SCC File No. 39781

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

B E T W E E N:

MATTHEW WINSTON BROWN

Appellant
(Respondent)

-and-

HER MAJESTY THE QUEEN

Respondent
(Appellant)

-and-

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Interveners

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# FACTUM OF THE INTERVENER, ATTORNEY GENERAL OF ONTARIO

**(Pursuant to Rules 37 and 42 of the *Rules of the Supreme Court of Canada*)**

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## PARTS I AND II – OVERVIEW OF ONTARIO'S POSITION

1. Section 33.1 of the *Criminal Code* is constitutional. Ontario has four submissions.

2. First, s. 33.1 operates in tandem with the *Daviault* defence, which requires the accused to prove extreme intoxication on a balance of probabilities. Only once the trier of fact is satisfied that the *Daviault* defence applies must they go on to consider s. 33.1. The evidence the accused must adduce to meet the burden imposed by *Daviault* will also usually establish that the accused's conduct was a marked departure under s. 33.1(2).

3. Second, s. 33.1 does not replicate the constitutional defect in the *Leary* rule identified in *Daviault*. It does not substitute proof of essential elements. It assumes the ordinary elements are absent and articulates a distinct statutory basis of liability.

4. Third, s. 33.1 adheres to a model of predicate-act liability that this Court held constitutional in *Penno*, *DeSousa* and *Creighton*.

5. Fourth, s. 33.1 is rationally connected to its objectives. Establishing that this test is met does not require evidence proving that s. 33.1 actually deters consumption of intoxicants.

## PART III – STATEMENT OF ARGUMENT

### A. Section 33.1 operates in tandem with and limits the *Daviault* defence by imposing liability in most cases where the defence would otherwise apply

6. Usually, for general-intent offences like assault, the essential elements that the *actus reus* was intentional and voluntarily performed may be inferred from the conduct itself.[1] The law presumes conduct is voluntary.[2] Where the accused relies on self-induced intoxication to argue the conduct was involuntary or unintentional, the *Daviault* defence is the appropriate framework for assessing the claim.

7. *Daviault* provides a reverse-onus defence. The accused must establish on a balance of probabilities that at the time of the offence they were in a state of extreme intoxication akin to

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[1] See *e.g. R. v. Daviault*, [1994] 3 S.C.R. 63, at p. 89I-J; *R. v. Bernard*, [1988] 2 S.C.R. 833, at pp. 878I-879A (*per* McIntyre J.); *R. v. Daley*, 2007 SCC 53, ¶35; *R. v. Tatton*, 2015 SCC 33, ¶35-39.
[2] *R. v. Stone*, [1999] 2 S.C.R. 290, ¶171, 179-80.

automatism that deprived them of the ability to "perform a voluntary willed act" or "of forming even the minimal intent required of a general intent offence".[3] The allocation of the burden is appropriate as "[i]t is only the accused who can give evidence as to the amount of alcohol [or drugs] consumed and its effect upon him."[4] But the accused's evidence on its own is insufficient. It must be supported by expert psychiatric evidence confirming "that the accused was probably in a state akin to automatism or insanity as a result of his drinking" or drug consumption.[5]

8. This defence will be left with the trier of fact only if it is put in play by evidence from which "a properly instructed jury could reasonably […] conclude in favour of the accused."[6] The reverse-onus *Daviault* defence will be in play if there is evidence that could permit a properly instructed jury to reasonably find, on a balance of probabilities, that the intoxication produced a state in which the accused lacked the capacity to form general intent or act voluntarily.

9. If this threshold is not met, there is no need to go further in the analysis. Resort to s. 33.1's alternate route to liability is necessary only if *Daviault* would otherwise result in an acquittal.

10. If the threshold is met, the next question is whether there is an air of reality to a defence under s. 16 of the *Criminal Code*. In *Bouchard-Lebrun*, the Court held that before considering s. 33.1, the court should first exclude the prospect that the involuntary state was caused by a disease of the mind. *Stone*'s holistic approach applies to "all cases involving claims of automatism" – in other words, all claims of "involuntary behaviour".[7] This approach is aimed at ensuring that those whose involuntary conduct stems from an underlying disease of the mind, rather than intoxication, receive a verdict of not criminally responsible under s. 16.[8] If there is no air of reality to a s. 16 defence, the trier of fact need only consider s. 33.1. If there is an air of reality to s. 16, the trier of fact should be instructed on s. 16 and s. 33.1.

11. The trier of fact, so instructed, will consider first whether it is satisfied on a balance of

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[3] *Daviault*, at pp. 100-03.
[4] *Ibid*., at p. 101E.
[5] *Ibid*., at p. 101B-J; *Stone*, ¶187.
[6] *R. v. Fontaine*, 2004 SCC 27, ¶64-74; *Daley*, ¶45.
[7] *Stone*, ¶163-65.
[8] *R. v. Bouchard-Lebrun*, 2011 SCC 58, ¶40, 67-69. See *e.g. R. v. Khan*, 2019 ONSC 1086; *R. v. Lauv*, 2004 BCSC 1093.

probabilities that the accused's conduct was involuntary or unintentional. If the answer is yes, the trier of fact will proceed to s. 16 (if charged on it),[9] and then s. 33.1.

12. The *Daviault* defence will lead to an acquittal unless s. 33.1 applies. Section 33.1(1) bars the operation of the *Daviault* defence if the requirements of s. 33.1(2) are met. The Crown bears the burden of proving the essential elements of s. 33.1(2) beyond a reasonable doubt.[10]

13. Justice Charron explained in *Beatty*, "the *actus reus* must be defined […] by the words of the enactment". The text of s. 33.1(2) discloses two requirements: the accused must (*i*) be in a state of self-induced intoxication that caused them to be "unaware of, or incapable of consciously controlling, their behaviour", and (*ii*) "voluntarily or involuntarily interfere[] or threaten[] to interfere with the bodily integrity of another person".

