SCC File No.: 39781

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL OF ALBERTA)

BETWEEN:

MATTHEW WINSTON BROWN

Appellant
(Respondent)

- and -

HER MAJESTY THE QUEEN

Respondent
(Appellant)

- and -

ATTORNEY GENERAL OF CANADA, ATTORNEY GENERAL OF BRITISH COLUMBIA, ATTORNEY GENERAL OF SASKATCHEWAN, ATTORNEY GENERAL OF MANITOBA, ATTORNEY GENERAL OF ONTARIO, CANADIAN CIVIL LIBERTIES ASSOCIATION, CRIMINAL LAWYER'S ASSOCIATION (ONTARIO), WOMEN'S LEGAL EDUCATION AND ACTION FUND INC., EMPOWERMENT COUNCIL

Interveners

FACTUM OF THE RESPONDENT
HER MAJESTY THE QUEEN
(Rules 42 and 43 of the *Rules of the Supreme Court of Canada)*

DEBORAH J. ALFORD
Alberta Crown Prosecution Service
Appeals and Specialized Prosecutions Office
3rd Floor, Bowker Building
9833 109 Street
Edmonton, AB T5K 2E8
Phone: (780) 422-5402
Fax: (780) 422-1106
Email: deborah.alford@gov.ab.ca

Counsel for the Respondent, Her Majesty the Queen in Right of Alberta

D. LYNNE WATT
Gowling WLG (Canada) LLP
2600, 160 Elgin Street
Ottawa, ON K1P 1C3
Phone: (613) 786-8695
Fax: (613) 788-3509
Email: lynne.watt@gowlingwlg.com

Ottawa Agent for the Respondent, Her Majesty the Queen in Right of Alberta

SEAN FAGAN and MICHELLE BIDDULPH
Evans & Fagan
The Manhattan Lofts
304-1117 1st Street SW
Calgary, AB T2R 0T9
Phone: (403) 517-1777
Fax: (403) 517-1776
Email: seanfagan@seanfagan.ca

Counsel for the Appellant, Matthew Brown

THOMAS SLADE
Supreme Advocacy LLP
340 Gilmour Street, Suite 100
Ottawa, ON K2P 0R3
Phone: (613) 695-8855 ext. 103
Fax: (613) 695-8580
Email: tslade@supremeadvocacy.ca

Ottawa Agent for Counsel to The Appellant, Matthew Brown

MICHAEL H. MORRIS, ROY LEE and REBECCA SEWELL
Department of Justice Canada
Prairie Regional Office (Edmonton)
300, 10423-101 Street
Edmonton, AB T5H 0E7
Phone: 780-246-5813
Fax: 780-495-8491
Email: michael.morris@justice.gc.ca

Counsel to the Intervener, Attorney General of Canada

CHRISTOPHER M. RUPAR
Attorney General of Canada
Department of Justice Canada
50 O'Connor Street, Suite 500, Room 556
Ottawa, ON K2P 6L2
Phone: (613) 941-2351
Fax: (613) 954-1920
Email: christopher.rupar@justice.gc.ca

Ottawa Agent for Counsel to the Intervener, Attorney General of Canada

JOAN BARRETT, MICHAEL PERLIN, and JEFFREY WYNGAARDEN
Attorney General of Ontario
Crown Law Office - Criminal
720 Bay Street, 10th Floor
Toronto, Ontario
M7A 2S9
Telephone: (416) 326-4600
Fax: (416) 326-4656
Email: Joan.Barrett@ontario.ca

Counsel to the Intervener, Attorney General of Ontario

NADIA EFFENDI
Borden Ladner Gervais LLP
World Exchange Plaza
100 Queen Street, suite 1300
Ottawa, Ontario
K1P 1J9
Telephone: (613) 787-3562
Fax: (613) 230-8842
Email: neffendi@blg.com

Ottawa Agent for Counsel to the Intervener, Attorney General of Ontario

AMIRAM KOTLER and REKHA MALAVIYA
Attorney General of Manitoba
5th Flr., Criminal Prosecutions Division
405 Broadway
Winnipeg, MB R3C 3L6
Phone: (204) 797-2357
Fax: (204) 945-1260
Email: ami.kotler@gov.mb.ca

Counsel to the Intervener, Attorney General of Manitoba

D. LYNNE WATT
Gowling WLG (Canada) LLP
2600 - 160 Elgin St
Ottawa, ON K1P 1C3
Phone: (613) 786-8695
Fax: (613) 563-9869
Email: lynne.watt@gowlingwlg.com

Ottawa Agent for Counsel to the Intervener, Attorney General of Manitoba

LARA VIZSOLYI
Attorney General of British Columbia
Criminal Appeals and Special Prosecutions
3rd Floor, 940 Blanshard Street
Victoria, BC V8W 3E6
Phone: (778) 974-5144
Fax: (250) 387-4262
Email: lara.vizsolyi@gov.bc.ca

Counsel to the Intervener, Attorney General of British Columbia

MATTHEW ESTABROOKS
Gowling WLG (Canada) LLP
2600 - 160 Elgin Street
Ottawa, ON K1P 1C3
Phone: (613) 786-0211
Fax: (613) 788-3573
Email: matthew.estabrooks@gowlingwlg.com

Ottawa Agent for Counsel to the Intervener, Attorney General of British Columbia

NOAH WERNIKOWSKI
Ministry of Justice Saskatchewan
820-1874 Scarth Street
Constitutional Law Branch
Regina, SK S4P 4B3
Phone: (306) 786-0206
Fax: (306) 787-9111
Email: noah.wernikowski@gov.sk.ca

Counsel to the Intervener, Attorney General of Saskatchewan

D. LYNNE WATT
Gowling WLG (Canada) LLP
2600 - 160 Elgin St
Ottawa, ON K1P 1C3
Phone: (613) 786-8695
Fax: (613) 563-9869
Email: lynne.watt@gowlingwlg.com

Ottawa Agent for Counsel to the Intervener, Attorney General of Saskatchewan

ANIL K. KAPOOR and DANA ACHTEMICHUK
Kapoor Barristers
161 Bay Street
Suite 2900
Toronto, Ontario
M5J 2S1
Telephone: (416) 363-2700
Fax: (416) 363-2787
Email: akk@kapoorbarristers.com

Counsel to the Intervener, Canadian Civil Liberties Association

MARIE-FRANCE MAJOR
Supreme Advocacy LLP
100- 340 Gilmour Street
Ottawa, Ontario
K2P 0R3
Telephone: (613) 695-8855 Ext: 102
Fax: (613) 695-8580
Email: mfmajor@supremeadvocacy.ca

Ottawa Agent for Counsel to the Intervener, Canadian Civil Liberties Association

ANITA SZIGETI and MAYA KOTOB
Anita Szigeti Advocates
400 University Avenue
Suite 2001
Toronto, Ontario
M5G 1S5
Telephone: (416) 504-6544
Fax: (416) 204-9562
Email: anita@asabarristers.com

MARIE-FRANCE MAJOR
Supreme Advocacy LLP
100- 340 Gilmour Street
Ottawa, Ontario
K2P 0R3
Telephone: (613) 695-8855 Ext: 102
Fax: (613) 695-8580
Email: mfmajor@supremeadvocacy.ca

Counsel to the Intervener, Empowerment Council

LINDSAY DAVIAU and ERIC NEUBAUER
Rosen & Company Barristers
65 Queen Street West
Suite 600
Toronto, Ontario
M5H 2Y2
Telephone: (416) 205-9700
Email: LindsayDaviau@rosenlaw.ca

Ottawa Agent for Counsel to the Intervener, Empowerment Council

MARIE-FRANCE MAJOR
Supreme Advocacy LLP
100- 340 Gilmour Street
Ottawa, Ontario
K2P 0R3
Telephone: (613) 695-8855 Ext: 102
Fax: (613) 695-8580
Email: mfmajor@supremeadvocacy.ca

Counsel to the Intervener, Criminal Lawyers' Association

MEGAN STEPHENS
Megan Stephens Law
1039 - 20 Dundas Street West
Toronto, Ontario
M5G 2C2
Telephone: (416) 900-3319
Fax: (416) 900-6661
Email: megan@stephenslaw.ca

Ottawa Agent for Counsel to the Intervener, Criminal Lawyers' Association

NADIA EFFENDI
Borden Ladner Gervais LLP
World Exchange Plaza
100 Queen Street, suite 1300
Ottawa, Ontario
K1P 1J9
Telephone: (613) 787-3562
Fax: (613) 230-8842
Email: neffendi@blg.com

Counsel to the Intervener, Women's Legal Education and Action Fund Inc.

Ottawa Agent for Counsel to the Intervener, Women's Legal Education and Action Fund Inc.

TABLE OF CONTENTS

Page No.

FACTUM OF THE RESPONDENT

PART I – OVERVIEW AND FACTS

Overview

1. This case concerns the constitutional validity of s. 33.1 of the *Criminal Code of Canada*. The Appellant asserts that the section unjustifiably contravenes ss. 7 and 11(d) of the *Charter of Rights and Freedoms.*

2. At the heart of the dispute is whether the impugned section, which has existed for a quarter of a century, permits the conviction of the morally blameless, which was the central concern of this Court in *R v Daviault*.[1] The Respondent's position is that when the proper scope of the provision is determined, and the section and its critical elements are properly interpreted, it is constitutionally compliant.

3. It is critical to understand that both the scope of the section and its essential elements were firmly established by this Court in *R v Bouchard-Lebrun*.[2] Furthermore, the word "*self-induced*" has received definitive judicial determination that makes the section's constitutional validity quite apparent. The proper interpretations have been in place and applied by the courts for more than half a century.

4. To be more specific, the term "*self-induced*" has been definitely determined to contain a requirement of voluntariness. With that proper understanding, the section is constitutionally compliant. The section is not the dissent in *Daviault*, and is far removed from the rule in *Leary v R*,[3] which contained the common law rule at issue in *Daviault*.

5. A central concern of the Respondent is that the concept of "self-induced intoxication" is a key element in the limitation of defences in relation to sexual violence offences which primarily

---

[1] *R v Daviault*, 1994 CanLII (SCC), [1994] 3 SCR 63.
[2] *R v Bouchard-Lebrun*, 2011 SCC 58 (CanLII), [2011] 3 SCR 575.
[3] *Leary v R*, 1977 SCC (CanLII) 2, [1978] 1 SCR 29.

impact women and children. Section 33.1 must not be viewed in isolation but rather as one of a number of sections in which Parliament has attempted to curtail the ongoing violence against women and children.

6. The section does not limit other defences such as not criminally responsible pursuant to s. 16 of the *Criminal Code*. That section, in common with s. 33.1 and other sections that restrict defences, have long recognized that those who voluntarily intoxicate themselves to the extreme are not morally blameless.

