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 -

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(Rules 42 and 43 of the *Rules of the Supreme Court of Canada)*

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PART I – OVERVIEW AND STATEMENT OF FACTS

1. Much ink has been spilt wrestling with the conundrum posed by the individual who harms another while in an automatistic state induced by their own voluntary consumption of intoxicants. Courts, law reform commissions, and legislatures across the world continue to grapple with this problem. There perhaps is no perfect solution. The question before this Court is whether the solution chosen by Parliament, s. 33.1 of the *Criminal Code of Canada*, is constitutionally compliant – not whether it is the best solution or a perfect solution.

2. Section 33.1 of the *Criminal Code* addresses a lacuna left by this Court's decision in *R. v. Daviault*[1] which, in effect, created a new defence of extreme intoxication resulting in automatism. This defence was applicable to all offences, regardless of whether the offence was one of specific intent or general intent. The decision in *Daviault* was both a departure from and an evolution of earlier decisions from the House of Lords and this Court and the decision was met with a public outcry.[2]

3. The reaction to the decision should not have been surprising. Mr. Daviault was acquitted of rape by reason of his having become an automaton ensuing from his voluntary consumption of alcohol. This Court was firmly divided on the issue as it had been in *Leary v. the Queen*[3], albeit in *Leary*, the majority upheld the rule that intoxication was not a defence where an accused person was charged with an offence of general intent. With strong opinions in this Court on whether a person could be held responsible for their actions arising from their own conduct in rendering themselves into an automaton, it is not surprising that the public also had strong opinions. As a result, Parliament chose to act and the path it chose was to enact s. 33.1 of the *Code*.

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[1] [1994] 3 S.C.R. 63.

[2] Gina Stoduto, Susan Bondy & Robin Room, "Self-Induced Intoxication as a Defence" in Norman Giesbrecht et al, eds, *Sober Reflections: Commerce, Public Health, and the Evolution of Alcohol Policy in Canada, 1980-2000* (Montreal and Kingston, McGill-Queen's University Press, 2006) 265 at 269-273.

[3] [1978] 1 S.C.R. 29.

4. Twenty-five years later, this Court is asked in two separate cases, this one and *R. v. Sullivan et al* (SCC #39270), to determine the constitutional validity of the provision. In *Sullivan*[4], the Ontario Court of Appeal found the provision violated ss. 7 and 11(d) of the *Charter of Rights and Freedoms* and could not be saved under s. 1 of the *Charter*. In this matter[5], the majority of the Alberta Court of Appeal found that s. 33.1 did not violate ss. 7 or 11(d) of the *Charter*. Khullar J.A. held that the provision did infringe s. 7 of the *Charter* but was saved by s. 1.

5. Thus, even in 2021, the courts remain troubled and divided on this thorny issue. This Court has heard argument already in the *Sullivan* matter and has heard from multiple Attorneys General with respect to the constitutionality of the provision. The Attorney General of British Columbia ("AGBC") will address in this factum the purposes of the legislation and how they should be addressed under the s. 1 analysis, should this Court find that the legislation infringes either s. 7 or 11(d) of the *Charter*. The AGBC will also address whether equality rights should be addressed under the s. 7 or s. 1 analysis. Finally, the AGBC will address the topic of remedy, should this Court find an infringement that is not saved under s. 1 of the *Charter*.

PART II – INTERVENER'S POSITION ON APPEAL

6. The AGBC intervenes, as of right, to address the following constitutional questions stated by the appellant Matthew Winston Brown:

1. **Does s. 33.1 of the *Criminal Code* infringe s. 7 of the *Charter of Rights and Freedoms*?**
2. **Does s. 33.1 of the *Criminal Code* infringe s. 11(d) of the *Charter of Rights and Freedoms*?**
3. **If s. 33.1 infringes either s. 7 or s. 11(d), is that infringement justified under s. 1 of the *Charter of Rights and Freedoms*?**

7. AGBC submits that s. 33.1 of the *Criminal Code* does not infringe ss. 7 or 11(d) of the *Charter*. AGBC further submits that if s. 33.1 does infringe ss. 7 or 11(d) of the *Charter*, the infringement is justified under s. 1 of the *Charter*.

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[4] 2020 ONCA 333.
[5] *R. v. Brown*, 2021 ABCA 273.

