SCC File No. 39781

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

BETWEEN:

MATTHEW WINSTON BROWN

APPELLANT
(Respondent)

- and -

HER MAJESTY THE QUEEN

RESPONDENT
(Appellant)

- and -

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

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

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Part I – Overview and Statement of Facts

A. Overview

1. The Attorney General of Manitoba agrees with the Alberta Court of Appeal that "[t]he effect of [*Criminal Code*] s. 33.1 is not to eliminate the need for voluntariness or *mens rea*," but rather "to measure [them] at the time of self-intoxication," and that the fault requirement imposed by the provision is "the marked departure from acceptable standards when an accused voluntarily engages an objectively foreseeable risk of harm."[1] With respect, these conclusions follow from a reasonable reading of the legislation consistent with well-established principles of statutory interpretation.[2]

2. Where that fault requirement is made out, the significant moral blameworthiness attached to the decision to ignore the risks and create a dangerous state of self-induced intoxication justifies liability for violent crimes committed as a result. Whatever its alleged shortcomings in terms of traditional doctrine, s. 33.1 is fundamentally fair, principled and – given the stakes – demonstrably justifiable in a free and democratic society.

B. Facts and Procedural History

3. The Intervener agrees with the facts as set out by the parties.

Part II – Issues

1. Does *Criminal Code* s. 33.1 infringe *Charter* ss. 7 or 11(d)?

2. If so, is the infringement justified under *Charter* s. 1?

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[1] *R. v. Brown*, 2021 ABCA 273, paras. 21, 129, 138.

[2] See, *e.g., R. v. Rafilovich*, 2019 SCC 51, para. 20: "This analysis, which is concerned with legislative intent, is guided by the words Parliament has chosen to use, the way it intended to achieve its objectives and the scheme it has out in place."

Part III – Argument

A. Section 33.1 Assesses Fault and Voluntariness at the Point of Self-Intoxication

4. Section 33.1 provides that:

> **33.1 (1)** It is not a defence to an offence referred to in subsection (3) that the accused, by reason of self-induced intoxication, lacked the general intent or the voluntariness required to commit the offence, where the accused departed markedly from the standard of care as described in subsection (2).
>
> **(2)** For the purposes of this section, a person departs markedly from the standard of reasonable care generally recognized in Canadian society and is thereby criminally at fault where the person, while in a state of self-induced intoxication that renders the person unaware of, or incapable of consciously controlling, their behavior, voluntarily or involuntarily interferes or threatens to interfere with the bodily integrity of another person.
>
> **(3)** This section applies in respect of an offence … that includes as an element an assault or any other interference or threat of interference by a person with the bodily integrity of another person.

5. The Appellant suggests that the wording of subsection (2), particularly the phrase, "while in a state of self-induced intoxication," suggests that the marked departure contemplated by Parliament is not the choice to become intoxicated to the point of automatism, but rather the violent offence that follows.[3] As such, he argues, the section seeks to penalize behavior beyond an accused's control since at that point, he or she can no longer restrain his or her actions. It thus imposes liability in the absence of fault and risks conviction of the morally innocent.

6. With respect, while linguistically plausible, this reading of subsection (2) violates fundamental principles of statutory interpretation. As an initial matter, as the Appellant points out, it removes any fault requirement from the provision: liability would attach on the basis of an automatistic act that might not even be voluntary. This runs counter to the well-settled presumption that Parliament does not intend to ignore basic constitutional rights and impose

[3] Appellant's Factum, para. 22.

liability absent personal fault. As Cory J. observed in *R. v. Lucas*, "[t]here has for centuries been a presumption that Parliament did not intend to make criminals of persons who were in no way blameworthy in what they did."[4] Where possible, courts should construe legislation in a way that maintains a fault requirement:

> [I]f there are two possible interpretations of a statutory provision, one of which embodies the *Charter* values and the other which does not, that which embodies the *Charter* values should be adopted.[5]

