SCC Court File Number: 39270

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)

RESPONSE TO THE APPLICATION FOR LEAVE TO APPEAL
(DAVID SULLIVAN, RESPONDENT)
(Pursuant to Rule 28 of the *Rules of the Supreme Court of Canada)*

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TABLE OF CONTENTS

PART I – OVERVIEW & FACTS

1. This Court does not overrule itself lightly.[1]

2. In *Daviault*, this Court held that a failure to recognize the defence of self-induced intoxication akin to automatism was a "drastic[2]" violation of ss. 7 and 11(d) of the *Canadian Charter of Rights and Freedoms*, and could not be justified by s. 1. In fact, Justice Cory held that the *Charter* mandates recognition of the defence. The *Daviault* decision remains good law; however, its application has been constrained by operation of s. 33.1 of the *Criminal Code,*[3] which was enacted one year after *Daviault* was decided.[4] In enacting s. 33.1, Parliament codified an offence-based prohibition on invoking a defence which this Court had recognized as a constitutional imperative. As a result of *Daviault,* s. 33.1 was constitutionally infirm the instant it was enacted.

3. It has been almost twenty-six years since the *Daviault* decision. *Hunter and Southam* is "older"; *Kienapple* "older" still. It is not the age of a decision that determines its worth. The *Daviault* decision flows inexorably from core and entrenched principles of common law. These constitutional principles have withstood the test of time. They have passed constitutional muster again and again in the intervening years; as a result, *Daviault* is stronger today than when it was decided. It need not be revisited by this Honourable Court.

4. The Applicant Crown seeks leave to appeal to the Supreme Court of Canada from the decision of the Ontario Court of Appeal in *R. v. Sullivan and Chan,*[5] which struck down s. 33.1 of the *Criminal Code.* The ultimate determination in *Sullivan and Chan* flows inexorably from the application of *Daviault,* and the cases relied upon by Justice Cory in deciding *Daviault.* The Court of Appeal did not create new law in *Sullivan and Chan;* it simply applied seminal jurisprudence

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[1] *Canada v. Craig*, [2012] S.C.J. No. 43, [2012] 2 S.C.R. 489, at para. 24 (S.C.C.).
[2] *R. v. Daviault,*[1994] 3 S.C.R. 63 at para. 49.
[3] R.S.C. 1985, c. C-46
[4] *Ibid.,* at para. 35 [Emphasis Added].
[5] 2020 ONCA 333 [*Sullivan and Chan*].

emanating from this Court. *Sullivan and Chan* was unanimous in its result.[6]

5. As a result of the Court of Appeal's decision to strike down s. 33.1, David Sullivan's conviction for aggravated assault was overturned and an acquittal was entered by the Court below. The Respondent Sullivan now opposes the Crown's application for leave.

6. The Respondent agrees with the facts as put forward by the Applicant for the purpose of the application for leave.

PART II – STATEMENT OF THE ISSUES IN QUESTION

7. The Applicant takes the position that the constitutionality of s. 33.1 is itself an issue of public importance on which this Court should grant leave pursuant to s. 693(1)(b) of the *Criminal Code*. The Applicant has broken down the identified issue of public importance into two sub-issues:

a. Whether s. 33.1 of the *Criminal Code*, infringes ss. 7 or 11(d) of the *Charter*, and, if so,

b. 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*.

8. The Applicant goes on to indicate that "[e]mbedded 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."

PART III – STATEMENT OF ARGUMENT

The Merits of the Potential Appeal are Not Relevant to the Test for Leave

9. Much of the Applicant's Memorandum of Argument focuses on the merits of the proposed

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[6] Justice Paciocco authored the majority judgement, which was agreed to by Justice Watt. Justice Lauwers authored a concurring judgement.

appeal, particularly on the question of whether the Ontario Court of Appeal erred in its application of the *Oakes* test[7].

10. The Respondent does not agree; the reasoning of the Court below was complete, compelling and correct. That said, the correctness of the decision in the Court below is, by and large, irrelevant to the test for leave.