PART III – STATEMENT OF ARGUMENT

A. Section 1 of the *Charter*

8. In *Sullivan*, Paciocco J.A., writing for himself and Watt J.A., held that s. 33.1 could not be justified under s. 1 of the *Charter*. In doing so, he effectively dismissed both the accountability and protective purposes of the legislation. The accountability purpose was said to be an improper purpose for s. 1 evaluation because to override principles that deny accountability for the purpose of imposing accountability is not a compelling reason for infringing core constitutional values. Further, he added that legislation is unconstitutional if its purpose is unconstitutional. Because it is unconstitutional to hold someone criminally accountable in the absence of voluntariness or penal negligence, the accountability purpose is unconstitutional. Moreover, all criminal legislation exists to hold offenders accountable and as such, the standard would be met for any criminal offence.[6]

9. With respect to the protective purpose, Paciocco J.A. conceded that the objective was pressing and substantial but found that the provision was not rationally connected to this purpose because it was not likely to deter a potential offender.[7]

10. In *Brown*, Slatter J.A. conducted a s. 1 analysis despite having found that s. 33.1 did not infringe either s. 7 or 11(d) of the *Charter*. Hughes J.A., having also found no infringement, concurred in that analysis. Slatter J.A. recognized that there has historically been a clear link between intoxication and violent crime and that "the fundamental purpose of s. 33.1 is to address violent crimes by those who have voluntarily become intoxicated even those who may have become severely intoxicated in the face of the objectively foreseeable of the possible violent consequences".[8]

11. Khullar J.A. found that s. 33.1 did infringe s. 7 of the *Charter*, but also concluded the provision was justified under s. 1. She agreed with other jurists who identified both an accountability and a protective purpose underlying s. 33.1. Unlike Paciocco J.A., she saw nothing wrong in an objective which seeks to hold individuals accountable for the violent acts they commit while intoxicated to the point of automatism. While she accepted that holding such persons

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[6] *Sullivan*, paras. 112-116.
[7] *Sullivan*, paras. 117-122.
[8] *Brown*, para. 60.

accountable violated two principles of fundamental justice – the voluntariness principle and the principle of constitutionally minimum *mens rea* – she held that this did not mean the purpose itself was impermissible. That the provision violates s. 7 only makes it *prima facie* unconstitutional. Whether it is ultimately unconstitutional depends on whether it can be justified under s. 1.[9]

12. The protective purpose of s. 33.1, as found by Khullar J.A., 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*.[10]

13. Khullar J. found both the accountability and protective purposes pressing and substantial.[11]

14. She further held, as conceded by the parties, that there was a rational connection between the accountability purpose and the provision. With respect to the protective purpose, she held that the question was whether there is a rational connection between holding people liable for crimes of violence committed in an automatistic state arising from self-induced intoxication and deterring over-intoxication associated with violence. Deterrence is accomplished in two ways – first criminalization of conduct can be reasonably expected to deter rational actors, at the point at which they make consumption decisions, from excessive consumption of intoxicants despite there being some limits on the effectiveness of such deterrence. Secondly, criminalizing conduct as set out in s. 33.1 can "help form and strengthen a social ethos that disapproves of excessive intoxication because of its association with violence and imposes informal, social penalties, in addition to the formal sanctions of the legal system" as demonstrated by the social taboo associated with impaired driving.[12]

The Accountability Purpose

15. The AGBC submits that Slatter J.A. was correct when he characterized Paciocco J.A.'s reasoning as circular in rejecting the accountability purpose as improper because it is unconstitutional.[13] The AGBC further submits that Khullar J.A. was correct in assessing Paciocco

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[9] *Brown*, para. 183.
[10] *Brown*, para. 185.
[11] *Brown*, para. 186.
[12] *Brown*, paras. 188-189.
[13] *Brown*, paras. 62-64.

J.A.'s reasons as collapsing the purpose, accountability, with the effect of the provision which both she and Paciocco J.A. found infringed an accused person's s. 7 *Charter* rights. The result of conflating the two was to redefine the purpose from accountability to the impermissible purpose of removing lack of voluntariness or *mens rea* as a defence.[14] The AGBC agrees that it is important to keep the purpose and effect of the impugned legislation separate for this analysis. The AGBC submits that to do so is consistent with this Court's s. 7 jurisprudence distinguishing the purpose of the legislation from its effects.[15] The AGBC further submits that courts should exercise caution in determining the validity or legitimacy of a legislative objective. The question is whether the purpose is pressing and substantial and judicial opinions as to its propriety may venture too far into the legislative sphere.

