked to the public safety risks posed by the Appellant and support the statutory objectives of s. 515(10) (*Zora*; *Farago*). The Appellant's "lessened inhibitions" as a result of substance abuse are directly linked to his criminal behavior (*Colocho*). Alcohol abuse is the strongest predictor of future recidivism (Official Problem). The Appellant's criminal history is a testament to this trend.

> *Zora*, *supra* para 3 at para 87.
> *R v Farago*, 2002 ABQB 35 at para 5 [*Farago*].
> *R v Colocho-Romero*, 2020 ONCJ 344 at para 8 [*Colocho*].
> Official Problem, *supra* para 2 at para 17.

[33] There is a high risk that the Appellant would re-offend if permitted to drink in public. His seven previous arrests are all linked to intoxication and violent or dangerous behaviour (Official Problem). The nature of these arrests establishes a high likelihood of danger (*Lyons*). Much like a previous criminal history of sexual assault was affirmed by the Ontario Court of Appeal as relevant in predicting future risk, so too a previous history of assault is relevant to predicting risk (*Budreo*). The Conditions are therefore sufficiently linked to public safety. The impossibility of making exact predictions of risk does not preclude their imposition (*Budreo*; *Morales*).

> *R v Lyons*, [1987] 2 SCR 309 at 364, [1987] SCJ No 62 [*Lyons*].
> *Zora*, *supra* para 3 at para 101.
> Official Problem, *supra* para 2 at paras 5, 12, 17.
> *Budreo*, *supra* para 17 at paras 43–4 citing *Morales*, *supra* para 24 at para 43.

[34] The clear nexus between the Appellant's criminal charges and the Conditions demonstrates a sufficient link between the Conditions and the public safety objective. In *Mattice*, the BCCA has held that an evening curfew was a crucial element in ensuring public safety given the accused's history of housebreaking at night. In *Outifrakh*, the Ontario Court of Justice held that abstinence conditions were required following a drunk driving offence because of the clear nexus between alcohol consumption and impaired driving. Here, a limitation on the Appellant's public alcohol possession and consumption likewise has a clear nexus to his proclivity for violence when intoxicated outside the home. The Conditions are fine-tuned and target the risk to public safety by prohibiting the Appellant from "drinking alcohol outside of his home since his offences occurred when he was drunk outside of his home" (*Zora*; *Omeasoo*).

> *R v Mattice*, 2003 BCCA 37 at para 10 [*Mattice*].
> *Outifrakh*, *supra* para 24 at para 3.
> *Zora*, *supra* para 3 at para 92 citing *Omeasoo*, *supra* para 28 at para 42.

[35] The judge properly imposed Conditions related to a cause of the Appellant's charge (*Keenan*). In *Colocho*, the accused – a person with AUD – assaulted a child while intoxicated.

Given that AUD "lessens inhibitions" and thus increases the likelihood of repeated misconduct, the Court held that it was necessary to impose conditions prohibiting alcohol consumption and contact with youth to ensure public safety. Comparably, the Appellant's history of violence while intoxicated, paired with his AUD, necessitates conditions prohibiting public intoxication to ensure safety. Further, where an individual poses a particular risk to public safety due to a mental disorder, conditions which restrict their whereabouts are constitutionally valid preventative strategies (*Budreo*). In *Budreo,* conditions which prohibited the accused from entering areas where he was likely to reoffend were deemed necessary on the basis of community safety, despite compliance challenges. Similarly, despite the Appellant's challenges resisting alcohol in public, such conditions are necessary to prevent danger to himself and to others.

> *Re Keenan and The Queen* (1979), 57 CCC (2d) 267 (QCCA) at 278 [*Keenan*].
> *Colocho, supra* para 32 at para 8.
> *Morales*, *supra* para 24 at para 40.
> *Budreo*, *supra* para 17 at paras 37, 66.

2. The Conditions properly consider the Presumption of Innocence

[36] The Appellant's right to the presumption of innocence, entrenched in *Charter* s. 11, is satisfied given that the requirements of s. 11(e) are met. The Conditions do not insinuate guilt. Rather, they offer a proactive approach to limiting future harm based on his previous history of assault and intoxication, and the statistical likelihood of reoffending while under the influence.