7. Importantly, this presumption does not require a finding that the legislation in question is ambiguous. On the contrary, it applies even in the face of straight-forward language that omits any mention of a criminal fault requirement. In *R. v. De Sousa*, for example, *Criminal Code* (then) s. 269 provided that "Everyone who unlawfully causes bodily harm to any person is guilty of an indictable offence and liable to imprisonment[.]"[6] It said nothing about fault in relation to the causing of bodily harm, nor did it appear to require fault in relation to the underlying unlawful conduct. The trial judge held that this violated *Charter* s. 7. The Ontario Court of Appeal disagreed, holding that notwithstanding the plain language of the provision, "the mental element is implied so that it complies with constitutional requirements."[7]

8. This Honourable Court agreed with the Court of Appeal. Sopinka J. held that the presumption in favour of fault was so strong that Parliament should be taken to have required it for both the causation of bodily harm and the underlying illegal act. "Interpreted this way," he concluded, "[the section] complies with the requirements of s. 7 of the *Charter*."[8]

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[4] *R. v. Lucas*, [1998] 1 S.C.R. 439, paras. 64-65, quoting *Sweet v. Parsley*, [1970] A.C. 132 (H.L.) p. 148 (emphasis added).

[5] *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606, para. 121. See also *R. v. Martin* (1991), 63 C.C.C. (3d) 71 (Ont. C.A.), affirmed [1992] 1 S.C.R. 838.

[6] *Criminal Code*, R.S.C. 1985, c. C-46 (emphasis added).

[7] *R. v. De Sousa*, [1992] 2 S.C.R. 944, paras. 9-11.

[8] *De Sousa*, para. 22. See also *R. v. Creighton*, [1993] 3 S.C.R. 3, paras. 7, 11, 107-116. In both cases, objective foreseeability of non-trivial or transitory bodily harm satisfied s. 7.

9. Similarly, in *R. v. Finlay*, the accused was charged under s. 86(2), which (then) provided that "Everyone who, without lawful excuse, uses, carries, handles, ships or stores any firearm or ammunition in a careless manner or without reasonable precautions for the safety of other persons" was guilty of an offence. The Saskatchewan Court of Appeal held that both the language and legislative history of the section pointed to a civil standard of liability, raising s. 7 concerns. Lamer C.J.C. disagreed, holding that Parliament's reference to an objective standard of assessment implied its intention to apply the "marked departure" criminal standard, which satisfied its constitutional obligations. Again, Parliament would not have meant to impose criminal liability without fault.[9]

10. This is not to say that Parliament cannot intentionally exclude fault from an offence. Subject to the *Charter*, it can draft legislation in whatever terms it sees fit. But as Sopinka J. held in *De Sousa*, absent an unmistakable intention to do so, criminal legislation should be read in a way that requires fault on the part of the accused:

> 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.[10]

11. Here, there is no need to read down a direct statement like "Everyone who [does a proscribed act] commits an offence." Nor is it necessary to "read up" language consistent with a civil standard of liability. On the contrary, Parliament's explicit reference to the penal negligence standard in both s. 33.1(1) and s. 33.1(2) illustrates that it meant to penalize only those accused whose conduct "departs markedly from the standard of reasonable care generally recognized in Canadian society." While the phrasing of s. 33.1(2) could admittedly have been

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[9] *R. v. Finlay*, [1993] 3 S.C.R. 103, paras. 29, 35.

[10] *De Sousa*, para. 22 (emphasis added). See also Lamer C.J.C.'s Reasons in *Creighton*, in which having determined the constitutionally appropriate fault standard for s. 225(5)(a), he then asked "whether [the section] is open to an interpretation that would render it constitutional[.]" *Creighton*, para. 113 (emphasis added).

clearer, it does not, with respect, make out the "clear and unambiguous" intention required by Sopinka J. to impose liability without fault.[11]

12. Further to that, treating the violent act committed in a state of automatism as the gravamen of the marked departure in s. 33.1(2) offends the rules of logic. An action cannot be both negligent and involuntary. Rather, the concept of automatism excludes the notion of fault – this is why it is a defence. Parliament may not be populated by Aristotelian scholars, but surely legislators (and their counsel) can be given credit for recognizing that a thing cannot simultaneously be itself and its opposite. By definition, the actions of a person in an automatistic state lack fault. Parliament cannot realistically have intended to make them the point at which fault attaches under s. 33.1(2).

