



THE CHARTER CHALLENGE

Ontario Justice Education Network

CASE SCENARIO

Fall 2021

R. v. Brown

*This OJEN Charter Challenge Case Scenario has been adapted from the **2021 Wilson Moot**. The Wilson Moot was conceived to honour the outstanding contribution to Canadian law made by **the late Honourable Justice Bertha Wilson** and, in the spirit of this contribution, to promote justice for those disempowered within the legal system. The goal of The Wilson Moot is to **explore legal issues concerning women and minorities**, and thereby promote the education of students and the legal profession in these areas of pressing concern. OJEN would like to thank the organizers of the Wilson Moot, **Blake, Cassels & Graydon LLP**, for letting it adapt this law school resource for a high school audience.*

ONTARIO SUPERIOR COURT OF JUSTICE

DATE: 2021 10 12
COURT FILE No.: 112-51-974

BETWEEN:

Nino Brown

Applicant

- and -

HER MAJESTY THE QUEEN

Respondent

Reasons for Judgment

Siddiqui J.:

INTRODUCTION

1. This decision concerns bail conditions imposed on Mr. Nino Brown. Before providing my reasons and decision, some discussion of how Mr. Brown has arrived before this Court is necessary.

2. Mr. Brown is a 40-year old man residing in Peterborough, Ontario. Mr. Brown has an extensive history of criminal activity and alcoholism. In January 2021, he was arrested and charged under section 145(5) of the *Criminal Code* (the “Code”) for failing, without lawful excuse, to comply with a condition of a release order. As a defence against this charge, Mr. Brown has sought to challenge the constitutionality of the conditions of his release, on the basis that these conditions infringed his rights as guaranteed by the *Canadian Charter of Rights and Freedoms* (the “Charter”).

FACTS

3. On August 1, 2020, Constables Judd Marrow and Tracie Nelson of the Peterborough Police Service were called to a report of a fight at The Old Jack, a bar in the city’s east end, at 1:18 am. When they arrived, the police discovered that the people involved had left on foot.
4. An eyewitness described that a man matching Mr. Brown’s description had, after a verbal argument with another patron, thrown a glass beer bottle at the other patron and attacked the patron further with his fists.
5. The police found Mr. Brown sitting outside The Old Jack in a blue sedan parked nearby with the engine off. He was asked to exit the vehicle and complied; Const. Marrow approached him and immediately observed an odour of alcohol coming from Mr. Brown and that his face was flushed.

6. After being identified by the eyewitness, Mr. Brown was arrested and charged with assault with a weapon under section 267(a) of the *Code* and being in care or control of a vehicle while intoxicated contrary to section 320.14(1) of the *Code*.
7. Considering Mr. Brown's prior criminal history, the Crown opposed his release from custody on the basis that he was likely to commit further offences and that pre-trial detention was therefore necessary for the protection of the public. Following a contested bail hearing, Mr. Brown was granted interim judicial release under section 515 of the *Code*, subject to certain conditions as specified by the bail judge.
8. Section 515(4) of the *Code* provides that an accused may be required to comply with certain conditions specified in a judicial release order:

Conditions authorized

(4) When making an order under subsection (2), the justice may direct the accused to comply with one or more of the following conditions specified in the order:

(a) report at specified times to a peace officer, or other person, designated in the order;

(b) remain within a specified territorial jurisdiction;

(c) notify a peace officer or other person designated in the order of any change in their address, employment or occupation;

(d) abstain from communicating, directly or indirectly, with any victim, witness or other person identified in the order, except in accordance with any specified conditions that the justice considers necessary;

(e) abstain from going to any place or entering any geographic area specified in the order, except in accordance with any specified conditions that the justice considers necessary;

(f) deposit all their passports as specified in the order;

(g) comply with any other specified condition that the justice considers necessary to ensure the safety and security of any victim of or witness to the offence; and

(h) comply with any other reasonable conditions specified in the order that the justice considers desirable.

9. Mr. Brown's release was subject to the following conditions:

- 1- The accused will post a no cash bail of \$3000 and report to a bail supervisor within two days of release from the remand centre and thereafter as directed.
- 2- The accused will remain in the province of Ontario unless consent is granted by his bail supervisor.
- 3- The accused will not attend any licensed establishment that serves alcohol.
- 4- The accused will not possess or consume alcohol or any non-prescribed controlled substances during the term of his release, except within the confines of his home.
- 5- The accused will be subject to a curfew of 10:00 pm.
- 6- The accused will present himself at the door of his residence for any bail supervisor or peace officer who attends to confirm his compliance with his curfew.