11. The Supreme Court is "not a court of error" and "the fact that a court of appeal reached the wrong result is in itself insufficient" to grant leave.[8] The true question in an application for leave is "the national or public importance of the issue raised in the case sought to be appealed."[9] Consider the comments of Justice Sopinka and Mark Gelowitz in *The Conduct of an Appeal*:

> A common defect in application for leave to appeal to the Supreme Court is an overriding emphasis on the merits and *minutiae* of the case, at the expense of, or to the exclusion of, any consideration of the jurisprudential context of the case. On a fundamental level, whether or not the Court of Appeal was "wrong" had little if anything to do with whether the case is one of public importance. Indeed, the Court may be inclined in particular cases to grant leave precisely for the purpose of affirming the judgement of the Court of Appeal, thus giving direction on the point in issue to all of the courts of Canada.[10]

12. A successful leave motion is not an indication that this Court will ultimately grant the appeal. The Supreme Court routinely grants leave and then dismisses the appeal and affirms the judgement of the Court below. The question at the leave stage is whether the issues raised rise to a level of national or public importance.

13. For this reason, the Respondent has focused its submissions on issues which are relevant to the test for leave.

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[7] *R. v. Oakes,* [1986] 1 S.C.R. 103.
[8] John Sopinka, "The Supreme Court of Canada" in Brian A. Crane and Henry S. Brown, *Supreme Court of Canada Practice 1998 IToronto: Carswell, 1998),* pp. 306-316, specifically at 308.
[9] *Supreme Court Act,* s. 40(1); see also, John Sopinka and Mark A. Gelowitz, *The Conduct of an Appeal* (Toronto: Butterworths, 1993), pp. 166-167.
[10] John Sopinka and Mark A. Gelowitz, *The Conduct of an Appeal* (Toronto: Butterworths, 1993), pp. 166-167.

The Issue Raised by the Applicant Has Already Been Decided by This Court

14. Certainly, it will be rare that a decision regarding the constitutionality of a federal statute which is fundamental to the determination of criminal guilt will not meet the test for leave. However, this case is that rare exception. This Court need not grant the Crown's application for leave. The reason is simple: the Supreme Court of Canada has already considered and determined the issues identified in the Crown's leave application in *R. v. Daviault.*[11]

15. The ratio of *Daviault* is that the *Charter* demands recognition of the defence of self-induced intoxication akin to automatism. Consider the words of Justice Cory, in his plurality judgement in *Daviault*:

> I cannot agree […] that it is consistent with the principles of fundamental justice and the presumption of innocence for the courts to eliminate the mental element in crimes of general intent. Nor do I agree that self-induced intoxication is a sufficiently blameworthy state of mind to justify culpability, and to substitute it for the mental element that is an essential requirement of those crimes. In my opinion, the principles embodied in our *Canadian Charter of Rights and Freedoms*, and more specifically in ss. 7 and 11(d) mandate a limited exception to, or some flexibility in, the application of the Leary rule.[12]

16. The Ontario Court of Appeal's decision is *Sullivan and Chan* is a straightforward application of the law and principles enunciated in *Daviault*.[13]

17. The Applicant points out that the *Daviault* decision was released some time ago. While much has changed between 1994 and today, both in the legal world and outside of it, the bedrock principles upon which *Daviault* rests have withstood the test of time.

18. Of some note, in this Court's 2011 judgement in *Bouchard-Lebrun*, [14] where the constitutionality of s. 33.1 was not at issue,[15] this Court affirmed that *Daviault* remains good law:

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[11] [1994] 3 S.C.R. 63
[12] *Ibid.* at para. 4 [Emphasis Added].
[13] See, *Sullivan and Chan, supra.* at para. 52: "Arguments were presented before us that the principles identified in *Daviault* do not govern the constitutional validity of s. 33.1. I do not agree."
[14] [2011] S.C.J. No. 58
[15] *Ibid.,* at para. 28.