> *Pearson*, *supra* para 13 at para 12.
> *Zora*, *supra* para 3 at para 20.
> Official Problem, *supra* para 2 at para 17.

[37] In the alternative, conditions are justified where the presumption of innocence is proportionally balanced with public safety (*Zora*). The Ontario Superior Court has held that conditions prohibiting an accused from practicing as a health care provider or being alone with women did not negate the presumption of innocence where the accused was charged with sexual

assault. Given two prior sexual assault convictions, the accused's history outweighed the presumption and the conditions were upheld (*Provencher*). Given two prior convictions for assault and disorderly conduct, and one for impaired driving, the Appellant has a history of dangerous behaviour while intoxicated. The bail judge thus properly balanced the presumption of innocence with the need for public protection when determining the Appellant's Conditions.

> *Zora*, *supra* para 3 at paras 20, 87.
> *A v Provencher*, 2012 ONSC 4373 at paras 2, 11, 15 [*Provencher*].

Issue 3(A): Any infringement of the Appellant's s. 11(e) right is justified

1. The Conditions are justified under the Internal Justification test

[38] Any infringement of the Appellant's s. 11(e) right is justified. Internal justification is appropriate in s. 11(e) cases (*Zarinchang*; *Jevons*). Much like sentencing decisions that infringe s. 12 of the *Charter* require justification based on an internal disproportionality test (*Lloyd*), and judicial trial delays that infringe s. 11(b) are justified through an internal reasonableness test (*Jordan*), so too bail conditions that restrict *Charter* rights are justified based on the proportionality to the risk posed by the accused (*Zora*). Here, the Appellant's conditions proportionately target that risk.

> *R v Zarinchang*, 2010 ONCA 286 at para 47 [*Zarinchang*].
> *R v Jevons*, 2008 ONCJ 559 at paras 32–37 [*Jevons*].
> *R v Lloyd*, 2016 SCC 13 at paras 21–25 [*Lloyd*].
> *R v Jordan*, 2016 SCC 27 at paras 5, 51 [*Jordan*].
> *Zora*, *supra* para 3 at paras 98–9.

[39] The Conditions proportionally eliminate the risk of the Appellant's drunk driving given the requirement to drink only at home, where he need not drive. Much like a pedophile's exclusion from areas frequented by children was held to proportionally nullify his risk of assaulting children (*Budreo*), the Appellant's propensity for violence when intoxicated is also eliminated by his inability to access establishments that pair consumption with a crowd.

Budreo, *supra* para 17 at paras 155-166.

[40] The bail judge is in a unique position to consider the appropriateness of conditions and is owed deference in applying the proportionality test. The fact that a reviewing judge would have reached a different conclusion is not a basis to interfere with the bail judge's discretion (*Junkert*). The bail judge imposed justifiable conditions, and her proximity to the facts is owed deference.

R v Junkert, 2010 ONCA 549 at para 38 [*Junkert*].

2. The Conditions are justified under the *Doré* framework

[41] In the alternative, the Conditions arising from an "exercise of discretionary power by a sentencing judge" are justified under the *Doré* framework (Rankin). The Appellant does not challenge the constitutionality of s. 515(4) of the *Code*; rather, he challenges the specific Conditions authorized by the bail judge pursuant to her statutory powers. Judicial review of discretionary decisions, "whether of judges or administrative decision makers," requires a flexible and deferential approach given the decision-maker's expertise and proximity to the facts of the case (*Doré*). The test from *R v Oakes* is an "awkward fit" difficult to apply "beyond the context of reviewing a law or rule of general application" (*Doré*). Where, as in this case, the challenged decision is the product of judicial discretion, *Doré*'s reasonableness standard applies (*El-Alloul*). A decision is reasonable "if it reflects a proportionate balance between the *Charter* protections and the relevant statutory mandate" (*Loyola*).