14. In Ontario's submission, the mental element of s. 33.1(2) must attach to the act of self-induced intoxication. Frequently, offences state no clear mental element. When this occurs, "for centuries" courts have "read in words appropriate to require mens rea".[11] "As a matter of statutory interpretation, a provision should not be interpreted to lack any element of personal fault unless the statutory language mandates such an interpretation in clear and unambiguous terms."[12] The text of s. 33.1(2) does not clearly and unambiguously mandate the absence of any mental element. Section 33.1 has always been understood to require some fault linked to the act of self-induced

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[9] *Bouchard-Lebrun*, ¶37-38, 40. As noted in *R. v. Turcotte*, 2013 QCCA 1916, ¶118-21, leave to appeal ref'd [2014] S.C.C.A. No. 7, it is the trial judge's task to determine if the mental condition alleged by the accused would qualify as a disease of the mind, using the *Stone* holistic approach. If not, the s. 16 defence is not submitted to the jury. If so, the jury's role is to determine if that mental condition has been proven on a balance of probabilities, and if it was the cause of the automatism.

[10] *Bouchard-Lebrun*, ¶89; *R. v. Vickberg*, 1998 CanLII 15068 (BC SC), ¶68; *R. v. Brown*, 2021 ABCA 273, ¶54.

[11] *R. v. Lucas*, [1998] 1 S.C.R. 439, ¶58, 63-68; *R. v. A.D.H.*, 2013 SCC 28, ¶19-20 (*per* Cromwell J.), 87-91 (*per* Moldaver J.); *R. v. DeSousa*, [1992] 2 S.C.R. 944, at pp. 956-58; *R. v. Rube*, [1992] 3 S.C.R. 159.

[12] *DeSousa*, at p. 956.

intoxication.[13] Indeed, in *Bouchard-Lebrun*, this Court saw the accused's intoxicated state and the fact that it was self-induced as separate elements that must be proven for s. 33.1 to apply.[14] The other element of the *actus reus*, the violence, cannot be accompanied by a contemporaneous mental element: s. 33.1 is only engaged if that act is accompanied by the incapacity to act voluntarily or form general intent. Without a mental element for self-induced intoxication, s. 33.1(2) would have no mental element at all. Ontario adopts its submissions in *Sullivan* that s. 33.1 is predicated on negligence and so "must" be read as incorporating the marked-departure standard.[15]

15. This Court has held the marked-departure standard is met if the trier of fact is satisfied beyond a reasonable doubt that the conduct forming the *actus reus* "amounted to a marked departure from the standard of care that a reasonable person would observe in the accused's situation".[16] To prove a marked departure under s. 33.1(2), the Crown need not establish what the accused knew about the nature and specific effects of the substance, though those facts will of course be relevant. The question is simply whether the conduct of ingesting the intoxicant in the circumstances was a marked departure from what a reasonably prudent person would do.

16. A court applying the test must consider "all the evidence, including evidence about the accused's actual state of mind, if any".[17] The reasonable person used in the analysis "is placed in the accused's circumstances" —*i.e.* "the context of the events surrounding the incident"—"in order to assess the reasonableness of the conduct". But "evidence of the accused's personal attributes" like age, experience, education, and "psychological defences" short of incapacity "is irrelevant unless it goes to the accused's incapacity to appreciate or to avoid the risk".[18]

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[13] *R. v. Sullivan*, 2020 ONCA 333, ¶88, 90; *Vickberg*, ¶68; *R. v. Chaulk*, 2007 NSCA 84, ¶47 [*Chaulk* 2007]; *R. v. Brenton*, 1999 CanLII 4334 (NWT SC), ¶31, rev'd on other grounds, 2001 NWTCA 1; *Brown*, ¶25-31.

[14] *Bouchard-Lebrun*, ¶89.

[15] *R. v. Hundal*, [1993] 1 S.C.R. 867, at pp. 883, 888; *R. v. Creighton*, [1993] 3 S.C.R. 3, at p. 59D-H; *R. v. Javanmardi*, 2019 SCC 54, ¶31; *R. v. Finlay*, [1993] 3 S.C.R. 103, at pp. 114-15; *R. v. Naglik*, [1993] 3 S.C.R. 122, at p. 142.

[16] *Hundal*, at p. 888; *R. v. Beatty*, 2008 SCC 5, ¶43; *R. v. Roy*, 2012 SCC 26, ¶36. Liability will also flow if the facts disclose subjective *mens rea – e.g.* deliberate commission of the *actus reus*: *Roy*, ¶38; *Beatty*, ¶47.

[17] *Beatty*, ¶43.

[18] *Beatty*, ¶38, 40; *Roy*, ¶38; *Creighton*, at p. 61E-G, 65C-D.

17. If the conduct, assessed on its own, constitutes a marked departure, the trier of fact may convict. However, if the accused offers "an explanation [for the conduct …], then in order to convict, the trier of fact must be satisfied that a reasonable person in similar circumstances ought to have been aware of the risk and of the danger involved in the conduct".[19] The "underlying premise" for objective fault is that "a reasonable person in the position of the accused would have been aware of the risk posed by [the conduct] and would not have undertaken the activity". If that premise is unsustainable because of a reasonable doubt about whether a reasonable person would have appreciated the risk, or would have proceeded despite the risk, the accused must be acquitted.[20] A reasonable mistake of fact may exonerate "if, based on the accused's reasonable perception of the facts, the conduct measured up to the requisite standard of care".[21] For example, a defence would exist for someone "who in the absence of any warning or knowledge of its possible effects, takes a prescribed medication which suddenly and unexpectedly affects the [person] in such a way that" they perform the *actus reus*.[22]

18. The combined operation of the *Daviault* defence and s. 33.1 means that, in most cases, meeting the high bar set in *Daviault* will also lead to a conviction under s. 33.1. *Daviault* requires the accused to establish intoxication so great that it deprives them of the capacity to "perform a voluntary willed act".[23] Section 33.1(2) does not require proof that this specific form of intoxication was objectively foreseeable. By its terms, s. 33.1(2) require only a state of intoxication leaving the accused either "unaware of [… their] behaviour" or "incapable of consciously controlling [their] behaviour". This state, prohibited by the *actus reus*, is what must be objectively foreseeable.[24]