Statement of Facts

7. The Respondent agrees with the facts set forth in paragraphs 1 to 4 of the Appellant's factum but adds the following.

8. At approximately 4:00 a.m. on January 13, 2018, Janet Hamnett, was awakened by a "horrendous explosion." [4] As she exited her bedroom, she was attacked by a "huge presence"[5] and "beaten repeatedly with something really hard."[6] During the attack, the perpetrator was screaming loudly and did not use words. [7]

9. Following the attack, Janet Hamnett fled to her neighbour's residence. [8] Mr. Crone testified that as his wife contacted 911, he went outside and noticed a naked person going through a neighbour's car.[9] He took pictures of this person[10] and watched as he ran off. [11]

10. Mr. Varshney testified that he and wife awoke to the sound of shattering glass at approximately 5:00 a.m.[12] He stepped out of his bedroom to investigate, asked who was there and

[4] Transcript of Proceedings (AR, Vol. IV, p. 125/38-40).
[5] Transcript of Proceedings (AR, Vol. IV, p. 126/3).
[6] Transcript of Proceedings (AR, Vol. IV, p. 126/4-7)
[7] Transcript of Proceedings (AR, Vol. IV, p. 128/7-13).
[8] Transcript of Proceedings (AR, Vol. IV, p. 133/11-18).
[9] Transcript of Proceedings (AR, Vol. IV, p. 150/29-38).
[10] Transcript of Proceedings (AR, Vol. IV, p. 150/30-31).
[11] Transcript of Proceedings (AR, Vol. IV, p. 154/20-22).
[12] Transcript of Proceedings (AR, Vol. IV, p. 163/22-34).

"somebody from the outside shouted and yelled at us very loudly."[13] Mr. Varshney and his wife locked themselves in their bedroom and stayed on the telephone with 911 pending arrival of the police.[14]

11. Upon their attendance at the Varshney residence, the police searched the home for the intruder. They located the Appellant in a washroom.[15] He was completely naked and had some blood on him.[16] His movements were "slow and coordinated".[17] He was arrested and taken to the hospital.[18]

12. Janet Hamnett suffered significant injuries as a result of this attack. Her physical injuries included cuts and bruising on both hands and forearms.[19] She is right-handed and that hand was "broken, smashed severely,"[20] required extensive therapy[21]and is permanently damaged.[22] She also suffered psychological injuries including increased anxiety and worry.[23]

13. At trial, the Appellant testified that he went to his friend's house around 8:00 p.m.[24] He consumed about 6 or 7 "Moscow Mules" drinks for a total of 12 to 14 ounces Vodka[25]and a few beer.[26] He knew that a "pretty full" baggie of magic mushrooms was on the kitchen counter.[27]

14. The Appellant testified that he had consumed one gram of magic mushrooms once before and it had been a positive experience.[28] On the night in question, he first ate about half a gram of

---

[13] Transcript of Proceedings (AR, Vol. IV, pp. 163/41-164/1).
[14] Transcript of Proceedings (AR, Vol. IV, p. 166/18-22).
[15] Transcript of Proceedings (AR, Vol. IV, p. 171/16-32).
[16] Transcript of Proceedings (AR, Vol. IV, p. 207/12-21).
[17] Transcript of Proceedings (AR, Vol. IV, p. 207/32).
[18] Transcript of Proceedings (AR, Vol. IV, pp. 208/40 - 210/9).
[19] Transcript of Proceedings (AR, Vol. IV, p. 117/30-37).
[20] Transcript of Proceedings (AR, Vol. IV, p. 134/36).
[21] Transcript of Proceedings (AR, Vol. IV, p. 144/2-27).
[22] Transcript of Proceedings (AR, Vol. IV, pp. 118/10-12 and 144/29-32).
[23] Transcript of Proceedings (AR, Vol. IV, p. 145/8-15).
[24] Transcript of Proceedings (AR, Vol. V, p. 7/1-2).
[25] Transcript of Proceedings (AR, Vol. V, p. 8/22-35).
[26] Transcript of Proceedings (AR, Vol. V, p. 8/37-41).
[27] Transcript of Proceedings (AR, Vol. V, p. 9/11-24).
[28] Transcript of Proceedings (AR, Vol. V, pp. 9/36 - 10/11).

mushrooms at 10:00 p.m.[29] and continued to consume them in frequent smaller doses.[30]

15. Under cross-examination, the Appellant testified that he did not ask the host of the party how potent the mushrooms were or how much could safely be taken.[31] He also agreed that he knew magic mushrooms are illegal and a hallucinogenic.[32] He agreed that he had somewhere between 15-19 standard alcoholic drinks at the party.[33]

16. Expert evidence offered at trial included that at the time of the offence, the Appellant was experiencing "psilocybin intoxication delirium, acute, hyperactivity," [34] and he would have lost conscious control of his body.[35] The trial judge accepted that the Appellant was operating as an automaton and acquitted him of both charges.

PART II – ISSUES

Question in Issue #1: What is the proper interpretation of s. 33.1 of the *Criminal Code?*

The Respondent's position is that the proper interpretation of the impugned provision has been firmly established by prior judicial authority.

Question in Issue #2: Does s. 33.1 of the *Criminal Code* infringe ss. 7 or 11(d) of the *Charter?*

The Respondent's position is that s. 33.1 is fully *Charter* compliant.

Question in Issue #3: If s. 33.1 of the *Criminal Code* infringes s. 7 or s. 11(d) of the *Charter* is that infringement justified under s. 1?

The Respondent's position is that in the event an infringement is found, that the section is fully justified under s. 1 of the *Charter*.

---

[29] Transcript of Proceedings (AR, Vol. V, p. 10/34-40).
[30] Transcript of Proceedings (AR, Vol. V, pp. 11/23-12/41).
[31] Transcript of Proceedings (AR, Vol. V, p. 21/16-21).
[32] Transcript of Proceedings (AR, Vol. V, p. 22/16-27).
[33] Transcript of Proceedings (AR, Vol. V, p. 27/6-8).
[34] Transcript of Proceedings (AR, Vol. V, p. 184/34-39).
[35] Transcript of Proceedings (AR, Vol. V, pp. 188/38-189/11).

PART III – ARGUMENT

Introduction

(i) Context and Historical Development of s. 33.1

17. Historically, intoxication was not a defence to any crime.[36] In *Leary*,[37] this Court expressed the legal relationship between intoxication and the mental component of a crime. While intoxication might give rise to a reasonable doubt in relation to specific intent, intoxication should ***not*** be used as a means of avoiding criminal liability for offences requiring only general intent.[38]

18. The *Leary* rule was subsequently upheld by this Court in *R v Bernard* [39]and said not to violate ss. 7 or 11(d) of the *Charter*. It was reviewed again, six years later, in *R v Daviault*[40], with a majority of this Court holding that the *Leary* rule did violate ss. 7 and 11(d) of the *Charter*. The defence of intoxication to the point of automatism was therefore available for crimes involving both specific and general intent.

19. The majority in *Daviault* concluded that there are situations of intoxication that are so extreme that they are akin to automatism. Such a state would render an accused incapable of either performing a willed act or of forming the minimal intent required for a general intent offence – both a voluntariness and mental element condition. The majority concluded that conscious self-induced intoxication could not serve as a substitute for those requirements.

20. The majority said that Parliament could enact legislation to deal with the issue of intoxication and general intent offences and suggested the potential of a stand-alone offence of

---

[36] *R v Chaulk*, 2007 NSCA 84.
[37] *Leary v R, supra* note 3; for a discussion on specific and general intent crimes see *R v Tatton*, 2015 SCC 33.
[38] *R v Daviault, supra* note 1 at pp.78-79.
[39] *R v Bernard*, [1988] 2 SCR 833.
[40] *R v Daviault, supra* note 1.

criminal intoxication.[41] It was not suggested that this was the only measure that could be considered.

21. Parliament then took up the issue and introduced Bill C-72.[42] A number of hearings and consultations before various Parliamentary committees occurred.[43] These included, *inter alia*, the following submissions:

---

[41] *R v Daviault, supra* note 1 at p. 100.

[42] *An Act to Amend the Criminal Code (self-induced intoxication),* SC 1995, c 32 (assented: 13 July 1995), *Respondent's Book of Authorities,* Tab 5, pp. 28-32.

[43] The following Parliamentary record was before the pre-trial judge in the *voir dire* on the constitutionality of s. 33.1 *CCC* in the instant case: *Minutes of Proceedings and Evidence of the Standing Committee on Justice and Legal Affairs,* No. 97 (5 April 1995) 97:1- 28, *Appellant's Record,* Vol. II, Tab 8, pp. 185-212; *Minutes of Proceedings and Evidence of the Standing Committee on Justice and Legal Affairs,* No. 98 (6 April 1995) 98:3-29, *Appellant's Record,* Vol. II, Tab 1, pp. 2-30; *Minutes of Proceedings and Evidence of the Standing Committee on Justice and Legal Affairs,* No. 158-164 (6,7,13,15,20, June 1995) including: Sheehy, Elizabeth, "*A Brief on Bill C-72"* Brief presented by National Association of Women and the Law, Appendix "JULA-7" 112A:1-40, *Appellant's Record*, Vol. II, Tab 2, pp. 39-78; Bazilli, S., "*Brief to the Legislative Committee on Bill C-72*" presented by METRAC: Metro action committee on public violence against women and children. Appendix "JULA-8", 112A:41-60, *Appellant's Record,* Vol. II, Tab 2, pp. 79-98; Canadian Bar Association, "*Submission on Bill C-72"*, Appendix "JULA-9", 112A:61-72, *Appellant's Record*, Vol. II, Tab 2, pp. 99-110; Kendall, Perry Dr., Addiction Research Foundation, "*Presentation to Standing Committee on Justice and Legal Affairs on Bill C-72"*, 13 June 1995, Appendix "JULA-10", 112A:73-79, *Appellant's Record*, Vol. II, Tab 2, pp. 111-117; Kalant, Harold Dr. , University of Toronto, Department of Pharmacology and Addiction Research Foundation of Ontario, "*A Submission to the Standing Committee on Justice and the Solicitor General, Concerning Reform of the Criminal Code of Canada with Special Reference to the concept of intoxicated automatism*." (20-6-1995), 112A: 80-94, *Appellant's Record*, Vol. II, Tab 2, pp. 118-132. House Committee, Legal and Constitutional Affairs, (28-6-1995) 46: 21-23, *Appellant's Record,* Vol. II, Tab 9, pp. 213-215; Criminal

[a] Evidence on violence against women and children including statistics from November 1993 that reflect the number of women who have been subjected to violence at the hands of their spouses,[44] submissions on behalf of the National Association of Women and the Law[45] and Metro Action Committee on Public Violence against Women and Children.[46] The latter spoke to the social response that occurred after *Daviault* was decided.[47] The Statistics Canada survey showed that alcohol was involved in 40 per cent of incidents involving violence against women and spousal assault rates were six times higher for women living with men who drank heavily.