Micah B. Rankin, "Using Court Orders to Manage, Supervise and Control Mentally Disordered Offenders: A Rights-Based Approach, (2018) 65: 3–4 Criminal Law Quarterly 280 [Rankin].
Doré v Québec (Tribunal des professions), 2012 SCC 12 at paras 4, 37, 39, 54 [*Doré*].
El-Alloul v Procureure générale du Québec, 2018 QCCA 1611 at para 61 [*El-Alloul*].
Loyola High School v Quebec Attorney General, 2015 SCC 12 at para 37 [*Loyola*].

[42] The Conditions strike a proportionate balance through "the same justificatory muscles" as the final stages of the *Oakes* test: minimal impairment and balancing (*Doré*; *Loyola*). First, the

Conditions minimally impair s. 11(e) because they target only the Appellant's actual risk of violence and drunk driving while accommodating his AUD. Second, the benefit of public protection outweighs the severity of the impairment. The Conditions limit only the Appellant's ability to consume or possess alcohol *in public;* they do not require abstinence, isolation, or home confinement. In comparison, drunk driving is a "problem of gigantic proportion" (*Buckle*), and the gravity of societal violence "can hardly be overstated" (*Lavallee*).

> *Doré*, *supra* para 41 at paras 55, 57–8 citing *Loyola* at paras 4, 39, 40.
> *Buckle*, *supra* para 21 at para 32.
> *R v Lavallee*, [1990] 1 SCR 852 at para 36 [*Lavallee*].

Issue 2: The Conditions do not infringe the Appellant's s. 15 Charter rights

[43] To establish an infringement of s. 15 of the *Charter*, the claimant must show that: (1) a law or policy creates a distinction based on a protected ground; and (2) that the law or policy perpetuates, reinforces or exacerbates disadvantage (*Fraser*).

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

1. The Conditions do not draw a distinction based on an enumerated or analogous ground

a. Alcohol use disorder is not a disability under s. 15

[44] AUD is not a disability in *Charter* jurisprudence. Courts have declined to follow *Pickup*, the one decision which held that "alcoholism" was protected by s. 15 (*Ottaway*; *Hobbs*; *Jimmy*; *Jewett*). In *Pickup*, the characterization of "alcoholism" as a disability was based on submissions that "alcoholism" is a disease. In this appeal, the evidentiary record undermines the disease theory of alcoholism by establishing that the theory is "dated and not universally accepted within medical practice" (Official Problem). Academia supports the outdated nature of the theory, emphasizing that "the experience of 'addiction' is highly contested, fluid across time and space, and often at odds with biomedical definitions found in diagnostic tools" (Bunn).

> *R v Pickup*, 2009 ONCJ 608 at paras 31–5 [*Pickup*].

R v Ottaway, 2016 ONCJ 776 at paras 29, 32 [*Ottaway*].
R v Hobbs, 2010 ONCJ 460 at para 7 [*Hobbs*].
R v Jimmy, 2010 BCPC 256 at para 27 [*Jimmy*].
R v Jewett (2010), 9 MVR (6th) 306 at para 12, 2010 CarswellOnt 10520 (ONCJ) [*Jewett*].
Official Problem, *supra* para 2, at para 16.
Rebecca Bunn, "Conceptualizing Addiction as Disability in Discrimination Law: A Situated Comparison" (2019) 46:1 Contemporary Drug Problems 58 at 67 [Bunn].

[45] AUD is distinguishable from other disabilities given the degree of volition involved. Section 15 protects characteristics which are unchangeable or changeable only at unacceptable personal costs (*Corbiere*). Temporary disability is only protected under the *Charter* to the extent that it is "unchangeable for its duration, and entirely outside the control of the individual" (*Granovsky*). AUD, unlike temporary disabilities, involves volition and choice (*Wright*; *PHS*). Expert evidence supports the fact that alcohol abuse "involves choice and learned behaviour, not a total loss of control" (Official Problem). Because the duration of AUD is not "entirely outside the control" of the individual, it does not fall within the s. 15 conception of disability.

Granovsky v Canada (Minister of Employment and Immigration), 2000 SCC 28 at para 53 [*Granovsky*].
Corbiere v Canada (Minister of Indian & Northern Affairs), 2 SCR 203, 173 DLR (4th) 1 at para 13 [*Corbiere*].
Wright v College of Registered Nurses of Alberta, 2012 ABCA 267 at para 51 [*Wright*].
PHS, *supra* para 3 at para 100.
Official Problem, *supra* para 2 at para 16.