> In a general sense, the appellant can reasonably argue that Parliament implicitly endorsed Sopinka J.'s dissent in *Daviault* by enacting s. 33.1 *Cr. C.* However, the enactment of that provision did not revive the Leary rule. It did not actually codify the position taken by the dissenting judges in *Daviault*; rather, it limited the scope of the rule stated by the majority. This means that the principles set out in *Daviault* still represent the state of the law in Canada, subject, of course, to the significant restriction set out in s. 33.1 *Cr. C. Daviault* would still apply today, for example, to enable an accused charged with a property offence to plead extreme intoxication. Indeed, the fact that the appellant was acquitted at trial on the charges against him under ss. 348(1)(*a*) and 463 *Cr. C.* affords an eloquent example of this.[16]

19. *Daviault* is, itself, an application of long-standing principles of common law, which were entrenched by the *Charter,* and well-settled long before that case was decided.[17] As the majority in the Court below recognized, the constitutional principles relied upon in *Daviault,* and then again in *Sullivan and Chan,* "define when criminal accountability is constitutionally permissible, given entrenched, core values"[18] and "have not been modified in any way by subsequent authority."[19]

The Daviault Decision

20. In *Daviault,* Justice Cory concluded that the *Leary* rule breached ss. 7 and 11(d) of the *Charter* in three fundamental ways. They are well summarized by the Court below as follows:

> **The Voluntariness Breach** – It would be contrary to the principles of fundamental justice (*Charter*, s. 7) and the presumption of innocence (*Charter*, s. 11(d)) to permit accused persons to be convicted for their involuntary acts, as those acts are not willed and therefore not truly the acts of the accused: *Daviault*, at pp. 74, 91;
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> **The Improper Substitution Breach** – It would be contrary to the presumption of innocence (*Charter*, s. 11(d)) to convict accused persons in the absence of proof of a requisite element of the charged offence, unless a substituted element is proved that inexorably or inevitably includes that requisite element. A prior decision to become

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[16] *Ibid.,* at para. 35 [Emphasis Added].
[17] *Sullivan and Chan, supra.* at para. 53. See also, e.g., *Daviault, supra.* at para 40.
[18] *Sullivan and Chan, supra.* at para. 113.
[19] *Sullivan and Chan, supra.* at para. 61.

intoxicated cannot serve as a substituted element because it will not include the requisite mental state for the offences charged: *Daviault*, at pp. 89-91; and

The *Mens Rea* Breach – It would be contrary to the principles of fundamental justice (*Charter*, s. 7) to convict accused persons where the accused does not have the minimum *mens rea* that reflects the nature of the crime: *Daviault*, at pp. 90-92.[20]

21. These principles of law remain unchanged since *Daviault* was decided. The Court below relied on the same principles (and, for the most part, the same seminal caselaw) as Justice Cory relied upon in *Daviault*. There is no need for this Court to revisit law which forms the foundation of Canadian jurisprudence and has been, quite rightly, affirmed again and again.

a. The Voluntariness Breach

22. It is a cornerstone of the common law, and of Canadian constitutional law, that voluntariness is an essential element of criminal liability.[21] This is a principle of fundamental justice.

23. Both before and after *Daviault*, this Court has repeatedly affirmed that voluntariness must attach to the *actus reus* of the offence.[22] Speaking for a unanimous Court in *Bouchard-Lebrun,* Justice Lebel indicated that "it would be unfair in a democratic society to impose the consequences and stigma of criminal responsibility on an accused who did not voluntarily commit an act that constitutes a criminal offence."[23] The Court below relied on *Daviault,* as affirmed in *Bouchard-Lebrun,* in reaching its conclusion that s. 33.1 offended s. 7 of the *Charter*.[24]

24. In the Court of Appeal, the Applicant tried to rely on the *Penno* decision as authority abrogating from this fundamental principle; however, the Court below rightly held that *Penno* is

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[20] *Sullivan and Chan, supra.* at para. 47.
[21] See, e.g., *R. v. King,* [1962] S.C.R. 746 at p. 749; *Perka v. The Queen,* [1984] 2 S.C.R. 232 at p. 249; *R. v. Parks,* [1992] 2 S.C.R. 871; *R. v. Daviault,* [1994] 3 S.C.R. 63 at para. 44; *R. v. Ruzic,* [2001] S.C.R. 687 at paras. 45-47; *R. v. Bouchard-Lebrun,* [2011] 3 S.C.R. 575 at paras. 45-49.
[22] *Bouchard-Lebrun, supra.* at para. 45. See also, *R. v. Parks,* [1992] 2 S.C.R. 871 at p. 896; *R. v. Théroux,* [1993] 2 S.C.R. 5 at p. 17.
[23] *Bouchard-Lebrun, supra.* at para. 45 [Emphasis Added].
[24] *Sullivan and Chan, supra.* at paras. 64 and 66.

