SCC File No. _____

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

B E T W E E N:

HER MAJESTY THE QUEEN

Applicant
(Respondent)

-and-

DAVID SULLIVAN

Respondent
(Appellant)

AND

HER MAJESTY THE QUEEN

Applicant
(Respondent)

-and-

THOMAS CHAN

Respondent
(Appellant)

MEMORANDUM OF ARGUMENT OF THE APPLICANT, HER MAJESTY THE QUEEN

(Pursuant to Rule 25(1) of the *Rules of the Supreme Court of Canada*, SOR/2002-156)

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PART I – OVERVIEW AND STATEMENT OF FACTS

A. Overview

1. This application for leave to appeal raises a pressing issue of constitutional law and legal policy in Canada: whether Parliament can use its criminal-law power to protect victims of crime – particularly women and children – from violence committed by persons in states of extreme, self-induced intoxication. As Lauwers J.A. observed in his concurring reasons in the court below, "[t]he core competency of Parliament over the criminal law is implicated deeply in these appeals."[1]

2. In 1995, Parliament enacted s. 33.1 of the *Criminal Code*, which closed a gap in the criminal law's protection that had been opened by this Court's decision in *R. v. Daviault*.[2] Section 33.1 codified "[c]riminal fault by reason of intoxication". The section provides that if a person (*i*) enters "a state of self-induced intoxication that renders the person unaware of, or incapable of consciously controlling, their behaviour", and (*ii*) commits a violent offence in that state, liability cannot be avoided on the basis that the violent act was unintended or involuntary.[3] In *Daviault*, the Court struck down an analogous common-law rule, holding that "the mental element of voluntariness is a fundamental aspect of the crime which cannot be taken away by a judicially developed policy" and that "it is always open to Parliament to … make it a crime to commit a prohibited act while drunk". Parliament did so by enacting s. 33.1. The constitutionality of that response has remained uncertain for the past 25 years. The application at bar seeks leave to appeal the first appellate decision to address the constitutionality of the form of liability created by s. 33.1.[4] This is the Court's first opportunity to consider this important question.[5]

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[1] *R. v. Sullivan*, 2020 ONCA 333, ¶233, Application Record, Tab 7 (hereinafter "*OCA decision*").
[2] *An Act to amend the Criminal Code (self-induced intoxication)*, S.C. 1995, c. 32; *R. v. Daviault*, [1994] 3 S.C.R. 63.
[3] *Criminal Code*, R.S.C. 1985, c. C-46, s. 33.1.
[4] A Crown appeal from a ruling finding s. 33.1 unconstitutional is pending in the Alberta Court of Appeal: see *R. v. B*, 2019 ABQB 770; *R. v. Brown*, 2020 ABQB 166. That case, like one of the cases at issue here, involved violent conduct under the influence of magic mushrooms.
[5] Although this Court upheld convictions relying on s. 33.1 in *R. v. Bouchard-Lebrun*, 2011 SCC 58, this Court has never directly addressed the constitutionality of the provision.

3. The Court's guidance is sorely needed. The constitutionality of s. 33.1 has divided trial courts across Canada, such that the criminal law is being applied unevenly throughout the country. Section 33.1 has been found unconstitutional and inoperative in some jurisdictions (including in Ontario in the present case), and constitutionally valid and operative in others. Currently, whether an individual can be convicted of a general-intent violent offence committed in a state of extreme intoxication varies depending on the province or territory in which the conduct occurs.

4. Granting leave will allow the Court to address issues of public importance. At its core, this case is about the extent to which the constitution permits a Parliamentary response to a pernicious social problem: intoxicated violence. The Court of Appeal for Ontario's decision in the case at bar leaves it open for Canadians to consume intoxicants with impunity and in so doing insulate themselves from accountability for any violent behaviour. In analyzing whether the Court of Appeal was correct, this Court will be called on to resolve important issues of constitutional doctrine under ss. 7 and 11(*d*) of the *Charter*. The applicant will submit that the *Charter* breaches identified in the Court of Appeal rest on newly expanded principles that should not be recognized: they unduly restrict Parliament's ability to protect potential victims of violent crime; and they are not principles over which there is significant societal consensus that they are fundamental to the way the legal system ought fairly to operate. The applicant will argue that any ss. 7 or 11(*d*) limit imposed by s. 33.1 is reasonable and demonstrably justified in service of the crucial goal of protecting the dignity, equality, and safety of potential victims of violent crime, who are disproportionately women and children.

B. Background

5. Following separate judge alone trials, David Sullivan and Thomas Chan were each convicted of general-intent offences arising from unprovoked stabbings of family members committed while in a state of self-induced toxic psychosis. Sullivan was convicted of aggravated assault and assault with a weapon for stabbing his eighty-two-year-old mother, resulting in ten days of hospitalization, surgery for four puncture wounds, and permanent nerve damage. Sullivan's mother died of unrelated causes before trial. Chan was convicted of manslaughter and aggravated assault in relation to a stabbing attack that left his father dead and his father's partner with serious permanent injuries, including the loss of an eye. In each case, expert psychiatric

evidence demonstrated that neither accused had any underlying psychotic disorder. Rather, their psychotic states at the time of their violent attacks were temporary and would not have occurred but for their voluntary ingestion of drugs.[6]

6. The risk of psychosis was reasonably foreseeable in each case. Sullivan admitted that prior to the attack on his mother, he had ingested a massive overdose of Wellbutrin, a drug colloquially known as "poor-man's cocaine", in an aborted suicide attempt. He had a recent history of experiencing psychosis while using Wellbutrin. Chan's psychosis followed his ingestion of a double dose of "magic mushrooms", an illegal controlled substance that is primarily hallucinogenic in nature. This double dose resulted in Chan experiencing significantly greater effects than any of his friends who consumed a single dose of the illicit drug.