[46] Further, though drug and alcohol addiction are recognized as protected grounds in human rights legislation, recognizing them as a disability under the *Charter* would be improvident given the *Charter*'s broader application and scope. While the principles applied under human rights legislation are generally applicable to the test for discrimination under s. 15, differences between human rights legislation and the *Charter* must be considered (*Andrews*). Human rights legislation is for individualized, context-specific remedies to resolve discreet events of

discrimination (*Nixon*). Conversely, *Charter* remedies, which address challenges to government action, are broad and systemic (*Nixon*).

> *Andrews v Law Society (British Columbia)*, 1989 SCC 16 at para 20 [*Andrews*].
> *Nixon v Vancouver Rape Relief Society*, 2005 BCCA 601 at para 35 [*Nixon*].

[47] Given the broad reaching, systemic nature of *Charter* remedies, if substance use disorder ("SUD") is recognized as a disability under s. 15, large swaths of criminal and regulatory legislation could become unconstitutional. Where alcohol addiction is a protected ground in Canadian discrimination law, so too is illicit drug addiction (see e.g. *CHRA*); thus, if the Court finds that AUD is protected by the *Charter*, illicit drug use must then also be protected. This would undermine Canada's prohibitionist approach to drug policy. Protecting people who use illicit drugs from laws that discriminate against them "would contradict existing laws that criminalize the same group" (Bunn); in other words, criminalizing drugs would be discriminatory. Thus, whether SUD should be a s. 15 disability is not just a question of *Charter* interpretation – it is a question of penal policy. Given that "it is not the role of this Court to determine what theories of penology should be adopted by our elected legislatures," determining whether SUD is a *Charter*-protected disability should be left to Parliament (*Sauvé*).

> *Canadian Human Rights Act*, RSC 1985, c H-6, s 25 [*CHRA*].
> Bunn, *supra* para 44, at 62.
> *Sauvé v Canada (Chief Electoral Officer)*, 2002 SCC 68 at para 98 [*Sauvé*].

b. Alcohol use disorder should not be recognized as an analogous ground under s. 15

[48] AUD is not analogous to the grounds enumerated in s. 15. Only immutable or constructively immutable characteristics, meaning characteristics which are "changeable only at an unacceptable cost to personal identity" or "which the government has no legitimate interest in expecting us to change," are analogous grounds of discrimination (*Corbiere*). Given the health harms of substance abuse, the personal costs of *not* reducing substance use are often greater than

those of continued use. In *Energy Coalition*, poverty did "not suit the legal pattern for analogous grounds" because both the government and individuals living in poverty *did* have a legitimate interest in eradicating and escaping the "mutable characteristic of poverty." The same can be said about addiction, which the BCCA found to be "a temporary condition which many people voluntarily overcome" and which "involves choice and learned behaviours, not a total loss of control" (Official Problem). There is no basis for overturning this finding on appeal.

> *Corbiere*, *supra* para 45 at para 13.
> *Affordable Energy Coalition, Re,* 2009 NSCA 17 at para 42 [*Energy Coalition*].
> Official Problem, *supra* para 2, at paras 16, 19.

[49] It is imprudent for the Court to recognize AUD as an analogous ground. As per paragraph 47 of this Factum, the drug policy implications which would flow from protecting SUD under s. 15 are inherently political; "the issue of illegal drug use and addiction is a complex one which attracts a variety of social, political, scientific, and moral reactions (...) it is for the relevant governments, not the Court, to make criminal and health policy" (*PHS*). As such, the Court is ill-suited for determining whether AUD should be deemed an analogous ground.

> *PHS*, *supra* para 3 at para 105.

c. The Conditions do not draw a distinction on the basis of alcohol use disorder

[50] Even if AUD were accepted as a protected ground, the release conditions do not draw a distinction on the basis of AUD, either explicitly or in impact.

> *Fraser*, *supra* para 43 at paras 48, 50–2, 60.