inapplicable as it dealt with a situation where intoxication was an essential element of the offence. As the Court of Appeal noted, "[t]he inapplicability of *Penno* is underscored by the fact that in *Daviault*, at p. 102, Cory J. cited *Penno* but nonetheless decided that the *Leary* rules would contravene the principle of voluntariness".[25]

b. The Improper Substitution Breach

25. Likewise, the rule against improper substitution has been settled by this Court in favour of the interpretation relied upon by the Court below in this case. A provision which allows for conviction despite a reasonable doubt on an essential element of the offence *is* a violation of ss. 7 and 11(d) of the *Charter*.[26] In his majority decision in *Vaillancourt,*[27] Justice Lamer held that "[i]f the trier of fact may have a reasonable doubt as to the essential element notwithstanding proof beyond a reasonable doubt of the substituted element, then the substitution infringes ss. 7 and 11(d)."[28] *Daviault* applied this well-settled principle to hold that s. 11(d) mandates recognition of the defence of voluntary intoxication akin to automatism.[29] The law remains unchanged. As noted in the decision of the Court below, just last year, in his majority decision in *Morrison,* Justice Moldaver again affirmed *Vaillancourt* on this specific point.[30] The Court below relied upon the same legal basis enunciated in *Daviault* to reach the conclusion that it did.[31]

c. The *Mens Rea* Breach

26. In *Daviault,* Justice Cory relied on *DeSousa,*[32] *Théroux,*[33] and *Creighton*[34] to hold that self-induced intoxication could not supply the necessary link between the minimum *mens rea* and the prohibited act, such that "[…] the mental element is one of intention with respect to the *actus reus*

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[25] *Sullivan and Chan, supra.* at para. 67.
[26] See, e.g., *R. v. Oakes, supra* at para. 57; *R. v. Vailliancourt,* [1987] 2 S.C.R. 636 at para. 32; *R. v. Holmes,* [1988] 1 S.C.R. 914 at para. 33; and *R. v. Whyte,* [1988] 2 S.C.R. 3 at paras. 24-27; *R. v. St-Onge Lamoureaux,* 2012 SCC 57 at para. 24.
[27] [1987] 2 S.C.R. 636
[28] *Ibid.* at para. 32.
[29] *Daviault, supra.* at paras. 41 – 42.
[30] *R. v. Morrison,* [2019] 2 S.C.R. 3 at para. 51.
[31] See, *Sullivan and Chan, supra.* at para. 78 and *Daviault, supra.* at paras. 42-45.
[32] [1992] 2 S.C.R. 944
[33] [1993] 2 S.C.R. 5
[34] [1993] 3 S.C.R. 3

reus of the crime charged."[35] *DeSousa, Théroux,* and *Creighton* are all cases concerned with the imposition of criminal liability for the unintended consequences of an unlawful act. All three cases arrive at the same general conclusion: that criminal liability can attach to the unlawful act if the risk of harm is a foreseeable consequence of its commission.[36] In *Daviault,* Justice Cory found that the *Leary* rule violated s. 7 of the *Charter* because it did not require "the necessary link" between the intention to become intoxicated and the act prohibited by the offence charged. In other words, it did not require foreseeability of harm, the minimum constitutionally compliant *mens rea* for criminal liability developed by this Court in *Creighton*. [37]

27. Just like the *Leary* rule*,* s. 33.1 of the *Criminal Code* allows for conviction where the minimum *mens rea* is not present. This is because, again like the *Leary* rule*,* the provision admits no exception. It criminalizes voluntary ingestion even where the accused could not reasonably foresee that he would become intoxicated to the point of automatism or commit a violent act in that state. The absolute nature of the liability created by s. 33.1 is apparent on a plain reading of s. 33.1(2) and was confirmed by this Court's decision in *Bouchard-Lebrun,* where Justice Lebel set out the necessary preconditions for an application of s. 33.1 as follows:

> This provision applies where three conditions are met: (1) the accused was intoxicated at the material time; (2) the intoxication was self-induced; and (3) the accused departed from the standard of reasonable care generally recognized in Canadian society by interfering or threatening to interfere with the bodily integrity of another person […].[38]

28. In his detailed reasons for the majority of the Court below, Justice Paciocco expressed significant concern that the statutory rule, in negating the defence of intoxication akin to automatism, did not take into account "how unintentional, non-wilful, unknowing, or unforeseeable the interference with bodily integrity or threatening is."[39] The Court held that, s.

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[35] *Daviault, supra.* at para. 46. See also, para. 43.
[36] *DeSousa, supra.* at para. 28; *Théroux, supra.* at para. 27; and *Creighton, supra.* at para. 104. *DeSousa* (unlawfully causing bodily harm) and *Creighton* (unlawful act manslaughter) require objective foresight of bodily harm and *Théroux* requires subjective foresight of economic deprivation.
[37] *Sullivan and Chan, supra.* at para. 80.
[38] *Bouchard-Lebrun, supra.* at para. 89.
[39] *Sullivan and Chan, supra.* at para. 85.

33.1 violated the *Charter* because it did not meet the standard of penal negligence;[40] did not require objective foresight of automatism or the commission of an offence;[41] and did not require a marked departure from the standards of a reasonable person.[42] On the second point, the Court expressed unanimity with the comments of Justice Cory on the same point in *Daviault.*[43] On the last point, the Court below remarked that

> the notion that it is a marked departure from the standards of the norm to become intoxicated, let alone mildly intoxicated, is untethered from social reality, particularly in a nation where the personal use of cannabis has just been legalized.[44]

The Section 1 Analysis

29. The *Daviault* decision was emphatic in its condemnation of the *Charter*-breaches crated by the *Leary* rule. In his plurality judgement, Justice Cory explained that the *Leary* rule "[…] offends the *Charter* in a manner that is so drastic and so contrary to the principles of fundamental justice that it cannot be justified under s. 1 of the *Charter*."[45]

30. Though perhaps not strictly required when adjudicating the constitutionality of a common law rule, Justice Cory took it upon himself to consider and remark upon each step of the *Oakes* test. His Honour concluded that the common law rule failed the test for justification under s. 1 at every turn, saying:

> The experience of other jurisdictions which have completely abandoned the Leary rule, coupled with the fact that under the proposed approach, the defence would be available only in the rarest of cases, demonstrate that there is no urgent policy or pressing objective which need to be addressed. Studies on the relationship between intoxication and crime do not establish any rational link. Finally, as the Leary rule applies to all crimes of general intent, it cannot be said to be well tailored to address a particular objective and it would not meet either the proportionality or the minimum impairment requirements.[46]

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[40] *Sullivan and Chan, supra*. at para. 84-85.
[41] *Sullivan and Chan, supra*. at para. 86-87.
[42] *Ibid.* at para. 88-91.
[43] *Ibid.* at para. 86, see also, *Daviault, supra.* at para. 86.
[44] *Ibid. at* para. 90.
[45] *Daviault, supra.* at para. 47 [Emphasis Added].
[46] *Ibid.* at para. 47.

31. While the s. 1 analysis from *Daviault* may not have been strictly binding on the Court below,[47] the determination that the breaches at issue cannot be saved by s. 1 flows inescapably from *Daviault* and from core principles of constitutional law.

Discrete Issues Raised by The Applicant

32. The Applicant makes submissions regarding a number of discrete issues which it says militate in favour of granting leave to appeal. These are:

a. The Applicant argues that there exists uneven application of the criminal law as between provincial jurisdictions on this issue (see, Applicant's Memorandum, paragraphs 14 – 15);

b. The Applicant argues that it has been some time since the Supreme Court considered the issue (paragraph 16); and

c. The Applicant argues that the potential appeal raises "embedded issues of criminal-law theory (See, Applicant's Memorandum, paragraph 13).