The Protective Purpose and Rational Connection

16. The AGBC submits that Khullar J.A.'s assessment of the protective purpose should be preferred. The protection of potential victims of violence, particularly those understood to be more vulnerable, is a pressing and substantial objective and necessarily recognizes the dignity and self-worth of women and children who are, statistically, often the victims of violent crime.[16]

17. The AGBC further submits that there is a rational connection between the provision and the protective purpose. The protective purpose cannot be dismissed simply because the existence of the provision will not deter everyone or may not deter many people. Nor does the state have to prove deterrence. Moreover, Khullar J.A. is correct to note the social and moral ethos that arises from criminalizing conduct. Deterrence is more than just whether a person actively decides not to do something because they might be convicted of a crime. Deterrence is about creating an environment in which activities that Parliament has deemed worthy of sanction become broadly unacceptable and are not tolerated by society. This could also be characterized as denunciation. Regardless of how it is characterized, as Khullar J.A. noted, this effect can be seen in the impaired driving context. Imposing criminal sanctions for those who commit violent offences while in an

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[14] *Brown*, para. 184.
[15] See for example, *R. v. Moriarity*, [2015] 3 S.C.R. 485, paras. 25-27.
[16] *Brown*, para. 185.

automatistic state because of self-induced intoxication is rationally connected to the protective purpose.

18. In *R. v. Nur*[17], McLachlin C.J., writing for the majority, found that the government had not established that mandatory minimum sentences deterred gun-related crime. Nevertheless, despite the frailty of the connection, the provision was still rationally connected to its objective because it had a denunciatory and retributive effect. The test for rational connection does not require that the measure be wholly effective – only that there is a connection between its purpose and the means used to achieve that purpose.

19. Analyzed in this fashion, it is clear that the provision is rationally connected to the protective purpose.

B. The Equality Rights of Potential Victims are Properly Considered under s. 1

20. During the oral hearing in *Sullivan,* a question was raised as to whether the rights of potential victims should be considered as part of the s. 7 framework or whether they were more properly considered under s. 1 of the *Charter*. The Attorney General of Ontario was asked to reconcile the position it took in appeals heard the week prior related to the constitutionality of provisions governing the use of records in the possession of the accused in sexual offence trials.[18]

21. It is important to consider the specific rights that are said to have been infringed and the principles of fundamental justice engaged. In *R. v. Mills*[19], it was the right to a fair trial, specifically the right to make full answer and defence, which was engaged by the impugned procedural provisions. Also engaged were a complainant's rights to privacy, since an accused resorting to the procedure would, in effect, be seeking state-compelled disclosure of private information.

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[17] [2015] 1 S.C.R. 773, paras. 114-115.
[18] *Her Majesty the Queen v. J.J.* (SCC #39133); *A.S. v. Her Majesty the Queen et al.* (SCC #39516).
[19] [1999] 3 S.C.R. 668.

22. McLachlin and Iacobucci JJ., writing for the majority in *Mills* explained the approach to balancing rights:

> [61] At play in this appeal are three principles, which find their support in specific provisions of the *Charter*. These are full answer and defence, privacy, and equality. No single principle is absolute and capable of trumping the others; all must be defined in light of competing claims. As Lamer C.J. stated in *Dagenais*, *supra*, at p. 877: "When the protected rights of two individuals come into conflict . . . *Charter* principles require a balance to be achieved that fully respects the importance of both sets of rights." This illustrates the importance of interpreting rights in a contextual manner -- not because they are of intermittent importance but because they often inform, and are informed by, other similarly deserving rights or values at play in particular circumstances.
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> …
>
> [63] Considered in the abstract, these principles of fundamental justice may seem to conflict. The conflict is resolved by considering conflicting rights in the factual context of each particular case. Therefore, we do not say that a complainant's right to be free from an unreasonable search and seizure may be justifiably infringed by the accused's right to make full answer and defence or vice versa. Rather, part of what defines both a reasonable search or seizure and full answer and defence is a full appreciation of these principles of fundamental justice as they operate within a particular context.
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> …
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> [66] However, there are several important differences between the balancing exercises under ss. 1 and 7. The most important difference is that the issue under s. 7 is the delineation of the boundaries of the rights in question whereas under s. 1 the question is whether the violation of these boundaries may be justified. The different role played by ss. 1 and 7 also has important implications regarding which party bears the burden of proof. If interests are balanced under s. 7 then it is the rights claimant who bears the burden of proving that the balance struck by the impugned legislation violates s. 7. If interests are balanced under s. 1 then it is the state that bears the burden of justifying the infringement of the *Charter* rights.
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> [67] Because of these differences, the nature of the issues and interests to be balanced is not the same under the two sections. As Lamer J. (as he then was) stated in *Re B.C. Motor Vehicle Act*, *supra*, at p. 503: "the principles of fundamental justice are to be found in the basic tenets of our legal system". In contrast, s. 1 is concerned with the values underlying a free and democratic society, which are broader in nature. In *R. v. Oakes*, [1986] 1 S.C.R. 103, Dickson C.J. stated, at p. 136, that these values and principles "embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society". In *R. v. Keegstra*, [1990] 3 S.C.R. 697, at p. 737, Dickson C.J. described such values and principles as "numerous, covering the guarantees enumerated in the *Charter* and more".
>
> [Emphasis added]

