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 APPELLANT

COUNSEL FOR THE APPELLANT
TEAM 9

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PART I – OVERVIEW

[1] Mr. Chaudhry's appeal is about ensuring that Canada's bail system does not unjustly criminalize substance use disorders. It is about protecting marginalized people from unreasonable and discriminatory bail conditions that endanger their health, impose unnecessary criminal liability for otherwise lawful conduct, and reinforce stigma.

[2] Alcohol use disorder (AUD) is a disability subjected to historic and ongoing stigma (*Tranchemontagne*). Mr. Chaudhry has severe AUD and is physically dependent on alcohol (Official Problem). He suffers debilitating effects from his condition: he cannot hold a permanent job and he suffers severe withdrawal symptoms.

> *Ontario (Disability Support Program) v Tranchemontagne*, 2010 ONCA 593 at para 126 [*Tranchemontagne*].
> Official Problem, Wilson Moot 2021 at 4–7 [Official Problem].

[3] The interim release conditions imposed on Mr. Chaudhry violate s. 11(e) of the *Canadian Charter of Rights and Freedoms* (the *Charter*). The conditions are not necessary, not reasonable, not the least onerous considering the circumstances, and they are not sufficiently linked to the statutory ground of protecting public safety. By limiting alcohol possession and consumption to his home and prohibiting access to any establishment that serves alcohol, the conditions violate the requirement for reasonable bail. They threaten his health and safety and create perverse consequences which violate the presumption of innocence and cannot be justified.

[4] The conditions also violate Mr. Chaudhry's equality rights under s. 15 of the *Charter*. Given his disability, these conditions for Mr. Chaudhry impose significantly greater hardship than the same conditions would for accused persons who do not struggle with AUD. By criminalizing his addiction everywhere but his home, the conditions exacerbate his health risks, and reinforce stigma and social isolation. While Mr. Chaudhry does not seek to evade the general

application of the *Criminal Code*, it is discriminatory to impose personalized criminal liability on a person with alcohol use disorder for using alcohol.

Criminal Code, RSC 1985, c C-46 [*Criminal Code*].

PART II – STATEMENT OF FACTS

1. Factual background

[5] Mr. Chaudhry faces criminal sanction for consuming alcohol in a bar in contravention of his bail conditions. The underlying charges for which he was on bail have since been dropped.

Official Problem, *supra* para 2 at 2–3.
Clarifications to 2021 Wilson Moot problem at para 4 [Clarifications].

[6] Mr. Chaudhry struggles with alcohol dependence. He began drinking heavily in university while living alone for the first time. He has been fired from four or five different jobs due to his alcohol use. Mr. Chaudhry has on five occasions undertaken treatment but has each time relapsed. Dr. Yamane testified that Mr. Chaudhry has a severe form of AUD, defined by the American National Institute on Alcohol Abuse and Alcoholism as a "chronic relapsing brain disorder characterized by an impaired ability to stop or control alcohol use despite adverse social, occupational, or health consequences." Sometimes referred to as "addiction", AUD involves compulsive, rather than voluntary, alcohol consumption.

Official Problem, *supra* para 2 at 3–4, 6–7.

[7] Mr. Chaudhry has a criminal record consisting of three prior offences: driving under the influence in 2004, possession of cocaine in 2012, and assault causing bodily harm in 2017 from a fight with his then-partner. In 2019, police found Mr. Chaudhry apparently intoxicated in his parked vehicle following a bar fight in which he had allegedly thrown a beer bottle at another patron. Mr. Chaudhry was charged with assault with a weapon and being in care or control of a vehicle while intoxicated.

Official Problem, *supra* para 2 at 1, 4.

[8] Following a contested bail hearing, Mr. Chaudhry was released with conditions, including that he "not attend any licenced establishment that serves alcohol" and "not possess or consume alcohol or any non-prescribed controlled substances during the term of his release, except within the confines of his home." After his release, Mr. Chaudhry's mother moved into his apartment to provide support, as did Mr. Chaudhry's partner. Mr. Chaudhry's mother insisted as a condition of her support that he not consume alcohol in the home.

Official Problem, *supra* para 2 at 2, 5.

[9] Mr. Chaudhry attempted to abstain from alcohol. He suffered withdrawal symptoms including insomnia, severe pain, and at one point collapsing on the floor. He testified:

> I had every intention of following my bail order conditions. I admit I was drinking at The Gambler... I had not been out partying or having a good time or making trouble. I just could not take it anymore. I did everything I could think of to avoid drinking, but in the end I knew that a drink was the only thing that could put a stop to what I was feeling.
>
> I understand that I have a disease and that my struggle with alcohol will never disappear entirely. While that fact is not an excuse, what others see as a simple choice is for me a constant struggle that affects my mental and physical health. My doctors tell me that my brain reacts to alcohol differently than a normal person's would. I don't want any special treatment, but I don't think that it's fair to punish me for not being able to overcome that difference.

Official Problem, *supra* para 2 at 5.

2. Procedural history

[10] As Mr. Chaudhry's breach of his bail conditions caused no harm to person or property, the Crown had the option to pursue revocation or a judicial referral hearing to revisit the terms of his bail. Instead, the Crown elected to pursue the most severe punishment for the breach and prosecuted Mr. Chaudhry with an offence which carries the potential for imprisonment.

Criminal Code, *supra* para 4, ss 523.1, 524, 145(5).

[11] At trial, Mr. Chaudhry argued that the conditions of his bail violated his *Charter* rights. Justice Hooper of the British Columbia Provincial Court found that "a prohibition condition that effectively criminalizes his addiction anywhere but the confines of his home" is unreasonable and unjustifiably violates s. 11(e). Justice Hooper held that AUD is a disability under s. 15, and that the conditions discriminated against Mr. Chaudhry based on his disability in their effects.

Official Problem, *supra* para 2 at 8.

[12] The Crown appealed. Justice Schaefer for the Court of Appeal majority found that the conditions, not being a total prohibition on alcohol consumption, were reasonable and consistent with s. 11(e). The majority found that addiction is not a protected ground and there was no effects-based discrimination under s. 15. Justice Krelborn in dissent would have upheld the trial judge's finding that the conditions unjustifiably infringed Mr. Chaudhry's s. 15 rights.

Official Problem, *supra* para 2 at 9–10.

PART III – STATEMENT OF POINTS IN ISSUE

[13] This appeal raises the following issues:

1. **Do the conditions infringe Mr. Chaudhry's rights under s. 11(e) of the *Charter*?** Yes. They are not necessary, reasonable, least onerous, or sufficiently linked to public safety considering Mr. Chaudhry's severe AUD.
2. **Do the conditions infringe Mr. Chaudhry's rights under s. 15 of the *Charter*?** Yes. They have a disproportionate effect based on his disability, exacerbating the criminalization, stigma, isolation, and health risks he faces due to his severe AUD.
3. **Are the ss. 11(e) and 15 infringements justified in a free and democratic society?** No. The conditions fail the s. 11(e) internal limit test. They are also not minimally impairing or proportionate, and cannot be upheld under *Oakes*.