This is not a Case of "Conflicting Jurisprudence"

33. While a conflict between provincial courts of appeal regarding the application of the criminal law across the nation is a relevant factor militating in favour of leave, this case does not present this feature. The Ontario Court of Appeal is the only appellate court in Canada that has directly considered the constitutionality of s. 33.1. All of the cases listed by the Applicant at paragraph 14 of its Memorandum are trial level decisions. It is unnecessary for this Court to grant leave to correct a potential problem of uneven application that has not yet occurred.

34. Moreover, the fact that the *Daviault* decision has been misapplied in a handful of trial level decisions across the country over a twenty-six-year period, does not constitute widespread misapplication of this Court's decision, in need of correction or clarification by this Court

35. The limited relevance of trial level decisions is all the more apparent when one considers

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[47] *Sullivan and Chan, supra.* at para. 118 (C.A.).

the effect of trial level jurisprudence on this issue through the lens of the Ontario Court of Appeal's determination in *Sullivan and Chan* of the legal effect of a declaration of invalidity under s. 52 of the *Constitution Act,* 1982. In *Sullivan and Chan* the Court held that a declaration of invalidity by a Superior Court of Justice does not have binding effect throughout the province, but is governed, instead, by the ordinary rules of *stare decisis.*[48] If this is indeed the law,[49] then the fact that there are a handful of conflicting trial level decisions in provinces other than Ontario is of limited precedential value, and does not justify leave being granted by this Court.

Elapse of Time Since the Court Last Considered the Issue

36. As noted elsewhere in this Memorandum, despite the passage of time, *Daviault* remains good law. While the Supreme Court of Canada has recognized the wisdom of incremental development of the law to reflect the "dynamic and evolving framework of our society,"[50] the social issues which the Applicant identifies as relevant to the determination of this appeal remain relatively unchanged since the 1994 Court considered this issue. Violence of all kinds has always been abhorrent to Canadian society and to the Supreme Court.

37. Moreover, while the Respondent does not agree with the Applicant's suggestion that allowing the defence would have any impact on rates of violence against vulnerable individuals,[51] the facts of *Daviault* were squarely concerned with the issue of violence and sexual violence against a person with multiple, intersecting vulnerabilities. The facts of *Daviault* demanded consideration of the problem of violence on vulnerable individuals – even more so than the facts of the current appeals – and the 1994 Court reached its decision with due consideration of those

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[48] See *Sullivan and Chan, supra.* at paras. 34 - 41.

[49] This is currently the law in Ontario. It is not the law in British Columbia (see *R. v. Boutilier*, 2016 BCCA 24 (aff'd on other grounds, [2017] S.C.J. No. 64 at para. 45). The Respondent disagrees with this aspect of the appellate decision in *Sullivan and Chan*, and, if leave is granted in this matter, the Respondent will seek to uphold the judgment appealed from on the ground that this aspect of *Sullivan and Chan* was wrongly decided, under Rule 29(3) of the *Rules of the Supreme Court of Canada* (SOR/2002-156).

[50] *R. v. Salituro*, [1991] S.C.J. No. 97, at para. 37, [1991] 3 S.C.R. 654, at 670 (S.C.C.).

[51] Automatic violence is, by definition, not goal-oriented. The "choice" of victim is random.

issues.

38. If anything, the "matrix of legislative and social facts"[52] in this case would only reinforce the decision already reached by this Court in *Daviault*. The core issue in *Daviault,* and, indeed, in all cases which consider the constitutionality of restricting the defence of self-induced intoxication, is whether the moral fault of becoming intoxicated can be substituted for the moral fault of committing a general intent offence. In the years since *Daviault*, Canadian society has become increasingly tolerant of the use of certain intoxicating substances. In 2017, the *Cannabis Act*[53] was passed. In August 2020, Canada's Minister of Health granted four Canadians the right to use psilocybin (the substance consumed by Thomas Chan) as part of therapy aimed at ending end of life distress, signalling a shift in prevailing attitude towards consumption of the drug.[54] Moreover, in the intervening years since *Daviault* was decided, Canadian society and Canadian courts have only become increasingly aware of the relationship between mental health, substance use, and addiction.[55]