10. On October 28, 2020, police attended at The Old Jack, a bar in Peterborough, in response to a report of a fight. Mr. Brown was at The Old Jack and generally matched the description

of one of the suspects. He was asked to provide his identification. As police investigated him, they observed that he was holding a beer and appeared to be mildly intoxicated. Police reviewed his bail terms and he was arrested under section 145(5) of the *Code* for failing to comply with the condition to not attend licenced establishments and to abstain from alcohol outside his home under the terms of his release. Upon review of the surveillance video at the scene, the officers determined that he was not involved in the fight and accordingly he was only charged with the section 145(5) offence.

11. In December 2020, after the Crown's eyewitness recanted their statement, the assault charge against Mr. Brown was dropped.
12. Mr. Brown pleaded not guilty to the charge of failure to comply with the conditions of his release. He does not dispute that he had been drinking alcohol at The Old Jack, contrary to the terms of his release. Instead, he argues that the conditions of his bail, and in particular the prohibition on possession or consumption of alcohol outside the home:
 - (a) Violate his equality rights under section 15 of the *Charter*;
 - (b) Violate his right not to be denied reasonable bail without just cause under subsection 11(e) of the *Charter*; and
 - (c) Are not reasonable limits prescribed by law that can be demonstrably justified in a free and democratic society, per section 1 of the *Charter*.

FINDINGS

13. I make the following findings of fact:
 - (a) For most of his adult life, Mr. Brown has struggled with alcoholism.

- (b) Mr. Brown was raised in Peterborough. He describes his childhood as “normal” and “uneventful”, and states that he was raised in a strict, but loving and supportive home.
- (c) Alcohol did not have a large role in Mr. Brown’s upbringing. He describes his parents as occasional social drinkers who did not keep alcohol in the home regularly during his childhood and adolescence.
- (d) Mr. Brown began drinking alcohol with friends when he was twelve or thirteen years old. He says that he “experimented” with other drugs during his teenage years and twenties, but alcohol is the drug that he uses most consistently.
- (e) Mr. Brown has a degree in computer science from Trent University and has worked intermittently as a programmer since graduation.
- (f) Mr. Brown believes that his relationship with alcohol and other substances first became problematic in university when living on his own for the first time. While initially only a social drinker, he soon began to drink more heavily, realizing that no one was monitoring his consumption or preventing him from drinking throughout the week. He found that having a few drinks made it easier to get through his classes, and also found that his marks did not suffer as a result. He stated this was the time his drinking first became a habit.
- (g) Following university, Mr. Brown was able to get a job at a tech startup in downtown Peterborough. However, his alcohol use soon disrupted his career; he was fired from his first job when he was caught drinking at his desk in the middle of the afternoon. This began a pattern of similar self-destructive behaviour; he estimates that he has been fired from four or five different jobs as a result of issues related to his alcohol use.
- (h) By the time he was 25 years old, Mr. Brown stated it was not uncommon that he would buy two or three 26-ounce bottles of vodka and binge drink their contents by himself over the course of a weekend. He referred to this practice as his “weekend getaways”.
- (i) Mr. Brown has three previous criminal convictions: for operating a motor vehicle while impaired, possession of a prohibited substance, and assault causing bodily harm. His first criminal conviction came in 2005 at the age of 23, when he was pulled over during a routine traffic stop and observed to be intoxicated, blowing 0.09 on a breathalyzer test. He pleaded guilty and was fined \$800.

- (j) In 2013, Mr. Brown was charged with possession of cocaine after he was arrested for being drunk and disorderly outside the residence of his then-boyfriend. He was searched and the drugs were found in his pocket. He again pleaded guilty and served a 6-month suspended sentence.
- (k) In 2018, Mr. Brown was arrested and charged with assaulting his then-boyfriend after they got into a fight while exiting a bar in East Peterborough. Mr. Brown was drunk at the time of his arrest, was found guilty of assault causing bodily harm, and served an 18-month conditional sentence.
- (l) I note that while these convictions span nearly fifteen years, alcohol was an apparent factor in each crime. Mr. Brown has also been arrested three times during that period for causing a disturbance by being drunk, although none of those incidents led to convictions.
- (m) On at least five separate occasions, Mr. Brown has checked himself into rehabilitation programs for alcohol addiction. These efforts have met with some success; however, he has ultimately always relapsed and resumed drinking.
- i. His first attempt was in 2005, shortly after his drunk driving conviction, and his parents paid for him to attend a private rehabilitation centre in Kawartha Lakes. Mr. Brown stayed sober for over five months after his time at the centre. However, he met a new romantic partner around that time and relapsed shortly thereafter.
- ii. Mr. Brown made a second attempt at sobriety on his own in 2012 by going “cold turkey”. However, he found that the symptoms of withdrawal (vomiting, tremors, insomnia and migraines) were so severe that he could not make it into work. After running out of sick days Mr. Brown tried rationing himself alcohol as a form of self-medication, and ultimately relapsed entirely.
- iii. Mr. Brown again sought professional treatment following his conviction in 2018 as a condition of his sentence. He managed to remain sober for ten months before ultimately relapsing again.
- (n) Following his arrest, Mr. Brown’s mother Vanessa came to live with him to support him and help ensure that he complied with the conditions of his release. She helped him to meet his curfew, cleaned the apartment, and cooked meals for him.
- (o) Mr. Brown’s long-term boyfriend, Wesley, also moved into his apartment shortly after his release, in order to provide stability and emotional support.
14. Mr. Brown testified in his own defence, stating in part:

I have made a lot of mistakes in my life, and I have seen how those mistakes hurt me and the people I love. I understand that I have to own up for my actions, and have paid my debts to the people I have hurt. I have tried many times to quit drinking, and to change that part of my life for the better.

The first weeks at home after my release were not like the times in rehab before. I was in constant pain. I couldn't sleep, and everything hurt. Physically, I have never felt worse in my life. I often thought of death. My mother called an ambulance at one point because I collapsed in the living room and she thought I was having a seizure.

I know I could have had a drink at the house legally, but my mother was staying with me. She was very very concerned about helping me get my life back on track. Although she helped me a lot, in exchange for her assistance and support, she also forbade me from drinking while she was in the house. I did not want to disappoint her by bringing alcohol into the home against her wishes.

I had every intention of following my bail order conditions. I admit I was drinking at The Old Jack when I spoke to the officers that evening. 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.

15. I have heard, and accept, expert opinion evidence from Dr. Christine Rock, a psychiatrist and researcher at the Centre for Addiction and Mental Health in Toronto, as follows:

(p) Alcohol is the most commonly used drug among Canadians. In 2017, 78% (23.3 million) of Canadians reported consuming an alcoholic beverage in the past year, virtually unchanged from 2015 (77% or 22.7 million).

(q) In 2018, 19.1% of Canadians aged 12 and older (roughly 5.9 million people) reported alcohol consumption that classified them as heavy drinkers.

(r) Most alcohol-related illnesses, social problems, accidents, and deaths are caused by “problem drinking,” which causes problems in a person’s life, but does not include physical dependence, one indicator of addiction. Problem drinking is four times as common as severe physical dependence on alcohol.

(s) Physical dependence involves tolerance to alcohol’s effects, which means people need more alcohol to produce the desired effect. Physical dependence also includes withdrawal symptoms when regular alcohol use is abruptly stopped.

(t) People who are physically dependent on alcohol can develop withdrawal symptoms such as sleeplessness, tremors, nausea, and seizures within a few hours after their last drink. Symptoms can range from mild to severe and last two to seven days.

(u) The risk of developing alcoholism depends on many factors, including an individual’s environment. Persons with a family history of alcoholism or alcohol abuse are more likely to abuse alcohol themselves.

(v) In 2004, the World Health Organization recognized that “with recent advances in neuroscience, it is clear that dependence is as much a disorder of the brain as any other neurological or psychiatric illness.”

(w) The *Diagnostic and Statistical Manual of Mental Disorders* (DSM), published by the American Psychiatry Association, lists “alcohol use disorder” (AUD) as a distinct disorder, and lists eleven diagnostic criteria for the disorder.

(x) According to the DSM, anyone meeting any two of the eleven criteria during the same 12-month period receives a diagnosis of AUD. The severity of AUD – mild, moderate, or severe – is based on the number of criteria met.

(y) The American National Institute on Alcohol Abuse and Alcoholism describes AUD as “chronic relapsing brain disorder characterized by an impaired ability to stop or control alcohol use despite adverse social, occupational, or health consequences.” In other words, addiction triggers chemical changes in an individual’s brain, which result in a transition from voluntary to compulsive drug use. This affects the brain’s natural inhibition and reward centers, causing the addicted person to use drugs in spite of the adverse health, social, and legal consequences.

16. Dr. Rock opined that, based on Mr. Brown’s drinking habits, he meets all of the diagnostic criteria for AUD. Accordingly, Dr. Rock opined that Mr. Brown’s diagnosis is one of severe AUD, and his behaviour is consistent with a physical dependence upon alcohol.
17. On cross-examination, Dr. Rock conceded that the disease theory of alcoholism is dated and not universally accepted within medical practice. She agreed that alcohol abuse involves choice and learned behaviours, not total loss of control. However, Dr. Rock maintained that AUD has an observable neurochemical impact on the brain and should be recognized alongside other disorders of the brain for the purposes of research and treatment.
18. The office of the Attorney General of Canada intervened and provided evidence and submissions regarding the law of bail at Mr. Brown’s trial. I accept the intervenor’s evidence regarding the purpose, fundamental principles, and scientific data that inform the law of bail in Canada:

(a) The right not to be denied reasonable bail absent just cause is an essential element of the Canadian criminal justice system. It safeguards the presumption of innocence and the liberty of accused persons at the pre-trial stage of the criminal trial process.