PART IV – ARGUMENT

Issue 1: The conditions infringe Mr. Chaudhry's s. 11(e) *Charter* rights

[14] There are 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 judge's decision to impose bail conditions that prohibit Mr. Chaudhry from attending any licensed establishment that serves alcohol and from possessing or consuming any alcohol except within the confines of his home engage his right to reasonable bail (Official Problem).

> *R v Pearson*, [1992] 3 SCR 665 at paras 47–48, SCJ No 99 [*Pearson*].
> Official Problem, *supra* para 2 at 2.

[15] The right to reasonable bail requires that conditions be "clearly articulated, minimal in number, necessary, reasonable, least onerous in the circumstances, and sufficiently linked to the accused's risks regarding the statutory grounds for detention in s. 515(10)" of the *Criminal Code*: to ensure attendance in court, to protect public safety, and to maintain confidence in the administration of justice (*Zora*, *Criminal Code*). The test in *Zora* requires a proportionate balancing between the statutory risks and the impact of the bail conditions on the accused (*Zora*). Mr. Chaudhry's bail conditions violate s. 11(e) because they are not necessary, reasonable, or the least onerous considering his severe AUD and living conditions. They are not sufficiently linked to the statutory risk that Mr. Chaudhry would endanger public safety.

> *R v Zora*, 2020 SCC 14 at para 6 [*Zora*].
> *Criminal Code*, *supra* para 4, s 515(10)(a–c).

[16] The presumption of innocence is "an animating principle throughout the criminal justice process" (*Pearson*). From a constitutional perspective, bail restricts the liberty of those who are still presumed innocent and imposes a further risk of criminal liability (*Zora*). "The presumption of innocence is only satisfied … when the requirements of s. 11(e) are met" (*Zora*). Mr.

Chaudhry's bail conditions fail the constitutional requirement for reasonable bail and therefore violate the presumption of innocence and his s. 11(e) rights. The conditions cannot be justified.

Pearson, *supra* para 14 at para 33.
Zora, *supra* para 15 at para 20.

1. The bail conditions are not necessary

[17] To establish a sufficient link, the bail conditions need to be as narrowly defined as possible and demonstrably connected to addressing the public safety risk (*Zora*). Bail conditions are only necessary if the accused poses a substantial likelihood of endangering public safety during interim release (*Zora*). Mr. Chaudhry's conditions meet neither of these requirements.

Zora, *supra* para 15 at paras 84, 86.

a. *Bail conditions are not sufficiently linked to public safety if the accused cannot comply*

[18] The bail conditions do not protect public safety and are not sufficiently linked to the statutory objective if Mr. Chaudhry cannot comply with them (*Omeasoo*). The combination of Mr. Chaudhry's severe AUD and his mother's requirement that he not consume alcohol at home means that he will consume alcohol outside or attempt to abstain entirely with severe health consequences (Official Problem). The latter does not address the public safety risk: alcohol abstention is both ineffective as a form of crime control and poses a risk to the health and well-being of an accused who is addicted to alcohol (*Denny*). The effect of the conditions is not to protect public safety, but to punish Mr. Chaudhry for actions he cannot control while he is still presumed innocent.

R v Omeasoo, 2013 ABPC 328 at paras 37, 39 [*Omeasoo*].
Official Problem, *supra* para 2 at 5–7.
R v Denny, 2015 NSPC 49 at para 14 [*Denny*].

b. *Mr. Chaudhry is not substantially likely to endanger public safety*

[19] Conditions are not necessary for public safety "merely because an accused poses a risk of committing another offence on bail, unless they pose a 'substantial likelihood' of committing an offence that endangers public protection and safety" (*Zora*). Mr. Chaudhry's bail conditions fail this criterion. He has no prior record of breaching bail conditions during interim release, indicating that the risk to public safety is minimal (*Birtchnell*). Such restrictions aimed at public safety "based on the reasoning that the accused is likely to reoffend 'insinuates guilt instead of innocence'" and is inconsistent with the presumption of innocence (Trotter).

> *Zora*, *supra* para 15 at para 84.
> *R v Birtchnell*, 2019 ONCJ 198 at para 39 [*Birtchnell*].
> Gary T Trotter, *Law of Bail in Canada*, 3rd ed (Toronto: Thomson Reuters, 2010), ch 1 at 27 [Trotter].

[20] The Crown also failed to show why there is a substantial likelihood that Mr. Chaudhry poses a risk to public safety without the conditions. In *Farago*, a bail condition restricting the accused from associating with the Hell's Angels was unnecessary. The Crown failed to show why it was substantially likely that Mr. Farago would endanger public safety while awaiting trial simply by associating with the Hell's Angels even though he was charged with robbery in connection with the Hell's Angels. Similar to how association with the Hell's Angels did not indicate a public safety risk even though it was in connection with the alleged crime, consumption of alcohol in Mr. Chaudhry's case does not in itself indicate a public safety risk. The causal connection between alcohol and Mr. Chaudhry's alleged attack is unclear as there is no direct evidence, such as a blood alcohol sample, of Mr. Chaudhry's level of intoxication at the time. Mr. Chaudhry has for most of his life managed severe AUD and consumed alcohol without endangering public safety. There is no reason that he will be substantially likely to do so during interim release justifying the need for the conditions.

R v Farago, 2002 ABQB 35 [*Farago*].

c. *The staleness of past convictions indicates the conditions are unnecessary*

[21] The relative staleness of past convictions also suggest the condition is unnecessary. In *McDonald*, the court held that a two-year gap in the accused's last criminal record combined with unclear circumstances in the current charge indicate that the public safety danger is minimal. Mr. Chaudhry's impaired driving conviction occurred over 16 years ago when he was 23 and he has had no impaired driving convictions since. It should not influence his bail conditions today. Mr. Chaudhry's two other convictions were for the possession of cocaine and the assault of his ex-partner, each separated by a five-year period (Official Problem). There is also a lack of evidence in the two most recent convictions regarding Mr. Chaudhry's level of intoxication and whether consumption of alcohol was a causal factor.

R v McDonald, 2010 ABQB 770 at paras 27, 31–33 [*McDonald*].
Official Problem, *supra* para 2 at 4.

2. The bail conditions are not reasonable

[22] Reasonable bail requires that the accused can realistically comply as demanding the impossible is another means of denying bail altogether (*Zora*). Conditions that set up an accused to fail are not only unreasonable, but also carry the risk of additional criminal liability while he is under the presumption of innocence (*Zora*).

Zora, *supra* para 15 at para 87.

a. *The conditions are unrealistic and set up Mr. Chaudhry to fail*

[23] The expectation that Mr. Chaudhry can simply wait until the end of the day to go home and consume the alcohol that his body needs to function is unrealistic and sets him up to fail. It is akin to asking the clinically depressed "to just cheer up" and ignores the lived reality of addiction (*Omeasoo*). His physical dependence means that he suffers from withdrawal symptoms and

physical pain within a few hours of his last drink. Without regular consumption, he is in constant pain, he has never felt worse in his life, and he contemplates death (Official Problem).