7. While both Sullivan and Chan were found to have stabbed family members while in a state of toxic psychosis, only Sullivan raised the defence of non-mental disorder automatism at trial. The involuntariness of Sullivan's acts was not disputed and was supported by Sullivan's complete amnesia of the attack on his mother. In contrast, Chan explicitly stated that he was ***not*** raising automatism and sought instead to be found not criminally responsible, alleging an incapacity to appreciate the wrongfulness of his conduct given that his delusional mind had made him believe he was attacking the devil.

8. In both cases, the violent attacks on family members followed the ingestion of intoxicating substances. By virtue of s. 33.1 of the *Criminal Code*, the respondents' self-induced intoxication could not operate as a defence even if it deprived them of the capacity to form the general intent or voluntariness that would ordinarily be elements of the general-intent offences of violence with which they were charged. Section 33.1 provides as follows:

> *When defence not available*
>
> 33.1 (1) It is not a defence to an offence referred to in subsection (3) that the accused, by reason of self-induced intoxication, lacked the general intent or the voluntariness required to commit the offence, where the accused departed markedly from the standard of care as described in subsection (2).

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[6] *R. v. Sullivan*, [2016] O.J. No. 6847 (S.C.), at p. 8, ll. 21-24 and p. 12, ll. 23-29, Application Record, Tab 3; *R. v. Chan*, 2018 ONSC 7158, ¶72, 107, Application Record, Tab 6.

> *Criminal fault by reason of intoxication*
>
> (2) For the purposes of this section, a person departs markedly from the standard of reasonable care generally recognized in Canadian society and is thereby criminally at fault where the person, while in a state of self-induced intoxication that renders the person unaware of, or incapable of consciously controlling, their behaviour, voluntarily or involuntarily interferes or threatens to interfere with the bodily integrity of another person.
>
> *Application*
>
> (3) This section applies in respect of an offence under this Act or any other Act of Parliament that includes as an element an assault or any other interference or threat of interference by a person with the bodily integrity of another person.[7]

9. At their trials, both Sullivan and Chan sought to avoid the application of s. 33.1. Sullivan argued unsuccessfully that s. 33.1 was inapplicable because the purpose of his consumption of Wellbutrin was to commit suicide, not to experience intoxication. Chan sought to escape the reach of s. 33.1 by challenging the section's constitutionality. The trial judge found a *Charter* breach, but upheld s. 33.1 under s. 1. Section 33.1 applied in both cases. Sullivan was convicted of aggravated assault and assault with a weapon. Chan was convicted of manslaughter and aggravated assault. Both received sentences of five years' imprisonment, less credit for pre-sentence custody, as well as ancillary orders.

C. The Decision of the Court of Appeal for Ontario

10. On June 3, 2020, the Court of Appeal for Ontario unanimously declared s. 33.1 to be of no force or effect on grounds that it violates ss. 7 and 11(*d*) of the *Charter* and was not saved by s. 1 of the *Charter*.[8] The Court of Appeal set aside Sullivan's convictions and substituted acquittals. The Court of Appeal set aside Chan's convictions, but ordered a new trial to allow the issue of voluntariness to be addressed.

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[7] *Criminal Code*, R.S.C. 1985, c. C-46, s. 33.1.
[8] *OCA decision*, *supra*.

11. While the Court of Appeal was unanimous in the result, it was divided as to the analysis required under s. 1 of the *Charter*. In concurring reasons, Lauwers J.A. stated that he "disagree[d] with the substance and tone" of the s. 1 *Charter* analysis by Paciocco J.A. in which Watt J.A. concurred.[9]

[9] *OCA decision, supra*, ¶193.

PART II – QUESTIONS IN ISSUE

12. This application raises one issue: does the proposed appeal raise a question of law that "is, by reason of its public importance …, one that ought to be decided by the Supreme Court"?[10]

13. In the applicant's submission, the answer is yes. Granting leave to appeal would permit this Court to resolve the following issues of public importance:

(1) Whether s. 33.1 of the *Criminal Code*, R.S.C. 1985, c. C-46, infringes ss. 7 or 11(*d*) of the *Charter*; and, if so,

(2) Whether the infringement is a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s. 1 of the *Charter*.

Embedded within these questions are further issues of public importance involving fundamental questions of criminal-law theory, the interpretation of the *Canadian Charter of Rights and Freedoms*, deference to Parliamentary criminal law policy, and the separation of powers between Parliament and the courts.

[10] *Supreme Court Act*, R.S.C. 1985, c. S-26, s. 40(1); *Criminal Code*, R.S.C. 1985, c. C-46, s. 693(1)(*b*).

PART III –STATEMENT OF ARGUMENT

A. The proposed appeal raises questions of public importance

14. The Supreme Court of Canada is uniquely positioned to ensure consistency in the application of federal law throughout Canada. Divergent rulings on the constitutionality of s. 33.1 mean the law is being applied inconsistently. Section 33.1 has been held inoperative in Ontario and Alberta. It remains operative in every other province and territory.[11] As a result, criminal liability accrues in most Canadian jurisdictions for conduct that is not criminal in two of Canada's most populous provinces.

