SCC Court File No. 39781

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

MATTHEW WINSTON BROWN

Appellant

- AND -

HER MAJESTY THE QUEEN

Respondent

- AND -

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

Interveners

FACTUM OF THE INTERVENER CRIMINAL LAWYERS' ASSOCIATION (ONTARIO)

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

ROSEN & COMPANY, BARRISTERS
1220-390 Bay Street
Toronto, Ontario
M5H 2Y2

Lindsay Daviau
Eric Neubauer
Tel: 416.205.9700
Fax: 416.205.9970
Email: lindsaydaviau@rosenlaw.ca
Email: eric@neubauerlaw.ca

Counsel for the Intervener, Criminal Lawyers' Association (Ontario)

SUPREME ADVOCACY LLP
340 Gilmour St., Suite 100
Ottawa, ON K2P 0R3

Marie-France Major
Tel.: (613) 695-8855 ext 102
Fax: (613) 695-8580
Email: mfmajor@supremeadvocacy.ca

Agent for Counsel for the Intervener, Criminal Lawyers' Association

EVANS & FAGAN
The Manhattan Lofts
#304-1117 1st St SW
Calgary, AB T2R 0T9

Sean Fagan
Tel.: 403-517-1777
Fax: 403-517-1776
Email: seanfagan@seanfagan.ca

GREENSPAN HUMPHREY WEINSTEIN LLP
15 Bedford Road
Toronto, ON, M5R 2J7

Michelle Biddulph
Tel.: 416-868-1755
Fax: 416-868-1990

Co-Counsel to the Appellant, Matthew Brown

SUPREME ADVOCACY LLP
340 Gilmour St., Suite 100
Ottawa, ON K2P 0R3

Thomas Slade
Tel.: (613) 695-8855 ext 103
Fax: (613) 695-8580
Email: tslade@supremeadvocacy.ca

Agent for Counsel to the Appellant, Matthew Brown

JUSTICE AND SOLICITOR GENERAL
Alberta Crown Prosecution Service
Appeals Branch
3rd Floor, Bowker Building
9833-109 Street, Edmonton, AB
T5K 2E8

Deborah J. Alford
Tel.:780-427-5181
Fax: 780-422-1106
Email: deborah.alford@gov.ab.ca

Counsel to the Respondent, Her Majesty the Queen

GOWLING WLG (Canada) LLP
2600 - 160 Elgin St
Ottawa, ON K1P 1C3

D. Lynne Watt
Tel.: (613) 786-8695
Fax: (613) 563-9869
Email: lynne.watt@gowlingwlg.com

Agent for Counsel to the Respondent, Her Majesty the Queen

DEPARTMENT OF JUSTICE CANADA
Prairie Regional Office (Edmonton)
300, 10423-101 Street
Edmonton, AB T5H 0E7

Michael H. Morris
Roy Lee
Rebecca Sewell
Phone: 780-246-5813

ATTORNEY GENERAL OF CANADA
Department of Justice Canada
50 0'Connor Street, Suite 500, Room 556
Ottawa, ON K2P 6L2

Christopher M. Rupar
Tel.: (613) 941-2351

Fax: 780-495-8491
Email: michael.morris@justice.gc.ca

Counsel to the Intervener, Attorney General of Canada

MINISTRY OF JUSTICE SASKATCHEWAN
820-1874 Scarth Street
Constitutional Law Branch
Regina, SK S4P 4B3

Noah Wernikowski
Telephone: (306) 786-0206
FAX: (306) 787-9111
Email: noah.wernikowski@gov.sk.ca

Counsel to the Intervener, Attorney General of Saskatchewan

ATTORNEY GENERAL OF MANITOBA
5th Flr., Criminal Prosecutions Division
405 Broadway
Winnipeg, MB R3C 3L6

Amiram Kotler
Rekha Malaviya
Telephone: (204) 797-2357
FAX: (204) 945-1260
Email: ami.kotler@gov.mb.ca

Counsel to the Intervener, Attorney General of Manitoba

ATTORNEY GENERAL OF BRITISH COLUMBIA
Criminal Appeals and Special Prosecutions
3rd Floor, 940 Blanshard Street
Victoria, BC V8W 3E6

Lara Vizsolyi
Telephone: (778) 974-5144
FAX: (250) 387-4262
Email: lara.vizsolyi@gov.bc.ca

Fax: (613) 954-1920
Email: Christopher.rupar@justice.gc.ca

Agent for Counsel to the Intervener, Attorney General of Canada

GOWLING WLG (Canada) LLP
2600 - 160 Elgin St
Ottawa, ON K1P 1C3

D. Lynne Watt
Tel.: (613) 786-8695
Fax: (613) 563-9869
Email: lynne.watt@gowlingwlg.com

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

GOWLING WLG (Canada) LLP
2600 - 160 Elgin St
Ottawa, ON K1P 1C3

D. Lynne Watt
Tel.: (613) 786-8695
Fax: (613) 563-9869
Email: lynne.watt@gowlingwlg.com

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

GOWLING WLG (Canada) LLP
2600 - 160 Elgin Street
Ottawa, ON K1P 1C3

Matthew Estabrooks
Tel.: (613) 786-0211
Fax: (613) 788-3573
Email:
matthew.estabrooks@gowlingwlg.com