[b] Evidence of then Justice Minister Rock who indicated that Bill C-72 was a specific response to this Court's decision in *Daviault* and it was not a contradiction or a

---

Lawyers' Association of Ontario; "*Submissions on Bill C-72 Criminal Code (self-induced intoxication*) 1-12, *Appellant's Record,* Vol. II, Tab 10, pp. 216-228; *House of Commons Debates* (22 June 1995) Vol. 133, No 224. 14469-14484, *Appellant's Record,* Vol. II, Tab 11, pp. 229-239;The following documents were tabled at House Justice Committee (13 June 1995): Statistics Canada, *"The Daily (18 November 1993) The Violence against Women Survey"* (9 Pages), *Appellant's Record,* Vol. II, Tab 12, pp. 240-248; Department of Justice Canada "*Violence and Intoxication: A Review of the Social Science Literature*" (38 pages), *Appellant's Record,* Vol. II, Tab 13, pp. 249-289; Department of Justice Canada, "*Information Note: Self-Induced Intoxication as Criminal Fault*" (February 1995) (8 pages**)**, *Respondent's Book of Authorities,* Tab 6; *Evidence of Standing Committee on Justice and Legal Affairs, House of Commons* (06 June 1995 a.m.), *Appellant's Record,* Vol. II, Tab 4, pp. 137-149; *Evidence of Standing Committee on Justice and Legal Affairs, House of Commons* (06 June 1995 p.m.), *Appellant's Record,* Vol. II, Tab 5, pp. 150-158; *Evidence of Standing Committee on Justice and Legal Affairs, House of Commons* (07 June 1995), *Appellant's Record,* Vol. II, Tab 7, pp. 174-184; *Evidence of Standing Committee on Justice and Legal Affairs, House of Commons* (13 June 1995), *Appellant's Record,* Vol. II, Tab 6, pp. 159-173; *Evidence of Standing Committee on Justice and Legal Affairs, House of Commons* (15 June 1995), *Appellant's Record,* Vol. II, Tab 3, pp. 133-136.

[44] Statistics Canada, "*The Daily (18 November 1993) The Violence against Women Survey*" *Ibid*, pp. 240-248; Transcript of Proceedings (AR, Vol. IV, p. 43/8-11).

[45] Appendix JULA-7 *supra* note 43, *Appellant's Record,* Vol. II, Tab 2, pp. 39-78.

[46] Appendix JULA-8 *supra* note 43, *Appellant's Record,* Vol. II, Tab 2, pp. 79-98.

[47] Transcript of Proceedings (AR, Vol. IV, pp. 48/12 – 49/30) and Appendix JULA-8: METRAC submissions at page 112A:42-43, *supra* note 43, *Appellant's Record,* Vol. II, pp. 80-81.

reversal of that decision. He noted that Parliament is entitled to legislate and deal with the matter of intoxication in a criminal context.[48]

[c] Minister Rock also stated that the Bill is fair to victims of violence as it "ensures accountability for the aggressor (and) fosters protection for the security of the person…This Bill reflects Parliament's grave concern about intoxicated violence and particularly its disproportionate effect upon women and children in Canada… [T]he *Daviault* case involved allegations of violence by a man against a woman. Almost all of the cases that followed the *Daviault* judgment also involved allegations of violence by men against women."[49]

[d] Evidence of Dr. Harold Kalant regarding scientific skepticism that automatism can result from consumption of alcohol alone. He indicated that some drugs, such as Ketamine and PSP may produce dissociative states and "true automatism".[50]

[e] Submissions by Professor Christine Boyle regarding the s. 15 equality rights of women and children and how Bill C-72 recognized these equality rights as they are the victims of self-intoxicated fuelled violence.[51]

[f] The Department of Justice Review of Social Science Literature showed that alcohol was involved in 85 percent of domestic homicide cases. These studies confirmed that alcohol consumption is "strongly related" to both the occurrence and severity of violence, including wife assault and sexual assault – both of which are equality issues for women.[52]

[g] Information regarding drug intoxication was also presented. Cocaine psychosis becoming a defence was mentioned by MP Meredith.[53] One study noted that

---

[48] Transcript of Proceedings (AR, Vol., pp. 42/23-43/6); *Minutes of the Proceedings and Evidence of The Standing Committee on Justice and Legal Affairs* (6 April 1995) *supra* note 43 *Appellant's Record,* Vol. II, Tab 1, pp. 4-30.

[49] Transcript of Proceedings (AR, Vol. IV, p. 46/11-25); House of Commons Debates (22 June 1995) Vol. 133, No 224, 14471 *supra* note 43, *Appellant's Record*, Vol. II, p. 232.

[50] Transcript of Proceedings (AR, Vol. IV, p. 43/30-44/1); Appendix JULA-10, *supra* note 43, at p. 112A:88-89, *Appellant's Record,* Vol. II, Tab 2, pp. 126-127.

[51] Transcript of Proceedings (AR, Vol. IV, pp. 45/37-46/5); *Minutes of the Proceedings and Evidence of the Standing Committee on Justice and Legal Affairs*, No. 97 (5 April 1995) *supra* note 43, *Appellant's Record,* Vol. II, Tab 8, pp. 185-215.

[52] Department of Justice*: Violence and Intoxication: A Review of the Social Science Literature supra* note 43, *Appellant's Record,* Vol. II, Tab 13, pp. 249-289.

[53] *Evidence of Standing Committee on Justice and Legal Affairs, House of Commons* (06 June 1995 a.m.) at 1135 *supra* note 43, *Appellant's Record*, Vol. II, Tab 4, pp. 146-147.

stimulants, such as cocaine, have been linked directly to aggression and the simultaneous use of multiple different drugs presents the most worrisome problem.[54]

[h] Professor Patrick Healy asserted that the "rate of intoxication accompanying harmful conduct is unacceptably high as a social phenomenon."[55] Bill C-72 says "that people who commit harmful acts in a voluntary state of intoxication are …wrongful in what they do, precisely because they have induced that state of incapacity and irresponsibility."[56]

[i] Dr. Bradford of the Canadian Psychiatric Association testified that the connection between intoxication and violence is even stronger than that of violence and mental disorder, and a connection between alcohol and sexual violence exists.[57] It is important that intoxication in general terms not be accepted as an excuse for criminal activity.[58]

[j] Dr. Kendall of the Addiction Research Foundation noted that the consumption of alcohol contributes to the incidence of violence among certain individuals, that it should not be used to excuse or ameliorate the effects of that violence and that there is an individual and societal responsibility to attempt to diminish alcohol and drug-related harm.[59]

22. The legislative history makes it clear that Parliament was targeting general intent offences that involve violence. In *R v Chaulk*, the Nova Scotia Court of Appeal noted that the recognition of the defence of extreme intoxication provoked a legislative response in the form of s. 33.1.[60] The extensive preamble to this legislation recognizes the correlation of self-induced intoxicated violence and its disproportionate impact on women and children. It expressly identifies the rights of women and children to ss. 7, 15 and 28 *Charter* rights. It sets forth the legislation's objectives

---

[54] Department of Justice, *Violence and Intoxication: A Review of the Social Science Literature* at pp. 5-6, 10-12, 25, *supra* note 43, *Appellant's Record,* Vol. II, Tab 13, pp. 258-259, 263-265, 277.
[55] *Evidence of the Standing Committee on Justice and Legal Affairs,* No. 97 (5 April 1995) 97:5, *supra* note 43, *Appellant's Record,* Vol. II, Tab 8, p. 189.
[56] *Ibid,* 97:6, p. 190.
[57] *Evidence of the Standing Committee on Justice and Legal Affairs,* (13 June 1995) at 1035, *supra* note 43 *Appellant's Record,* Vol. II, Tab 6, pp. 167-168.
[58] *Ibid* at 0940, p. 160.
[59] *Ibid* at 1010, p. 164.
[60] *R v Chaulk, supra,* note 36 at para. 30.

to both protect society from those who choose to intoxicate themselves to the point of automatism and to have them account for their behaviour.[61]

Issue #1: What is the proper interpretation of s. 33.1 of the *Criminal Code?*

(i) The Term "Self-Induced" Incorporates Voluntariness

23. In *R v Bouchard-Lebrun*,[62] this Court confirmed that s. 33.1 applies where (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.[63] This Court specified that s. 33.1 is intended to:

> *…prevent an accused from avoiding criminal liability on the ground that his or her state of intoxication at the material time rendered the accused incapable of forming the mental element or having the voluntariness required to commit the offence*.[64]

If one considers the thrust of the above quote it provides a complete answer to the questions of interpretation and consequent constitutional validity.

24. Central to the delineation of the key elements of the section is that the limitation applies only where the intoxication was "*self-induced*". Long prior to the enactment of s. 33.1, courts grappled with the question of whether any foresight as to possible impairment was required, and if so, whether it should be based on an objective or subjective test. In *R v King*, this Court established a subjective/objective *mens rea* test for voluntary intoxication – voluntary consumption of alcohol or drug which "*he knew or had any reasonable ground for believing*

---

[61] *An Act to Amend the Criminal Code (self-induced intoxication)*, SC 1995, c 32 (assented: 13 July 1995), *Respondent's Book of Authorities*, Tab 5.
[62] *R v Bouchard-Lebrun*, *supra* note 2.
[63] *R v Bouchard-Lebrun*, *supra* note 2 at para. 89.
[64] *R v Bouchard-Lebrun*, *supra* note 2 at para. 90.

might cause him to be impaired".[65] This Court indicated that it could be taken as a matter of "*common experience*" that consumption of alcohol may produce intoxication.[66]

(ii) Self-inducement incorporates voluntariness

25. A critical development was that the Canadian courts recognized and affirmed that the term "*self-inducement*" incorporates a requirement of voluntariness. "*Self-induced*" has a well-defined meaning that has been in place and applied by the courts for decades. In *R v Vickberg*, the British Columbia Court of Appeal defined "*self-induced*" as meaning that there is an intention to self-intoxicate, "*either by voluntarily ingesting a substance knowing or having reasonable grounds to know it might be dangerous, or by recklessly ingesting such a substance*".[67] The case was authority for the proposition that voluntariness is encapsulated within the term "*self-induced*".

26. In 1999, *R v Brenton* applied the following test:[68]

> *[31] … Generally speaking, if* ***the ingestion of a drug (or alcohol) is voluntary and the risk of becoming intoxicated is within the contemplation or should be within the contemplation of the individual, then any resulting intoxication is self-induced****. Involuntary intoxication is generally confined to cases where the accused did not know he or she was ingesting an intoxicating substance (such as where the accused's drink is spiked) or where the accused becomes intoxicated while taking prescription drugs and their effects were unknown to the accused. This is fairly basic law.* [emphasis added]
>
> *[34] In this case, the appellant knew that the substance he was ingesting was marijuana. He voluntarily smoked it. He knew that it could have an intoxicating effect. Indeed it is reasonable to conclude that he intended it to have an intoxicating effect to some degree (he wanted to relax so he could sleep). He expected it to have an effect on him. What he*

---

[65] *R v King*, 1962 CanLII 16 at 763. That same test is applied in *R v McDowell*, 1980 CanLII 2857 (ONCA), *R v Rushton*, 1963 CarswellNS 17, [1963] NSJ No 3, [1964] 1 CCC 382 (NSSCAD), *Respondent's Book of Authorities*, Tab 2, and *R v Mack*, 1975 CanLII 1295 (ABCA).

[66] *R v King*, *supra* note 65 at p. 764.

[67] *R v Vickberg*, 1998 CanLII 15068 (BCSC) at para. 68.

[68] *R v Brenton*, 1999 CanLII 4334 (NWTSC) at para. 31; upheld on different grounds in *R v Brenton*, 2001 NWTCA 1.