Embedded Issues of Criminal Law Theory

39. The Applicant suggests that the proposed appeal raises the following additional issues:

a. The expansion of the Principles of Fundamental Justice, specifically:

i. Expansion of the requirement of voluntariness (see, Applicant's

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[52] *Carter v. Canada (Attorney General),* 2015 SCC 5, [2015] 1 S.C.R. 331, at para. 47.
[53] S.C. 2018, c. 16.
[54] David E. Carpenter, "Four Terminally Ill Canadians Gain Legal Right To Use Magic Mushrooms For End-Of-Life Distress" (8 August, 2020) Forbes, <https://www.forbes.com/sites/davidcarpenter/2020/08/08/four-terminally-ill-canadians-gain-legal-right-to-use-magic-mushrooms-for-end-of-life-distress/#4f8449562bdf>
[55] For example, in 2007 the federal government created the *Mental Health Commission of Canada*, which included as a priority addressing the overrepresentation of people living with mental health problems and illnesses in the criminal justice system. The MHCC's 2019-2021 mandate from Health Canada identified mental health and the criminal justice system as a renewed area of focus. Mental Health Commission of Canada. (2020) Mental Health and the Criminal Justice System: 'What we Heard'. Ottawa, Canada at p.1.

Memorandum, paragraphs 22 - 24);

ii. Expansion of the prohibition on substitution of "essential elements" (see, Applicant's Memorandum, paragraphs 25 – 27); and

iii. Elevation of the minimum constitutional fault requirements (see, Applicant's Memorandum, paragraphs 28 – 30); and

b. Accountability as a lawful purpose under the s. 1 analysis.

The Requirement that Voluntariness "Attaches" to the Prohibited Conduct

40. The Applicant suggests at paragraph 22 of its Memorandum that "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.'" It is simply untrue that the Court below did not have authority for this principle; it was enunciated by this Court in *Parks, Théroux,* and *Bouchard-Lebrun*. The Court below explicitly relied on these cases in support of this principle.[56]

41. The Applicant's suggestion that s. 33.1 is comparable to party liability under s. 21 of the *Criminal Code* is not compelling. A person who is convicted under s. 21(c), to draw on the Applicant's example, must voluntarily utter words that abet the specific offence. The voluntariness requirement attaches, in that example, to words that have the effect of abetting assault and that are uttered with knowledge and intent (or recklessness). Section 33.1 is unconstitutional precisely because it does not require a connection between the voluntary act (consuming an intoxicant) and the subsequent violent behaviour.

The Prohibition of Substitution of "Essential Elements"

42. In a similar vein, the Court below did not expand upon the prohibition against the substitution of essential elements, but relied on settled law. The Court below held that the intention to become voluntarily intoxicated could not be substituted for the intention to commit the criminal

[56] *Sullivan and Chan, supra.* at para. 66.

offence of assault.[57] At paragraph 26 of its Memorandum the Applicant argues that the Court below "erred by failing to consider whether voluntariness and intent with respect to the application of force are 'required' or 'essential'." It is difficult to imagine how this could be an error; the Court of Appeal need not consider whether voluntariness and intent with respect to the *actus reus* of assault is required, it could not be more clear in law that they are. This is why we call them "essential elements."

43. The Applicant argues that the Court below expanded on *Daviault* because the true question in *Daviault* is "whether courts can redefine the elements of statutory offences by substituting proof of one fact for proof of an essential element." This line of reasoning was aggressively pursued and emphatically rejected in the Court below.[58] On a plain reading of the cases, it is abundantly clear that *Daviault* is not a case about division of power; it is a case about the constitutional limits of criminal liability.

The Minimum Constitutional Fault Requirement

44. The Applicant argues that the Court below erred in approaching s. 33.1 as a negligence-based offence and that it should instead be viewed as a form of "intentional predicate-act liability." Reframing the issues in this manner is a distinction without a difference. Manslaughter, for example, is a form of "intentional predicate-act liability" – reasonable foreseeability of bodily harm remains constitutionally required.[59] This is the minimal constitutionally-required *mens rea* for all criminal liability, which is logically derived from the prohibition against absolute liability in the criminal context.