> *R v Omeasoo*, *supra* para 18 at paras 30, 37.
> Official Problem, *supra* para 2 at 5–7.

[24] The conditions' real effect is that Mr. Chaudhry is confined to his home because that is the only place where he can consume alcohol without criminal liability and manage his severe AUD. Home confinement severely limits the accused's liberty and has a punitive quality inappropriate for bail conditions as it challenges the presumption of innocence (*Singh*, *Proulx*). Its liberal application is unreasonable when there are less restrictive methods available. Liberal application of home confinement conditions is problematic because it poses the risk of net-widening where a severe deprivation of liberty is normalized over other forms of release as a default bail condition under the guise of protecting public safety (Trotter).

> *R v Singh*, 2011 ONSC 717 at para 51 [*Singh*].
> *R v Proulx*, 2000 SCC 5 at paras 36–37 [*Proulx*].
> Trotter, *supra* para 19 ch 6 at 35.

b. *Mr. Chaudhry's consumption is morally involuntary*

[25] Conditions that target morally involuntary actions relating to addiction are unreasonable because the accused cannot abide by such conditions; it sets them up to fail and is just another way of denying bail (*Zora*). Criminal liability for actions that are morally involuntary cannot be upheld (*Ruzic*, Stewart). *Sullivan* clarified that voluntariness is a requirement of the principle of fundamental justice and that it must be linked to the prohibited conduct: "the purpose of ... voluntariness is to ensure that individuals are convicted only of conduct they [*choose*]… it is unfair to convict 'an accused who did not voluntarily commit an act that constitutes a criminal offence'" (*Sullivan*).

> *Zora*, *supra* para 15 at paras 87, 92.
> *R v Ruzic*, 2001 SCC 24 [*Ruzic*].

Hamish Stewart, *Fundamental Justice: Section 7 of the Canadian Charter of Rights and Freedoms* (Toronto: Irwin Law, 2019) at 237–242 [Stewart].
R v Sullivan, 2020 ONCA 333 at paras 64–66 [*Sullivan*].

[26] Expert evidence describes AUD as a "chronic relapsing brain disorder" which triggers neurochemical changes in the brain that impair judgment. Consumption changes from voluntary to compulsive. Mr. Chaudhry himself confirmed that he tried everything to avoid consuming alcohol, but it was "the only thing that could put a stop to what [he] was feeling" (Official Problem). He is unable to control his alcohol consumption even in situations that have severe personal and professional consequences (Official Problem). Requiring him to not possess or consume alcohol outside of his home sets him up to fail every time he steps out of his house.

Official Problem, *supra* para 2 at 3–6.

c. *The conditions are perverse*

[27] Bail conditions that create "perverse consequences or unintended negative impacts on the safety of the accused" are unreasonable (*Zora*). The effects of Mr. Chaudhry's conditions are perverse. They criminalize the means necessary for Mr. Chaudhry to manage his mental disorder. The condition prohibiting the possession of alcohol outside his home means he is criminally liable for going to a liquor store to purchase the substance he needs to manage his severe AUD. This condition poses serious health and safety risks.

Zora, *supra* para 15 at para 96.

[28] Conditions which impair the accused's health or safety are perverse (*Zora*). In addition to denying him the means necessary to manage his severe AUD, the state forces him to possess and consume alcohol only at his home where he is more likely to be alone and vulnerable to overconsumption. The facts outlined by Justice Hooper illustrate a propensity for Mr. Chaudhry

to abuse alcohol when he is alone (Official Problem). At the time the bail conditions were imposed, it was implied that he was living alone (Official Problem).

> *Zora*, *supra* para 15 at para 96.
> Official Problem, *supra* para 2 at 3–5.

[29] The alternate argument that Mr. Chaudhry could have complied with his bail conditions if he simply disregarded his mother's wishes ignores the fact that removing a support system for those suffering from substance use disorders is itself a perverse consequence (*PHS*). When Mr. Chaudhry collapsed on the floor in his home, his mother was present and able to call for emergency assistance, highlighting the important safety support role she plays (Official Problem). The presence of Mr. Chaudhry's mother living with him also attenuates the public safety concern as there is someone monitoring his behaviour (*Netowastanum*). The effects of the bail conditions still lead to an impossible choice: lose the support he needs to manage his physical dependence or face criminal consequences for consuming outside his home. The fact remains that the state coerces him to make choices that exacerbate his severe AUD and make it more dangerous to consume.

> Official Problem, *supra* para 2 at 5.
> *PHS Community Services Society v Canada*, 2011 SCC 44 at paras 126–137 [*PHS*].
> *R v Netowastanum*, 2015 ABQB 412 at para 48 [*Neowastanum*].

[30] Mr. Chaudhry's bail conditions also remove facilities that would allow him to consume alcohol while supervised and create "red zones", banning access to resources supporting his physical dependence (Sylvestre). Managed alcohol programs where a patient with severe AUD can consume alcohol under medical supervision are not accessible. Bars and restaurants also have a statutory duty to ensure the safety of their patrons and can serve as sites where a person with severe AUD can consume alcohol under supervision (*Liquor Control & Licensing Act*, *Occupier's Liability Act*). By restricting him from access to these resources and only allowing

him to consume at home where he is more likely to be alone, the bail conditions make consumption for someone with severe AUD like Mr. Chaudhry more dangerous. Canadian Charter jurisprudence has held laws that endanger an individual's health and safety unconstitutional (*PHS, Parker*).

> Marie-Eve Sylvestre, Nicholas Blomley & Céline Bellot, *Red Zones: Criminal Law and the Territorial Governance of Marginalized People* (Cambridge: Cambridge University Press, 2020) at 163 [Sylvestre].
> *Liquor Control & Licensing Act*, RSBC 1996 c 267 [*Liquor Control & Licensing Act*].
> *Occupier's Liability Act*, RSBC 1996, c 337 [*Occupier's Liability Act*].
> *PHS, supra* para 29.
> *R v Parker*, [2000] OJ No 2787 at para 94, 135 OAC 1 (ONCA) [*Parker*].

d. *The conditions invite a breach*

[31] A probation condition inviting a breach is unreasonable. In *Forrest*, a probation condition which prohibited any alcohol consumption for an accused who has a history of drinking to excess was held to be unrealistic and invited a breach. Probation conditions are part of sentencing where the accused has already been convicted and is no longer under the presumption of innocence (*Proulx*). Bail conditions during the pre-trial stage where the accused is presumed innocent should be less restrictive and more individually tailored to the accused's circumstances (*Zora*).

> *R v Forrest*, [1992] BCWLD 811 at para 14, 10 BCAC 293 (BCCA) [*Forrest*].
> *R v Proulx*, *supra* para 24 at paras 31–33.
> *Zora*, *supra* para 15 at para 85–88.