> *did not expect, or intend, was the extent of that intoxicating effect. In my opinion, this was a situation of self-induced intoxication and the trial judge came to the correct conclusion.*

27. Again, trial courts continued to follow this. For example, in *R v McGrath:*[69]

> *[6] "Involuntary intoxication" has been defined in a variety of ways. In my view the most accurate definition is offered by Vertes J. in R. v. Brenton* [citations omitted]:
>
> > *Involuntary intoxication is generally confined to cases where the accused did not know he or she was ingesting an intoxicating substance (such as the accused's drink was spiked) or where the accused became intoxicated while taking prescription drugs and their effects were unknown to the accused.*

(iii) Therefore, mens rea is a part of self-inducement

28. The knowledge requirement does not mean that the accused must know to a nicety what the effect of the intoxicating substance will be.[70] The trial courts have over the decades managed to deal with a variety of circumstances that might or might not render the consumption "*voluntary*", such as the "*spiked drink*", pharmaceuticals, mixture of drugs and alcohol, etc.[71] The critical *mens rea* question is whether the accused contemplated the risk of intoxication. For example, in *R v Harris,* an air of reality to the defence of involuntary intoxication was said to exist where the accused heroin addict thought he was injected with heroin, but instead was injected with cocaine.[72]

29. The most often cited authority for the definition of "*self-induced*" is found in *R v Chaulk* where the Nova Scotia Court of Appeal emphatically affirmed that "*voluntariness*" is a necessary part of the legal meaning of self-inducement. That case expressly adopted the decision in *R v*

---

[69] *R v McGrath*, 2013 ONCJ 528 at para. 6.
[70] *R v Honish*, 1991 ABCA 304 at para. 12; affirmed [1993] 1 SCR 458.
[71] *R v Saxon*, 1975 CanLII 1292 (ABCA) at para. 14, *R v Hallahan*, 2021 ONCJ 156 at para. 15; R *v Tramble*, 1983 CarswellOnt 69 at para. 18-26, *Respondent's Book of Authorities,* Tab 3, pp. 26-27; *R v Krewson,* 2019 BCCA 34 at paras. 31-34; *R v Fletcher*, 2005 BCPC 67 at paras. 30-34, *Respondent's Book of Authorities,* Tab 1, pp. 12-13; *R v Nash*, 2012 ONSC 4604 at paras. 72, 84-90.
[72] *R v Harris,* 2019 BCCA 166 at paras. 42-50.

Brenton, supra, para. 26, which had defined "*self-inducement"* as containing an objective *mens rea* component. [73]

30. Thus, *Chaulk* firmly established that voluntariness is a component of self-inducement. From there, and after a review of several cases, the court in *Chaulk* moved to a further refined definition of voluntariness:[74]

> *[45] Thus, I conclude, since R. v. King, supra the courts have consistently held that "voluntary intoxication" means the consuming of a substance where the person* ***knew or had reasonable grounds for believing*** *such might cause him to be impaired. (See also R. v. McDowell [citation omitted] per Martin J.A. at para. 14) In Regina v. Mack [citation omitted] Prowse J.A., commenting upon R. v. King, supra at p. 264 said:* [emphasis added]
>
> > *The effect of this decision is that if an accused knew or had any reasonable grounds for believing that the consumption of drugs or alcohol might cause him to be impaired, such evidence supports the conclusion that his condition was due to the voluntary consumption of drugs or alcohol and that intoxication voluntarily induced by itself does not rebut the rebuttable presumption that a man intends the natural consequences of his acts.*
>
> *[46] Nor must the accused contemplate the extent of the intoxication or intend a certain level of intoxication. In R. v. Honish [citation omitted], aff'd R. v. Honish [citation omitted], the accused, after consuming alcohol had tried to kill himself by taking 45 tablets of an anti-depressant and 15 tablets of a sleeping pill. He had no memory thereafter of his involvement in a motor vehicle accident. The defence argued that the intoxication was involuntary because he did not know and had no reasonable grounds for believing that the drugs would cause him to be impaired. The trial judge found, as a fact, that Honish was warned by his doctor not to consume alcohol or other medication while taking the drugs and that there was a warning label on the bottle. Fraser J.A., as she then was, writing for the court, said at p. 339:*
>
> > *... The law concerning responsibility for one's acts following voluntary ingestion of intoxicating substances does not require that the consumer know to a nicety what the effect of the intoxicating substances will be. It is enough that he knows it might be dangerous and is recklessly indifferent with respect to ingestion or as to warnings relating to the effects of ingestion: R. v. Rushton [citation omitted]; R. v. Szymusik [citation omitted] In this case, the evidence supports the conclusion that Honish's consumption of the intoxicants falls within the category of reckless indifference.*

---

[73] *R v Chaulk, supra* note 36 at para. 38.
[74] *R v Chaulk, supra* note 36 at paras. 45-46.

31. Therefore, a critical aspect of *Chaulk* is the existence of a *mens rea* requirement within the voluntariness portion of self-inducement. The court concluded:[75]

> *[47] Synthesizing these authorities, the two judges dealing expressly with s. 33.1 would both apply an objective element to the issue of self-induced intoxication: Vickberg, supra,- "...voluntarily ingesting a substance knowing or having reasonable grounds to know it might be dangerous ..."; Brenton, supra, - "... the risk of becoming intoxicated is within the contemplation or should be within the contemplation of the individual ...". This approach is consistent with the cases pre-dating the introduction of s. 33.1: R. v. King, supra, in giving meaning to voluntary impairment', - "... knew or had any reasonable grounds for believing might cause him to be impaired ..."; R. v. McDowell, supra, - "... knew or ought to have known that his ability might thereby be impaired.".* ***I would therefore express the test for self-induced intoxication as follows:***
>
> > ***(i) The accused voluntarily consumed a substance which;***
> > ***(ii) S/he knew or ought to have known was an intoxicant and;***
> > ***(iii) The risk of becoming intoxicated was or should have been within his/her contemplation.*** [emphasis added]

32. Notably, *Chaulk* was cited as authority by this Court in *Bouchard-Lebrun* for its general discussion of the elements.[76] The definitions contained within *Chaulk* continue to be applied, [77] with the defence having an onus of pointing to evidence that raises a reasonable doubt, before voluntariness is an issue at all - the well-established air of reality test.[78] For example, in *R v Huppie,* dealing with a horrific home invasion rape case that the trial judge described as a "*horrible nightmare*", the accused claimed a memory blank after consuming alcohol and ketamine, ecstasy and possibly cocaine. The trial judge specifically spelled out the *Chaulk* definition of self-induced intoxication requiring proof of voluntariness, with an evidentiary burden on the accused.[79] As this Court pointed out in *Bouchard-Lebrun,* cases are to be decided on the facts of each individual case - cases are very fact dependent.[80]

---

[75] *R v Chaulk, supra* note 36 at para. 47.
[76] *R v Bouchard-Lebrun, supra* note 2 at para. 89.
[77] *R v Harris,* 2004 ABQB 205 at para. 23.
[78] *R v Johnston,* 2021 ONSC 4410 at para. 14; *R v Harris, supra* note 72 at para. 49; *R v Talock,* 2003 SKCA 69 at paras. 13-15.
[79] *R v Huppie,* 2008 ABQB 539 at paras. 21-24.
[80] *R v Bouchard-Lebrun, supra* note 2 at para. 67.

33. It is clear that this Court, and others across Canada, have clearly understood the meaning to be attributed to the phrase "*self-induced*", as requiring an element of voluntariness. It is clear that the standard jury instructions are based upon the tests as enunciated in *Chaulk:*

> *5. On the other hand, if [the accused's] intoxication was not involuntary – in other words, (he/she) knew or ought to have known that (he/she) might become impaired in such circumstances – you must go on to consider what I have to say about voluntary intoxication.*[81]

34. Parliament is presumed to know the law - including the common law.[82] The most important guides are: (a) when Parliament uses a legal term with a well-understood legal meaning, it is presumed that Parliament intended to incorporate that legal meaning into the statute, (b) any departure from the legal meaning must be clearly expressed, and (c) there can be no common law offences.[83] The first two are particularly germane. The test for self-induced intoxication, and its incorporation of voluntariness, has been well established for decades. Nothing in s. 33.1 would permit a court to find that there is an intended departure from the meaning of self-induced intoxication, given its consistent usage by the courts.

35. An additional pertinent point of statutory interpretation encompasses a holistic analysis of the provision with reference, *inter alia*, to the provision's context and history as well as prior jurisprudence from this Court. The inclusion of wording by Parliament is presumed to be deliberate and must be given meaning.[84] "*[T]o determine whether a provision is consistent with the Charter, it is first necessary to ascertain whether its purpose or effect is to curtail a Charter right.*"[85] Regard must be given to the underlying presumption of modern statutory interpretation that "*legislation is enacted to comply with constitutional norms."*[86] As will be detailed below,

---

[81] Gerry A. Ferguson, Michael R. Dambrot, and Elizabeth A. Bennett, *CRIMJI: Canadian Criminal Jury Instructions* (Vancouver: Continuing Legal Education Society of British Columbia, 2006) at 129.4(5). See also generally 129.2, 129.3, *Respondent's Book of Authorities*, Tab 7, pp. 36-40.
[82] *R v DLW*, 2016 SCC 22 at para. 14.
[83] *R v DLW, supra* note 82 at para. 18; *R v Steadman*, 2021 ABCA 332 at para. 58.
[84] *Canada v JTI MacDonald Corp.*, 2007 SCC 30 at para. 87.
[85] *R v Big M Drug Mart Ltd.*, at p. 331; *Reference re Same Sex Marriage*, [2004] 3 SCR 698 at para. 40.
[86] *Charkaoui v Canada*, [2007] 1 SCR 350.

only a strained interpretation of s. 33.1 would permit a conclusion that it was intended to do anything but comply with norms.

(iv) There is an Imperative to Affirming the Definition of the Key Terms

36. While it is generally accepted that s. 33.1 was a response to the *Daviault* case it must be considered in the context that Parliament and courts have been rightly concerned with the violence perpetrated upon women and children. It must be seen as a part of the progressive reforms that have been enacted over the past decade.

37. There has been, over the years, a number of critical reforms that seek to attenuate the precarious position of women and children in our society, and their particular susceptibility to violence. We have begun to take seriously the grave risk to Indigenous women, women of colour and gender fluid minorities.

38. To that end, Parliament has over the past number of years enacted a series of reforms to the criminal law system to limit the scope of defences in cases that involve sexual violence. This includes limiting the defence of mistake of fact in relation to consent [87]and mistake of fact as to age. [88] Each of those developments are based upon limiting the defence by either precluding or restricting the usage of self-induced intoxication. That same policy consideration is embedded in s. 33.1.

39. The erroneous conclusion of the minority reasoning in the court below, and its counterpart in the majority judgment in *Sullivan*, that there is no *mens rea* component to s. 33.1 places in jeopardy the legislative framework that underpins the provisions put in place by Parliament to provide protection to vulnerable persons within our society. The reasoning simply fails to recognize how the key words within s. 33.1 have been interpreted and applied for decades. Reliance upon that reasoning could well result in unintended and highly unfortunate consequences for the vulnerable.

---

[87] S. 273.2(a)(i) of the *Criminal Code.*
[88] *R v Nguyen*, 2017 SKCA 30 at paras. 10-14.

40. There exists an important imperative to follow the normal presumption that words are to be given their well-established meaning, absent an express or by necessary implication, indication of the contrary intention by Parliament. In the case of s. 33.1, one simply cannot draw the conclusion that anything to the contrary was intended by Parliament. It was apparent that with the striking down of the *Leary* rule that Parliament had to consider enacting a provision that would offer some protection to Canadians. The majority in *Daviault* said that Parliament could enact legislation to deal with the issue of self-induced intoxication and general intent offences and suggested the potential of a stand-alone offence of criminal intoxication.[89] It was not suggested, however, that this was the only measure that could be considered.