15. This Court should seize the opportunity to address the undesirable inconsistency in the law. Although s. 33.1 was enacted 25 years ago, it has proved evasive of this Court's scrutiny. Indeed, the present application seeks leave to appeal from the first, and at present only, appellate decision to analyze and rule on the constitutionality of s. 33.1.

16. This is also the Court's first time in a quarter century to address and elaborate on the principles set down in *Daviault*.[12] *Daviault* was a contentious decision when released and it prompted an almost immediate legislative response from Parliament.[13] Granting leave would allow the Court to continue its dialogue with Parliament on how – if at all – the law may address the thorny issue of violence committed in a state of extreme intoxication. It cannot be gainsaid that intoxicated violence is an issue of pressing concern to Canadians. Intoxicated violence is a problem faced by vulnerable groups throughout our country. The Court of Appeal for Ontario's analysis leaves little room for Parliament to address this issue.

17. This case raises two immediate constitutional questions that this Court ought to answer: (*i*) whether s. 33.1 of the *Criminal Code* offends ss. 7 or 11(*d*) of the *Charter*, and, if so (*ii*) whether

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[11] Found unconstitutional: **Ontario**: *OCA decision*, *supra*; **Alberta**: *R. v. B*, 2019 ABQB 770, resulting in an acquittal in *R. v. Brown*, 2020 ABQB 166; **Northwest Territory**: *R. v. Brenton* (1999), 180 D.L.R. (4th) 314 (N.W.T.S.C.), rev'd on the basis that the constitutional issue was "academic", 2001 NWTCA 1.
Found constitutional: **British Columbia**: *R. v. Vickberg* (1998), 16 C.R. (5th) 164 (B.C.S.C.); **Quebec**: *R. v. Dow*, 2010 QCCS 4276, rev'd on other grounds, 2014 QCCA 1416; **Nunavut**: *R. v. N.(S.)*, 2012 NUCJ 2; **Saskatchewan**: *R. v. Robb*, 2019 SKQB 295.

[12] *R. v. Daviault*, [1994] 3 S.C.R. 63.

[13] *An Act to amend the Criminal Code (self-induced intoxication)*, S.C. 1995, c. 32.

any infringements are saved by s. 1. As will be discussed below, there are good reasons to believe the Court of Appeal erred in answering 'yes' to the first question and 'no' to the second.

18. The case also raises questions of constitutional doctrine that have important implications for the respective roles of Parliament and the courts, which this Court should consider. For instance, the court below adopted expanded interpretations of three principles of fundamental justice. These expanded principles, if left to stand, will no doubt be applied in future cases. This court should take the opportunity to assess whether the principles articulated in the court below should be recognized. The Court of Appeal's analysis under s. 1 also raises important questions about the degree of deference that ought to be accorded to Parliament in crafting criminal policy to address social harms.

19. Although this is the first appellate authority to decide the constitutionality of s. 33.1, the issue is ripe for this Court's consideration. The constitutionality of s. 33.1 has been the subject of numerous lower-court analyses. In this case, the constitutional issues have been explored through pleadings and submissions of multiple parties and interveners. If leave is granted, the Court would also have the benefit of two sets of reasons from the Court of Appeal for Ontario.

20. Finally, there are good reasons to believe the Court of Appeal for Ontario was wrong in holding that s. 33.1 of the *Criminal Code* is unconstitutional. If leave is granted, the applicant expects to argue that the appeal should be allowed for the following reasons.

B. Section 33.1 of the *Criminal Code* does not infringe ss. 7 and 11(*d*) of the *Charter*

21. The Court of Appeal for Ontario's decision in this case adds to the existing divide in the jurisprudence regarding the constitutionality of s. 33.1 of the *Criminal Code*. In finding that s. 33.1 violates ss. 7 and 11(*d*) of the *Charter*, the court found three breaches that rested on new, expansive interpretations of principles of fundamental justice. The decision to adopt these interpretations should be reviewed by this Court.

a. Expansion of the requirement of voluntariness

22. There is no dispute that there must be some voluntary conduct in every offence. However, the majority in the court below concluded, without any supporting authority, that the requirement

of voluntariness attaches to "the conduct that constitutes the criminal offence charged, in this case, the assaultive acts" (emphasis added).[14] This analysis suggests that it is open to courts to freeze statutory offences defined by Parliament in time, insulating them from future Parliamentary change. The analysis also assumes that when an accused is charged with assault, the gravamen of the offence is ***always*** the intentional application of force and that there is a constitutional requirement that this act be performed voluntarily. If true, this is a new development in the law.

23. The fact that an offence is labelled "assault" does not always mean that the "gravamen of the offence[] is … assaultive behaviour" performed voluntarily by the accused.[15] For example, under s. 21(1)(*c*) of the *Criminal Code,* an "assault" can be committed by simply encouraging someone else to commit an assault.[16] Like s. 21(1)(*c*), s. 33.1 simply provides a different mode of liability. Under s. 33.1, liability is contingent on proof of self-induced extreme intoxication, which is a distinct voluntary act that sets the stage for violence, and which act the Crown must prove beyond a reasonable doubt.