[32] As a consequence, the bail judge's failure to tailor the conditions to Mr. Chaudhry's circumstances criminalize inherently lawful behaviour. Mr. Chaudhry's bail conditions cover a wide range of actions that have no relation to public safety and invite a breach due to their breadth. He cannot dine at a restaurant *even if* he does not consume alcohol. He cannot enjoy a glass of wine at a friend's house. He cannot even purchase certain over-the-counter medicine if they contain alcohol. In *AT*, a prohibition from entering licensed establishments invited a breach

as almost every restaurant in the city served alcohol. The condition was revised to state that the accused shall not be intoxicated in public.

R v A(T), 2003 BCCA 218 at paras 6–7 [*AT*].

3. The bail conditions are not the least onerous.

[33] The bail conditions' cumulative effect needs to be the least onerous in the circumstances. The court must abide by the principles of restraint to uphold the presumption of innocence (*Zora*). The ladder principle in this stage of the analysis prevents a judge from imposing a more restrictive form of release unless necessary and requires a judge to justify why a more restrictive condition is appropriate (*Antic*, *Criminal Code*). The bail and review judges erred when imposing the bail conditions as they did not properly consider vulnerability factors or justified why their decision was the least onerous.

Zora, *supra* para 15 at paras 89, 101.
R v Antic, 2017 SCC 27 at para 67.
Criminal Code, *supra* para 4 s 493.1.

a. *Mr. Chaudhry belongs to a vulnerable group.*

[34] A judge must give particular attention to an accused who belongs to a "vulnerable population that is overrepresented in the criminal justice system and disadvantaged in obtaining release" (*Zora*, *Criminal Code*). The judge must create conditions considering these factors so that the accused can comply (*Zora*).

Zora, *supra* para 15 at paras 26, 92.
Criminal Code, *supra* para 4 s 493.2.

[35] AUD is a recognized mental disorder that places those suffering in a vulnerable position. Criminalization of substance use disorders from unreasonable bail conditions contributes to overcrowding in remand centres indicating an overrepresentation in the criminal justice system (*Zora*). The Supreme Court of Canada (SCC) recognizes the connection between involvement in

the criminal justice system and vulnerability due to homelessness, poverty, cognitive disorders, and addiction (*Boudreault*). Mr. Chaudhry, who is South Asian (Clarifications), belongs to a visible minority group which the SCC affirms is at particular risk within the criminal justice system (*Le*). When imposing bail conditions on an individual with a severe substance use disorder, the judge must be attuned to their living conditions and intersectional factors which point to vulnerability and make sufficient accommodations to ensure the accused is reasonably able to comply.

> *R v Boudreault*, 2018 SCC 58 at para 3 [*Boudreault*].
> Clarifications, *supra* para 5 at para 6.
> *R v Le*, 2019 SCC 34 at para 87.

b. *The bail judge failed to consider his vulnerability.*

[36] The bail and review judges failed to consider the impact of their conditions on Mr. Chaudhry given his living conditions, severe AUD, and vulnerability. They failed the ladder principle as they did not provide a reasoned justification on why the conditions were the least onerous (Clarifications). The result of this error is that Mr. Chaudhry is criminalized for consuming alcohol as the only method to manage his severe AUD is to consume outside his home. Losing the support of his mother, who requires him to stay abstinent as a condition for that support, is not an option. Her support is necessary to get his life back on track (Official Problem). Bail conditions are "unconstitutional where the defendants' personal circumstances severely restrict their freedom of choice whether to comply with those conditions" (Hannaford).

> Clarifications, *supra* para 5 at para 5.
> Alanna Hannaford, "Issues Surrounding Pre-Conviction Abstention Conditions on Persons Suffering from Illicit Substance Addictions", (2020) 43:5 Man LJ 39 at 53–54 [Hannaford].
> Official Problem, *supra* para 2 at 5.

Issue 3(A): A breach of s. 11(e) is not justified under the internal limits test

[37] The breach of Mr. Chaudhry's s. 11(e) right to reasonable bail cannot be justified. The overwhelming majority of cases dealing with a s. 11(e) breach have never been justified under s. 1 (*Pearson, Morales, Antic, Zora*). Justification is inherently internal to the analysis. The requirement that bail is minimal in number, necessary, reasonable, the least onerous, and sufficiently linked to the statutory purpose suggest an internal justification consistent with other criminal procedural rights involving judicial discretion which are protected by the *Charter*. Sentencing decisions that engage s. 12 of the *Charter* are internally justified by a disproportionality test (*Lloyd*). Trial delays that engage s. 11(b) are justified by an internal reasonability analysis (*Jordan*).

> *Pearson*, *supra* para 14.
> *R v Morales*, [1992] 3 SCR 711 at para 20, [1992] SCJ No 98 [*Morales*].
> *Antic*, *supra* para 33.
> *Zora*, *supra* para 15.
> *R v Jordan*, 2016 SCC 27 at paras 197–206 [*Jordan*].
> *R v Lloyd*, 2016 SCC 13 at paras 22–24 [*Lloyd*].

[38] The consideration for the necessity and reasonableness of bail conditions also serves a justificatory purpose as they consider the proportionality of the impact on the accused against the risk he poses without the condition (*Zora*). "Section 11(e) of the Charter internally balances the competing interests of protecting the public and protecting the liberty of the accused" (*Sahaluk*). The impact on Mr. Chaudhry is disproportionate to the goal of protecting public safety because the state criminalizes and removes the supports and means necessary to manage his severe AUD without establishing why they are necessary. A breach of s. 11(e) also indicates a violation of the presumption of innocence and reinforces the disproportionate impact on Mr. Chaudhry (*Zora*).

> *Zora*, *supra* para 15 at paras 20, 98–99.
> *Sahaluk v Alberta (Transportation Safety Board)*, 2017 ABCA 153 at para 108 [*Sahaluk*].

Issue 2: The conditions infringe Mr. Chaudhry's s. 15 *Charter* rights

[39] To prove s. 15 disrimination, claimants must show state conduct "creates a distinction based on a protected ground" and "perpetuates, reinforces or exacerbates disadvantage" (*Fraser*).

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

[40] The conditions draw a distinction in effects by placing a disproportionate burden on Mr. Chaudhry due to his disability. Contributing to criminalization, stigma, social isolation, and health risk, the conditions exacerbate his disadvantage as a person with severe AUD.

1. Alcohol use disorder is a disability protected under s. 15

[41] AUD fits within the s. 15 *Charter* conception of disability. It is already widely recognized as a disability in the human rights context. The High Court of the Dominion of Canada should restore Justice Hooper's finding that AUD is a disability under s. 15 of the *Charter*.

a. *Alcohol use disorder falls under the Charter conception of disability*

[42] AUD has achieved initial recognition as a disability in the s. 15 context (*Pickup*). Based on the s. 15 jurisprudence on disability, that approach should be affirmed here.

> *R v Pickup*, 2009 ONCJ 608 at para 32 [*Pickup*].

[43] The SCC conceptualizes disability based on medical impairment as well as social and economic marginalization (McColl). With respect to medical impairment, AUD is a "disorder of the brain as much as any other neurological or psychiatric illness" (Official Problem). The SCC considers substance use disorders to be mental illnesses (*Zora*).