13. Rather, as Slatter and Hughes JJ.A. observed, the marked departure contemplated by the section must be the decision to become intoxicated – so intoxicated that the accused loses the ability to control his or her behavior and thus becomes a risk to others.[12] This is a decision capable of being analyzed in terms of fault, unlike the involuntary actions that followed. The court's focus in assessing whether or not an accused "depart[ed] markedly from the standard of reasonable care generally recognized in Canada" must be on the circumstances in which he or she became extremely intoxicated. The violent act that follows is a consequence of that marked departure, not its gravamen.

14. This interpretation is supported by the wording of s. 33.1(1), which provides that automatism is not a defence where it arises "by reason of [the accused's] self-induced intoxication." Again, the basis for imposing liability is the decision to become intoxicated. This must be the point where fault is assessed.

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[11] The Appellant suggests that rather than restricting liability to those who were actually negligent, Parliament intended to simply "deem" negligent anyone who committed a violent offence while extremely intoxicated. As discussed below, this suggestion is inherently problematic.

[12] *Brown*, paras. 21, 26, 30, 33, 74, 137, 139, 146, 161.

15. Further support is provided by Parliament's use of the words "self-induced" in both s. 33.1(1) and s. 33.1(2). As Hughes J.A. observed, this excludes situations where the accused becomes intoxicated involuntarily – *e.g.*, by way of a spiked drink.[13] It also, however, implies a choice – the only such choice, with respect, contemplated by the section. The Attorney General of Manitoba agrees with the Appellant that basic principles of criminal liability require a morally blameworthy act for conviction – here, the sole candidate for such an assessment is the accused's decision to become intoxicated.

16. Were this not the case, there would be no need to repeat the words "self-induced" in the definition of a marked departure in s. 33.1(2). Indeed, as discussed further below, there would be no need for s. 33.1(2) at all. Liability would simply ensue on the basis of s. 33.1(1) whenever the accused committed an offence listed in s. 33.1(3) while voluntarily intoxicated. As Martin J. observed in *Rafilovich*, "Parliament … is presumed to intend for its provisions to be read harmoniously, and to be interpreted and applied so they fit together in a way that … gives purpose and meaning to each provision."[14] Again, well-settled principles of statutory interpretation suggest that Parliament intended courts to assess the accused's moral blameworthiness at the point at which he or she became so intoxicated as to lose self-control, not after that loss of self-control had already occurred.

B. Section 33.1 Requires Objective Foreseeability of Violent Loss of Self-Control

17. Like Paciocco J.A. in *R. v. Sullivan*, the Appellant suggests that s. 33.1 applies whenever it was objectively foreseeable that an accused might become intoxicated – to any degree – by consuming an intoxicant. This would impute liability to those who "cannot reasonably expect that, as a result of [their] intoxication, they may become unaware of their behavior or incapable of consciously controlling their behavior."[15] It would similarly catch "people who lack any basis for believing that self-intoxication would cause them to become

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[13] *Brown*, para. 161.

[14] *Rafilovich*, para. 20 (emphasis added).

[15] *R. v. Sullivan*, 2020 ONCA 333, para. 88. Indeed, Paciocco J.A. suggests, it may even catch those who do not realize that they are taking an intoxicant. *Sullivan*, para. 89.

[violently] psychotic[.]"[16] With respect, this interpretation rests upon a similar misreading of the provision.

18. Again, Parliament is presumed to be aware of its constitutional obligations. As the Appellant correctly observes, Canadians routinely consume intoxicants every day, whether at home, with friends, in licensed premises, or at doctors' offices. It defies common sense to assume that Parliament intended to sanction such normal behavior.