23. In *R. v. O'Connor*, L'Heureux-Dubé J., noted that the right to a fair trial is not absolute and necessarily incorporates society's point of view.[20]

24. The distinction between s. 7 and s. 1 was further explained in *R. v. Malmo-Levine; R. v. Caine*[21]:

> [96] We do not think that these authorities should be taken as suggesting that courts engage in a free-standing inquiry under s. 7 into whether a particular legislative measure "strikes the right balance" between individual and societal interests in general, or that achieving the right balance is itself an overarching principle of fundamental justice. Such a general undertaking to balance individual and societal interests, *independent of any identified principle of fundamental justice*, would entirely collapse the s. 1 inquiry into s. 7. The procedural implications of such a collapse are significant. Counsel for the appellant Caine, for example, urges that the appellants having identified a threat to the liberty or security of the person, the evidentiary onus should switch at once to the Crown *within s. 7* "to provide evidence of the significant harm that it relies upon to justify the use of criminal sanctions" (Caine's factum, at para. 24).
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> [97] We do not agree. …
>
> [98] The balancing of individual and societal interests within s. 7 is only relevant when elucidating a particular principle of fundamental justice. As Sopinka J. explained in *Rodriguez*, *supra*, "in arriving at these principles [of fundamental justice], a balancing of the interest of the state and the individual is required" (pp. 592-93 (emphasis added)). Once the principle of fundamental justice has been elucidated, however, it is not within the ambit of s. 7 to bring into account such "societal interests" as health care costs. Those considerations will be looked at, if at all, under s. 1. As Lamer C.J. commented in *R. v. Swain*, [1991] 1 S.C.R. 933, at p. 977:
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> > It is not appropriate for the state to thwart the exercise of the accused's right by attempting to bring societal interests into the principles of fundamental justice and to thereby limit an accused's s. 7 rights. Societal interests are to be dealt with under s. 1 of the *Charter*, where the Crown has the burden of proving that the impugned law is demonstrably justified in a free and democratic society.
>
> [99] … The delineation of the principles of fundamental justice must inevitably take into account the social nature of our collective existence. To that limited extent, societal values play a role in the delineation of the boundaries of the rights and principles in question.
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> [Italic emphasis in original, underline emphasis added except in para. 98 where noted]

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[20] [1995] 4 S.C.R. 411, paras. 107-109.
[21] [2003] 3 S.C.R. 571.

25. The question under s. 7 is whether the law's negative effect on life, liberty or security of the person is in accordance with the principles of fundamental justice.[22] The procedural rights that were at stake in *Mills* are very different from the principles of fundamental justice said to be infringed by s. 33.1. The balancing occurred under s. 7 in *Mills* because it was necessary to determine the scope of the rights in question. The principles of fundamental justice in this appeal, namely the voluntariness principle which requires some or all of the conduct charged to be voluntary and the requirement for a constitutionally required minimum level of *mens rea*, have already been arrived at and cannot be limited by competing rights of potential victims.

26. The AGBC submits that with respect to the present matter, the consideration of societal factors, which includes the rights of potential victims, particularly women and children, must be considered under s. 1 both in considering whether the purpose of the legislation is pressing and substantial and in analyzing overall proportionality.

C. Remedy

27. One of the arguments made before this Court is that, utilizing the principles of statutory interpretation, s. 33.1 can be read such that the marked departure standard in 33.1(2) applies to the self-induced intoxication as opposed to, or in addition to, the violence committed while in a state of extreme intoxication such that one's actions are no longer voluntary. There is logic to this position as there is no need to import a marked departure standard to the violence because every offence of violence is, by definition, a marked departure from the standard of care. However, a plain reading of the section does suggest that the marked departure standard applies to the underlying violence as opposed to the self-induced intoxication rendering a persons' actions involuntary. Should this Court not find that s. 33.1 is amenable to the proposed statutory interpretation on its face, and also find that the provision as written infringes ss. 7 or 11(d) of the *Charter* and is not saved under s. 1 of the *Charter*, then this Court must consider an appropriate remedy.

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[22] *Canada (Attorney General) v. Bedford*, [2013] 3 S.C.R. 1011, para. 125.

28. The appellant seeks to have the provision declared to be of no force and effect. However, the AGBC submits that this may be an appropriate case in which to read in a marked departure standard in respect of the self-induced intoxication. This standard would require objective foreseeability of the risk that the consumption of intoxicants could result in an automatistic state in which involuntary acts of violence may be committed.