24. The majority in the Court of Appeal rejected the argument that s. 33.1 creates a new mode of liability on the basis that s. 33.1 eliminates a defence rather than creating an offence.[17] In the applicant's submission, this approach wrongly puts form over substance. In enacting s. 33.1, Parliament sought to impose liability in situations where there was no liability before. Whether this legislative act is portrayed as the enactment of a new mode of liability or the elimination of a defence is immaterial to whether the result – liability based on a particular set of facts – offends the basic norms at the heart of our system of justice.

b. Expansion of the prohibition on substitution of "essential" elements

25. The majority in the court below found a s. 11(*d*) breach on the basis that Parliament had offended the principle from *Daviault* that it is unconstitutional to substitute "voluntary intoxication for the required elements of a charged offence".[18]

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[14] *OCA decision, supra,* ¶65.
[15] *OCA decision, supra,* ¶67.
[16] *Criminal Code,* R.S.C. 1985, c. C-46, s. 21(1)(*c*).
[17] *OCA decision, supra,* ¶69-72.
[18] *OCA decision, supra,* ¶76-78.

26. A well-recognized constitutional principle prohibits substituting proof of one fact for proof of an "essential" element of the offence, unless proof of the substituted fact inexorably proves the missing essential element. An element of an offence can be found "essential" because it is required by the Constitution or by statute.[19] The majority in the court below was satisfied that, pursuant to *Daviault*, s. 33.1 infringes s. 11(*d*) by permitting proof of self-induced extreme intoxication to stand in for proof of what would ordinarily be essential elements in an assault-based offence. But the Court of Appeal majority erred by failing to consider whether voluntariness and intent with respect to the application of force are "required" or "essential".

27. The Court of Appeal expanded the purview of *Daviault*. That case does not stand for the proposition that an intentional and voluntary application of force are constitutionally required to ground liability for an assault-based offence. The question in *Daviault* was whether courts can redefine the elements of statutory offences by substituting proof of one fact for proof of an essential element. The question was, as Cory J. explained, whether it is permissible "for the courts to eliminate the mental element in crimes of general intent" (emphasis added). The *Daviault* majority held, in essence, that the common law had developed to unconstitutionally permit findings of guilt in circumstances not intended by Parliament. It noted that "the mental element of voluntariness … cannot be taken away by a judicially developed policy" (emphasis added).[20] Section 33.1 does not offend this principle: it involves Parliament creating a new form of liability.

c. Elevation of the minimum constitutional fault requirements

28. The third *Charter* breach the Court of Appeal majority found was that s. 33.1 enables "the conviction of accused persons who do not have the constitutionally required level of fault for the commission of a criminal offence."[21] The majority held that s. 33.1's constitutionality must be assessed based on its adherence to, or deviation from, the standard of "penal negligence", which the majority characterized as "the minimum, constitutionally-compliant level of fault for criminal offences", citing this Court's decision in *R. v. Creighton*.[22]

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[19] *R. v. Vaillancourt*, [1987] 2 S.C.R. 636, at pp. 653-659; *R. v. Whyte*, [1988] 2 S.C.R. 3, at pp. 16, 18-19; see also *R. v. Morrison*, 2019 SCC 15, ¶52-62.
[20] *R. v. Daviault*, [1994] 3 S.C.R. 63, at pp. 72-74, 87, 89-91.
[21] *OCA decision*, *supra*, ¶79.
[22] *OCA decision*, *supra*, ¶80-82; *R. v. Creighton*, [1993] 3 S.C.R. 3.

29. Although s. 33.1 uses language evocative of criminal *negligence*, it is really a form of *intentional* predicate-act liability: a form of liability with different minimum fault requirements than criminal negligence or predicate-act liability based on a negligent act. In *DeSousa*, this Court unanimously held that it is constitutionally permissible to punish offenders for the unintended and unforeseen consequences of an underlying predicate act. This Court explained, as long as "there is a sufficiently blameworthy element in the *actus reus* to which a culpable mental state is attached", there is "no … requirement" that additional elements of the *actus reus* be linked to *any* culpable mental state at all. "In punishing for unforeseen consequences [of an unlawful act] the law is not punishing the morally innocent but those who cause injury through avoidable unlawful action."[23] The court below did not address *DeSousa*.

30. Section 33.1 passes the test from *DeSousa*. The section imposes criminal liability where a predicate act – self-induced extreme intoxication – sets the stage and leads to an unintended violent offence. Self-induced extreme intoxication is, in the words of *DeSousa*, "a sufficiently blameworthy element in the *actus reus*" to impose liability for unintended assault-based offences. Indeed, while liability under s. 33.1 rests on self-induced *extreme* intoxication, a lesser predicate act justifies liability elsewhere in the *Criminal Code*. For example, where "the accused's self-induced intoxication" results in the accused lacking the mental state ordinarily required for a conviction for sexual assault, liability still accrues under s. 273.2(*a*)(i).[24] Conduct that, in the accused's mind, is consensual and innocent is rendered criminal, because the accused has voluntarily entered a state of intoxication in which that mistake of fact could be made. The analysis in the court below would suggest that this well-known form of liability is unconstitutional.[25]

C. Any violation of ss. 7 or 11(*d*) is a reasonable limit under s. 1 of the *Charter*

31. Whether s. 1 of the *Charter* applies in this case to save s. 33.1 is a question that this Court ought to consider, as evident in the fact that several courts across Canada have found s. 33.1 is a reasonable limit within the meaning of s. 1.[26] In finding that s. 33.1 was not a reasonable limit, the

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[23] *R. v. DeSousa*, [1992] 2 S.C.R. 944, at pp. 962, 964-967.
[24] See *Criminal Code*, R.S.C. 1985, c. C-46, s. 273.2(*a*)(i).
[25] *OCA decision*, *supra*, ¶91.
[26] *R. v. Chan*, 2018 ONSC 3849, Application Record, Tab 5; *R. v. Vickberg* (1998), 16 C.R. (5th) 164 (B.C.S.C.); *R. v. Decaire*, [1998] O.J. No. 6339 (Gen. Div.); *R. v. Dow*, 2010 QCCS 4276,