> Mary Ann McColl et al, "People with Disabilities and the Charter: Disability rights at the Supreme Court of Canada under the Charter of Rights and Freedoms" (2016) 5:1 Can J Disability Studies 183 at 200–201 [McColl].
> Official Problem, *supra* para 2 at 6.
> *Zora*, *supra* para 15 at para 92.

[44] With respect to experiences of marginalization, "addiction is a disability that carries with it great social stigma" (*Tranchemontagne*). Like the claimants in *Tranchemontagne*, Mr. Chaudhry has struggled to hold a job due to his severe AUD (Official Problem). This corresponds with the s. 15 understanding of disability: "[p]eople with mental illnesses face persistent stigma and prejudicial treatment in Canadian society" (*Ontario v G*). *Eldridge* also lists exclusion from the labour force as a form of disadvantage faced by persons with disabilities.

> *Tranchemontagne*, *supra* para 2 at para 126.
> Official Problem, *supra* para 2 at 4.
> *Ontario (Attorney General) v G*, 2020 SCC 38 at para 1 [*Ontario v G*].
> *Eldridge v British Columbia (Attorney General)*, [1997] 3 SCR 624 at 668, 151 DLR (4th) 577 [*Eldridge*].

[45] Justice Schaefer of the Court of Appeal erred in finding that because "addiction is a temporary condition", it does not warrant *Charter* protection (Official Problem). In *Granovsky*, the SCC ruled that temporary disability is protected under s. 15. The *Charter* protects identities that are immutable or constructively immutable (*Corbiere*). *Granovsky* found temporary disability to be constructively immutable: "though *temporary* disability is not, by definition, immutable in the sense of unchangeable, it is clearly a characteristic that is unchangeable for its duration, and entirely outside the control of the individual thus burdened." Mr. Chaudhry's condition is "unchangeable for its duration" and therefore falls under the *Charter* conception of disability from *Granovsky*. Further, the Ontario Court of Appeal found that even a person who is medically considered to have recovered from alcohol dependence may be subjected to discrimination (*Entrop*). AUD can therefore have lifelong consequences, even after recovery.

> Official Problem, *supra* para 2 at 9.
> *Granovsky v Canada (Minister of Employment and Immigration)*, 2000 SCC 28 at para 53 [*Granovsky*].
> *Corbiere v Canada (Minister of Northern Affairs)*, [1999] 2 SCR 203 at para 13, 173 DLR (4th) 1 [*Corbiere*].
> *Entrop v Imperial Oil Limited*, 2000 CanLII 16800 (ONCA), 50 OR (3d) 18 [*Entrop*].

[46] To suggest, as did Justice Schaefer of the Court of Appeal, that AUD does not deserve s. 15 protection because some people "voluntarily overcome" it is based on harmful stereotypes about this medically-recognized condition. Gascon J in dissent in *Stewart* noted the "stigmas surrounding drug dependence — like the belief that individuals suffering from it are the authors of their own misfortune… — sometimes impair the ability of courts" to objectively assess claims. Mr. Chaudhry has on five occasions undertaken rehabilitative treatment for his AUD but each time eventually relapsed (Official Problem). His challenge in overcoming his condition is directly connected to his "chronic relapsing brain disorder" (Official Problem), which should be treated as a *Charter*-protected disability, not a personal failure deserving punishment.

> Official Problem, *supra* para 2 at 9.
> *Stewart v Elk Valley Coal Corp*, 2017 SCC 30 at para 58 [*Stewart*].

[47] The stereotypes about AUD are similar to those about chronic pain, which is a recognized s. 15 *Charter* disability (*Martin & Laseur*). Chronic pain sufferers experience the stereotype that they do "not suffer from a legitimate medical condition but… that their pain stems from weakness of character" (*Martin & Laseur*). *Martin & Laseur* held that excluding chronic pain sufferers from benefits available to other persons with disabilities ran counter to the underlying rationale of s. 15's disability protection: "to recognize the needs, capacities and circumstances of persons suffering from widely different disabilities." Excluding people disabled by AUD from s. 15 *Charter* protection similarly runs counter to that purpose by refusing to "recognize the needs, capacities and circumstances" of people with this particular disability.

> *Nova Scotia (Workers' Compensation Board) v Martin*; *Nova Scotia (Workers' Compensation Board) v Laseur*, 2003 SCC 54 at paras 86, 89 [*Martin & Laseur*].

[48] Justice Brown of the Ontario Court of Justice in *Pickup* recognized AUD as a s. 15 disability. He found Mr. Pickup's s. 15 rights were infringed because s. 255(5) of the *Criminal*

Code, which provided the option of curative treatment for people with substance use disorders in lieu of standard sentencing routes for impaired driving, was not in force in Ontario. The reason *Pickup* has not been followed subsequently is that s. 255(5)'s not-in-force status in some provinces is understood as a distinction based on province of residence instead of disability (*Alton*, *Jimmy*, *Ottaway*). *Jimmy* and *Ottaway* do not explicitly reject AUD as a s. 15 disability.

> *Pickup*, *supra* para 42.
> *R v Alton*, 1989 CanLII 7221 (ONCA), 53 CCC (3d) 252 [*Alton*].
> *R v Jimmy*, 2010 BCPC 257 [*Jimmy*].
> *R v Ottaway*, 2016 ONCJ 776 [*Ottaway*].

b. *Alcohol use disorder is recognized as a disability in the human rights context*

[49] That a characteristic is recognized by legislators and jurists as warranting protection in the human rights context suggests it also warrants protection under the *Charter* (*Miron*). Human rights codes are "aimed at the same general wrong as s. 15(1) of the *Charter*" (*Meiorin*). Section 15 aims to combat discrimination against disadvantaged groups (*Turpin, Quebec v A*).

> *Miron v Trudel*, [1995] 2 SCR 418 at 496, 124 DLR (4th) 693 [*Miron*].
> *British Columbia (Public Service Employee Relations Commission) v BCGSEU*, [1999] 3 SCR 3 at para 48, 176 DLR (4th) 1 [*Meiorin*].
> *R v Turpin*, [1989] 1 SCR 1296 at 1332, 1989 CanLII 98 [*Turpin*].
> *Quebec (Attorney General) v A*, 2013 SCC 5 at para 332 [*Quebec v A*].

[50] It would run counter to the purpose of the *Charter* to deny protection to a group that is widely recognized in the human rights jurisprudence as being subjected to discrimination. With its recognition tracing back decades (*Handfield*), alcohol addiction is firmly established as a disability under provincial human rights codes (*Stewart*, *Northern Regional Health*, *Gooding*). The *Canadian Human Rights Code* explicitly defines alcohol dependence as a disability.

> *Handfield v North Thompson School District No. 26*, [1995] BCCHRD No 4, 1995 CarswellBC 3081 [*Handfield*].
> *Stewart*, *supra* para 46 at para 3.
> *Northern Regional Health Authority v Manitoba Human Rights Commission et al*, 2017 MBCA 98 at para 82 [*Northern Regional Health*].