[51] The Conditions were imposed because of the Appellant's "extensive history of criminal activity" and violence while under the influence of alcohol, not because he has AUD (Official Problem). This is distinguishable from *Ontario v G*, where the challenged law drew an explicit distinction by designating all persons deemed "not criminally responsible on account of mental

disorder" ("NCRMD") as a perpetual threat, regardless of their individual characteristics. Conversely, in this case, the Appellant is subject to the Conditions not because he has AUD, but because individualized assessment has shown the risk he poses to public safety.

Official Problem, *supra* para 2, at para 1.
Ontario v G, 2020 SCC 38 at paras 3–6, 68 [*Ontario v G*].

[52] The Conditions do not adversely affect the Appellant based on his AUD. To show that a law creates a distinction based on a prohibited ground through its effects, there must be evidence tying the alleged impact to the claimant's protected characteristic (*Fraser*; *Taypotat*). Ideally, there should be evidence of both "the circumstances of the claimant group *and* the results produced by the challenged law" (*Fraser*). In this case, both types of evidence are lacking.

Fraser, *supra* para 43 at paras 52, 58–61.
Kahkewistahaw First Nation v Taypotat, 2015 SCC 30 at paras 21, 34 *[Taypotat]*.

[53] Evidence about the claimant group's situation is necessary to show that group membership is associated with the characteristics targeted by the challenged law (*Fraser)*. In this case, there is insufficient evidence to show that AUD is associated with an inability to control *where* substance use occurs, which is what the Conditions target. Persons with addictions can make rational choices about where they consume drugs or alcohol (*PHS*). The Appellant's behaviour suggests he retained this capacity. When he drank in public, he was not acting "impulsively" or without control; rather, he made a calculated decision about where he wanted to drink in order to avoid the adverse social consequence of disappointing his mother (Official Problem). This is not the behaviour of an individual whose ability to control substance use is so impaired that they can no longer make rational decisions about where they use.

Fraser, *supra* para 43 at para 57.
PHS, *supra* para 3 at para 100.
Official Problem, *supra* para 2 at paras 13, 18.

[54] Second, there was no evidence that the Conditions resulted in a disproportionate impact (*Fraser*). Evidence about the results of the challenged Conditions is necessary "to establish 'a disparate pattern of exclusion or harm that is statistically significant and not simply the result of chance'" (*Fraser*). The evidentiary record in this appeal contains no evidence of statistical disparity whatsoever, either with regards to the challenged Conditions or "substantially similar ones" (*Fraser*). To the contrary, *Zora* suggests that the same conditions imposed on a substance abuser reasonably accommodate addiction-related compliance challenges. The Appellant struggled to comply with the Conditions not because of his addiction, but because he "did not want to disappoint [his mother] by bringing alcohol into the home against her wishes" (Official Problem). At most, there is a correlation between the Appellant's AUD and his difficulty with compliance; this does not establish disproportionate impact because "correlation is not, itself, a link" between adverse treatment and protected grounds (*VANDU*).

> Official Problem, *supra* para 2 at para 13.
> *Fraser*, *supra* para 43 at paras 5859, 61.
> *Zora*, *supra* para 3 at 92.
> *Vancouver Area Network of Drug Users v Downtown Vancouver Business Improvement Association*, 2018 BCCA 132 at para 91 [*VANDU*].

[55] The evidentiary record indicates that the Appellant's AUD did not deprive him of his capacity to comply with the Conditions. There is no evidence that – had the Appellant's mother not been a factor – his AUD would have made compliance more challenging. An adverse effects claim on the basis of addiction can only succeed where addiction deprives the claimant of their "capacity to comply" with the allegedly discriminatory law or policy (*Elk Valley Coal*). "Capacity to comply" is a necessary standard; otherwise, if an individual fails to comply with a policy or restriction for "a reason related to addiction," then "no sanction would be possible without discrimination" (*Elk Valley Coal*). For example, a person with an opioid dependency

who steals narcotics from a hospital could successfully claim that penalizing them for theft disproportionately impacts them because their conduct is caused by addiction (*Wright*).