Court of Appeal majority rejected Parliament's explicitly stated objectives and failed to properly weigh the competing *Charter* rights of women and children. In doing so, the majority failed to accord proper deference to Parliament and diminished Parliament's role in addressing social harm through its criminal-law power. The resulting decision may unduly constrain future legislative action and should be reviewed by this Court. Absent these errors, the s. 1 analysis would have yielded a different result: namely, that any violation of ss. 7 or 11(*d*) is demonstrably justified under s. 1.

a. Pressing and substantial objective

32. Parliament explicitly stated the objective of s. 33.1 in the Preamble to Bill C-72. There, Parliament declared s. 33.1 was intended to (*i*) hold individuals accountable for acts of violence committed while in a state of self-induced intoxication (*i.e.* the "accountability" or "penal" purpose) and, (*ii*) promote and protect the *Charter* rights of all Canadians as guaranteed under ss. 7, 11, 15 and 28 of the *Charter*, particularly women and children (*i.e.* the "protective" purpose). However, the Court of Appeal majority "refined" s. 33.1's purpose in a manner that both improperly compartmentalized these goals and restricted their scope to ***violence by intoxicated automatons***, rather than intoxicated violence generally. In doing so, the majority committed the same error it recognized other courts have committed: "improperly confus[ing] the means of the legislation with its purpose".[27]

33. In rejecting Parliament's stated objectives, the majority adopted an approach that strayed from fundamental principles of statutory interpretation and failed to give effect to Parliament's intent. Notably, the cases the majority relied upon in rejecting Parliament's stated objectives in preference of a narrower purpose did not involve legislation with a lengthy preamble – *i.e.* a clear statement by the legislature itself of what it intended the impugned law to accomplish.[28] On a proper consideration of the "context, deference, and … flexible and realistic standard of proof" essential to all aspects of the s. 1 analysis,[29] the pressing and substantial objectives underlying s.

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rev'd on other grounds, 2014 QCCA 1416; *R. v. N.(S.)*, 2012 NUCJ 2; *R. v. Robb*, 2019 SKQB 295.

[27] *OCA decision, supra*, ¶108.

[28] *OCA decision, supra*, ¶110; *Frank v. Canada (Attorney General)*, 2019 SCC 1, ¶ 49, 54; *Longley v. Canada (Attorney General)*, 2007 ONCA 852, ¶49.

[29] *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, at p. 333.

33.1 are clear. In his concurring reasons, Lauwers J.A. accepted Parliament's expressed objectives as accurate. He found that Parliament's penal and protective objectives in enacting s. 33.1 were "self-evidently pressing and substantial objectives"[30] and fell within Parliament's "core competency" to "criminaliz[e] socially harmful conduct."[31]

34. By conducting the s. 1 analysis using a "refined" set of objectives rather than those identified by Parliament in its detailed Preamble, the Court of Appeal majority erred. As Côté and Brown JJ. stated in ***Frank v. Canada (Attorney General)***, dissenting but not on this point, "the best way of discerning a legislature's purpose will usually be to look to the legislation itself …. [A]n express statutory statement of purpose, where it exists, will generally be determinative, as it was available to and voted on by all members of the legislature, knowing that it would represent a corporate statement of legislative purpose" (emphasis added).[32] This Court applied the same approach in *Sauvé v. Canada (Chief Electoral Officer)*, where "despite the abstract nature of the government's objectives and the rather thin basis upon which they rest", this Court accepted the government's stated objectives, noting that "prudence suggests that we proceed to the proportionality analysis, rather than dismissing the government's objectives outright."[33] No such prudence was exercised by the Court of Appeal majority, which first dismissed the government's stated "accountability" objective outright and then declined to conduct the proportionality analysis with this objective in mind.[34]

b. Accountability is a lawful purpose

35. The Court of Appeal majority erred in conducting the s. 1 analysis on the basis that only one of Parliament's two purposes (as refined by the majority), namely its "protective purpose", was a constitutionally legitimate objective. The majority reasoned that to accept "accountability" as a lawful purpose would "inoculate any criminal legislation" given that a law criminalizing any conduct would then meet the requirement of addressing a pressing and substantial purpose.[35] This

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[30] *OCA decision*, *supra*, ¶242, 251-252.
[31] *OCA decision*, *supra*, ¶232.
[32] *Frank v. Canada (Attorney General)*, 2019 SCC 1, ¶130. See also: *Reference re Genetic Non-Discrimination Act*, 2020 SCC 17, ¶178, 265.
[33] *Sauvé v. Canada (Chief Electoral Officer)*, 2002 SCC 68, ¶26.
[34] *OCA decision*, *supra*, ¶112-116, 122, 135, 139, 146.
[35] *OCA decision*, *supra*, ¶115.

compartmentalized approach to the s. 1 analysis may impact future cases and should be reviewed by this Court. Parliament's objectives are interdependent, not independent. By facilitating the conviction of those who commit general intent offences of violence while extremely intoxicated, Parliament acted to protect Canadians from such harm.