Issue #2: Does s. 33.1 of the *Criminal Code* infringe ss. 7 or 11(d) of the *Charter?*

(i) Introduction – s. 33.1 is not simply the dissent in Daviault

41. While this legislation engages the s. 7 liberty interest, it accords with the principles of fundamental justice. The presumption of innocence in s. 11(d) is a specific example of a principle of fundamental justice and similarly is not violated by s. 33.1.

42. This Court expressly said in *R v Bouchard-Lebrun* that s. 33.1 was ***not*** an adoption of the minority judgment from *Daviault*. Lebel J. writing for the unanimous Court said:

> *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.*[90] [emphasis added]

[89] *R v Daviault, supra* note 1 at p. 100.
[90] *R v Bouchard-Lebrun, supra* note 2 at para. 35.

43. Some historical context is required to properly interpret s. 33.1. In *R v Daley*,[91] this Court reviewed the three stages of intoxication relevant to criminal proceedings: (a) mild intoxication which lowers inhibitions and does not represent a defence to anything; (b) advanced intoxication which **might** [dependent on the facts] be a defence to specific intent offences, and (c) extreme intoxication, akin to automatism which, if proven, might serve as a defence to both the *actus reus* and *mens rea* of a criminal offence.

44. In *Daviault* this Court was dealing with the common law rule enunciated in *Leary*,[92] which precluded a defence predicated by any of the three levels of intoxication established in *Daley*.[93] The common law precluded a defence of self-induced intoxication to any offence, whether property or violence to a person; whether a general or specific intent offence. This was subsequently modified in *Leary* so that evidence of intoxication amounting to incapacity might be a defence but only to specific intent offences.[94] Section 33.1 is anything but a recasting of the *Leary* principle.

45. Several distinguishing features are apparent. First, the *Bouchard-Lebrun* decision makes it clear that self-induced intoxication is a defence in Canada, even for general intent offences. Specific intent must be proven by the prosecution where the offence so requires. In *Bouchard-Lebrun* this Court reviewed the principle that intoxication can be raised as a defence in respect of a specific intent offence and said: *"This principle still represents the state of the law in Canada on this question"*. This Court added: *"[s]ince Beard, it has thus been possible to apply the intoxication defence to acquit an accused charged with a specific intent offence..."*.[95] If there was any doubt, it was resolved by this Court in *R v Daley* in which it was made clear that the defence of intoxication was available for specific intent offences, and that s. 33.1 was directed solely at a sub-set of general intent offences.[96]

---

[91] *R v Daley*, [2007] 3 SCR 523 paras. 41-43.
[92] *Leary v R, supra* note 3.
[93] *Ibid* at pp. 51, 57
[94] *Ibid* at p. 57.
[95] *R v Bouchard-Lebrun, supra* note 2 at paras. 30-31.
[96] *R v Daley, supra* note 91 at paras. 35-37.

46. On this point, the decision of the Ontario Court of Appeal that s. 33.1 would apply to specific intent offences is plainly wrong.[97] To the extent that the minority opinion below relies solely on *Sullivan,* it too is in error.

47. Additionally, the proper way of describing the elements of s. 33.1 is a requirement that the restriction applies only where the intoxication is voluntary, which contains a *mens rea* element. In turn, because of the requirement of voluntary consumption, mistake of fact is available. This is exemplified by *R v Harris*[98] in which the accused, thinking that he was consuming heroin, was in fact consuming cocaine. This was critical as the expert evidence established that the known effects of each were completely different. The charge was murder - a specific intent offence. There was no doubting that intoxication could negate the specific intent, but the general intent manslaughter offence had to be considered. The trial judge properly instructed the jury as it related to negating the *mens rea* for murder but declined to instruct the jury on voluntary, extreme intoxication on manslaughter. The British Columbia Court of Appeal ordered a new trial. By reason of his mistake of fact, the intoxication could be construed as involuntary. It was viewed as comparable to a situation where someone consumes a "spiked" drink.[99] Suggestions that s. 33.1 would preclude a defence in "spiked" drink cases are simply wrong.

48. It is not the case, as the Ontario Court of Appeal erroneously concluded, that the "*…implication is that a decision to become intoxicated to any degree is enough to trigger s. 33.1, even where the accused person cannot reasonably expect that, as a result of that intoxication, they may become unaware of their behaviour or incapable of consciously controlling their behaviour*."[100] That interpretation ignores the conditions that must be proved. To the extent that the minority opinion below relies solely upon *Sullivan*, it too is in error.

49. A crucial aspect of s. 33.1, which was given insufficient consideration by the Ontario Court of Appeal majority, is that the predicate element of voluntary intoxication must be a marked

---

[97] *R v Sullivan*, 2020 ONCA 333 at para. 127.
[98] *R v Harris*, 2019 BCCA 166, *supra* note 72.
[99] *Ibid* at paras. 46-48.
[100] *R v Sullivan, supra* note 97 at para. 88.

departure from standards of care. As Hughes, J.A. notes in the court below, this Court has previously held that those "… *who have the capacity to live up to a standard of care and fail to do so, in circumstances involving inherently dangerous activities, however, cannot be said to have done nothing wrong*."[101]

50. In the court below, Slatter, J.A. was correct in reiterating that: (a) s. 33.1 does not involve a "voluntariness breach" because it requires the voluntary consumption of intoxicating substances, (b) there is no "*mens rea* breach" because s. 33.1 requires objective foresight, (c) there is no "improper substitution breach" because s. 33.1 has redefined, not "substituted", the *mens rea* the Crown must prove for general intent offences, and (d) it is not simply the fact of intoxication that attaches moral culpability but rather, that it attaches where there is objective foresight. [102]

51. On each of the above points Slatter, J.A. was completely correct in relying upon established precedent in deciding that any conclusion that s. 33.1 does not contain an objective standard is clearly wrong.[103] He was correct in referring to key passages on what this Court and others have said concerning the consumption of alcohol and drugs. Indeed, the authority from this Court would be binding. His references were:

> *[30] With respect to the reckless consumption of intoxicants, Creighton held at p. 60:*
>
> > *At the very least, a person administering a dangerous drug like cocaine to another has a duty to inform himself as to the precise risk the injection entails and to refrain from administering it unless reasonably satisfied that there was no risk of harm.*
>
> *As observed by Lamer CJ in R. v Penno, [citation omitted] at p. 885:*
>
> > *By voluntarily taking the first drink, an individual can reasonably be held to have assumed the risk that intoxication would make him or her do what he or she otherwise would not normally do with a clear mind.*

---

[101] *R v Brown* 2021 ABCA 273 at para. 138.
[102] *Ibid* at paras. 23, 25-28, 39.
[103] *Ibid* at para. 31.

The point was refined in R. v Honish, [citation omitted] at para. 12:

> *The law concerning responsibility for one's acts following voluntary ingestion of intoxicating substances does not require that the consumer know to a nicety what the effect of the intoxicating substances will be. It is enough that he knows it might be dangerous and is recklessly indifferent with respect to ingestion or as to warnings relating to the effects of ingestion.*

52. Similarly, Hughes, J.A. was correct when she stated that:

> *...it is reasonable to ask citizens to live up to the standard of care set out in s. 33.1. If they fail to do so, they cannot be said to have done nothing wrong. Section 33.1 makes them accountable for unintended consequences based on their* ***intentional and voluntary consumption*** *of drugs and/or alcohol to an extreme level. DeSousa and Creighton are authority for the proposition that an offence does not offend s. 7 of the Charter even if the accused did not subjectively intend to commit unintended consequences.* [emphasis added][104]

53. Hughes, J.A. spends considerable time on this topic delineating in precise terms the meaning of "*substitution*", how it might offend s. 11(d) of the *Charter*, and why s. 33.1 is not a case of substitution.[105] The essence of substitution is that it permits, upon proof of a fact, the trier of fact to convict notwithstanding the existence of reasonable doubt as to any mental element or another legitimate defence. The requirement that the intoxication must be self-induced, which requires voluntariness, which in turn requires at least objective foresight of risk, precludes that conclusion.

54. The dissenting reasons are basically contained within a single paragraph adopting the majority reasoning in the Ontario Court of Appeal decision in *R v Sullivan*.[106] That decision, it is respectfully submitted, was entirely deficient in failing to consider the precise legal meaning that had been accorded the critical phrases "*self-induced*" and "*voluntary*". **This is not a situation where words have to be implied or read in to establish a *mens rea* component – the case law already establishes its existence; one applied for a quarter of a century.**

---

[104] *Ibid* at para. 139.
[105] *Ibid* at paras. 150-155, 158.
[106] *R v Sullivan, supra* note 97 at para. 168.

(ii) Objective Mens Rea is Constitutionally Valid

55. As noted above, objective tests of behaviour have been held by this Court to be constitutional. Parliament is entitled to set standards of behaviour to which all persons must adhere. There is a "*cardinal principle*" that criminal law is concerned with setting standards of human behaviour. The law fixes a standard for all; everyone is expected to observe that standard and that standard fixes the degree of self-control that is expected of all in society.[107]

56. Once again, on this point the decisions of Slatter, J.A. and Hughes, J.A. are completely correct. The dissent does not address the point.

(iii) Symmetry is Not a Constitutional Requirement

57. There is no principle of fundamental justice that requires symmetry between the *mens rea* of an offence and the prohibited consequences of the offence. Section 33.1 is structured to impose liability for the unintended consequences of the predicate act. The *Charter* does not require proof of a discrete mental element attached to the act's consequences.

58. In *R v DeSousa* this Court held that "*to require fault in regard to each consequence of an action in order to establish liability for causing that consequence would substantially restructure current notions of criminal responsibility.*"[108] Sopinka J. said that "*provided that there is a sufficiently blameworthy element in the actus reus to which a culpable mental state is attached, there is no additional requirement that any other element of the actus reus be linked to this mental state or a further culpable mental state.*"[109]

59. Similarly, in *R v Creighton,* this Court concluded that s. 7 of the *Charter* was satisfied by a test of objective foresight of harm for charges of manslaughter, which contains a penalty of up to

---

[107] *R v Tran,* [2010] 3 SCR 350 at pp. 367-368.
[108] *R v DeSousa,* [1992] 2 RCS 944 at p. 967.
[109] *Ibid* at pp. 964-964.

life imprisonment. Nor was the reasonable person portion of the test modified by the extreme intoxication that existed in that case.[110]

60. Slatter, J.A. devotes several paragraphs to this topic and, based upon prior and binding authority of this Court, correctly concludes that symmetry is not a constitutional requirement.[111]

(iv) S. 33.1 does not shift the burden of proof, nor does it limit other defences

61. Hughes, J.A. further correctly pointed out that s. 33.1 does not shift the burden of proof.[112] The *Daviault* decision held that because a defence of extreme intoxication is akin to the defence of automatism there should be a similar legal burden – proof on a balance of probabilities.[113] Thus, the placement of the burden flows from the *Daviault* decision, not from s. 33.1. Hughes, J.A. also correctly noted that, based on authority from this Court, an accused may raise a reasonable doubt to an objective fault level - for example, may raise a reasonable doubt on the facts of the case as to whether the intoxication was self-induced or a prescribed medication had any warning of possible effect.