> *Stewart v Elk Valley Coal Corp,* 2017 SCC 30 at paras 32–42 [*Elk Valley Coal*].
> *Wright*, *supra* para 45 at paras 64, 66–7.

[56] Without evidence that the Conditions disproportionately impact the Appellant because of his AUD, there exists "merely a 'web of instinct'" (*Taypotat*). *Taypotat*, affirmed in *Fraser*, emphasizes that instinctual connections between a protected characteristic and an adverse impact are insufficient to prove the first step of the s. 15 test; evidence is required. Here, there is insufficient evidence to prove that a distinction was drawn on the basis of the Appellant's AUD.

> *Taypotat*, *supra* para 52 at para 34.
> *Fraser*, *supra* para 43 at para 60.

2. The Conditions are not discriminatory

[57] The Conditions are not discriminatory. A distinction is discriminatory if it fails to respond to the actual capacities and needs of the group and instead imposes a burden or denies a benefit in a manner that has the effect of reinforcing, perpetuating, or exacerbating disadvantage (*Taypotat*; *Fraser*). The record contains no evidence of historical disadvantage among those with AUD, let alone evidence of how the Conditions may reinforce, perpetuate, or exacerbate disadvantage. In the BCCA, Justice Shaefer held that "abusers of alcohol are not an identifiable group suffering social, political, and legal disadvantage" (Official Problem). There is no basis for overturning this finding. Mere intuition, instinct, or the "bare assertion" of a claimant are insufficient proof of discrimination (*Taypotat*).

> *Fraser*, *supra* para 43 at paras 39, 76.
> *Taypotat*, *supra* para 52 at paras 20, 33–4.
> Official Problem, *supra* para 2 at para 19.

[58] Further, the fact that a criminal prohibition disadvantages a person with a protected characteristic is not enough to find discrimination. All criminal sanctions and restrictions on liberty are disadvantageous to the person subject to them. In *Adam*, the BCSC rejected the argument that a probation order, which was necessary for public safety, exacerbated the offender's pre-existing disadvantage as a person with a mental disability. Courts have repeatedly held that criminal charges, on their own, do not exacerbate disadvantage to a degree that is discriminatory. If the disadvantage of criminal liability was automatically discriminatory, then this would render "much of the criminal law (...) vulnerable to s. 15 challenge" given the overrepresentation of certain protected groups in the criminal justice system (*Johnson; Nur*; *McKenzie-Sinclair*). If the Court finds the Conditions to be discriminatory, any criminal restriction which is harder for substance abusers to comply with will not pass constitutional muster. For example, laws restricting impaired driving would always perpetuate the disadvantage of those with SUD.

> *R v Adam*, 2014 BCSC 1943 at para 66 [*Adam*].
> *R v Johnson*, 2011 ONCJ 77 at para 130 [*Johnson*].
> *R v Nur*, 2011 ONSC 4874 at paras 79-82, aff'd 2013 ONCA 677 [*Nur*].
> *R v McKenzie-Sinclair*, 2015 MBPC 5 at paras 136–40 [*McKenzie-Sinclair*].

[59] Additionally, the Conditions correspond to the actual circumstances and capacities of the Appellant. Distinctions are discriminatory when they have "the effect of limiting an individual's or group's right to the opportunities generally available because of attributed rather than actual characteristics" (*Fraser*); conversely, "distinctions (...) based on an individual's merits and capacities will rarely be so classed" (*Andrews*). The correspondence between a distinction and an individual's merits and capacities has generally been decisive of discrimination claims on the basis of mental disability (*Eaton*; *Winko*; *Ontario v G*). In *Ontario v G*, the challenged law was discriminatory because the differential treatment was based on the prejudicial idea that those

with mental illnesses are "inherently and perpetually dangerous" rather than the actual risk posed by a specific mentally disabled individual. Conversely, in *Winko,* the challenged *Code* provision, which allowed judges to detain NCRMD accused persons if they posed a threat to public safety, was not discriminatory because the distinction was based on the actual personal situation of a given NCRMD, *not* on attributed characteristics of those with mental disabilities.