19. The practical effect of the accused's burden under *Daviault* is that much of the evidence the accused must adduce to prove extreme intoxication at the time of the offence will also support the application of s. 33.1. The accused, in proving the level of intoxication required by *Daviault*

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[19] *Beatty*, ¶43, 49; *Roy*, ¶39-40.
[20] *Beatty*, ¶37; *Roy*, ¶40.
[21] *Beatty*, ¶38.
[22] *Hundal*, at p. 887.
[23] *Daviault*, at p. 102.
[24] See *Naglik*, at pp. 143-44: in a criminal-negligence offence, "essential elements of the *actus reus*" must be objectively foreseeable; "aggravating consequences" need not be.

on a balance of probabilities, will likely admit facts that will also establish a marked departure. Evidence that the accused ingested a substance capable of causing an automatistic state will also suggest that the conduct constituted a marked departure. Little will be required from the Crown.

20. The marked departure is apparent when the accused admits using illegal street drugs. When the accused knowingly ingests a drug capable of grounding a *Daviault* defence, a trier of fact should have no difficulty finding an objectively foreseeable risk of the accused becoming either "unaware of [… their] behaviour" or "incapable of consciously controlling [their] behaviour". The evidence before Parliament supported the statement in s. 33.1's Preamble that "most intoxicants, including alcohol, by themselves, will not cause a person to act involuntarily".[25] Only a small number—dissociative anesthetics including "ketamine, phencyclidine (PCP) and related substances that are or were used as veterinary anesthetics, and which have had some vogue among illicit drug users"—can cause true automatism.[26] "A number of other drugs, including amphetamines, cocaine, and cannabis" can in high doses produce "a paranoid state" of impaired judgment and "serious misperception of the external reality" amounting to "a chemically-induced temporary insanity".[27] Hallucinogenic drugs are well-known to cause false perceptions a person might believe to be true.

21. While very few substances are likely to produce true automatism, the ones mentioned above create an objectively foreseeable risk of one becoming at least "unaware of [… their] behaviour". Temporary insanity or hallucinations may leave the accused unaware of the objective reality around them, and so incapable of appreciating what they are doing.[28]

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[25] *An Act to amend the Criminal Code (self-induced intoxication)*, S.C. 1995, c. 32, Preamble, ¶4. Since alcohol alone cannot produce automatism, the question whether its use is sufficiently blameworthy to ground a conviction under s. 33.1 is irrelevant.

[26] See House of Commons, *Minutes of Proceedings of the Standing Committee on Justice and Legal Affairs*, No. 112 (June 1995), AR Vol. II, Tab 8, pp. 114-15, 123, 125-127.

[27] *Ibid*.

[28] See *R. v. Chaulk*, [1990] 3 S.C.R. 1303, at pp. 1321-22. Sometimes delusion-driven behaviour will result in the unintentional conduct. "For example, a person charged with murder could claim that while he consciously and voluntarily did the act of chopping, he thought that he was chopping

22. The same risk is objectively foreseeable for a person who does not know the precise makeup of an intoxicant they consume. Justice McLachlin recognized in *Creighton* that a person embarking on a potentially dangerous course of conduct—there, administering cocaine to someone else—"has a duty to inform himself as to the precise risk" the conduct entails and to refrain from engaging in that conduct "unless reasonably satisfied that there was no risk of harm".[29] This is a difficult duty to discharge for a person consuming illegal drugs, which will almost invariably be of unknown provenance. Who knows what they might be, or be laced with? The accused who proceeds in such circumstances assumes the risk that they might be taking something that could leave them "unaware of […their] behaviour". The same can be said for those who abuse legal substances, by taking them in unprescribed quantities, ways, or combinations.

23. Taking a risk of entering the prohibited states in s. 33.1(2) generally constitutes a marked departure. In rare cases, the accused's conduct may be non-culpable if a reasonable person would have proceeded despite the risk of extreme intoxication: *e.g.*, by consuming a prescribed dosage of medication that the accused knows carries a risk of psychosis. Usually, though, a reasonably prudent person does not take the risk of losing all control. The defining feature of such a state is its unpredictability.[30] A person who risks entering this potentially dangerous state should be held to have assumed the risks their conduct entails. Taking this risk generally constitutes a marked departure, such that s. 33.1 does—and should—apply.

### B. Parliament cured the constitutional defect in the *Leary* rule by "legislat[ing] a basis of criminal fault in relation to self-induced intoxication"[31]

24. The *Daviault* majority's analysis of "How the Leary Rule Violates Section 7 and 11(*d*) of the Charter"[32] identified no new constitutional principle. Instead, Cory J. described a series of problems that emerged from "the most vehement and cogent criticism" of the *Leary* rule: it

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a loaf of bread in half, when, in fact, he was chopping off the victim's head". An accused in such a state lacks *mens rea*. Other forms of delusion-driven behaviour may or may not eliminate *mens rea* or voluntariness so as to attract a *Daviault* defence and engage s. 33.1.

[29] *Creighton*, at p. 75.
[30] *Brenton* (NWT SC), ¶99.
[31] Preamble, ¶7.
[32] *Daviault*, at pp. 87-93.

"substitute[d] proof of drunkenness for proof of the requisite mental element" for the offence charged.[33] His focus echoed Wilson J.'s reasons in *Bernard*, where she held that "[t]he real concern" with the *Leary* rule was not that it punished the "morally innocent" but that it offended the rule against substitution from, *e.g.*, *Whyte*.[34]

25. The rule from *Whyte* provides that if an element of an offence is essential because the Constitution or Parliament has said so, liability cannot be imposed for the offence without proof of either (*i*) the essential element or (*ii*) a substituted element that inexorably proves the essential element.[35] A rule that permits a conviction when reasonable doubt exists on an essential element offends s. 11(*d*). This Court has found infringements where a statutory provision improperly deems an essential element to have been established based on an equivocal fact that may be consistent with the essential element being absent.[36] The *Daviault* majority logically extended this principle by applying it to a situation involving substitution performed not by Parliament, but by the courts.