19. Further to that, the language of s. 33.1 makes it clear that Parliament intended to target negligence and impose liability only where "a person departs markedly from the standard of reasonable care generally recognized in Canadian society." Surely it could not have meant to label conduct widely recognized as consistent with Canadian standards of care a marked departure from those standards. Nor could Parliament have intended the section to apply where the accused was not actually negligent and did not depart from that standard of care. This is an unreasonable reading of the legislation.

20. As the Attorney General of Saskatchewan observes, the same conclusion follows from a reading of the provision as a whole.[17] Section 33.1(1) provides that "self-induced intoxication" does not provide an automatism defence to general intent offences where the accused departs from the standard of care as described in s. 33.1(2). Section 33.1(2) then describes that marked departure in terms of "self-induced intoxication that renders the person unaware of, or incapable of consciously controlling, their behavior." If the Appellant were correct, and the degree of foreseeable intoxication were not relevant to fault, there would be no need for s. 33.1(2), or for the reference to it at the conclusion of s. 33.1(1). The accused would be negligent simply on the basis of his or her "self-induced intoxication," that is, voluntary intoxication to any degree.

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[16] *Sullivan*, para. 216.

[17] See Attorney General of Saskatchewan's Intervener factum in *Sullivan*, paras. 13-19.

21. Again, long-standing interpretive principles require that every part of a provision be treated meaningfully.[18] Here, s. 33.1(2) clarifies that foreseeability of any degree of intoxication is not enough to establish the fault required by Parliament. The words "self-induced" in s. 33.1(2) do not modify only "intoxication," but also the words that follow. As Slatter J.A. observed, "[t]he *mens rea* selected by Parliament is the marked departure from acceptable standards of conduct when an accused voluntarily engages an objectively foreseeable risk of harm."[19]

22. Further to that, the history and commentary surrounding the adoption of s. 33.1 underline Parliament's overarching concern with harm. As legislators repeatedly noted, the provision was aimed at individuals who "voluntarily become so intoxicated they lose conscious control of their behavior … and who cause harm to others while in that state."[20] As Slatter J.A. observed, Parliament wanted to address the "objectively foreseeable risks of self-induced intoxication that subsequently manifest themselves,"[21] that is, a loss of self-control and subsequent violent act. Common sense suggests that these were the risks to which Parliament believed reasonable people would turn their minds before making decisions about ingesting intoxicants.

23. The degree to which these dangers are foreseeable will vary with, *inter alia*, the intoxicants consumed, the amount taken and the surrounding circumstances. The Appellant argues that since "the reasonable person is not imbued with advanced medical knowledge [as to] incredibly rare side effects of various intoxicants," the section will rarely apply.[22] With respect,

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[18] Again, see, *e.g.*, *Rafilovich*, para. 20.

[19] *Brown*, para. 21 (emphasis added). See also *Brown*, para. 26.

[20] Minutes of Proceedings and Evidence of the Standing Committee on Justice and Legal Affairs, *Respecting Bill C-72, An Act to Amend the Criminal Code (self-induced intoxication)*, (April 6, 1995) at 98:5 (Hon. Alan Rock), reproduced at Vol. V, Tab 32, p. 65 of the Appellant's Record in the *Sullivan* appeal. See also paras. 21-22 of the Respondent's factum in this appeal and the additional examples cited therein.

[21] *Brown*, para. 30.

[22] Appellant's Factum, para. 17.

while this may be true for some intoxicants – *e.g.*, obscure prescription medication – the links between widely-abused substances like crystal methamphetamine ("meth"), phencyclidine ("PCP") and synthetic cathinones ("bath salts") and toxic psychosis are well-established. Abuse of these substances is frequently associated with paranoia, hallucination and extreme violence, including "homicidality."[23] While individual cases will obviously turn on their facts, a reasonable person would not require "advanced medical knowledge" to appreciate the risks associated with consuming these drugs, particularly in significant amounts or over a prolonged period of time.[24] On the contrary, the serious violent offences regularly linked to their abuse make these risks only too apparent.