> *Fraser*, *supra* para 43 at paras 39, 76.
> *Andrews*, *supra* para 46 at para 19.
> *Eaton v Brant (County) Board of Education*, [1997] 1 SCR 241 at paras 66, 69, 207 NR 171 [*Eaton*].
> *Taypotat*, *supra* para 52 at para 20.
> *Winko v Forensic Psychiatric Institute*, [1999] 2 SCR 625 at para 90, 241 NR 1 [*Winko*].
> *Ontario v G*, *supra* para 51 at para 15.

[60] Similarly to *Winko*, the Conditions imposed on the Appellant were the product of individually assessing the actual risk he posed given his "extensive history of criminal activity and alcoholism" (Official Problem). The Conditions limit the Appellant's activity based on his actual circumstances and capacities, not based on attributed characteristics of those with mental disabilities. Limitations on an individual's behaviour premised on their actual risk "cannot be discriminatory any more than the crime of arson is discriminatory towards pyromaniacs or theft towards kleptomaniacs" (*Budreo*). In fact, treating an accused person based on their individual risk profile, "far from being a denial of equality, constitutes the essence of equal treatment from a substantive point of view" (*Winko*). As such, the distinction is not discriminatory.

> Official Problem, *supra* para 2 at para 1.
> *Ontario v G*, *supra* para 51 at paras 62, 67.
> *Budreo*, *supra* para 17 at para 117.
> *Winko*, *supra* para 59 at para 90

Issue 3(B): Any infringement of the Appellant's s. 15 right is justified under the Doré framework

[61] The Appellant lacks the evidentiary basis to establish any breach of *Charter* s. 15. In the alternative, a breach of s. 15 is reasonable and proportionate under the *Doré* framework.

1. Any Charter infringement is justified

[62] As argued in Part IV Issue 3(A), *Doré* is the appropriate justification framework in the context of the bail judge's discretionary decision. The bail judge is owed deference. Bail judges have "the discretion to grant bail under...conditions tailored to meet the facts of an individual case" (*Hall*) and are thus in the best position to consider the impact of the relevant *Charter* values (*Doré*). While the bail judge did not provide explicit reasons pertaining to the Appellant's *Charter* s.15 rights, the concept of deference requires reviewing courts to consider the reasons "which could be offered in support of a decision" (*NFLD*). In the absence of formal reasons, courts can "look to the record for the purpose of assessing the reasonableness of the outcome" (*TWU*). In the present appeal, the record supports the reasonableness of the Conditions.

> *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 15 [*NFLD*].
> *R v Hall*, 2002 SCC 64 at para 85 [*Hall*].
> *Law Society of British Columbia v Trinity Western University*, 2018 SCC 32 at para 56 [*TWU*].

a. The statutory objective is public safety

[63] The *Code* grants bail judges the discretion to authorize conditions to curtail statutorily identified risks posed by a particular person (*Junkert*, Official Problem). Conditions of judicial interim release must be linked to the basis for denying bail in s.515(10) of the *Code*. Here, imposing Conditions on the Appellant was necessary for public safety given his "extensive history of criminal activity and alcoholism" (Official Problem).

> *Junkert*, *supra* para 40 at para 38.
> Official Problem, *supra* para 2 at paras 1, 17.

b. The Conditions strike a proportionate balance between Charter protections and the statutory objective

[64] A decision is reasonable if it proportionately balances *Charter* protections in light of the statutory objectives (*Doré*). The minimal impairment stage of the *Doré* analysis requires that *Charter* protections are limited "no more than necessary" given the objective (*Loyola*). At the balancing stage, the *Charter* infringement is weighed against the benefit to the objective (*TWU*).

> *Doré*, *supra* para 41 at para 56.
> *Loyola*, *supra* para 41 at paras 4, 39–40.
> *TWU*, *supra* para 62 at para 82.

<u>i. The Conditions are minimally impairing</u>

[65] Any other form of release would have either been more onerous – such as denying bail or requiring total abstinence – or would have failed to uphold the statutory mandate of public safety. The bail judge considered the Crown's position that denying bail altogether was required for public protection. She also considered the Appellant's circumstances and his harmful conduct while under the influence of alcohol, including throwing a glass beer bottle at a victim, physically assaulting victims on multiple occasions, and operating a motor vehicle while impaired (Official Problem). Given the Appellant's risk to public safety when permitted to consume alcohol in public, it was reasonable for the bail judge to conclude that "the conditions imposed the least onerous form of release possible … in the circumstances" (Clarifications).