26. The rule from *Whyte* only limits substitution of elements that are essential. The *Daviault*

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[33] *Daviault*, at p. 97A-B.
[34] *Ibid*., at p. 86A-B, J; *Bernard*, at pp. 889D-890H.
[35] *Bernard*, at pp. 889I-890H; *Daviault*, at p. 90A-F.
[36] See ***R. v. Vaillancourt***, [1987] 2 S.C.R. 636, at pp. 653-59: s. 213(*d*) would permit a murder conviction if the victim's death occurred during the commission of specified underlying offences, notwithstanding that commission of the underlying offence did not inexorably prove the minimum constitutionally required fault element for murder. ***R. v. Whyte***, [1988] 2 S.C.R. 3, at pp. 15-19: the essential element of care or control was deemed proven by s. 237(1)(*a*) if the accused occupied the driver's seat, notwithstanding that "[a] person can be seated in the driver's seat without an intention to assume care or control of the vehicle within the meaning of s. 234". ***R. v. Downey***, [1992] 2 S.C.R. 10, at pp. 17, 25-27, 30: the essential element of living on the avails of prostitution was deemed proven by s. 195(2) if the accused "lives with or is habitually in the company of prostitutes", notwithstanding that living with a sex worker does not inexorably prove that the person is living on avails. ***R. v. Morrison***, 2019 SCC 15, ¶52-62: an essential element of child luring, that the accused believed the complainant was underage, was deemed proven by s. 172.1(3) if the complainant represented to the accused as being under 16, notwithstanding that it does not inexorably prove the accused believed the representation to be true.

majority applied the analysis to sexual assault – an offence comprised of a standard set of essential elements, which Cory J. described as (*i*) a physical element, (*ii*) voluntarily performed, and (*iii*) a contemporaneous mental element comprising intention to carry out the physical element.[37]

27. Every problem Cory J. identified with the operation of the *Leary* rule flowed from the fact that it would impose liability in circumstances in which the standard set of essential elements, which sexual assault possesses, were not proven. The *Leary* rule:

- Eliminated the requirement of proof of the essential elements of intent and voluntariness with respect to the prohibited act (an application of force in circumstances of a sexual nature),[38] and **substituted proof** of self-induced intoxication, which does not inexorably prove that the accused intended to commit, or voluntarily performed, the prohibited act;[39]

- Imposed liability with **no statutory mental element or voluntariness** requirement;[40]

- Disrupted the requirement of a **contemporaneous act and fault**[41] by retaining the statutory *actus reus* (the application of force) and inferring fault from the temporally distinct act of self-induced intoxication;[42] and

- Eliminated the "**link […] between the minimal mental element and the prohibited act**". The substituted mental element of self-induced intoxication did not mirror the statutory *actus reus* – the application of force.[43]

28. Section 33.1 suffers none of these defects. It does not purport to prove essential elements with equivocal facts, but instead enacts **a distinct route to liability**:[44] it provides that even in the absence of "the general intent or voluntariness required to commit" a violent offence, the accused

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[37] *Daviault*, at pp. 74A-75D.
[38] *Daviault*, at p. 89I-J; *R. v. Chase*, [1987] 2 S.C.R. 293; *R. v. Ewanchuk*, [1999] 1 S.C.R. 330, ¶24-26.
[39] *Daviault*, at pp. 72J-73A, 89H-91E, 91I-92A, 97A-B.
[40] *Ibid*., at pp. 89J-90A, 91I-92A.
[41] *R. v. Cooper*, [1993] 1 S.C.R. 146, at p. 157.
[42] *Daviault*, at p. 87E.
[43] *Ibid*., at p. 92E-H.
[44] *Brown*, ¶27.

is "criminally at fault" when he or she breaches the standard of care in s. 33.1(2). Section 33.1 has always been understood to have **a mental element**,[45] which is **contemporaneous** with and **linked** to the **voluntary** act of "self-induced" intoxication.

29. Justice Cory's reasons do not suggest that Parliament, when enacting offences, must adhere to the standard set of essential elements and cannot identify new ways of committing criminal offences. Rather, he observed that the standard set of essential elements applies "unless the legislator provides otherwise".[46] He explained that the issue before the Court involved "the reconsideration of a common law principle", that it was inconsistent with the principles of fundamental justice "for the courts to eliminate the mental element of crimes of general intent", and that the requirement of voluntariness "cannot be taken away by a judicially developed policy".[47] But he observed that "[v]oluntary intoxication is not yet a crime", and that "it is always open to Parliament to fashion a remedy which would make it a crime to commit a prohibited act while drunk".[48] He invited Parliament to "remedy" the problems with the *Leary* rule by enacting a different form of liability. The only plausible reading of these passages is that if essential elements are not substituted with other facts, but Parliament instead bases liability on different essential elements, the constitutional problems identified in *Daviault* vanish.

30. Justice Cory's reasons could be read as suggesting a broader rule: "to deny that even a very minimal mental element is required for sexual assault offends the *Charter* in a manner that is so drastic and so contrary to the principles of fundamental justice that it cannot be justified under s. 1 of the *Charter*."[49] Ontario submits that for four reasons this passage should not be read as setting, as a constitutional minimum fault requirement for sexual assault or other general-intent offences, a requirement of an intentional and voluntary application of force by the accused.

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[45] See *e.g. Sullivan*, ¶88, 90; *Vickberg*, ¶68; *Chaulk* 2007, ¶47; *Brenton* (NWT SC), ¶31; *Brown*, ¶25-31; *Bouchard-Lebrun*, ¶89.

[46] *Daviault*, at p. 74A.

[47] *Ibid*., at pp. 72I-J, 73D, 91A-B.