62. Furthermore, as detailed above, the issue would have to be dealt with whenever the facts of the case warrant, if an air of reality exists to the defence. In *Daviault* it was clearly stated: "*Thus it is appropriate to place an evidentiary and legal burden on the accused to establish, on a balance of probabilities that he was in a state of extreme intoxication that was akin to automatism or insanity at the time he committed the offence*".[114]

63. Nor can s. 33.1 be legitimately accused of impacting or limiting a s. 16, not criminally responsible, defence. *Bouchard-Lebrun* made it clear that a defence of extreme intoxication and a s. 16 defence are distinct, specifically stating that s. 33.1 is not to be interpreted so as to limit a

---

[110] *R v Creighton,* [1993] 3 SCR 3.
[111] *R v Brown, supra* note 101 at paras. 32-36.
[112] *Ibid* at para. 159.
[113] *R v Daviault, supra* note 1 at pp. 101-102.
[114] *R v Daviault, supra* note 1 at p.102.

s. 16 defence. [115] Where intoxication is a minor contributor, the s. 16 defence is entirely available. [116] Again, s. 33.1 does not impact that conclusion.[117]

(v) S. 33.1 does not convict the morally innocent

64. In this Court's unanimous decision in *R v Bouchard-Lebrun* it was stated:

> *In my opinion, the Court, in its decision in Cooper, recommended a contextual approach that was intended to strike a fair balance between the need to protect the public from persons whose mental state is inherently dangerous and the desire to impose criminal liability solely on persons* ***who are responsible for the state they were in at the time of the offence.*** [118] [emphasis added]

65. *R v Sullivan* and the trial decision in the instant case also fail to account for the fact that people who voluntarily deprive themselves of the normal power of self-control to such an extent that they are violent towards others are not morally innocent. They cannot blame anyone but themselves for turning their bodies into an uncontrollable threat to others. As stated in *R v Hamlyn*, "*if the offender wished not to be psychotic he must not take drugs, and can blame no one but himself for what he had done*."[119]

66. Finally, in the words of Fraser JA (as she then was) in *R v Honish* it "*would be ironic indeed if the person who displayed the most culpable conduct in terms of ingestion of alcohol or drugs were afforded a defence…while the individual who stopped short of intoxicating himself to the point of "automatism or insanity" were criminally liable to the fullest extent of the law.*"[120]

67. When a person chooses to self-intoxicate to such an extreme as the facts of the instant case reflect as well as those in *R v Sullivan* and *R v Chan*, the person ***is*** morally blameworthy. When

---

[115] *R v Bouchard-Lebrun, supra* note 2 at para. 36; *R v Jacquard,* [1997] 1 SCR 314 at para. 29;
[116] *R v Coogan,* 2021 BCSC 217.
[117] *R v Turcotte*, 2013 QCCA 1916 at para. 118; leave to appeal dismissed *R v Turcotte,* 2014 SCCA No. 7, *Respondent's Book of Authorities,* Tab 4.
[118] *R v Bouchard Lebrun, supra* 2 at para. 68.
[119] *R v Hamlyn,* 2016 ABCA 127 at para. 24.
[120] *R v Honish*, 1991 ABCA 304 *supra* note 70 at para. 17.

one chooses to take illegal drugs, as in the instant case, this moral blameworthiness is augmented. The Appellant knew the "magic mushrooms" were illegal and were a hallucinogen. Drugs which are "controlled" under the *Controlled Drugs and Substances Act* are not regulated. To ingest this drug in any fashion, let alone the indiscriminate fashion exhibited by the Appellant, is morally blameworthy behaviour for which there must be accountability.

68. Failure to criminalize this behaviour is a failure to recognize that other members of society expect and are entitled to be kept safe from violence fuelled by self-intoxication to the point of automatism. All citizens, including women and children, are at risk of being victimized by intoxicated-fuelled violence. As shown by the facts of the instant case, significant bodily harm to a person in her own home can result.

Issue #3: If s. 33.1 of the *Criminal Code* infringes s. 7 or s. 11(d) of the *Charter* is that infringement justified under s. 1?

(i) Section 33.1 is a reasonable limit and is saved by section 1 of the Charter.

69. Should this Court find that s. 33.1 violates s. 7 and/or s.11 (d) of the *Charter*, the Respondent submits that any violation is a reasonable limit under s. 1. To establish that a limit is reasonable and demonstrably justified requires the establishment of two central criteria. First, the objectives of the impugned legislation must be of sufficient importance to warrant overriding a constitutionally protected right or freedom. Therefore, the objectives must relate to concerns which are pressing and substantial in a free and democratic society. Second, the means chosen to achieve the objective must be proportional.[121]

70. The proportionality analysis has three stages: (a) rational connection between the objectives and the means chosen, (b) minimal impairment, and (c) proportionality - a balance between salutary and deleterious effects.[122] For proportionality the court must balance the interests of society with those of individuals and groups.

---

[121] *R v Oakes*, [1986] 1 SCR 103 at paras. 69-70.
[122] *Ibid.*

71. Proportionality does not require perfection for s. 1 only requires that the limit be "*reasonable*".[123] None of the rights are absolute and the courts must balance competing *Charter* rights and other values essential to a free and democratic society such as equality and a respect for the inherent dignity of all human beings.[124] Policy choices are for the legislature. As stated in *Malmo-Levine*,[125]it is not up to the court to assess the wisdom of validly enacted legislation. The deferential standard is applicable to both the objectives and the means chosen to achieve the objectives.[126]

72. Section 7 and/or 11(d) violations can be justified under s. 1. In *Carter* and *Bedford*, this Court recognized that there may be circumstances in which the public good and competing societal interests can justify a s. 7 violation.[127] While s. 7 focusses on the law's impact on individual's rights, s. 1 considers a much broader range of interests.[128] Similarly, violations of s. 11(d) have been justified under s. 1, particularly in the context of impaired driving, which engages the pressing and substantial societal interests in detecting and deterring impaired drivers.[129] Section 33.1 serves an equally laudable goal.

(ii) The objectives of s. 33.1 are "pressing and substantial"

73. The articulation of the objectives of legislation provides the framework for the proportionality part of the test. As stated by this Court in *Frank v Canada (AG)*,[130] "*the integrity of the justification analysis requires that the legislative objectives be properly stated*." As per s.

---

[123] *Saskatchewan v Whatcott*, 2013 SCC 11 at para. 78.
[124] *Ibid* at paras. 64-66.
[125] *R v Malmo-Levine*, [2003] 3 SCR 571 at para. 211.
[126] *Ibid* at paras. 177, 211.
[127] *Carter v Canada (Attorney General)*, [2015] 1 SCR 331 at para. 95; *Canada (Attorney General) v Bedford*, [2013] 3 SCR 1101 at para. 129.
[128] *R v Bedford, ibid* at paras. 124-128.
[129] *R v St-Onge-Lamoureux*, 2012 SCC 57; *R v Whyte* [1988] 2 SCR 3.
[130] *Frank v Canada (Attorney General)*, 2019 SCC 1, at para. 46.

13 of the *Interpretation Act*, the "*preamble of an enactment shall be read as a part of the enactment intended to assist in explaining its purport and object*."[131]

74. In this case, the Alberta Court of Appeal was unanimous in finding that both protection and accountability are pressing and substantial objectives of s. 33.1. This is contrary to the view expressed by Paciocco and Watt J.J.A. in *R v Sullivan* where only the protective objective was found to be pressing and substantial.[132] Paciocco and Watt J.J.A. held that the accountability objective was wholly unjustified and inappropriate to consider. However, Lauwers J.A. disagreed and held that both the penal (or accountability) objective and the protective objective are pressing and substantial. [133]

75. In the Alberta Court of Appeal, Khullar J.A. stated that "*the protective purpose is to protect potential victims of violence, especially women and children. Built into this protective purpose is the recognition and protection of equality rights in ss. 15 and 28 of the Charter of the typical and predominant victims of violence; women and children*." [134] At paragraph 43 of his factum, the Appellant agrees that the protective purpose is a pressing and substantial objective. He disagrees, however, that the accountability objective is pressing and substantial.

76. Accountability is a proper objective of this legislation. The preamble to s. 33.1 clearly states that "*…people who, while in a state of self-induced intoxication, violate the physical integrity of others are blameworthy in relation to their harmful conduct and should be held criminally accountable for it.*"[135] To find a statutory preamble to be inaccurate and restricted in its objectives ignores the "*prospect of respect*" Parliament should be accorded. As stated by the majority in *R v Mills*, "*…courts must presume that Parliament intended to enact constitutional legislation and strive where possible to give effect to this intention*."[136]

---

[131] *Interpretation Act*, R.S.C. 1985 c. 1-21, s. 13.
[132] *R v Sullivan, supra* note 97, at paras. 112-116.
[133] *Ibid* at para. 252.
[134] *R v Brown, supra* note 101 at para. 185.
[135] *An Act to amend the Criminal Code (self-induced intoxication)*, S.C. 1995, c. 32, *supra* note 42, *Respondent's Book of Authorities*, Tab 5, pp. 28-32.
[136] *R v Mills*, [1999] 3 SCR 668 at para. 56.

77. In this case, Slatter J.A. held that "…*holding persons accountable for criminal conduct is neither an unconstitutional purpose nor is it contrary to any principle of fundamental justice*." [137] Khullar J.A. stated that the accountability objective "…*is to hold individuals accountable for the violent acts they commit while intoxicated to the point of automatism. Unlike others, I see nothing wrong with such a purpose*." [138]

78. The broad interpretation of the objectives is preferred to the approach of Paciocco and Watt J.J.A. in *R v Sullivan* where the objectives of s. 33.1 were narrowly articulated. Their approach fails to consider the stated objectives as discussed in the preamble to the legislation as well as the various submissions that were provided to Parliament at the time of passage of s. 33.1. [139]

79. As pointed out by Khullar J.A., "…*when the majority in Sullivan said that the accountability objective was impermissible it begged the question of whether holding an accused accountable in the circumstances set out in s. 33.1 can be justified under s. 1*." [140] She further explained that the majority in *Sullivan* "…*collapsed the purpose, accountability, with the effect of s. 33.1, breach of s. 7 rights. This resulted in redefining the purpose of s. 33.1 from accountability, to the impermissible purpose of removing lack of voluntariness or mens rea as a defence*." [141]

80. To protect the public from offenders who choose to ingest intoxicants and commit violent crimes and to hold those offenders accountable are pressing and substantial objectives that warrant overriding *Charter* rights. Section 33.1 enhances the rights of victims of intoxication-fuelled violence, including the right to life and security of the person, and the equality rights of women and children to full participation in society. It ensures the accountability of offenders across the

---

[137] *R v Brown*, *supra* note 101 at para. 63.
[138] *Ibid* at para. 184.
[139] See for example the submissions of the Hon. Allan Rock upon second reading of Bill C-72 where he states that fundamental to the approach disclosed in Bill C-72 is the principle of accountability. House of Commons Debates, 35-1., Vol. 133, No. 1777 (27 March 1995) at 1210, *Appellant's Record*, Vol. III, pp. 107-131at para. 1215.
[140] *R v Brown*, *supra* note 101 at para. 183.
[141] *Ibid* at para. 184.

full spectrum of self-induced intoxication and serves to deter and denounce dangerous voluntary behaviour that places public safety at risk.

(iii) The proportionality analysis - Rational connection

81. The rational connection requirement describes the link between the legislative objective and the legislative means chosen to achieve that objective. "*The rational connection need not be established on a scientific basis or direct causal link, but can be established as a matter of logic*." [142] If this Court agrees that s. 33.1 has both a protective and accountability objective, then the means chosen to advance those objectives are clearly rationally connected to those objectives.