British Columbia (Public Service Agency) v British Columbia Government and Service Employees Union, 2008 BCCA 357 [*Gooding*].
Canadian Human Rights Code, RSC 1985, c H-6, s 25.

[51] Whereas human rights codes address individual instances of discrimination, the SCC recognizes that discrimination by the state is even more harmful: "[t]he worst oppression will result from discriminatory measures having the force of law. It is against this evil that s. 15 provides a guarantee" (*Andrews*, *Ontario v G*). It is unacceptable and contrary to the purpose of s. 15 that persons with severe AUD should have recourse against discrimination by private parties, but not against the most oppressive form of discrimination from coercive state laws.

Andrews v Law Society of British Columbia, [1989] 1 SCR 143 at 172, 56 DLR (4th) 1 [*Andrews*].
Ontario v G, *supra* para 44 at para 39.

2. The conditions draw a distinction on the basis of disability in their effects

[52] Seemingly neutral state conduct can have adverse effects based on disability (*Eldridge*). The conditions restricting alcohol use operate as "built-in headwinds" for Mr. Chaudhry due to his alcohol use disorder, drawing a distinction based on disability in their effects (*Fraser*).

Eldridge, *supra* para 44.
Fraser, *supra* para 39 at paras 53.

[53] The conditions disproportionately impact Mr. Chaudhry relative to a similar accused person without severe AUD. While mirror comparator groups are no longer required (*Withler*), the SCC has not "abandoned or proscribed" their use, but only rejected "overly rigid formalism" (*APP*). Though many criminal offences are alcohol-related, most "problem drinkers" do not suffer from severe alcohol dependence (Official Problem). Consider, therefore, another accused with the same history of alcohol-related offences as Mr. Chaudhry, but without the physical dependence and impaired ability to stop consuming alcohol despite adverse consequences that characterizes severe AUD. Faced with the same conditions, that accused person would be far

more likely to be able to comply and would suffer far less from the effort of trying. For example, that person could abstain from alcohol without suffering withdrawal symptoms.

> *Withler v Canada (Attorney General)*, 2011 SCC 12.
> *Quebec (Attorney General) v Alliance du personnel professionnel et technique de la santé et des services sociaux*, 2018 SCC 17 at para 92 [*APP*].
> Official Problem, *supra* para 2 at 6.

[54] *Capay* followed similar reasoning to find that treatment of an accused person drew a distinction in effects based on mental disability. Mr. Capay, a claimant with mental illness, was charged with murder after allegedly stabbing another inmate. He was then placed in prolonged segregation. This treatment disproportionately harmed Mr. Capay "relative to inmates without pre-existing mental health issues", infringing s. 15. Similarly, the conditions disproportionately harmed Mr. Chaudhry relative to an accused without severe AUD.

> *R v Capay*, 2019 ONSC 535 at para 476 [*Capay*].

[55] The distinction is based on Mr. Chaudhry's disability, not criminal activity. Mr. Chaudhry's case is distinguishable from human rights cases where persons with substance use disorders stole those substances from their employer (*Gooding*, *Wright*). In those cases, the employers fired the employees who had committed theft due to their criminal conduct, and did not discriminate based on disability (*Gooding*, *Wright*). In contrast, Mr. Chaudhry is charged for alcohol use itself, which is not generally prohibited. While most people with substance use disorders of course do not steal (*Wright*), most *do* consume those substances. Restrictions on alcohol use itself will have a disproportionate effect on a person with alcohol use disorder.

> *Gooding*, *supra* para 50.
> *Wright v College and Association of Registered Nurses of Alberta (Appeals Committee)*, 2012 ABCA 267 at para 64 [*Wright*].

[56] Justice Schaefer erred in considering the connection between the conditions and the state's public safety objective at the s. 15 stage (Official Problem). He incorrectly ruled out

adverse effects discrimination because "the condition targets the very behaviour… [that] has been shown to be attendant to a greater risk of reoffending" (Official Problem). However, *Fraser* confirms that a connection to a legitimate state objective is properly dealt with at s. 1. *BCCLA*, which considered whether provisions authorizing administrative segregation infringed the s. 15 rights of inmates with mental illness, provides an illustrative example. In that case, the Attorney General of Canada's safety concerns about limiting the use of segregation were not relevant at the s. 15 stage, and would properly be considered under s. 1 (*BCCLA*). Similarly, whether there was a "rational basis" for Mr. Chaudhry's bail conditions based on concern for public safety is "an inquiry properly left to s. 1" (*Fraser*), but has no bearing on the s. 15 analysis.

> Official Problem, *supra* para 2 at 9.
> *Fraser*, *supra* para 39 at para 79.
> *British Columbia Civil Liberties Association v Canada (Attorney General)*, 2019 BCCA 228 at para 226 [*BCCLA*].

[57] Further, the fact that Mr. Chaudhry retained some power of choice with respect to his conduct does not negate his s. 15 claim. "Differential treatment can be discriminatory even if it is based on choices made by the affected individual or group" (*Fraser*). Professor Skolnik has observed increased judicial acknowledgment that "personal circumstances can affect individuals' ability to comply with laws governing the proper administration of justice." This echoes *Fraser*'s understanding that choice is constrained by sociological, or in this case medical, conditions.

> *Fraser*, *supra* para 39 at para 86.
> Terry Skolnik, "Beyond Boudreault: Challenging Choice, Culpability, Punishment" (2019) 50 Criminal Reports WL Can (7th) 283 [Skolnik].

3. The conditions exacerbate Mr. Chaudhry's disadvantage as a person with AUD

[58] The second stage of the s. 15 inquiry asks "whether this adverse impact reinforces, exacerbates or perpetuates disadvantage" (*Fraser*). For Mr. Chaudhry, the conditions exacerbate

the pre-existing disadvantages he faces as a person with severe AUD by reinforcing criminalization, stigma, social isolation, and health risk.

Fraser, *supra* para 39 at para 107.

[59] As Martin J said in *Boudreault*, "addiction is not cured merely by threatening state sanction." The conditions do not correspond to "the actual need, capacity, or circumstances of the claimant" (*Law*) as they do nothing to address Mr. Chaudhry's underlying AUD. Instead, the conditions impose a risk of criminal liability each time he leaves his home for the very behaviour associated with his disability: alcohol use itself.

Boudreault, *supra* para 35 at para 86.
Law v Canada (Minister of Employment and Immigration), [1999] 1 SCR 497 at para 88, 170 DLR (4th) 1 [*Law*].

a. *Criminalization*

[60] The conditions impose "personal sources of potential criminal liability" (*Zora*) on a person with alcohol use disorder for consuming alcohol. AUD is characterized by impaired judgment with respect to the consumption of alcohol despite adverse consequences (Official Problem). The effects of the conditions, as the trial judge found, were therefore to "criminaliz[e] his addiction anywhere but the confines of his home" (Official Problem).