[48] *Ibid*., at pp. 92B, 100H. The words "while drunk" must be understood as referring to the type of extreme intoxication considered in *Daviault*. Parliament would have had no reason to provide a "remedy" in relation to lesser forms of intoxication, which, following *Daviault*, continued to be incapable of furnishing a defence for general-intent crimes.

[49] *Ibid*., at p. 92I.

31. First, there was no reason for Cory J. to comment on whether intent and voluntariness with respect to an application of force are minimum constitutional essential elements for sexual assault. For that offence, intent and voluntariness were made essential by Parliament. Since replacing statutory essential elements with improper substitutes offends s. 11(*d*), the question whether the elements were also constitutionally required simply did not arise.

32. Second, establishing minimum fault requirements for an offence is a significant holding that permanently limits how Parliament may respond to a social problem. When this Court states requirements of this nature, it does so clearly and explicitly, after applying the relevant legal test. This Court held in *Vaillancourt* that "very few" offences, due to their penalties and "the special stigma attached to a conviction", constitutionally require "a *mens rea* reflecting the particular nature of that crime".[50] It is hard to accept that Cory J. intended to identify sexual assault as one such offence without analyzing its stigma and penalties or even explicitly stating the conclusion.

33. Third, a rule that assault can only exist if the accused intentionally applies force to another has too many exceptions to be a principle of fundamental justice.[51] Sexual assault as defined under s. 265(1)(*c*) and (2) involves no application of force. A conviction for any form of sexual assault in s. 265(1) can arise from participation as a secondary party under ss. 21 or 22. The accused could be convicted for performing a culpable act, but without ever applying force to someone else.

34. Fourth, although Cory J. expressed concern about imposing liability in the absence of "a very minimal mental element […] required for sexual assault", these words should be understood as a reference to imposing liability in the absence of the essential elements required by Parliament. The passage is explicitly framed as a concluding "summary" of the majority's reasoning, which focused on substitution of statutory essential elements. Similarly, the reference to "a very minimal mental element" was likely an allusion to the well-known prohibition against absolute criminal liability, which s. 33.1 does not offend since it contains a statutory mental element.[52] The comment signifies only that some mental element is required, but not that intention with respect to the application of force is the only element that would survive constitutional scrutiny.

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[50] *Vaillancourt*, at pp. 653-54; *R. v. Martineau*, [1990] 2 S.C.R. 633; *Creighton*, at pp. 46-49.
[51] *Creighton*, at p. 53A-D; also see *R. v. Malmo-Levine*, 2003 SCC 74, ¶115-18.
[52] See *e.g. Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486.

### C. In enacting s. 33.1, Parliament followed a blueprint for predicate-act liability that this Court held constitutional in *Penno*, *DeSousa* and *Creighton*

35. When Parliament enacted s. 33.1, the core message that this Court had recently delivered was that the principles of fundamental justice governing the construction of criminal offences are not so exacting that they dictate essential elements or operate as a straitjacket, confining Parliament to specific models and collections of essential elements. Parliament has leeway to develop offences. Moreover, s. 33.1 follows a model explicitly endorsed by this Court, in which a culpable predicate act imposes liability based on its consequences. In this model, there is no constitutional requirement that the consequence be accompanied by any objective or subjective mental element. It may be unintended, involuntary, and objectively unforeseeable. The predicate act must be culpable, but can be an act of penal negligence proven on a marked-departure standard.

36. In *Penno*, in 1990, this Court considered the elements of impaired care or control of a motor vehicle and their consistency with ss. 7 and 11(*d*) of the *Charter*. The majority accepted that intoxication is not a defence to the charge: "Even if the accused is too drunk to know that he or she is assuming care and control of the motor vehicle, that does not matter, since the mental element of the offence lies in voluntarily becoming intoxicated. This interpretation recognizes that intoxication is excluded as a defence to impaired driving since it is the very gravamen of the offence." The act of assuming care or control could be involuntary or unintentional due to self-induced intoxication, and this would be no defence. This result is constitutional. Justices McLachlin and La Forest (for a majority) held that the absence of an intoxication defence did not limit the accused's rights under ss. 7 or 11(*d*). While Lamer C.J. and Wilson J. would have found an infringement, they agreed such an infringement would be justified under s. 1.[53] Following *Penno*, if the gravamen of an offence is self-induced intoxication, impairment is not a defence, even if it leaves the accused unaware of performing later *actus reus* elements. Liability under s. 33.1, like the offence at issue in *Penno*, is predicated on self-induced intoxication.

37. The form of predicate-act liability ultimately adopted in s. 33.1 was explored in 1992 in *DeSousa*. Justice Sopinka held for the unanimous Court that although the offence at issue in *DeSousa* (unlawfully causing bodily harm) included the mental element of the predicate act and

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[53] *R. v. Penno*, [1990] 2 S.C.R. 865, at pp. 896, 903-05 (*per* McLachlin J.). See also pp. 891-92 (*per* Wilson J.), 893-95 (*per* La Forest J.), 880, 885 (*per* Lamer C.J.).

"the additional requirement of objective foresight of bodily harm", "[t]here is […] no constitutional requirement that intention, either on an objective or a subjective basis, extend to the consequences of unlawful acts in general."[54] He cited several examples of offences constructed in this way.[55] He explained that "[p]rovided 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". He noted there "appears to be a general principle in Canada […] that, in the absence of an express legislative direction, the mental element of an offence attaches only to the underlying offence and not to the aggravating circumstances".[56] He concluded, "[n]o principle of fundamental justice prevents Parliament from treating crimes with certain consequences as more serious than crimes which lack those consequences", and that this form of liability has a principled rationale:

> In punishing for unforeseen consequences the law is not punishing the morally innocent but those who cause injury through avoidable unlawful action. Neither basic principles of criminal law, nor the dictates of fundamental justice require, by necessity, intention in relation to the consequences of an otherwise blameworthy act.[57]