Legal Principles

29. In *Schachter v. Canada*, Lamer C.J., writing for the majority, explained the remedial options available upon a finding that legislation infringes the *Charter* and the infringement is not justified under s. 1[23]:

> A court has flexibility in determining what course of action to take following a violation of the *Charter* which does not survive s. 1 scrutiny. Section 52 of the *Constitution Act, 1982* mandates the striking down of any law that is inconsistent with the provisions of the Constitution, but only "to the extent of the inconsistency". Depending upon the circumstances, a court may simply strike down, it may strike down and temporarily suspend the declaration of invalidity, or it may resort to the techniques of reading down or reading in. In addition, s. 24 of the *Charter* extends to any court of competent jurisdiction the power to grant an "appropriate and just" remedy to "[a]nyone whose [*Charter*] rights and freedoms ... have been infringed or denied". In choosing how to apply s. 52 or s. 24 a court will determine its course of action with reference to the nature of the violation and the context of the specific legislation under consideration.

30. Reading in is a tool is meant to avoid undue intrusion into the legislative sphere. It may be appropriate in cases where the second or third elements of the proportionality test under s. 1 are not met.[24] The appropriateness of reading in will depend on the whether a constitutionally compliant wording can be determined with sufficient precision such that the Court can fill the gap as opposed to requiring the legislator to do so.[25] Furthermore, reading in or reading down must be consistent with the legislative intent – otherwise such a remedy intrudes too greatly into the legislative sphere.[26]

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[23] [1992] 2 S.C.R. 679, pp. 695-696.
[24] *Schachter*, pp. 700 and 705.
[25] *Schachter*, p. 705.
[26] *Schachter*, pp. 707-709.

31. *Schachter* established that reading in is appropriate: (1) where the legislative objective is obvious, or it is revealed through the evidence offered pursuant to the failed s. 1 argument, and reading in would further that objective, or constitute a lesser interference with that objective than would striking down; and (2) where the choice of means used by the legislature to further that objective is not so unequivocal that severance/reading in would constitute an unacceptable intrusion into the legislative domain.[27] The third requirement in *Shachter*, budgetary considerations, is not a relevant consideration in the present matter.

32. This Court has rarely chosen the remedy of reading in in the context of criminal law, most often because what would be read in is contrary to the legislative intent. For example, in *R. v. Seaboyer: R. v. Gayme*[28], the legislative provision was unconstitutional because it did not permit judicial discretion. To read in the necessary judicial discretion to make the provision constitutionally compliant would be to read in a component the legislature specifically excluded.

33. *R. v. Sharpe*[29], is an example of when this Court has chosen the remedy of reading in:

> [122] The first question is whether the legislative objective of s. 163.1(4) is evident. In my view it is. The purpose of the legislation is to protect children from exploitation and abuse by prohibiting possession of material that presents a reasoned risk of harm to children. This question leads to a second: whether reading in will further that objective. In other words, will precluding the offending applications of the law better conform to Parliament's objective than striking down the whole law? Again the answer is clearly yes. The applications of the law that pose constitutional problems are exactly those whose relation to the objective of the legislation is most remote. Carving out those applications by incorporating the proposed exception will not undermine the force of the law; rather, it will preserve the force of the statute while also recognizing the purposes of the *Charter*. The defects of the section are not so great that their exclusion amounts to impermissible redrafting, as was the case in *Osborne v. Canada (Treasury Board)*, [1991] 2 S.C.R. 69, and *R. v. Heywood*, [1994] 3 S.C.R. 761. The new exceptions resemble those that Parliament has already created and are consistent with its overall approach of catching mainstream child pornography reasonably linked to harm while excluding peripheral material that engages free speech values. Moreover, since the problematic applications lie on the periphery of the material targeted by Parliament, carving them out will not create an exception-riddled provision bearing little resemblance to the provision envisioned by Parliament. This suggests that excluding the offending applications of the law will not subvert Parliament's object. On the other hand, striking down the statute

[27] *Schachter*, p. 719.
[28] [1991] 2 S.C.R. 577.
[29] [2001] 1 S.C.R. 45.

altogether would assuredly undermine Parliament's object, making it impossible to combat the lawfully targeted harms until it can pass new legislation.

[123] I recognize that questions may arise in the application of the excepted categories. However, the same may be said for s. 163.1 as drafted. It will be for the courts to consider precise questions of interpretation if and when they arise, bearing in mind Parliament's fundamental object: to ban possession of child pornography which raises a reasoned apprehension of harm to children.