Zora, *supra* para 15 at para 6.
Official Problem, *supra* para 2 at 8.

[61] Persons with severe substance use issues are already disproportionately re-admitted into custody (Official Problem). As discussed above, the conditions set Mr. Chaudhry up to fail whenever he stepped outside his home due to his severe AUD. This predictably results in further criminal sanctions. Contributing to over-incarceration is considered a harm relevant to s. 15. For example, *Sharma* found that state conduct which reinforced the over-incarceration of Indigenous persons ran afoul of s. 15. Breaches of bail conditions in particular can "create a cycle of

incarceration" for vulnerable people, where an initial breach leads to harsher bail conditions and further breach charges (*Zora*). This criminalization has reverberating effects on all aspects of a person's life, including housing, employment, and personal relationships (*Zora*).

> Official Problem, *supra* para 2 at 8.
> *R v Sharma*, 2020 ONCA 478 [*Sharma*].
> *Zora*, *supra* para 15 at paras 5, 54–57, 62.

b. *Stigma*

[62] "It is well known that addicts… have been, and continue to be, the subjects of stigma and prejudice" (*Tranchemontagne*). One manifestation of this stigma is the harmful view that AUD is "the result of some deliberate act or weakness of character rather than a disease" (*Browning*).

> *Tranchemontagne*, *supra* para 2 at para 121.
> *Saskatchewan (Department of Finance) v Saskatchewan (Human Rights Commission)*, 2004 SKCA 134 at para 21 [*Browning*].

[63] To impose criminal liability on Mr. Chaudhry for alcohol consumption everywhere but his home assigns moral blameworthiness to him for his disability. It is well-established that the criminal law punishes morally blameworthy conduct, resulting in stigma (*Creighton, Ruzic*). The conditions criminalize alcohol consumption and even possession, conduct that is inextricably tied to Mr. Chaudhry's disability, which is defined by consumption despite adverse consequences (Official Problem). This criminalization therefore reinforces the stigma Mr. Chaudhry already faces as a person with AUD, that he is morally blameworthy for his alcohol use. Stigmatization undermines human dignity, the core interest s. 15 seeks to protect (*Law*).

> *R v Creighton*, [1993] 3 SCR 3, 105 DLR (4th) 632 [*Creighton*].
> *Ruzic*, *supra* para 25 at para 47.
> *Law*, *supra* para 59 at para 48.

c. *Social isolation*

[64] "Persons with disabilities have too often been excluded from the labour force [and] denied access to meaningful opportunities for social interaction" (*Eldridge*). This is true for persons disabled by severe AUD. In *Tranchemontagne*, the claimants were unemployed and alienated from family due to their AUD. Mr. Chaudhry is similarly unable to participate in the labour force, and therefore lacks that form of social integration.

> *Eldridge*, *supra* para 44 at para 56.
> *Tranchemontagne*, *supra* para 2.

[65] Due to his severe AUD, the conditions effectively confine Mr. Chaudhry to his home. Mr. Chaudhry cannot go long without running the risk of consuming alcohol, meaning the very act of leaving his home exposes him to criminal consequences. This effective home confinement reinforces his social isolation. Social isolation is recognized as a form of marginalization faced by persons with disabilities, who were historically "relegated to institutions" and removed from the public sphere (*Eldridge*).

> Official Problem, *supra* para 2 at 5.
> *Eldridge*, *supra* para 44 at 668.

d. *Health and safety risk*

[66] Considering the "nature of the interest", as directed in *Law*, Mr. Chaudhry's physical health is clearly a fundamental interest. Risks to health engage both physical and psychological security of the person (*Chaoulli*; *Morgentaller*).

> *Law*, *supra* para 59 at para 74.
> *Chaoulli v Quebec (Attorney General)*, 2005 SCC 35 at para 119 [*Chaoulli*].
> *R v Morgentaler*, [1988] 1 SCR 30, [1988] SCJ No 1 at 59 [*Morgentaler*].

[67] The conditions endanger Mr. Chaudhry's health, amplifying his risks as a person struggling with severe AUD. To comply, either Mr. Chaudhry needed to consume in his home,

reducing his access to community supports, or he needed to attempt to abstain from alcohol altogether. Either choice put his health and safety at risk.

[68] *PHS* found that removing access to supervised consumption posed risks to the lives of addicted persons. Similarly, forcing Mr. Chaudhry to consume at home, where he is more likely to be alone, puts him at greater risk by removing access to supervision while he consumes, such as staff at a licensed establishment who could call an ambulance in the event of a health crisis.

PHS, *supra* para 29.

[69] If Mr. Chaudhry instead chose to attempt to abstain in order to maintain his mother's support, as he did, he would be subjected to physical pain and risk of seizures. *Denny* acknowledged the risk to life and health posed by forcing a person with AUD to go through withdrawal without providing access to treatment. *Carter* (BCSC) found a criminal prohibition which forced disabled persons to experience severe pain infringed s. 15.

Denny, *supra* para 37 at para 18.
Carter v Canada (Attorney General), 2012 BCSC 886 [*Carter* (BCSC)].

Issue 3(B): The s. 15 infringement cannot be justified

[70] The conditions are not minimally impairing and their detrimental impact far outweighs any illusory benefits. Accordingly, the infringement of Mr. Chaudhry's rights cannot be justified.

1. The proper test

[71] This case raises the issue of the appropriate justification framework where a judge's decision on bail conditions infringes s. 15. Though stemming from a discretionary decision, bail conditions create new crimes, and therefore demand a full and rigorous *Oakes* analysis.

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

[72] Similar to Parliament's role in crafting *Criminal Code* offences, judges crafting bail conditions define wrongful conduct which gives rise to criminal liability. Bail conditions are

"personal sources of potential criminal liability", which "become criminal offences under s. 145(3)" (*Zora*). The conditions define the prohibited conduct, or *actus reus*, that constitutes an offence under s. 145(3), similar to how probation conditions define an offence under s. 733.1. Whether the accused person has committed this *actus reus*, for example consuming alcohol in a drinking establishment, must be proved based on evidence, just as the *actus reus* would for an offence of general application, like impaired driving (*Shoker*).

> *Zora*, *supra* para 15 at paras 6, 82.
> *Criminal Code*, *supra* para 10, ss 145(3), 733.1.
> *R v Shoker*, 2006 SCC 44 at para 20 [*Shoker*].

[73] The criminal law context, where the state is "the singular antagonist of the individual whose right has been infringed", demands a particularly rigorous justification approach (*Irwin Toy*). In contrast, the *Doré* framework has been criticized for providing weaker protection for *Charter* rights in the administrative law context, and replacing the primacy of "rights" with vague reference to *Charter* "values" (Macklin). It would be dangerous to adopt this approach which would diminish the *Charter* rights of an accused person facing criminal sanction.