38. *DeSousa* was affirmed one year later in 1993 in *Creighton*. Justice McLachlin, for a majority on this point, found no authority for a constitutional rule "that the *mens rea* of an offence must always attach to the precise consequence which is prohibited". She observed, "[t]he relevant constitutional principles have been cast more broadly[….] Provided an element of mental fault or moral culpability is present, and provided that it is proportionate to the seriousness and consequences of the offence charged, the principles of fundamental justice are satisfied." Parliament may treat an act as "more or less serious" depending on its consequences. This form of liability may be built on a predicate act of negligence, which "must also be read as requiring a 'marked departure' from the standard of the reasonable person."[58]

39. One year later, *Daviault* prompted an extensive legislative process that culminated in s. 33.1. Professor Healy opined before the Standing Committee that s. 33.1 was constitutional, as the

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[54] *DeSousa*, at p. 965C-E.
[55] *Ibid*., at pp. 965E-H, 966D-H.
[56] *Ibid*., at p. 967D.
[57] *Ibid*., at pp. 966B-967C.
[58] *Creighton*, at pp. 53C-54G, 59B-H.

drafters took "what the Supreme Court said in a number of […] judgments, including *DeSousa, Creighton* […] and a series of others" and adopted a marked departure standard for liability.[59]

40. Following these cases, the pertinent question is whether s. 33.1 has "a sufficiently blameworthy element in the *actus reus* to which a culpable mental state is attached".[60] Although McLachlin J. in *Creighton* referred to a requirement from *Martineau* that the predicate act's mental element be "proportionate to the seriousness and consequences [*i.e.* stigma and penalty] of the offence charged",[61] the standard should be understood to be infringed only when the stigma and penalty are grossly disproportionate to the mental element or moral blameworthiness of an offence. Cases decided after *Creighton* make clear that gross disproportionality is the only measure of unconstitutional disproportionality under s. 7 of the *Charter*.[62] It would be wrong to require strict proportionality for the mental elements of crimes. The result would be incoherent and unacceptable.[63] A mandatory-minimum sentence could be upheld under s. 12 because it was disproportionate but not grossly disproportionate to the fit sentence, but the underlying offence provision would fall under s. 7 because the mandatory-minimum punishment was merely disproportionate to the moral blameworthiness of the offender.

41. A standard of gross disproportionality accords appropriate deference to Parliament. Parliament's exclusive jurisdiction over criminal policy means it enjoys broad discretion to proscribe conduct as criminal. It is Parliament's role to set societal standards of acceptable behaviour and calibrate an offence's blameworthiness and consequences. Courts should intervene only when Parliament is manifestly wrong. A rule requiring strict proportionality would in essence give courts power to substitute their view of what conduct should be criminalized. The Court's role is more limited: setting the broad constitutional parameters within which Parliament can act.[64]

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[59] *Minutes of Proceedings and Evidence of the Standing Committee on Justice and Legal Affairs*, 35-1, No. 97 (April 5, 1995), AR Vol. II, Tab 8, at pp. 190, 197 (Patrick Healy).
[60] *DeSousa*, at pp. 964-65; *Creighton*, at pp. 42-43, 53-55.
[61] *Creighton*, pp. 46A-C (citing *Martineau*) and 53J-54A.
[62] *Martineau*, at pp. 645-46 (*per* Lamer C.J.); *Creighton*, at pp. 46, 53-54 (*per* McLachlin J.); *Canada (Attorney General) v. Bedford*, 2013 SCC 72, ¶45; *Malmo-Levine*, ¶143, 158-161, 169; *R. v. Safarzadeh-Markhali*, 2016 SCC 14, ¶21, 67-73; *R. v. Lloyd*, 2016 SCC 13, ¶40-43.
[63] *Malmo-Levine*, ¶160; *Lloyd*, ¶40-47.
[64] *Lloyd*, ¶45 (*per* McLachlin C.J.), 102-03 (*per* Wagner, Gascon and Brown JJ., dissenting, but not on this point).

The appropriate level of deference is reflected in the "stringent and demanding" standard of gross disproportionality. It is met by punishments "abhorrent or intolerable" to society or "so excessive as to outrage standards of decency", and legislation that has effects that are "totally out of sync" with the legislative goal and "so severe that [they] violate[] our fundamental norms".[65]

42. For the reasons set out in the appellant's factum in *Sullivan* at paragraphs 55 to 63, s. 33.1's mental element is constitutionally sufficient. Ontario has two additional observations.

43. First, the penalties for general-intent offences of violence disclose a balanced approach that allocates an important role to the courts in preventing unconstitutional results. While s. 33.1, properly interpreted, should prevent acquittals in most cases of intoxicated violence, courts retain broad discretion over the appropriate sentence. Most offences that could result in convictions through s. 33.1 qualify for conditional and absolute discharges under s. 730.[66] When discharges are unavailable for offences with a life or 14-year maximum sentence like manslaughter or aggravated assault, a suspended sentence remains available under s. 731. Through the exercise of their discretion, sentencing courts can account for the unintentional nature of the consequences of the accused's extreme intoxication and ensure proportionate sentences. This significantly mitigates any constitutional concerns about s. 33.1.[67]

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[65] *Bedford*, ¶105, 109, 120; *Lloyd*, ¶24; *R. v. Goltz*, [1991] 3 S.C.R. 485, at p. 499; *R. v. Smith*, [1987] 1 S.C.R. 1045, at pp. 1072; *R. v. Morrisey*, 2000 SCC 39, ¶26; *R. v. Nur*, 2015 SCC 15, ¶39; *Steele v. Mountain Institution*, [1990] 2 S.C.R. 1385, at p. 1417; *Carter v. Canada (Attorney General)*, 2015 SCC 5, ¶89.