[124] The second prong of *Schachter*, *supra*, is directed to the possibility that reading in, though recognizing the objective of the legislation, may nonetheless undermine legislative intent by substituting one means of effecting that intent with another. As we noted in *Vriend v. Alberta*, [1998] 1 S.C.R. 493, the relevant question is "what the legislature would . . . have done if it had known that its chosen measures would be found unconstitutional" (para. 167). If it is not clear that the legislature would have enacted the legislation without the problematic provisions or aspects, then reading in a term may not provide the appropriate remedy. This concern has more relevance where the legislature has made a "deliberate choice of means" by which to reach its objective. Even in such a case, however, "a deliberate choice of means will not act as a bar to reading in save for those circumstances in which the means chosen can be shown to be of such centrality to the aims of the legislature and so integral to the scheme of the legislation, that the legislature would not have enacted the statute without them": *Vriend, supra*, at para. 167.

[125] In the present case it cannot be said that the legislature has made a deliberate choice of means in the sense that phrase was used in *Vriend, supra*. Clearly, s. 163.1(4) is a deliberate choice of means in the general sense that the provision was adopted to address the problem of child abuse and exploitation. I see no evidence, however, that Parliament saw the statute's application to the two problematic categories of materials (i.e., self-created expressive materials and private recordings that do not depict unlawful sexual activity) as an integral part of the legislative scheme. On the contrary, given that the risk to children posed by materials falling within these two categories is relatively remote, it seems reasonable to conclude that such materials are caught incidentally, not deliberately, and that Parliament would have excluded these two categories from the purview of the law had it been seized of the difficulty raised by their inclusion.

[126] The legislative history of Bill C-128, which introduced s. 163.1(4), reinforces my view that reading in an exclusion of the problematic material would not unduly intrude on the legislative domain. As was noted during the Senate Committee's proceedings, there had over the years been a great deal of debate, both within Parliament and in the country more generally, about the problem of child pornography and the appropriate way to address it (*Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs*, Issue No. 50, June 21, 1993, at p. 50:41 (statement of Richard Mosley, Chief Policy Counsel, Criminal and Social Policy, Department of Justice)).

[Emphasis added]

Application of the Legal Principles to Section 33.1

34. The AGBC submits that reading in a marked departure standard in relation to self-induced intoxication is consistent with the legislative intent and cures any constitutional defect in the provision as presently written.

35. Section 33.1 reads as follows:

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

36. Section 33.1(1) sets out that self-induced intoxication is not a defence where there is a marked departure from the standard of care as defined in (2). However, s. 33.1(2), which describes the standard of care, says that a person departs markedly from the standard of care where, while in a state of self-induced intoxication, voluntarily or involuntarily interferes or threatens to interfere with the bodily integrity of another person and is thus criminally responsible.

37. As previously noted, on a plain reading, the standard of care appears to apply to interfering or threatening to interfere with the bodily integrity of another person. However, interfering or threatening to interfere with the bodily integrity of another person will always represent a marked departure from the standard of care. The question has always been whether a person could be held criminally responsible for that behaviour if their actions were involuntary regardless of the cause of that involuntariness. Logically, Parliament's intent must have been to import a marked

departure standard to self-induced intoxication rendering a person unaware, or incapable, of consciously controlling their behaviour. Moreover, importing a marked departure standard of care is consistent with Parliament's intent as stated in the preamble and with jurisprudence addressing criminal fault and addressing self-induced intoxication.

i. Parliament's intent

38. In the preamble, Parliament stated:

> WHEREAS the Parliament of Canada considers it necessary to legislate a basis of criminal fault in relation to self-induced intoxication and general intent offences involving violence;
>
> WHEREAS the Parliament of Canada recognizes the continuing existence of a common law principle that intoxication to an extent that is less than that which would cause a person to lack the voluntariness required to commit a criminal offence of general intent is never a defence at law;
>
> WHEREAS the Parliament of Canada considers it necessary and desirable to legislate a standard of care, in order to make it clear that a person, who, while in a state of incapacity by reason of self-induced intoxication, commits an offence involving violence against another person, departs markedly from the standard of reasonable care that Canadians owe to each other and is thereby criminally at fault;[30]

39. Parliament's intent was clearly to import a marked departure standard which necessarily relies on penal negligence as the criminal fault element. The language of marked departure could not have been chosen randomly and clearly invokes penal negligence.

ii. Penal Negligence

40. In *R. v. Hundal*, Cory J., writing for the majority, held that:

> Depending on the provisions of the particular section and the context in which it appears, the constitutional requirement of *mens rea* may be satisfied in different ways. The offence can require proof of a positive state of mind such as intent, recklessness or wilful blindness. Alternatively, the *mens rea* or element of fault can be satisfied by proof of negligence whereby the conduct of the accused is measured on the basis of an objective standard without establishing the subjective mental state of the particular accused. In the appropriate context, negligence can be an acceptable basis of liability which meets the fault requirement of s. 7 of the *Charter*. See *R. v. Wholesale Travel Group Inc.*, [1991] 3 S.C.R.