45. The Applicant faults the Court below for not addressing the principle from *DeSousa,*[60] which states that an accused can be held liable for the unintended consequences of an unlawful act. The Court below cannot be faulted for failing to address *DeSousa*. In *Daviault,* Justice Cory considered *DeSousa* on this point, and found that the ratio of *DeSousa* militates in favour of a finding that any rule vitiating the defence of self-induced intoxication offends the requirement that

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[57] *Daviault, supra.* at para. 78.
[58] *Sullivan and Chan*, paras. 39 – 42 and 53 - 54.
[59] *Creighton, supra.* at para. 104.
[60] *R. v. DeSousa,* [1993] 2 S.C.R. 944.

the accused possess the minimum *mens rea* that reflects the nature of the crime.[61] Both *DeSousa* and *Daviault* were binding upon the Court below.

Accountability

46. The judgement of the Court below on the issue of accountability was not a departure from the jurisprudence of this Court and it need not be revisited. The majority decision in *Penno*, cited by the Applicant for the idea that accountability is a lawful purpose, was that the sections of the *Criminal Code* at issue in that case did not violate ss. 7 and 11(d) of the *Charter*. The s. 1 analysis focused on accountability was only endorsed by a single judge (albeit the Chief Justice at the time). *Sauvé*, also cited by the Applicant on this point, is a case about prisoner's voting rights, not about the imposition of criminal liability.

47. In holding that accountability was not a legitimate purpose in the circumstances of this case, the Court below relied on seminal jurisprudence of this Court and applied it to the facts before it. This Court held in *Big M. Drug Mart* that legislation is unlawful if its purpose is to breach the constitution. The Court of Appeal in this case concluded that, on the factual matrix before it, the adoption of an accountability purpose would offend that rule.

Conclusion

48. The Crown's application in this case does not meet the threshold for granting leave to appeal to the Supreme Court of Canada. Insofar as it seeks to revisit issues conclusively determined by this Honourable Court and on which there is no conflicting appellate jurisprudence, it fails to raise issues of national importance.

PART IV – COSTS

49. The Respondent makes no submissions as to costs.

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[61] *Daviault, supra.* at para. 46. See also, *DeSousa, supra.* at para. 33.

PART V – ORDER SOUGHT

50. The Respondent seeks an order dismissing the application for leave to appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED , this 14th day of September, 2020.

Stephanie DiGiuseppe	Karen Heath	Annamaria Enenajor

PART VI – TABLE OF AUTHORITIES

Case Law	Para(s)
Canada v. Craig, [2012] S.C.J. No. 43, [2012] 2 S.C.R. 489 (S.C.C.)	1
R. v. Daviault, [1994] 3 S.C.R. 63	2, 3, 4, 14, 15, 16, 17, 18, 19, 20, 22, 23, 25, 26, 28, 29, 30, 31, 34, 37, 38, 42, 43, 45
R. v. Sullivan; R. v. Chan 2020 ONCA 333	4, 5, 16, 19, 24, 25, 26, 28, 35, 40
R. v. Bouchard-Lebrun, [2011] S.C.J. No. 58	18, 22, 23, 27, 40
R. v. King, [1962] S.C.R. 746	22
Perka v. The Queen, [1984] 2 S.C.R. 232	22
R. v. Parks, [1992] 2 S.C.R. 871	22, 40
R. v. Ruzic, [2001] S.C.R. 687	22
R. v. Théroux, [1993] 2 S.C.R. 5	26, 40
R. v. Oakes, [1986] 1 S.C.R. 103	9, 25, 30
R. v. Vailliancourt, [1987] 2 S.C.R. 636	25

STATUTES & REGULATIONS

	Para(s)
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 *Loi Constitutionnelle de 1982*, ch. 11 (R.U.), Annexe B, Partie I, c. 11	
s.1	2, 7, 15, 29, 46
s. 7	2, 7, 15, 20, 23, 25, 26, 46
s. 11(d)	2, 7, 15, 20, 25, 46
Criminal Code, R.S.C. 1985, c. C-46, s. 693(1)(b), s. 33.1 Code criminal, L.R.C. (1985), ch. C-46, s. 693(1)(b), s. 33.1	2, 4, 5, 7, 17, 18, 23, 27, 28, 32, 41, 44