[66] It appears there are no offences captured by s. 33.1 to which a mandatory minimum sentence applies. Many offences of violence that have minimum sentences are specific-intent offences: see *e.g.* ss. 151, 152, 153. Section 33.1 deals with mental elements required to commit a general intent offence, but has no application to additional mental elements required to trigger aggravating sentencing consequences, like "use" of a firearm in an offence (*e.g.* s. 236(*a*), 272(2)(*a*), 273(2)(*a*)); *R. v. Steele*, 2007 SCC 36, ¶32) or knowledge that a victim was under 16 (or wilful blindness or subjective recklessness to that fact) under ss. 271, 272(2)(*a*.2) and 273(2)(*a*.2): see s. 150.1(4); *Morrison*, ¶88; *R. v. Carbone*, 2020 ONCA 394, ¶113, 119-25.

[67] *Tatton*, ¶45.

44. Second, on the question of stigma, in *Creighton*, McLachlin J. commented that it would "shock the public's conscience to think that a person could be convicted of manslaughter absent any moral fault based on foreseeability of harm".[68] This could be read as suggesting s. 33.1 is unconstitutional, since an accused found guilty of manslaughter through s. 33.1 who is incapable of acting voluntarily at the time of an assault that led to death would also be incapable of foreseeing the risk of bodily harm incumbent in that act. However, McLachlin J.'s comment, made in the context of assessing whether the ordinary mental element for manslaughter is constitutionally sufficient, should not be read as definitively addressing the sufficiency of other mental elements she was not considering. The reasons should not be read to exclude the possibility of liability where the accused's blameworthy act renders them incapable of appreciating the risk.

45. McLachlin J.'s comment raises the question of stigma: is a manslaughter conviction so stigmatizing that it cannot be predicated on criminally negligent extreme intoxication? In Ontario's submission, the stigma of manslaughter is nearly identical to the stigma of impaired driving causing death. The minimum mental element required to establish manslaughter under s. 33.1—criminally negligent extreme intoxication constituting a marked departure—is at least as blameworthy as the minimum mental element for impaired driving causing death: intent to become intoxicated to any degree. The latter offence has no requirement of objective foreseeability of death or bodily harm, and no mental element or voluntariness associated with the act of driving in cases of extreme intoxication contemplated in *Penno*.[69] Given these similarities between these offences, it cannot be said that the stigma of a manslaughter conviction is grossly disproportionate to the fault required by s. 33.1.

### D. Section 33.1 is rationally connected to its objectives

46. Under s. 1, "reason and logic are important complements to tangible evidence."[70] When Parliament attempts to influence inherently complex human behaviour, it can act based "on inferential reasoning that is premised on logic and common sense".[71] Parliament was thus entitled

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[68] *Creighton*, at p. 48.
[69] *Penno*, at pp. 903-04 (*per* McLachlin J.), 893-94 (*per* La Forest J.).
[70] *R. v. K.R.J.*, 2016 SCC 31, ¶90.
[71] *R. v. Sharpe*, 2001 SCC 2, ¶89; *R. v. Butler*, [1992] 1 S.C.R. 452, at pp. 502-03; *Frank v. Canada (Attorney General)*, 2019 SCC 1, ¶64.

to conclude that s. 33.1 is rationally connected to its twin objectives of accountability for and protection from intoxicated violence.[72] Searching for "evidence" that s. 33.1 deters individuals is asking for proof of a negative. For most of common-law history, intoxication has not afforded a defence. Under s. 33.1, this remains true for violent crimes. The inability to advance an intoxication defence has surely prevented the defence from even being raised.[73]

47. It was reasonable for Parliament to believe that the enactment of s. 33.1 would further its accountability and protective purposes. Both purposes are ultimately about deterrence. Holding people accountable deters, and thereby protects other potential victims. While holding a particular person accountable may serve no specific deterrent purpose, it may still send a strong message of society's condemnation of the over-intoxication that resulted in violence. This condemnation assists in setting uniform standards of behaviour, promotes the responsible use of intoxicants, and communicates the "system of values" shared by all Canadians: intoxicating yourself to the point that you lose voluntary control is blameworthy, not an excuse.[74]

48. This Court's jurisprudence supports Parliament's conclusion that s. 33.1 would further its twin objectives of accountability and protection in three ways. First, enacting s. 33.1 would reduce reckless intoxication and resulting violence. The Parliamentary record showed that intoxication contributes to the frequency and severity of domestic violence.[75] Indeed, in Scandinavian countries, "rates of domestic violence have followed suit" with an increase or decrease in per capita consumption of alcohol.[76] This Court has recognized the "habitual" role alcohol plays in violent crime, including in sexual assault. The *Daviault* majority noted that "alcohol makes it easier for violence to occur by diminishing the sense of what is acceptable behaviour".[77]

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[72] *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, ¶133-38, 153-59; *Sharpe*, ¶84-94; *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, ¶48, 85.
[73] See *e.g. R. v. S.N.*, 2012 NUCJ 2, ¶102-03.
[74] *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500, ¶81; *Creighton*, at pp. 66, 71-73.
[75] Statistics Canada 1993: The Violence Against Women Survey, AR Vol. II, Tab 8, at pp. 244-45; Department of Justice, Research and Statistics Section "Violence and Intoxication A Review of the Social Science Literature", AR Vol. II, Tab 8, at pp. 259-69.
[76] *Committee Evidence* (13 June 1995) AR Vol. II, Tab 8, at p. 166 (Sue Bondy).
[77] *Bernard*, at pp. 879-80; *Tatton*, ¶42; *Daviault*, at pp. 87-89.