[30] Bill C-72, *An Act to amend the Criminal Code (self-induced intoxication)*, SC 1995, c. 32.

> 154. Thus, the intent required for a particular offence may be either subjective or objective.[31]
>
> [Emphasis added]

41. The test for negligence is objective and requires "a marked departure from the standard of care of a reasonable person".[32] In the case of dangerous driving, a modified objective test was found to be appropriate. A modified objective test requires that the conduct be examined in the context in which it occurred and permits an accused person to raise a reasonable doubt that a reasonable person would have been aware of the risks in the accused's conduct.[33]

42. Dangerous driving is akin to self-induced intoxication in that the question to be answered is when a lawful activity becomes dangerous to a criminal standard. However, there are distinctions. The first being that the risk of harm arising from dangerous driving is more obviously foreseeable than the harm that may arise from rendering oneself an automaton. The second is that the dangerousness of the driving constitutes the *simpliciter* version of the offence whereas self-induced intoxication, even to the point of incapacity is not, in and of itself, an offence.

43. Another category of *mens rea* which can rely on penal negligence is predicate offence liability, such as unlawful act manslaughter. In *R. v. Creighton*[34], the majority of this Court held that the *mens rea* for unlawful act manslaughter was the intent to commit the predicate offence and the objective foresight of the risk of bodily harm which is neither trivial nor transitory. In other words, the law requires that the unlawful act be objectively dangerous. The unlawful act may be one of negligence requiring a marked departure from the standard of care. This form of *mens rea* was found to be constitutionally compliant.

44. Again, there are both similarities and differences between s. 33.1 and unlawful act manslaughter. The construction of the provision is similar in that there is a predicate that underlies the offence. The difference is that the predicate in unlawful act manslaughter is itself unlawful (meaning that it is prohibited by law whether by criminal sanction or by regulation), whereas self-

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[31] [1993] 1 S.C.R. 867, p.882.
[32] *Hundal*, p. 882.
[33] *Hundal*, pp. 886-888.
[34] [1993] 3 S.C.R. 3.

induced intoxication that causes incapacity is not, in and of itself, an unlawful act though in some circumstances it may be (for example, the consumption of illegal drugs).

45. The AGBC submits that the application of existing jurisprudence from both dangerous driving and predicate offence liability can provide the interpretative assistance necessary to apply a marked departure standard to self-induced intoxication in a constitutionally compliant manner.

46. In *R. v. Beatty*, the majority of this Court clarified the *actus reus* and *mens rea* of the dangerous driving:

> (a) The *Actus Reus*
>
> The trier of fact must be satisfied beyond a reasonable doubt that, viewed objectively, the accused was, in the words of the section, driving in a manner that was "dangerous to the public, having regard to all the circumstances, including the nature, condition and use of the place at which the motor vehicle is being operated and the amount of traffic that at the time is or might reasonably be expected to be at that place".
>
> (b) The *Mens Rea*
>
> The trier of fact must also be satisfied beyond a reasonable doubt that the accused's objectively dangerous conduct was accompanied by the required *mens rea*. In making the objective assessment, the trier of fact should be satisfied on the basis of all the evidence, including evidence about the accused's actual state of mind, if any, that the conduct amounted to a marked departure from the standard of care that a reasonable person would observe in the accused's circumstances. Moreover, if an explanation is offered by the accused, 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 manifested by the accused.[35]
>
> [Emphasis added]

47. AGBC submits that this is an appropriate articulation of the criminal liability that Parliament intended in enacting s. 33.1. The consumption of intoxicants must be objectively dangerous and the risk of rendering oneself into an automaton and inflicting or threatening violence on another person must be reasonably foreseeable.

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[35] [2008] 1 S.C.R. 49, para. 43

iii. Marked Departure as Applied to Self-Induced Intoxication

48. An examination of the jurisprudence demonstrates that courts are well-equipped to determine whether consumption was voluntary and whether the risks of impairment and its potential consequences were reasonably foreseeable. A few examples follow.

49. In *R. v. Honish*[36], Fraser J.A., for the majority of the court, held that to prove that an accused voluntarily consented to the consumption of intoxicating substances, the Crown must prove that the accused was aware of the fact of consumption and that they actively agreed to it. Moreover, responsibility for one's acts following voluntary ingestion of intoxicants does "not require the consumer to know to a nicety what the effect of the intoxicating substances will be". It will be sufficient that they know that it might be dangerous and are recklessly indifferent with respect to ingestion or as to warnings relating to the effects of ingestion.