24. In most cases, a foreseeable loss of self-control will also suggest the foreseeability of violence. An accused who surrenders control over his or her body is in no position to regulate his or her behavior and prevent such an offence, any more than a driver who removes his or her hands from the wheel is in a position to prevent a collision. Moreover, as noted above, some drugs make violent behavior much more likely. That said, there may be cases where notwithstanding the objective foreseeability of a loss of self-control, a reasonable person would not foresee the likelihood of violence. An addict, for example, may go to a safe consumption site to consume crystal meth in an isolated space where he or she will be monitored and kept away from other people. While he or she reasonably anticipates the likelihood of a loss of self-control given the nature of the substance involved, the totality of the circumstances may not suggest a risk of violence. If so, the accused has not departed markedly from the standard of reasonable care and will not have met the fault requirement of s. 33.1, even if for some reason (*e.g.*, a monitoring failure) a violent act occurs. Parliament sought to punish negligence, not misfortune. As argued below, however, this does not mean that the negligent do not deserve punishment.

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[23] See the Attorney General of Manitoba's Intervener factum in *Sullivan*, paras. 7-13, 15.

[24] This may be especially true in light of the accused's history with the substance in question. As Moldaver J. observed during the *Sullivan* hearing, one of the appellants had previously experienced psychotic symptoms after abusing the substance in question. In such circumstances, a reasonable person might well foresee the risk that this could happen again.

C. Section 33.1 Does Not Punish the Morally Innocent

25. Properly construed, s. 33.1 excludes liability for unforeseeable risks as well as liability for foreseeable risks that a reasonable person would have taken – *e.g.*, using medication in accordance with a prescription notwithstanding the possibility of an adverse side effect. It punishes only those who unreasonably place themselves in a state that poses a threat to other community members. As Moldaver J. observed during the *Sullivan* hearing, such individuals turn themselves into loaded guns that cannot distinguish between a demon and a child playing in a park. Does this dangerous behavior justify conviction for violent crimes committed while in this condition?

26. This Honourable Court has repeatedly affirmed that objective foreseeability is a legitimate basis upon which to impose liability for the consequences of dangerous actions. No principle of fundamental justice requires that an accused intend, or even subjectively foresee, such consequences. On the contrary, as Slatter J.A. observed, echoing Sopinka J.'s comments in *De Sousa*, "[s]omeone is not 'morally innocent' just because he or she did not intend the unforeseen, but reasonably foreseeable, consequences of his or her actions."[25]

27. The Appellant does not appear to disagree with this proposition. Like Paciocco J.A. in the *Sullivan* appeal, he suggests that Parliament could have legitimately created a stand-alone offence of, *e.g.*, "criminal negligence by intoxication causing bodily harm."[26] His objection is to the registration of a conviction for the violent offence itself since, as he puts it, "here, the consequences *are* the criminal conduct."[27] That is, s. 33.1 transposes the unlawful act and its

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[25] *Brown*, para. 37, discussing this Honourable Court's decisions in *De Sousa* and *Creighton*. Indeed, depending on the circumstances, foreseeability may not be necessary. See Respondent's Factum, paras. 55-60 and Appellant's Factum in the *Sullivan* appeal, para. 54.

[26] Appellant's Factum, paras. 21, 58-60. Indeed, he recommends such an offence as a preferable alternative to s. 33.1.

[27] Appellant's Factum, paras. 35, 40.

consequence. The accused is actually being punished for his or her unintentional violence, not for whatever negligence he or she may have exhibited earlier.