82. The narrow articulation of the objectives expressed by Paciocco and Watt J.J.A. in *Sullivan* led them to conclude that the rational connection test was not met.[143] Lauwers J.A. found though that the measures in s. 33.1 are rationally connected to the penal (or accountability) objective based on his broad articulation of the objectives.[144]

83. The broad articulation of the objectives advanced by the unanimous Alberta Court of Appeal in this case are to be preferred to the narrow articulation of the objectives by Paciocco and Watt J.J.A. in *Sullivan*. In broadly articulating the objectives, the Alberta Court of Appeal held that the objectives *are* rationally connected to the means chosen to achieve those objectives. As stated by Slatter J.A., " *[h]olding citizens accountable for what they do when they voluntarily engage the risks inherent in voluntary intoxication is rationally connected to the purposes of s. 33.1*." [145] The objectives and rational connection are of utmost significance when determining whether or not a law is minimally impairing.

---

[142] *Ibid* at para. 189.
[143] *R v Sullivan, supra* note 97 at paras. 119-122.
[144] *Ibid* at para. 266.
[145] *R v Brown, supra* note 101 at para. 66.

(iv) Minimal Impairment

84. The Respondent asserts that once the proper objectives are enunciated for this legislation, s. 33.1 is a reasonable option duly considered by Parliament and clearly falls within an acceptable range of legislative options. It is minimally impairing of the affected *Charter* rights.

85. Minimal impairment means that the limit on the right is reasonably tailored to the objective. It is only when there are alternative, less harmful means of achieving the government's objective in a real and substantial manner that a law should fail the minimal impairment test.[146] Simply because a court might conceive of an alternative that might better tailor objective to infringement does not suffice.[147]

86. Minimal impairment does not mean that Parliament has adopted the least restrictive means of achieving its end. The standard is not perfection and Parliament is entitled to some deference in determining what would be the most effective and efficient means to achieve its objectives.[148] Therefore, it is sufficient if the means adopted fall within a *reasonable range* of solutions to the problem.

87. The majority decision in *Sullivan* identified two reasons for their conclusion that the minimal impairment test had not been met by the government. The first reason was their interpretation of s. 33.1 as extending beyond general intent offences and capturing specific intent offences.[149] This interpretation is patently wrong as explained in paragraphs 45 and 46 above.

88. The second reason identified was that Parliament had insufficient reason to reject a *Law Reform Commission of Canada* recommendation for reform.[150] In their view, that recommendation would have been more narrowly tailored to the valid government objective.

---

[146] *Hutterian Bretheren v Alberta*, 2009 SCC 37 at para. 55; *R v Bryan*, [2007] 1 SCR 527 at paras. 42-43; *Saskatchewan v Whatcott, supra* note 123 at para. 101.
[147] *R v Bryan, ibid* at para. 42.
[148] *R v KRJ*, 2016 SCC 31 at para. 75.
[149] *R v Sullivan, supra* note 97, at para. 127.
[150] *Ibid* at paras. 132 -134.

Obviously, this then refers to their overly narrow approach to establishing a pressing government objective. As paragraphs 74, 78, 82 and 83 above indicate, it is the Respondent's position that they were clearly wrong.

89. That difference in defining the valid government objectives explains the reason why Lauwers, J.A. was of the view that s. 33.1 to some extent fell within reasonable parameters. His concern was that s. 33.1 was insufficiently subjective. [151] However, as discussed above, a standard of objective *mens rea* has been held to be constitutionally valid. When one examines those cases, this Court has delineated the proper approach to identifying what characteristics may be attributed to the "*reasonable person*".[152] Parliament is presumed to know the law and should be entitled to rely on what this Court has said is permissible attribution of characteristics.

90. Slatter J.A. correctly concluded that a protective purpose was essential given the clear link between intoxication and violent crime. That conclusion, he noted, was established in prior decisions of this Court. Therefore, he properly concluded that both protection and accountability were essential.[153] It would be absurd to suggest that Parliament is forbidden from legislating with the intent of protecting life, liberty, and security of all citizens.[154] One would be entitled to ask, "if not, why does Parliament exist?"

91. Given the different positions on government objectives as between the Alberta and Ontario Courts of Appeal, it is not surprising that Slatter, J.A. was of the view that the scope of reasonable alternatives was broader than that of the Ontario Court of Appeal.[155]

---

[151] *Ibid* at paras. 276-277.
[152] *R v Creighton, supra* note 110 at pp. 60-63; *R v Javanmardi* 2019 SCC 54 at para. 36; *R v Beatty* [2008] 1 SCR 49 at para. 40; *R v Tran, supra* note 107 at para. 34.
[153] *R v Brown, supra* note 101 at paras. 58-65
[154] *Ibid* at para. 65.
[155] *Ibid* at paras. 69-79.

92. Khullar J.A. was of the view that in defining the objectives, the express intention of Parliament contained in the preamble had to be given weight. Accordingly, she identified seven concerns that s. 33.1 had to address:

> *[179] From the preamble, it is clear that s 33.1 is concerned about the following:*
>
> - *addressing the incidence of violence, especially against women and children;*
> - *recognizing the close association between violence and intoxication;*
> - *balancing a number of constitutional rights including ss. 7, 11, 15 and 28;*
> - *recognizing that most intoxicants, by themselves, will not cause someone to act involuntarily;*
> - *concluding that anyone who inflicts violence while in a state of self-induced intoxication is morally blameworthy and should be held criminally accountable;*
> - *rejecting that self-induced intoxication to the point of automatism can be used as an excuse for violence, especially against women and children; and*
> - *establishing a test for when the defence of self-induced intoxication to the point of automatism will not apply.*

93. Again, that manifestly changes how one approaches the issue of minimal impairment. As Khullar, J.A. correctly stated:

> *[183]...Holding people accountable for crimes of violence committed in the circumstances set out in s. 33.1 violates s. 7 but that means only that it is prima facie unconstitutional. Whether it is ultimately unconstitutional depends on whether it can be justified under s. 1. When the majority in Sullivan said that the accountability objective was impermissible it begged the question of whether holding an accused accountable in the circumstances set out in s. 33.1 can be justified under s. 1.*
>
> *[184] Another way of explaining the conclusion of the majority in Sullivan, is that it collapsed the purpose, accountability, with the effect of s. 33.1, breach of s. 7 rights. This resulted in redefining the purpose of s. 33.1 from accountability, to the impermissible purpose of removing lack of voluntariness or mens rea as a defence. It is important to keep the purpose and effect of the impugned legislation separate for this analysis.*

94. Khullar J.A. carefully reviewed the process of legislative reform in light of the twin objectives that she considered to be wholly valid. She noted that Parliament was responsive to some of the comments received and concluded that s. 33.1 was "measured" by restricting its application to general intent offences, but only those that violated bodily integrity, and self-induced intoxication to the point of automatism.[156] She was of the view that one might suggest different drafting options but that is not the pertinent question. Given the options and considerations before it, Parliament chose an objective standard that would send a message to Canadians that self-induced intoxication that leads to violence is not acceptable. It would make it plain that no excuse or explanation based on personal circumstances will assist in escaping penal consequences.[157]As she concluded:

> *[198] Most members of Canadian society are aware that alcohol consumption above a given level will impair their ability to operate a motor vehicle. Canadians should also be aware that consumption of alcohol and drugs may lead to consequences they do not intend and, sometimes, cannot control. Parliament has decided that people have to be accountable for their unintended consequences when they take this kind of risk. That is the standard of care to which s. 33.1 refers.*

95. During the debates and submissions involved in the passage of Bill-72, a number of alternatives were considered and ultimately rejected by Parliament, which it has a right to do. These included:

> *(a) A new offence of "criminal intoxication*":
>
> > *Much discussion occurred around this idea. Ultimately it was rejected in part on grounds that it would obscure the nature of the criminal conduct to be punished. An assault committed during intoxication would not be punished as an assault but rather as criminal intoxication. Then Justice Minister Rock explained that based on the consultations conducted, it was preferable that a person who commits an assault be convicted of an assault.[158] To apply a different label to the crime would undermine the*

---

[156] *R v Brown, supra* note 101 at para. 196.

[157] *Ibid* at para. 197.

[158] *Minutes of Proceedings and Evidence of the Standing Committee Justice and Legal Affairs,* No. 98 *supra* note 43, pp. 98:5-98:6; Department of Justice Canada, "*Information Note: Self-Induced Intoxication as Criminal Fault*" (February 1995) *supra* note 43 at pp. 5-6, *Respondent's Book of Authorities,* Tab 7, pp. 33-34; M. Lawrence, S. Verdun-Jones, "*Blurred Lines of Intoxication and Insanity: An Examination of the Treatment at Law of Accused Persons Found to have Committed Criminal Acts while in States of Substance-Associated Psychosis, Where*

offender's accountability. Penalty was another concern. There could be no "intoxication discount" to a sentence. Finally, an offence of "criminal intoxication" raised its own Charter issues, including concerns of self-incrimination since an accused whose defence to the substantive charge was intoxication would then be convicted almost automatically of the charge of criminal intoxication. Concerns regarding procedural fairness were also raised.

(b) *Creating a special verdict of not criminally responsible on account of automatism*:

This was rejected by Parliament as in most circumstances it would be inapplicable because alcohol on its own is not capable of producing a state akin to automatism. The special verdict would also mislabel the conduct and treat intoxicated violence as a mental health issue when the offender is unlikely in need of treatment.[159] *Self-induced toxic psychosis is excluded from the legal concept of "disease of the mind," and does not exempt an accused from criminal responsibility.*

(c) *Enacting a broader version of s. 33.1:*

Parliament rejected the application of s. 33.1 to ***all*** *general intent offences because statistics did not reveal the same problem with extreme intoxication in "non-violent offences such as property crimes." It was only "intoxicated violence" that disadvantaged women and children, thereby engaging competing Charter rights. By adopting a narrow approach and restricting it to crimes of violence, Parliament carefully tailored s. 33.1 to its objective.*[160]

(d) *Doing nothing and allowing Daviault to operate:*

This directly subverts Parliament's goal by allowing extremely intoxicated violent offenders to escape liability.[161]

(e) *Enacting an offence of criminal negligence due to self-induced intoxication*

Intoxication was Voluntary." (2015) 93 Can.Bar Rev. 571, pp. 601-603, *Respondent's Book of Authorities,* Tab 9, pp. 105-107.

[159] *Evidence of Standing Committee on Justice and Legal Affairs, House of Commons* (13 June 1995) *supra* note 43 at 955 (Dr. Kalant); 1010, 1035, 1105 (Dr. Kendall); 1105 (Sue Bondy); 1050, 1055 (Dr. Bradford), *Appellant's Record,* Vol. II, Tab 6, pp. 164-172; Evidence (7 June 1995) at 1630 (Hon Ms. Meredith), *Appellant's Record,* Vol. II, Tab 7, p. 182; Evidence (6 June 1995) at 1140 (Prof Liz Sheehy), *Appellant's Record,* Vol. II, Tab 4, p. 147.

[160] *Evidence of Standing Committee on Justice and Legal Affairs, House of Commons* (06 June 1995) at 1540 *supra* note 43, *Appellant's Record,* Vol. II, Tab 5, p. 150; Evidence (15 June 1995) at 1540-1550 (Russell MacLellan) *supra* note 43, *Appellant's Record,* Vol. II, Tab 3, pp. 133-134.