50. *R. v. Vickberg*[37], a case in which s. 33.1 was found to violate s. 7 of the *Charter* but the infringement was found to be justified under s. 1, dealt with whether the accused's consumption of the pills could be said to be voluntary such that the defence of automatism would not be available to him.

51. Owen-Flood J. held that he was left with a reasonable doubt as to whether the appellant's consumption was voluntary. He found that any awareness the accused had was limited to the consumption of the first six to eight tablets of a medication that was prescribed him without any warnings about possible impairment. There was no evidence to indicate that an overdose of the medication could result in a state of impairment. As a result, s. 33.1 was found not to apply to bar a defence of automatism because the accused's intoxicated state was not arrived at with the requisite degree of voluntariness.

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[36] 1991 ABCA 304, appeal dismissed [1993] 1 S.C.R. 458, pp. 338-339.
[37] [1998] B.C.J. No. 1034 (BCSC).

52. *R. v. Chaulk*[38] set out the test for determining whether intoxication is self induced: the accused voluntarily consumed a substance which (1) they ought to have know was an intoxicant and (2) the risk of becoming intoxicated was or should have been within their contemplation.

53. In *R. v. Harris*[39], the court applied the test in *Chaulk* and determined that there was evidence that, while the accused, who thought he was taking heroin but was actually taking cocaine, voluntarily consumed a substance he knew to be an intoxicant. However, given his past experience with the drug he thought he was consuming (heroin), he had no reason to believe it was dangerous. The defence of involuntary intoxication ought to have been put to the jury.

54. In *R. v. Goard*[40], Trotter J., as he then was, found that the risk of becoming intoxicated was obvious in consuming Clonazepam, washed down with beer. He concluded that "any reasonable person would realize that this was a combination that might have drastic effects". He further found that the accused knew the risks given his self-described vast experience with drugs and alcohol.

iv. Proposed Remedy

55. The AGBC suggests the following amendment (as underlined) as possible remedial language:

> **When defence not available**
> **33.1 (1)** It is not a defence to an offence referred to in subsection (3) that the accused, by reason of self-induced intoxication, lacked the general intent or the voluntariness required to commit the offence, where the accused departed markedly from the standard of care as described in subsection (2).
>
> **Criminal fault by reason of intoxication**
> **(2)** For the purposes of this section, a person departs markedly from the standard of reasonable care generally recognized in Canadian society and is thereby criminally at fault <u>by rendering themselves unaware of, or incapable of consciously controlling, their behaviour as a result of self-induced intoxication, and where the person voluntarily or involuntarily interferes or threatens to interfere with the bodily integrity of another person</u>.

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[38] 2007 NSCA 84, para. 47.
[39] 2019 BCCA 166, paras. 41-50.
[40] 2014 ONSC 2215, para. 100.

56. The remedy proposed above is consistent with Parliament's intent by holding persons criminally liable for their negligence in consuming intoxicants to a point where they render themselves incapable of consciously controlling their behaviour and where they commit violent offences in that condition. The proposed remedy is constitutionally compliant because it has sufficient *mens rea*. It relies on penal negligence which requires a modified objective test. A trier of fact must be satisfied based on all the evidence, including evidence about the accused's actual state of mind, if any, that the intoxication was voluntary and its consequences (i.e. becoming unaware or incapable of consciously controlling their behaviour) amounted to a marked departure from the standard of care that a reasonable person would observe in the accused's circumstances. A 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 of an automatistic state created by the voluntary consumption of intoxicants by the accused.

iv. Conclusion

57. The AGBC submits that a remedy which reads in a marked departure standard applied to self-induced intoxication and employing a modified objective test for *mens rea* is constitutionally compliant, is consistent with the objectives of the impugned provision, and is consistent with Parliamentary intent. The AGBC submits that it is an appropriate remedy in these circumstances.

PART IV – SUBMISSIONS CONCERNING COSTS

58. AGBC makes no submissions on costs.

PART V – ORDER SOUGHT

59. AGBC takes no position on the disposition of the appeal. AGBC requests the right to present oral argument not exceeding 10 minutes at the hearing of the appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED,

for:

Lara Vizsolyi
Counsel for the Intervener,
Attorney General of British Columbia

Dated this 26th day of October, 2021
at Victoria, British Columbia

PART VII – TABLE OF AUTHORITIES AND LEGISLATION

Authorities	**Paragraph No.**
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Secondary Sources	**Paragraph No.**
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Gina Stoduto, Susan Bondy & Robin Room, "Self-Induced Intoxication as a Defence" in Norman Giesbrecht et al, eds, *Sober Reflections: Commerce, Public Health, and the Evolution of Alcohol Policy in Canada, 1980-2000* (Montreal and Kingston, McGill-Queen's University Press, 2006) 265	2