28. At least some members of the 1986 Law Reform Commission that studied intoxicated crime felt otherwise. While the majority of Commissioners recommended a separate offence of committing a crime while intoxicated, a minority recommended the "simpler, more straight-forward approach" of allowing conviction for any offence that could be committed by negligence, effectively treating the accused's intentional intoxication as the negligent act that justified liability.[28] As the Attorney General of Ontario has argued, this is essentially the effect of s. 33.1: it allows the offences described in s. 33.1(3) to be committed by negligence, and treats the accused's disregard of the risks involved in extreme intoxication as the negligent act where it meets the fault threshold of s. 33.1(2). While narrower and more focused, s. 33.1 thus follows one of several options offered by the Commission.[29]

29. Moreover, as a practical matter, as Slatter J.A. observed, the distinction carries little weight.[30] The same conduct on the part of the accused, carried out in exactly the same way, would remain a criminal offence and be punished to the same degree. As Moldaver J. noted during the *Sullivan* hearing, an accused being sentenced for, *e.g.*, an assault on the basis of s. 33.1 could not be treated as if he or she had committed the assault intentionally. On the contrary, the sentence would reflect his or her actual moral blameworthiness – the failure to direct his or her mind to the risks a reasonable person would have foreseen before becoming extremely intoxicated. Conversely, an accused being sentenced for "criminal intoxication" would see his or her sentence increase to reflect the gravity and consequences of the resulting violence. There is no risk of disproportionate punishment, whatever the offence is called.

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[28] Again, see the Attorney General of Manitoba's *Sullivan* factum, para. 35 and footnote 59.

[29] As Paciocco J.A. recognized in *Sullivan*, the pedigree of the Commission commands respect. *Sullivan*, para. 132. Its members included, *inter alia*, Justice Alan Linden, Gilles Letourneau (later of the Federal Court of Appeal) and Joseph Maingot, Q.C. (counsel to Parliament).

[30] *Brown*, paras. 72-74.

30. This was a persuasive consideration in *R. v. Tatton*. As Moldaver J. observed, "if the judge has discretion to tailor the sentence to the facts of the case, and to consider the accused's intoxication as part of that assessment, precluding the accused from advancing a defence of intoxication is less worrisome."[31] While *Tatton* involved the classification of an offence rather than a *Charter* challenge, the principle is no less applicable under *Charter* s. 1. Whatever this Honourable Court makes of the doctrinal objections raised by the Appellant in terms of s. 7, their practical impact on the treatment of the accused is unlikely to be significant.[32]

31. Further to that, while the moral blameworthiness of an accused liable under s. 33.1 may not correspond precisely to that of a sober accused prosecuted for the offences included in s. 33.1(3), this does not mean that his or her moral blameworthiness is not still substantial. Rather, as the Respondent points out, such an accused engages in dangerous conduct with no regard for the safety of those who may be harmed as a result of his or her choices. He or she gambles with the lives of other people. As the cases discussed in the Attorney General of Manitoba's *Sullivan* factum illustrate, the consequences can be devastating.[33]

32. In cases where similar conduct is prosecuted by way of a stand-alone offence – *e.g.*, dangerous driving causing death – punishment can extend to life imprisonment, reflecting the high degree of moral blameworthiness associated with this behavior.[34]

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[31] *R. v. Tatton*, 2015 SCC 3, para. 45 (emphasis added).

[32] The Appellant argues, for example, that even if automatism and violence are objectively foreseeable consequences of extreme intoxication, "[m]ere commission of one morally blameworthy act cannot inexorably lead to the conclusion that the accused voluntarily or intentionally committed an entirely different criminal offence." Appellant's Factum, para. 35. With respect, no one will be alleging that an accused prosecuted pursuant to s. 33.1 voluntarily or intentionally committed a violent offence. On the contrary, his or her liability will rest on the failure to have considered the danger associated with his or her conduct, and he or she will be dealt with accordingly throughout the judicial process.

[33] Attorney General of Manitoba's *Sullivan* factum, para. 15.

[34] See *Criminal Code* ss. 220-221, 320.2, 320.21.

33. Conversely, the treatment of self-induced intoxication – particularly over the years since the enactment of s. 33.1 – reflects an increasing skepticism about the degree to which it reduces an accused's moral blameworthiness, even where it might be relevant to his or her mental state at the time of the offence.[35] As discussed below, this reflects the common sense observation that the same risky behavior that causes an offence should not also make it impossible to prosecute, arguable doctrinal inconsistencies notwithstanding.