36. The majority's rejection of accountability as a constitutionally legitimate purpose under s. 1 of the *Charter* is a departure from the jurisprudence of this Court. For instance, this Court has upheld various impaired driving provisions of the *Criminal Code* that are designed to secure the conviction of impaired drivers given the threat they pose to public safety.[36] In *Sauvé v. Canada (Chief Electoral Officer),* this Court accepted that the objective of "[enhancing] civic responsibility and respect for the rule of law" meets the requirement of being "pressing and substantial".[37]

37. The rejection of accountability as a lawful objective ignored the competing *Charter* rights of the victims of intoxicated violence, who are disproportionately women and children. The Court of Appeal majority stated that this case "is not about the constitutionality of a legislated compromise between protected interests".[38] It is hard to imagine how s. 33.1, in seeking to criminalize violent acts against others, is not a "legislated compromise between protected interests". Intoxicated violence directly impacts rights guaranteed under ss. 7, 11, 15 and 28 of the *Charter*. The conduct targeted by s. 33.1 is similar to other forms of conduct that Parliament has criminalized as a reflection of Canadian values of acceptable behaviour and social norms, including impaired driving, child pornography, and hate propaganda.[39]

38. As this Court noted in *R. v. Keegstra*, the criminalization of conduct communicates standards of behaviour that remind everyone of the "value of equality and the worth and dignity of each human person". Criminalization provides a "great deal of comfort" to those victimized by the targeted conduct from knowing that individuals will be criminally prosecuted.[40] Most recently, in *R. v. Friesen* this Court recognized that the criminal law "is a system of values" and serves as

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[36] *R. v. Penno*, [1990] 2 S.C.R. 865, at pp. 882-883.
[37] *Sauvé v. Canada (Chief Electoral Officer),* 2002 SCC 68, ¶26.
[38] *OCA decision*, *supra*, ¶58.
[39] See *e.g. R. v. Whyte*, [1988] 2 S.C.R. 3, at pp. 20-21, 24-25; *R. v. Penno*, [1990] 2 S.C.R. 865, at pp. 882-883 *per* Lamer C.J., p, 892 *per* Wilson J.; *R. v. Sharpe*, 2001 SCC 2, ¶82; *R. v. Keegstra*, [1990] 3 S.C.R. 697, at pp. 758, 769, 791, 795.
[40] *R. v. Keegstra*, *ibid.*

an "important mechanism" through which Parliament can provide protection from violence and "hold perpetrators accountable, and to communicate the wrongfulness" of certain conduct.[41] Further, in *Reference re Genetic Non-Discrimination Act*,[42] this Court reaffirmed Parliament's use of its criminal law powers to safeguard the vital interests of individuals in their personal autonomy, equality, privacy and dignity.

c. Section 33.1 is proportionate to Parliament's objective

39. The Court of Appeal majority's rejection of Parliament's stated objectives, including its intent to hold intoxicated violent offenders accountable, erroneously expanded the role of courts in reviewing criminal-law policy decisions of Parliament to address complex problems in Canadian society and mediate the competing rights of accused persons and the victims of intoxicated violence.

d. Section 33.1 is rationally connected to its objectives

40. Unlike Paciocco J.A. for the majority, Lauwers J.A. found that the "accountability" purpose stated by Parliament was lawful and met the rational connection test.[43] When addressing s. 33.1's "protective purpose", the Court of Appeal majority erroneously assessed the law's deterrent value based on the foreseeability of the risk of the penal consequence, which, the majority held, under s. 33.1 required foresight of, and therefore deterrence from, ***violent automatism***.[44] The rational connection test is not so demanding. Individuals who voluntarily self-intoxicate to the point of extreme intoxication should be held culpable for any acts of violence they commit. Like impaired drivers, they took a risk, and should be held responsible for the consequences. Both types of offender can be deterred from taking the risk.

41. By deeming foresight of violent automatism to be essential to s. 33.1's protective purpose, the Court of Appeal concluded that individuals lacking such foresight, such as Sullivan and Chan,

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[41] *R. v. Friesen*, 2020 SCC 9, ¶45, 105; see also *R. v. Morrison*, 2019 SCC 15, ¶65-66, in which this Court recognized that provisions which facilitate the prosecution of socially harmful acts meet the pressing and substantial objective requirement.

[42] *Reference re Genetic Non-Discrimination Act*, 2020 SCC 17, ¶4, 90, 99.

[43] *OCA decision*, *supra*, ¶266.

[44] *OCA decision*, *supra*, ¶121.

are morally innocent. In doing so, the Court ignored the inherent blameworthiness of their conduct. Intoxicating substances are consumed for the very purpose of altering one's mental functioning, an activity which carries inherent risks that vary greatly depending on the quantity and toxicity of the substance ingested. In the instant case, Sullivan had subjective knowledge of the risk of toxic psychosis from consuming Wellbutrin. With respect to Chan, the very ***possession*** of psilocybin (*i.e.* magic mushrooms) is illegal because of its inherent risks.[45] Psilocybin is generally consumed precisely for its mind-altering effects. Further, this Court recognized in *R. v. Bouchard-Lebrun* that "toxic psychosis is unfortunately a fairly frequent phenomenon that seems to result from the high toxicity of chemical drugs".[46] Indeed, this Court noted that psychosis was a "normal" reaction to the ingestion of certain drugs; for instance, the evidence showed that psychosis was likely in 50% of users of "PCP".[47] On the evidence in the case at bar, psychosis was a foreseeable reaction of magic mushrooms or an overdose of Wellbutrin. Consequently, while Sullivan and Chan may have lacked foresight of becoming violent, the risk of extreme intoxication ***was*** foreseeable. Section 33.1 is rationally connected to reducing this foreseeable risk. It criminalizes the predicate act of self-induced extreme intoxication (when it results in violence) and should thereby deter the predicate act, and its associated risk of violence.