49. Parliament reasonably believed that s. 33.1 would promote responsible intoxication. Criminalizing all but the most exceptional instances of intoxicated violence will discourage over-intoxication and promote respect for the *Charter* rights of all Canadians. While individuals may not appreciate the risk of "automatism" from intoxication, reasonable people appreciate that intoxication influences their behaviour. They exercise control over their choice of intoxicants and the amounts ingested.[78] The Parliamentary record demonstrated the links between intoxication, expected standards of behaviour, and the criminal law's role as a tool to influence behaviour. The Standing Committee heard evidence that "people are influenced by the culture they inhabit" and that "[i]f it is socially unacceptable to behave in a certain way, fewer people will tend to adopt that behaviour and vice versa". A law that holds "individuals responsible for the adverse consequences of their actions […] likely will encourage more responsible behaviours."[79]

50. Second, allowing a defence of extreme intoxication would decrease reporting of crime. A fear of further victimization at the hands of the criminal justice system is a powerful disincentive to reporting sexual assault.[80] Sexual assault continues to be "among the most highly gendered and underreported crimes" and is "one of the more pressing challenges we face as a society."[81] If perpetrators of violent crime can avoid liability because they were too intoxicated to control their conduct, this will have a chilling effect on reporting.[82] Studies show that accountability concerns lead sexual assault victims—predominately women—to not report.[83]

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[78] *Creighton*, at pp. 66-70.
[79] *Committee Evidence* (13 June 1995) AR Vol. II, Tab 8, at p. 164 (Dr. Kendall). See also Department of Justice, Research and Statistics Section "Violence and Intoxication A Review of the Social Science Literature", AR Vol. II, Tab 8, at p. 275.
[80] *R. v. Osolin*, [1993] 4 S.C.R. 595, at p. 628.
[81] *R. v. Goldfinch*, 2019 SCC 38, ¶37. See also: *R. v. Friesen*, 2020 SCC 9, ¶42, 56-57, 61-64, 68; *R. v. Barton*, 2019 SCC 33, ¶1.
[82] *R. v. Mills*, [1999] 3 S.C.R. 668, ¶58-59; E. Sheehy, I. Grant "Extreme intoxication" appeal decision is yet another blow to women, (July 14, 2020) available at: https://policyoptions.irpp.org/magazines/july-2020/extreme-intoxication-appeal-decision-is-yet-another-blow-to-women/; *S.N.*, ¶100-01; Isabel Grant, "Second Chances: Bill C-72 and the Charter" (1995) 33 Osgoode Hall L.J. 379, at pp. 405-06.
[83] Department of Justice, "Bill C-46: Records Applications Post-Mills, A Caselaw Review" (7 January 2015), https://www.justice.gc.ca/eng/rp-pr/csj-sjc/ccs-ajc/rr06_vic2/p3_4.html; Alana Prochuk, "We are here: Women's Experiences of the Barriers to Reporting Sexual Assault" (2018) at p. 14, online (pdf): *West Coast LEAF* http://www.westcoastleaf.org/wp-content/uploads/2018/10/West-Coast-Leaf-dismantling-web-final.pdf

51. Similar concerns exist with children. In *Friesen*, this Court recognized that the "under-reporting of sexual violence against children is compounded by the ways in which the criminal justice system and the court process have historically failed children."[84] Accountability for blameworthy, unlawful acts is essential to maintain confidence in the justice system,[85] which would be undermined by any negative impact on the reporting of intoxicated violent crime.[86] As noted in *Keegstra*, victims of harmful conduct gain a "great deal of comfort" knowing that the perpetrator is "criminally prosecuted". At the same time, "the community as a whole is reminded of […] the value of equality and the worth and dignity of each human".[87]

52. Third, intoxicated violence that goes unpunished can embolden this behaviour by rewarding those who engage in the riskiest use of intoxicants. Allowing "self-induced intoxication to provide an accused with a defence would be to endorse, if not promote, the very behaviour that has historically proved to be a root cause of the problem."[88]

53. Section 33.1 seeks to deter over-intoxication where there is an objectively foreseeable risk that the individual will become "unaware of, or incapable of consciously controlling, their behaviour".[89] Such intoxication is inherently dangerous as it creates a risk that the individual will become a mere instrument, capable of physical action but devoid of rational thought. By artificially creating a state of dissociation in which their body lacks the conscious control of their mind, a risk of harm necessarily exists. When that harm materializes, it is properly criminalized.

54. Punishing the violent consequences of this dangerous activity serves a denunciatory and deterrent function similar to that performed by penalties in the impaired driving context. For instance, in *R. v. Lacasse*, this Court restored a "severe" six-and-a-half-year jail sentence imposed on a remorseful, twenty-year-old first-offender whose impaired driving resulted in the deaths of his two friends. Parliament's decision to increase the sentences for these offences reflects the view that the objectives of deterrence and denunciation "must be emphasized in order to convey

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[84] *Friesen*, ¶67.
[85] *R. v. Hall*, 2002 SCC 64, ¶26-27.
[86] *L.L.A. v. A.B.*, [1995] 4 S.C.R. 536, ¶58.
[87] *R. v. Keegstra*, [1990] 3 S.C.R. 697, at p. 769.
[88] *Tatton*, ¶42.
[89] Section 33.1(2).

society's condemnation" of this harmful conduct.[90] The paramountcy of these principles remains in cases where the accused's impaired driving unintentionally kills a loved one.[91] To suggest that this has no deterrent, accountability or public-safety value ignores the impact on the public's faith in the justice system if such conduct goes unpunished.

## PARTS IV AND V – SUBMISSIONS ON COSTS AND ORDER SOUGHT

55. Ontario makes no submissions on costs. Ontario asks that this Court hold that s. 33.1 of the *Criminal Code* is constitutional.

ALL OF WHICH IS RESPECTFULLY SUBMITTED BY

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Dated at Toronto this 25th day of October, 2021.

[90] *R. v. Lacasse*, 2015 SCC 64, ¶3-7, 18-22, 105.
[91] See *e.g. R. v. Blakeley*, [1998] O.J. No. 2973 (C.A.), ¶11.

## PART VI – CASE SENSITIVITY

56. Not applicable.

## PART VII – TABLE OF AUTHORITIES

| **Cases** | **Paragraph Reference in Factum** |
|---|---|
| *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37 | 46 |
| *Canada (Attorney General) v. Bedford*, 2013 SCC 72 | 40, 41 |
| *Carter v. Canada (Attorney General)*, 2015 SCC 5 | 41 |
| *Frank v. Canada (Attorney General)*, 2019 SCC 1 | 46 |
| *L.L.A. v. A.B.*, [1995] 4 SCR 536 | 51 |
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