34. In short, as the Attorney General of Ontario argued in *Sullivan*, the stigma and punishment associated with liability under s. 33.1 are ultimately proportionate to the moral blameworthiness of the conduct it targets.[36] Just as the justice system is flexible enough to accommodate the prosecution and sentencing of other offences that can be committed with one of several levels of fault – intention, recklessness, willful blindness, *etc*. – so too can it fairly address the treatment of those whose liability rests on the negligence contemplated by s. 33.1.[37]

35. As the Respondent notes, an offence of "criminal intoxication" would also present its own set of significant problems, including, *inter alia*, logistical uncertainties, procedural fairness issues and constitutional concerns surrounding the possibility of self-incrimination. While the creation of such an offence may avoid some difficulties, it creates others. This was not lost on Parliament when it considered how best to address the threat posed by intoxicated violence.[38]

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[35] See, *e.g.*, *Criminal Code* ss. 153.1(5) and 273.2(a)(i).

[36] Appellant's Factum in *Sullivan*, paras. 59-63.

[37] It bears repeating that depending on the accused's history with the substance in question and the facts known to him or her at the time, the level of fault involved may rise to the level of willful blindness or even recklessness. Someone who has become psychotic and violent in the past after using a particular drug can hardly claim to be surprised when this reoccurs.

[38] Respondent's Factum, para. 95. Indeed, Paciocco J.A. conceded as much in his Reasons in *Sullivan*. See *Sullivan*, para. 136, and the Appellant's Factum in *Sullivan*, para. 102. As noted in the Attorney General of Manitoba's *Sullivan* Factum, this Honourable Court has expressed similar reservations. See, *e.g.*, *R. v. Penno*, [1990] 2 S.C.R. 865, para. 55.

36. As the Law Reform Commission noted, intoxicated crime presents a challenge that does not fit easily into traditional black-letter rules.[39] There are, unfortunately, no perfect solutions. Rather, the Commission's divided recommendations illustrate that reasonable people can disagree about the best and fairest way to respond.

37. The Parliamentary record reflects a diligent attempt by legislators to grapple with these issues and craft a balance between protecting the rights of vulnerable Canadians, maintaining confidence in the administration of justice and limiting the interference with the rights of the accused.[40] Without minimizing the importance of the principles highlighted by the Appellant's s. 7 arguments, it is, with respect, hard to say that Parliament acted outside the range of reasonable options given the complex nature of the problem and the urgent need to respond.[41]

38. Further to that, as argued in the Attorney General of Manitoba's *Sullivan* factum, s. 1 analysis must, in addition to the various rights involved, also include consideration of s. 33.1's role in maintaining public confidence in the justice system. This is an essential principle of the administration of justice that, as this Honourable Court has observed, justifies the restriction of *Charter* rights.[42]

39. The Attorney General of Manitoba agrees with Slatter J.A. that in this regard, "it is imperative to step back from the theoretical analysis" and assess the issue from the perspective of the reasonable member of the public. Without taking a position on the Appellant's case, he also submits that Slatter J.A.'s comments are instructive:

> [The accused] is a recreational user of drugs. He voluntarily consumed magic mushrooms knowing that they had a hallucinogenic effect and because they had a

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[39] Attorney General of Manitoba's *Sullivan* factum, para. 35.

[40] Respondent's Factum, paras. 21, 95. Indeed, while it preferred the general approach of the minority of Commissioners, Parliament stopped well short of their recommendation, restricting the application of s. 33.1 to violent general intent offences. See *Brown*, para. 196.

[41] See Respondent's Factum, paras. 84-86 and authorities cited therein.

[42] See Attorney General of Manitoba's *Sullivan* Factum, paras. 29-31.