e. Section 33.1 is minimally impairing

42. The Court of Appeal majority concluded that s. 33.1 is not minimally impairing, as Parliament "could have chosen less intrusive alternative means which would have achieved the identified objective as effectively".[48] The majority identified two such alternatives, namely (*i*) a stand-alone offence of criminal intoxication, or (*ii*) allowing the *Daviault* decision to operate. To be considered at this stage, an alternative less impairing option must still further the government's objective "in a real and substantial manner". To fail this stage, the option chosen by Parliament must fall outside the range of reasonable options open to Parliament.[49]

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[45] *Controlled Drugs and Substances Act*, S.C. 1996, c. 19, s. 4, Schedule III.
[46] *R. v. Bouchard-Lebrun*, 2011 SCC 58, ¶79.
[47] *R. v. Bouchard-Lebrun*, 2011 SCC 58, ¶6, 10, 18, 79-80.
[48] *OCA decision, supra*, ¶131.
[49] See *e.g., Frank v. Canada (Attorney General)*, 2019 SCC 1, ¶66; *R. v. K.R.J.*, 2016 SCC 31, ¶70.

43. The proposed alternatives proffered by the majority fail to apply the deferential posture required when considering the "wide latitude" Parliament is to be accorded when responding to social harm.[50] The first option offered by the Court of Appeal majority – enacting the form of liability set out in s. 33.1 in a stand-alone offence – would impose liability for the same conduct captured by s. 33.1. It is not at all clear why this option is less impairing than s. 33.1. The second option – not legislating to address the gap left by *Daviault* – would not advance Parliament's goals.

44. The majority's conclusion under minimal impairment also rests on erroneous assumptions that "accountability" is an unlawful policy objective under s. 1 and that allowing the defence from *Daviault* to operate would impact only a "few cases", thereby making the "prospects of escaping liability… slim." As noted above, accountability ***is*** a lawful purpose. Further, *Daviault*'s potential reach is significant. Psychosis is a foreseeable consequence for many common street drugs. For example, as demonstrated by the evidence before this Court in *R. v. Bouchard-Lebrun*, "half (50 percent) of subjects who take drugs containing PCP are likely to develop a psychotic condition when intoxicated."[51]

f. Section 33.1's salutary and deleterious effects are proportionate

45. The Court of Appeal majority concluded that in terms of salutary effects, "s. 33.1 achieves little" and that its deterrent value is "negligible" if not "entirely illusory".[52] The majority curiously discounts a foundational principle of our criminal law that criminalizing conduct will deter that conduct – here, entering a state of extreme self-induced intoxication.

46. The majority's conclusion is wrongly premised on s. 33.1 serving only one, improperly narrowed purpose: protection from ***violent automatism***.[53] The majority identified three salutary benefits, which they described as "collateral salutary effects":[54] (*i*) encouraging victims to report intoxicated violence; (*ii*) recognizing and promoting the equality, security and dignity of victims, particularly women and children, who are disproportionately affected by intoxicated violence; and (*iii*) avoiding normalizing and / or incentivizing intoxicated violence. However, the majority

[50] *Reference re Genetic Non-Discrimination Act*, 2020 SCC 17, ¶78, 149.
[51] *R. v. Bouchard-Lebrun*, 2011 SCC 58, ¶79.
[52] *OCA decision, supra*, ¶154.
[53] *OCA decision, supra*, ¶146-149.
[54] *OCA decision, supra*, ¶155-157.

concluded that these did not alter the balance as s. 33.1 addressed "a miniscule percentage of intoxicated violence cases".[55] The majority concluded that these salutary benefits were disproportionate to the provision's "profound" deleterious effects, including "the contravention of virtually all criminal law principles that the law relies upon to protect the morally innocent". The majority also failed to recognize that if s. 33.1's ambit is so narrow that it applies in only a "miniscule" number of cases, while it only offers protection to a small number of people, it also only infringes the *Charter* rights of a similarly small number of people.

47. Treating the rights of others as a "collateral salutary effect" is inconsistent with this Court's decision of *Dagenais v. Canadian Broadcasting Corp.*,[56] which recognized that there is no hierarchy of *Charter* rights. All are equal. The majority's dismissal of the risk that victims may be disinclined to report intoxicated violence absent s. 33.1 is also at odds with this Court's jurisprudence and fails to properly consider the disproportionate impact of intoxicated violence on women and children.[57] As L'Heureux-Dubé J. wrote in *R. v. Osolin*,[58] dissenting on other grounds, "one of the most powerful disincentives to reporting of sexual assaults is women's fear of further victimization at the hands of the criminal justice system" and that the "trial process itself will be yet another experience of trauma." Such is the result if women and children can expect to see their attacker go free because of the accused's extreme intoxication. The lifelong harm inflicted on women and children when their rights to personal autonomy, bodily integrity, dignity and equality are violated by intoxicated violence that then goes unpunished is profound. This harm can have "ripple effects" that last for years and extend beyond the direct victim to the broader community and society as a whole.[59] The denial of justice caused by striking down s. 33.1 only serves to perpetuate the vulnerability and disadvantage of women and children.[60] Intoxicated violence is a serious social problem that undermines gender equality and threatens the core of human dignity

[55] *OCA decision*, *supra*, ¶156.
[56] *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, at p. 877. See also: *R. v. Mills*, [1999] 3 S.C.R. 668, ¶21.
[57] *R. v. Mills*, [1999] 3 S.C.R. 668, ¶61-68.
[58] *R. v. Osolin*, [1993] 4 S.C.R. 595, at p. 628.
[59] *R. v. Friesen*, 2020 SCC 9, ¶61-64.
[60] *R. v. Friesen*, 2020 SCC 9, ¶42, 56, 57, 63, 68.

and autonomy.[61] It perpetuates historic disadvantage for already-marginalized groups in our society. It is a scourge that Parliament reasonably wishes to stamp out.