(b) Bail conditions are intended to be particularized standards of behavior designed to curtail statutorily identified risks posed by a particular person. Conditions must be linked to the bases for denying bail in section 515(10) of the *Code*: to ensure that the accused will attend court, to protect the public, or to maintain confidence in the administration of justice.

(c) Ensuring the security and safety of victims and witnesses is an essential part of the decision-making process. If a court is considering judicial interim release with respect to an offence involving actual, threatened, or attempted violence against a person, the court must consider whether conditions that ensure the safety and security of any victim should be imposed as part of a release order.

(d) In accordance with these principles, Crown policy is to seek bail conditions requiring total abstinence from substance use only for accused with particular risk profiles, on the basis of scientific data, or where the conditions may further the goal of rehabilitation. In oral argument, counsel for the Attorney General of Canada acknowledged that there is no data regarding compliance of individual Crown counsel with this general policy.

(e) Studies published in *the Journal of Criminal Justice* and *Drug and Alcohol Dependence* have concluded that offenders' alcohol problems are the strongest predictor of future recidivism, and that a previous conviction for drunken driving strongly predicted DUI recidivism.

(f) For individuals with substance abuse issues, substance abuse can be directly linked to criminal behaviour and reoffending. A study conducted in New Zealand from 2005 to 2015, found that 19% of persons released on bail committed another offence while on release, and that the rate of recidivism was nearly double in persons with substance abuse issues who relapse while on release.

(g) A 2015 study by Corrections Canada found that the severity of offenders' substance abuse issues correlated strongly with their rate of readmission into custody, with 44% of persons who had "severe" substance abuse issues being readmitted into custody (for any

reason). The study also found the risk of criminal recidivism was further increased where the offender's crimes are directly linked to their substance abuse.

19. The Crown urges this Court to consider that Mr. Brown is charged with committing a violent crime while under the influence of alcohol and that his criminal history demonstrates a propensity for committing crimes while under the influence of alcohol. In the Crown's view, abstention from alcohol outside the home was a reasonable condition, sufficiently linked to the goal of protecting the public under section 515(10) of the *Criminal Code*, and thus not a violation of his section 11(e) right to reasonable bail.
20. The Crown further submits that Mr. Brown's equality rights have not been infringed upon, because section 15 protects against discrimination based on characteristics that are immutable or changeable only at unacceptable cost to personal identity. The Crown argues that since many people voluntarily overcome alcohol use disorder, it is cannot be an immutable condition within the meaning of the *Charter*.
21. I am not persuaded to this view. I accept, based on the medical and social science evidence before me, that the accused suffers from alcohol use disorder, and that alcohol use disorder is a disability for the purposes of section 15 of the *Charter*. I note this disability is generally recognized within human rights jurisprudence. The accused suffers from a condition that interferes with his effective physical, social, and psychological functioning. Conditions 3 and 4, while neutral on their face, have a disproportionate effect on the claimant as a result of his disability. In my view, they arbitrarily perpetuate his disadvantage by criminalizing behaviour to which he is predisposed due to disability. A bail condition that

places an accused in jeopardy because of a disability is not reasonable within the meaning of section 11(e).

22. Accordingly, I hold that the conditions of Mr. Brown's release violate his equality rights under section 15 of the *Charter*. The law is clear that the conditions imposed under section 515(4) of the *Code* must be minimal, necessary, reasonable, the least onerous in the circumstances, and sufficiently connected to a risk listed in section 515(10). The default position of the court must be unconditional release unless the need for a condition is demonstrated. While I accept that the accused has a history of violence and criminal behaviour connected to his abuse of alcohol, I cannot conclude that a prohibition condition that effectively criminalizes his addiction anywhere but the confines of his home is demonstrably necessary in these circumstances. The conditions imposed upon Mr. Brown's release were unreasonable and violate his right to reasonable bail. These infringements cannot be justified in a free and democratic society, and hence are not saved by section 1 of the *Charter*.

SIDDIQUI J.

ISSUES ON APPEAL

- I. Do the bail conditions imposed under s. 515(4) of the *Criminal Code* violate Mr. Brown’s right to reasonable bail as set out in s. 11(e) of the *Charter*?

- II. Do the bail conditions imposed under s. 515(4) of the *Criminal Code* violate Mr. Brown’s equality rights as a person with a disability under s. 15 of the *Charter*?

- III. If the answer to either of the above questions is “yes”, can such infringement be demonstrably justified in a free and democratic society?