> Official Problem, *supra* para 2 at paras 1, 3, 5–6.
> Clarifications, *supra* para 29 at para 5.

[66] There is no requirement for the decision-maker to choose the option that limits *Charter* protections the least; rather, the question is "whether the decision falls within a range of reasonable outcomes" (*TWU*). In *TWU*, the SCC held that the Law Society of British Columbia's ("LSBC") decision to deny Trinity Western University's (the "University") proposed law school

was reasonable, despite the fact that the LSBC did not choose the option which limited *Charter* protections the least. Though permitting the University to open their proposed law school would have been less impairing of the claimant's freedom of religion, this less impairing means "would not have advanced the relevant statutory objectives, and therefore was not a reasonable possibility" (*TWU*). Similarly, while releasing the Appellant without Conditions or with fewer conditions would have been less impairing of his s. 15 right, this was not a reasonable possibility given the statutory objective of public protection. Given the Appellant's history of violent and reckless conduct while intoxicated, and the high rates of recidivism among those with substance use issues who relapse on release, the Conditions limiting his consumption and possession of alcohol in public spaces fell within a range of reasonable alternatives (Official Problem).

TWU, *supra* para 62 at paras 81, 84, 105.
Official Problem, *supra* para 2 at para 17.

ii. The public safety benefits outweigh the harm to the Appellant's Charter rights

[68] The Appellant's right to equality was not significantly limited. In *TWU*, the SCC held that the LSBC's decision did not significantly limit freedom of religion, because the University was only prohibited from opening a law school with *mandatory* religion-based admission requirements. While the claimant's "optimal" religious learning environment was prohibited, studying law in a religious environment was not prohibited altogether (*TW*). Similarly, the Conditions interfere only with the Appellant's ability to consume or possess alcohol *in public;* they do not require abstinence. While his home may not have been his "optimal" environment for consumption, he was not prohibited from consuming altogether. Allowing alcohol consumption accommodated the Appellant's AUD such that compliance was possible.

TWU, *supra* para 62 at paras 84, 87.

[69] The substantial public protection benefits of the Conditions outweigh the minimal limitation to the Appellant's s. 15 right. The Appellant commits violent and dangerous acts while intoxicated. He has faced charges for throwing broken glass at a victim in a public venue, physically assaulting an intimate partner and a stranger, and impaired driving (Official Problem). Evidence accepted by the BCPC establishes that alcohol abuse and drunk driving offences strongly predict recidivism (Official Problem). In light of this evidence, the Appellant's criminal history and AUD put him at high risk for re-offending. Given that impaired driving is a "problem of gigantic proportion" (*Buckle*) and that the gravity of societal violence "can hardly be overstated" (*Lavallee*), the benefits of minimizing the risk that the Appellant would re-offend was highly beneficial to the public protection objective. As such, the benefits to the statutory objective far outweighed any minimal infringement to his s. 15 rights.

Buckle, *supra* para 21 at para 32.
Lavallee, *supra* para 42 at para 36.
Official Problem, *supra* para 2 at paras 1, 3–4, 12, 17.

[70] The bail judge is owed deference. Much like sentencing judges, bail judges are in a "unique position to exercise discretion as to the appropriateness of a condition," and courts should not interfere with the exercise of discretion where it is reasonable (*Hardenstine*). In authorizing the Conditions, the bail judge gave effect as fully as possible to the Appellant's *Charter* rights, given the need to ensure public protection. A proportionate balance was struck and any infringements on the Appellant's *Charter* rights are justified.

Hardenstine, *supra* para 19 at para 10.

PART V – ORDERS SOUGHT

[71] For these reasons, the Respondent respectfully submits that the appeal should be dismissed and the decision of the Court of Appeal of British Columbia be upheld.

PART VI – LIST OF AUTHORITIES AND STATUTES

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