48. The salutary effects of s. 33.1 are evident. The section forms, along with s. 16 of the *Criminal Code*,[62] part of a comprehensive scheme for dealing with dangerous, violent conduct produced by mental disorder or substance use. That scheme is compromised by the Court of Appeal's decision. For offenders with both a substance disorder and a concurrent mental disorder, s. 16 is now unlikely to be raised. The accused would no doubt prefer an acquittal (available if s. 33.1 is struck down) over a verdict of not criminal responsible and the possibility of lengthy oversight in the Review Board regime. In this way, if s. 33.1 is struck down people who, due to mental disorder, pose a risk to public safety can circumvent mechanisms intended to treat that risk.

49. Second, public safety is compromised without s. 33.1, because, in its absence, some violent acts are beyond the reach of the law. The possibility of mischief is real: offenders, and putative offenders planning criminal conduct, can give themselves a real shot at an acquittal by taking certain dissociative drugs before or just after committing an offence, thereby generating evidence that can be used as the basis for a defence. Parliament quite rightly wanted to prevent this result.

[61] *R. v. Friesen*, 2020 SCC 9, ¶77-81.
[62] *Criminal Code*, R.S.C. 1985, c. C-46, s. 16.

PART IV – COSTS

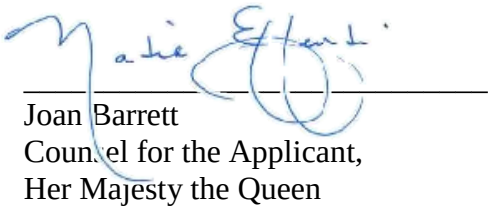
50. The applicant makes no submissions as to costs.

PART V – ORDER REQUESTED

51. The applicant requests that the application for leave to appeal be allowed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 30th day of July, 2020 BY

Per:



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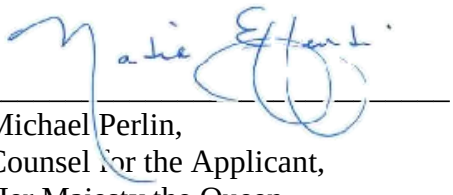
Per:



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Her Majesty the Queen

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PART VI – AUTHORITIES CITED

Jurisprudence

Jurisprudence	Para(s)
Dagenais v. Canadian Broadcasting Corp., [1994] 3 S.C.R. 835	47
Frank v. Canada (Attorney General), 2019 SCC 1	33-34, 42
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R. v. Bouchard-Lebrun, 2011 SCC 58	2, 41, 44
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R. v. Brenton, 2001 NWTCA 1	14
R. v. Brown, 2020 ABQB 166	2, 14
R. v. Chan, 2018 ONSC 3849	31
R. v. Chan, 2018 ONSC 7158	5
R. v. Creighton, [1993] 3 S.C.R. 3	28
R. v. Decaire, [1998] O.J. No. 6339 (Gen. Div.)	31
R. v. Daviault, [1994] 3 S.C.R. 63	2, 16, 25-27, 42-44
R. v. DeSousa, [1992] 2 S.C.R. 944	29-30
R. v. Dow, 2010 QCCS 4276	14, 31
R. v. Dow, 2014 QCCA 1416	14, 31
R. v. Friesen, 2020 SCC 9	38, 47
R. v. K.R.J., 2016 SCC 31	42
R. v. Keegstra, [1990] 3 S.C.R. 697	37-38
R. v. Mills, [1999] 3 S.C.R. 668	47
R. v. Morrison, 2019 SCC 15	26, 38
R. v. N.(S.), 2012 NUCJ 2	14, 31
R. v. Osolin, [1993] 4 S.C.R. 595	47
R. v. Penno, [1990] 2 S.C.R. 865	36-37
R. v. Robb, 2019 SKQB 295	14, 31

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R. v. Sharpe, 2001 SCC 2	37
R. v. Sullivan, [2016] O.J. No. 6847 (S.C.)	5
R. v. Sullivan, 2020 ONCA 333	1, 10-11, 14, 22-25, 28, 30, 32-35, 37, 40, 42, 45-46
R. v. Vaillancourt, [1987] 2 S.C.R. 636	26
R. v. Vickberg (1998), 16 C.R. (5th) 164 (B.C.S.C.)	14, 31
R. v. Whyte, [1988] 2 S.C.R. 3	26, 37
Reference re Genetic Non-Discrimination Act, 2020 SCC 17	34, 38, 43
RJR-MacDonald Inc. v. Canada (Attorney General), [1995] 3 S.C.R. 199	33
Sauvé v. Canada (Chief Electoral Officer), 2002 SCC 68	34, 36

Relevant Statutory Provisions:

Relevant Statutory Provisions	**Paragraph(s)**
An Act to amend the Criminal Code (self-induced intoxication), S.C. 1995, c. 32 [English] [French]	2, 16
Canadian Charter of Rights and Freedoms, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c. 11	
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Controlled Drugs and Substances Act, S.C. 1996, c. 19,	41
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