> hallucinogenic effect. When they had the foreseen effect, he ran amok, breaking into [the victim's] home … and beating her [causing permanent injuries].
>
> Who is responsible for this? The [accused] essentially says "no one."[43]

40. He then asks, "Is society not entitled to protect people like [the victim], who lived alone and had a reasonable expectation that irresponsible drug-addled people would not break into her house in the middle of the night and beat her up?"[44] The Attorney General of Manitoba respectfully submits that the answer is "yes," and that in fact, society must be able to respond to violent attacks by those who ignore the predictable consequences and place themselves in a dangerous state of self-induced intoxication – or it risks the "pervasive sense of outrage" described by Lauwers J.A. in *Sullivan*. As he observed, the suggestion that the system is helpless in the face of such negligent and dangerous behavior offends the community's "deep intuition of justice" and jeopardizes public confidence in the administration of justice.[45]

41. These concerns are no less pressing now, twenty-seven years after the "swift and damning [public] furor" that followed the decision in *R. v. Daviault*.[46] On the contrary, increased awareness of the particular impact of intoxicated violence on vulnerable women and children and frequent acts of extraordinary violence by those under the influence of powerful drugs like crystal meth have only intensified them. With respect, it is not a risk Parliament can ignore.

Part IV – Costs

42. The Intervener does not seek costs and asks that costs not be awarded against it.

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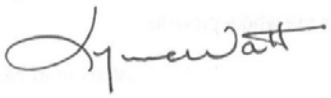
[43] *Brown*, paras. 41-42 (emphasis added).
[44] *Brown*, para. 43.
[45] *Sullivan*, para. 215.
[46] *Brown*, para. 11, describing the reaction to *R. v. Daviault*, [1994] 3 S.C.R. 63, and quoting M.S. Lawrence, *Voluntary Intoxication and the Charter: Revisiting the Constitutionality of Section 33.1 of the Criminal Code* (2017), 40 Man. L.J. 3391, p. 400.

Part V – Order Sought

43. The Attorney General of The Attorney General of Manitoba takes no position on the disposition of the appeal. The Attorney General of Manitoba requests the right to present oral argument not exceeding 10 minutes at the hearing of the appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, this 26th day of October, 2021.



for:

AMI KOTLER
Counsel for the Intervener
Attorney General of Manitoba

Part VII – Table of Authorities, Legislation and Other Documents

Authorities	**Cited at Paragraph No.**
R. v. Brown, 2021 ABCA 273	1, 13, 15, 21, 22, 27, 29, 35, 37, 39, 40
R. v. Creighton, [1993] 3 S.C.R. 3	8, 10, 26
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LEGISLATION

Legislation	**Cited at Paragraph/Page No.**
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Canadian Charter of Rights and Freedoms, s. 7 *La Charte canadienne des droits et libertés*, s. 7	Page 1 Paras. 7, 8, 9, 30, 37
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Criminal Code, RSC 1985, c C-46, s.86(2) *Code Criminel*, LRC 1985, ch C-46, s.86(2)	Para. 9
Criminal Code, RSC 1985, c C-46, s. 153.1(5) *Code Criminel*, LRC 1985, ch C-46, s. 153.1(5)	Para. 33
Criminal Code, RSC 1985, c C-46, s. 220 *Code Criminel*, LRC 1985, ch C-46, s. 220	Para.32
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Criminal Code, RSC 1985, c C-46, s. 225(5)(a) *Code Criminel*, LRC 1985, ch C-46, s. 225(5)(a)	Para. 10
Criminal Code, RSC 1985, c C-46, s. 273.2 *Code Criminel*, LRC 1985, ch C-46, s. 273.2	Para. 33
Criminal Code, RSC 1985, c C-46, s. 320.2 *Code Criminel*, LRC 1985, ch C-46, s. 320.2	Para. 32
Criminal Code, RSC 1985, c C-46, 320.21 *Code Criminel*, LRC 1985, ch C-46, 320.21	Para. 32

OTHER DOCUMENTS

Other Documents	
M.S. Lawrence, *Voluntary Intoxication and the Charter: Revisiting the Constitutionality of Section 33.1 of the Criminal Code* (2017), 40 Man. L.J. 3391	Para. 41