> *Irwin Toy Ltd v Quebec (Attorney General)*, [1989] 1 SCR 927 at 994, 58 DLR (4th) 577 [*Irwin Toy*].
> *Doré v Barreau du Québec*, 2012 SCC 12 [*Doré*].
> A Macklin, "Charter Right or Charter-Lite? Administrative Discretion and the Charter" (2014), 67 SCLR (2d) 561 [Macklin].

[74] *Doré* created a proportionality framework to reconcile *Charter* review with administrative law principles. However, Mr. Chaudhry is not a judicial review applicant. The bail judge was not an administrative decision-maker. "Notwithstanding that provincial courts are statutory bodies", Provincial Court judges are members of the judiciary, not the executive [*Provincial Judges Reference*]. Unlike administrative decision-makers, bail judges create new crimes, a context which demands a more rigorous review to defend the rights of accused persons.

Doré, *supra* para 73 at paras 3–5.
Reference re Remuneration of Judges of the Provincial Court (P.E.I.), [1997] 3 SCR 3 at paras 126–127, 150 DLR (4th) 577 [*Provincial Judges Reference*].

[75] As the Crown has charged Mr. Chaudhry for breaching conditions that infringe his *Charter* rights, it must bear the burden of proving the offending conditions are demonstrably justified. Whereas *Doré* may place the burden on the claimant to prove disproportionality (Liston), *Oakes* demands that the Crown justifies the incursion, as is required here.

M Liston, "Administering the *Charter*, Proportioning Justice: Thirty-five Years of Development in a Nutshell" (2017), 30 Can J Admin L & Prac 211 at 222 [Liston].
Oakes, *supra* para 71 at 136–137.

[76] Despite the assertion in *Doré*, the *Oakes* test is workable for discretionary decisions, as evidenced by the many times it has so been used (*Slaight*; *Multani*). *Rogers* confirmed that s. 1 applies to exercises of judicial discretion in the criminal context. While the probation order in *Rogers* had public protection as its objective, it failed under s. 1 because less impairing options were available.

Doré, *supra* para 73 at para 37.
Slaight Communications Inc v Davidson, [1989] 1 SCR 1038, 59 DLR (4th) 416 [*Slaight*].
Multani v Commission scolaire Marguerite-Bourgeoys, 2006 SCC 6 at paras 42–79 [*Multani*].
R v Rogers, 1990 CanLII 432 (BCCA) at para 14, 2 CR (4th) 192 [*Rogers*].

2. The infringement cannot be upheld under Oakes

[77] The first stage of the *Oakes* test requires a "pressing and substantial objective." The protection of public safety is such an objective. However, the conditions fail at the second, or proportionality, stage.

[78] The prohibition on entering a licensed establishment is not minimally impairing. Conditions that are overbroad are unlikely to be minimally impairing (*Heywood*). Like in *Heywood*, the condition that Mr. Chaudhry not enter any licensed establishment is "overly broad

in its geographic ambit" and therefore not minimally impairing. The alleged assault for which Mr. Chaudhry was charged occurred at a bar and late at night (after 10 p.m., the time of his curfew per another condition of his bail). To prohibit Mr. Chaudhry from eating breakfast at a restaurant, simply because that establishment may serve alcohol, has no connection to the public safety objective. There is no evidence to suggest that Mr. Chaudhry poses a public safety risk for being in an establishment whose primary purpose is not to serve alcohol, and at a time of day when no one around him is likely to be consuming alcohol.

R v Heywood, [1994] 3 SCR 761 at 794-795, 120 DLR (4th) 348 [*Heywood*].

[79] The prohibition on possessing or consuming alcohol outside the confines of his home is also not minimally impairing. In *Sahaluk*, the automatic license suspension for persons accused of driving under the influence was not minimally impairing because alternate options were available, such as an ignition interlock program, that were more tailored to the particular public safety risk, with a less severe impact on the liberty of the accused. Similarly, more tailored and less impairing conditions were available for Mr. Chaudhry.

Sahaluk, *supra* para 38 at para 142.

[80] To prohibit Mr Chaudhry from possessing alcohol outside the home, even when he does not consume it, is overbroad and not minimally impairing. Even if Mr. Chaudhry's risk of reoffending is tied to consumption, it certainly is not tied to his merely walking home from the liquor store with his purchase. Further, even a prohibition on consuming alcohol in public would have been less impairing, as Mr. Chaudhry could at least visit the residences of family or friends without risking breaching his conditions. As the Crown's public safety concern relates to Mr. Chaudhry's excessive intoxication, bail conditions properly tailored to that particular risk might prohibit his being severely intoxicated in a public, except for seeking emergency care.

[81] Additionally, the harmful effects of the infringement of Mr. Chaudhry's rights far outweigh any marginal benefits. Conditions that severely impact the claimant's liberty and security of the person, but with only "marginal and speculative" societal benefits, will fail at the proportionality of effects stage (*KRJ*). The conditions exacerbate risks to Mr. Chaudhry's health, and further stigmatize and marginalize him as a person with severe AUD. Meanwhile, the public safety benefits are speculative and inflated. The many years elapsed since Mr. Chaudhry's previous convictions point to a low likelihood that he would commit another offence while on bail.

R v KRJ, 2020 SCC 31 at paras 91–92 [*KRJ*].

3. The infringement should also not be upheld under Doré

[82] In the alternative, if the *Doré* framework is used, the conditions are not proportionate. The majority in *Loyola* held that *Doré* effectively considers minimal impairment and balancing in the requirement that the state conduct infringe the *Charter* "as little as reasonably possible in light of the state's particular objectives." Accordingly, as the conditions are not minimally impairing and disproportionately harmed the accused, they cannot be upheld under *Doré*.

Doré, *supra* para 75.
Loyola High School v Quebec (Attorney General), 2015 SCC 12 at para 40 [*Loyola*].

PART V – ORDERS SOUGHT

[83] Mr. Chaudhry requests that the trial judgement be restored.

PART VI – TABLE OF STATUTES AND AUTHORITIES

Legislation	**Paragraphs**
Canadian Charter of Rights and Freedoms, Part I of the *Constitutional Act*, 1982, being Schedule B of the *Canada Act* 1982 (UK), 1982, c 11.	3
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M Liston, "Administering the *Charter*, Proportioning Justice: Thirty-five Years of Development in a Nutshell" (2017), 30 Can J Admin L & Prac. 211	75
A Macklin, "Charter Right or Charter-Lite? Administrative Discretion and the Charter" (2014), 67 SCLR (2d) 561	73
Terry Skolnik, "Beyond Boudreault: Challenging Choice, Culpability, Punishment" (2019) 50 Criminal Reports WL Can (7th) 283	57

Hamish Stewart, *Fundamental Justice: Section 7 of the Canadian Charter of Rights and Freedoms* (Toronto: Irwin Law, 2019)	25
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Gary T. Trotter, *Law of Bail in Canada*, 3rd ed (Toronto: Thomson Reuters, 2010)	19, 24

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Official Problem, Wilson Moot 2021	2, 5, 6, 7, 8, 9, 11, 12, 14, 21, 23, 26, 28, 29, 36, 43, 44, 45, 46, 53, 56, 60, 61, 65
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