[161] Grant, Isabel, "*Second Chances. Bill C-72 and the Charter*" (1995) 33 Osgoode Hall L.J. 379 at pp. 407-408, *Respondent's Book of Authorities,* Tab 8, pp. 69-70.

> *This option avoided accountability for the conduct in question and provided a "lesser label" for the harm done. It was rejected.*[162]

96. As Khullar J.A. concludes "…*the question is whether the choice made by Parliament minimally impairs the appellant's s. 7 rights given the options and considerations before it. Parliament chose an objective standard – that the behaviour of an accused who intoxicates himself to the point of automatism is deemed to be a marked departure from the standards of behaviour of a reasonable person."*[163]

97. The Respondent asserts that s. 33.1 is a considered Parliamentary response. It is a proper compromise between the rights of an accused and the rights of all in society, and particularly women and children, to be protected from violent offences committed by offenders who are in a state of automatism caused by self-induced intoxication. Section 33.1 fell within the range of reasonable solutions and therefore satisfied the minimal impairment portion of the *Oakes* analysis.

(v) The deleterious and salutary effects of s. 33.1 are proportionate

98. The final stage of the s. 1 analysis requires a balancing between the salutary and deleterious effects of the legislation, with no greater standard of proof for the existence of the salutary effects.[164] In *KRJ*,[165] the majority decision explained that this final step allows the court to stand back to determine on a normative basis whether a right's infringement is justified. The examination will entail difficult value judgments but it should be explicitly done. According to the majority, proceeding to this final stage permits appropriate deference to Parliament's choice of means, as well as its full legislative objective.

---

[162] House of Commons Debates, 35-1., Vol. 133, No. 1777 (27 March 1995) at 1210, *Appellant's Book of Authorities*, Tab 3, pp. 23-24.
[163] *R v Brown*, *supra* note 101 at para. 197.
[164] *R v Bryan*, *supra* note 146 at para. 48.
[165] *R v KRJ*, *supra* note 148 at para. 79.

99. Here the court must weigh the negative impact of the law in terms of achieving its goal for the greater public good. The impacts are judged both qualitatively and quantitatively. The more severe the deleterious effects of a measure, the more important the objective must be if the measure is to be reasonable and demonstrably justified in a free and democratic society.[166]

100. The deleterious effect of s. 33.1 is that it precludes an accused charged with a violent, general intent offence from escaping criminal liability by using extreme self-induced intoxication to negate general intent or voluntariness. If a person becomes intoxicated on an involuntary basis, s. 33.1 is *not* triggered and the defence is available. The moral blameworthiness of an accused is enhanced if that self-induced intoxication is the result of taking ***illegal*** controlled substances.

101. The salutary effects are many. Individuals who commit crimes of violence against others while in a state of self-induced intoxication can be held criminally accountable for their actions. It allows the *Charter* protected rights of primarily women and children to be given legal and practical recognition. As was shown before Parliament, women and children are the ones most likely to suffer intoxicated-fuelled violence. This reality has not waned since s.33.1 was enacted. To allow their victimization to occur without criminal liability infringes their right to life, liberty and security and their right to equality. In light of the long-standing disadvantage and victimization suffered by women and children, it was entirely appropriate for Parliament to adopt s. 33.1.

102. As the public outcry in the wake of *Daviault* demonstrated,[167] excusing such violence undermines public trust in the justice system. Individuals who are caught by s. 33.1 are not morally blameless; they chose to consume intoxicating substances in amounts that resulted in them perpetrating violence against others. Victims must not bear the risk of this choice.

---

[166] *Ibid*.

[167] Lawrence, M, "*Voluntary Intoxication and the Charter: Revisiting the Constitutionality of Section 33.1 of the Criminal Code*." 40 Man LJ 391 at p. 5, *Appellant's Book of Authorities*, Tab 5, p. 45.

103. To abolish s. 33.1 would undoubtedly bring the administration of justice into disrepute, particularly where advances in the recognition of the rights of complainants have also been made as evidenced by such cases as *R v Barton* [168], *R v RV* [169] and *R v Goldfinch.* [170]

104. As Khullar J.A. insightfully noted:[171]

> *[202] There are some important benefits to the law though. A significant one is the recognition of the dignity and self-worth of women and children who are often the victims of crime, through holding the perpetrators to account in court. This recognition breathes some meaning into the equality rights of victims as found in ss. 15 and 28 of the Charter.*

105. A zone of criminal immunity for extreme intoxication would dissuade victims from reporting violent offences, especially sexual assaults, committed by not just extremely intoxicated attackers but also those who may not meet the criminal test for an automaton. Parliament heard that such an accountability gap for the extremely intoxicated would lead victims to think "*…if in the end result in any event the man were to be held not accountable, what is the purpose of going through the reporting of the [crime]*."[172]

106. It is indisputable that there is a strong correlation between intoxication and violent crime. Intoxicants increase the risk of offending and the severity of the offences. Imposing criminality for extremely intoxicated violence ensures that offenders are accountable, communicates society's intolerance of such behaviour, protects victims and reaffirms society's commitment to the equality rights and security of the person of those victimized by intoxicated violence, who studies show are disproportionately women and children.

---

[168] *R v Barton*, 2019 SCC 33.
[169] *R v RV*, 2019 SCC 41.
[170] *R v Goldfinch*, 2019 SCC 38.
[171] *R v Brown, supra* note 101 at para. 202.
[172] House Justice Committee, Minutes of Proceedings (Issue No 112); Prof. Sheehy, A brief on Bill C-72 presented by National Association of Women and the Law on 6 June 1995,Appendix JULA-7 112A; 9-12 *supra* note 43, *Appellant's Record*, Vol. II, Tab 2, pp. 47-50.

107. One who chooses to self-intoxicate to the point of losing all conscious control and risking their life and creating a risk of injury and perhaps loss of life to other people is ***not*** engaged in morally innocent behaviour. This behaviour and any resultant general intent crimes of violence must not be rewarded with immunity from criminal prosecution. The salutary effects of s. 33.1 far outweigh any deleterious effect.

PART IV – COSTS

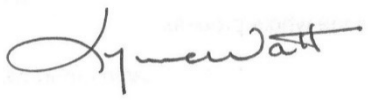
108. The Respondent does not seek costs.

PART V – ORDER SOUGHT

109. The Respondent requests that the appeal be dismissed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED at Edmonton, Alberta, this 22nd day of October, 2021.



for:

DEBORAH J. ALFORD
COUNSEL FOR THE RESPONDENT,
HER MAJESTY THE QUEEN IN RIGHT
OF ALBERTA

PART VI – SUBMISSIONS ON CONFIDENTIALITY INFORMATION

There are no sealing or confidentiality orders, publication ban, classification of information in the file as confidential under legislation or restriction on public access to information in the file that could have an impact on the Court's reasons in the appeal.

PART VII – TABLE OF AUTHORITIES AND LEGISLATION

Legislative Sources	**Cited at Paragraph No.**	**Tab No.**
Criminal Code, R.S.C. 1985, c. C-46, s. 273.2(a)(i) *Code criminel* (L.R.C. (1985), ch. C-46), s. 273.2(a)(i)	38	
Interpretation Act, R.S.C. 1985 c. 1-21, s. 13 *Loi d'interprétation* (L.R.C. (1985), ch. I-21), s. 13	73	

Secondary Sources	**Cited at Paragraph No.**	**Tab No.**
An Act to Amend the Criminal Code (self-induced intoxication), SC 1995, c 32 (assented: 13 July 1995)	21, 22, 76	Respondent's Book of Authorities, Tab 5
Criminal Lawyers' Association of Ontario; "*Submissions on Bill C-72 Criminal Code (self-induced intoxication*) 1-12	21	Appellant's Record, Vol. II, Tab 10
Department of Justice Canada "Violence and Intoxication: A Review of the Social Science Literature"	21, 21F, 21G	Appellant's Record, Vol. II, Tab 13
Department of Justice Canada, "*Information Note: Self-Induced Intoxication as Criminal Fault*" (February 1995)	21, 95	Respondent's Book of Authorities, Tab 6
Evidence of Standing Committee on Justice and Legal Affairs, House of Commons (06 June 1995 a.m.)	21, 21G, 95	Appellant's Record, Vol. II, Tab 4
Evidence of Standing Committee on Justice and Legal Affairs, House of Commons (06 June 1995 p.m.)	21	Appellant's Record, Vol. II, Tab 5
Evidence of Standing Committee on Justice and Legal Affairs, House of Commons (07 June 1995)	21, 95	Appellant's Record, Vol. II, Tab 7

Evidence of Standing Committee on Justice and Legal Affairs, House of Commons (13 June 1995)	21, 95	Appellant's Record, Vol. II, Tab 6
Evidence of Standing Committee on Justice and Legal Affairs, House of Commons (15 June 1995)	21, 95	Appellant's Record, Vol. II, Tab 3
Gerry A. Ferguson, Michael R. Dambrot, and Elizabeth A. Bennett, *CRIMJI: Canadian Criminal Jury Instructions* (Vancouver: Continuing Legal Education Society of British Columbia, 2006)	33	Respondent's Book of Authorities, Tab 7
Grant, Isabel, "*Second Chances. Bill C-72 and the Charter*" (1995) 33 Osgoode Hall L.J. 379	95	Respondent's Book of Authorities, Tab 8
House Committee, Legal and Constitutional Affairs, (28-6-1995) 46: 21-23	21	Appellant's Record, Vol. II, Tab 9
House of Commons Debates (22 June 1995) Vol. 133, No 224. 14469-14484	21, 21C	Appellant's Record, Vol. II, Tab 11
House of Commons Debates, 35-1. Vol. 133, No 1777 (27 March 1995)	78, 95	Appellant's Book of Authorities, Tab 3
Lawrence, M, "*Voluntary Intoxication and the Charter: Revisiting the Constitutionality of Section 33.1 of the Criminal Code*." 40 Man LJ 391	102	Appellant's Book of Authorities, Tab 5
M. Lawrence, S. Verdun-Jones, "*Blurred Lines of Intoxication and Insanity: An Examination of the Treatment at Law of Accused Persons Found to have Committed Criminal Acts while in States of Substance-associated Psychosis, Where Intoxication was Voluntary*." (2015) 93 Can.Bar Rev. 571	95	Respondent's Book of Authorities, Tab 9
Minutes of Proceedings and Evidence of the Standing Committee on Justice and Legal Affairs, No. 97 (5 April 1995) 97:1- 28	21, 21E, 21H	Appellant's Record, Vol. II, Tab 8

Minutes of Proceedings and Evidence of the Standing Committee on Justice and Legal Affairs, No. 98 (6 April 1995) 98:3-29	21, 21B, 95	Appellant's Record, Vol. II, Tab 1
Minutes of Proceedings and Evidence of the Standing Committee on Justice and Legal Affairs, No. 158-164 (6, 7,13,15,20, June 1995)	21, 21A, 21D, 21I, 21J, 95	Appellant's Record, Vol. II, Tab 2
The following documents were tabled at House Justice Committee (13 June 1995): Statistics Canada, *"The Daily (18 November 1993) The Violence against Women Survey"*	21	Appellant's Record, Vol. II, Tab 12