Counsel to the Intervener, Attorney General of British Columbia

ATTORNEY GENERAL OF ONTARIO
Crown Law Office - Criminal
720 Bay Street, 10th Floor
Toronto, Ontario M7A 2S9

Joan Barrett
Telephone: (416) 326-4600
FAX: (416) 326-4656
Email: Joan.Barrett@ontario.ca

Counsel for the Intervener, the Attorney General of Ontario

MEGAN STEPHENS LAW
1039 - 20 Dundas Street West
Toronto, ON M5G 2C2

Megan Stephens
Telephone: (416) 900-3319
FAX: (416) 900-6661
Email: megan@stephenslaw.ca

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

KAPOOR BARRISTERS
161 Bay Street, Suite 2600
Toronto, ON M5J 2S1

Anil K. Kapoor
Dana Achtemichuk
Tel: 416-363-2700
Fax: 416-363-2787
E-mail: akk@kapoorbarristers.com
dca@kapoorbarristers.com

Counsel for the Intervener, Canadian Civil Liberties Association

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

BORDEN LADNER GERVAIS LLP
World Exchange Plaza
100 Queen Street, suite 1300
Ottawa, ON K1P 1J9

Nadia Effendi
Telephone: (613) 787-3562
FAX: (613) 230-8842
Email: neffendi@blg.com

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

BORDEN LADNER GERVAIS LLP
World Exchange Plaza
100 Queen Street, suite 1300
Ottawa, ON K1P 1J9

Nadia Effendi
Telephone: (613) 787-3562
FAX: (613) 230-8842
Email: neffendi@blg.com

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

SUPREME ADVOCACY LLP
340 Gilmour St., Suite 100
Ottawa, ON K2P 0R3

Marie-France Major
Tel.: (613) 695-8855 ext 102
Fax: (613) 695-8580
Email: mfmajor@supremeadvocacy.ca

Agent for Counsel for the Intervener, Canadian Civil Liberties Association

ANITA SZIGETI ADVOCATES
400 University Avenue
Suite 2001
Toronto, ON M5G 1S5

Anita Szigeti
Maya Kotob
Telephone: (416) 504-6544
FAX: (416) 204-9562
Email: anita@asabarristers.com

MARTELL DEFENCE
110-116 Simcoe Street
Toronto, Ontario, M5H 4E2

Carter Martell
Tel.: (647) 748-7487
Fax: (416) 596-2597
Email: martell@martelldefence.com

MCKAY FERG LLP
1705, 639 5th Avenue SW
Calgary, Alberta, T2P 0M9

Sarah Rankin
Tel.: (403) 984-1919
Fax: (844) 895-3926
Email: sarah@mckaycriminaldefence.com

Co - Counsel for the Intervener,
The Empowerment Council

SUPREME ADVOCACY LLP
340 Gilmour St., Suite 100
Ottawa, ON K2P 0R3

Marie-France Major
Tel.: (613) 695-8855 ext 102
Fax: (613) 695-8580
Email: mfmajor@supremeadvocacy.ca

Agent for Co-Counsel for the
Intervener, Empowerment Council

TABLE OF CONTENTS

PART I - OVERVIEW AND STATEMENT OF FACTS

1. As in *Her Majesty the Queen v. David Sullivan*, and *Her Majesty the Queen v. Thomas Chan*, SCC File No. 39270, this appeal concerns whether an accused who commits a general intent offence while extremely impaired can raise the rare and restrictive defence of automatism via self-induced intoxication. Unlike in *Sullivan and Chan*, this appeal arises from a finding of the Alberta Court of Appeal (the "ABCA") that section 33.1 of the *Criminal Code* is constitutional.[1]

2. The Criminal Lawyers' Association for Ontario (the "CLA") takes the following positions with respect to the decision below, each of which pertain to the section 1 analysis:

a) Section 33.1's purpose is not pressing or substantial. In enacting section 33.1 of the *Criminal Code*, Parliament was concerned about protecting the public, but this was not its legislative purpose. Properly construed, using the interpretive framework outlined by this Court, Parliament's purpose for enacting section 33.1 was to ensure intoxicated offenders were held accountable, even where they lacked voluntariness or the minimum requisite degree of mental fault. By virtue of this Court's decision in *Daviault,*[2] that purpose was an unconstitutional one, and is neither pressing nor substantial as contemplated within section 1 of the *Charter*.

b) Section 33.1 cannot be saved under section 1 of the *Charter*. Even assuming it has a pressing and substantial protective purpose, the provision does not minimally impair. Fashioning a constitutional alternative to the common-law defence articulated in *Daviault* is understandably challenging. The standard articulated by this Court in *Daviault* is a compromise, placing a significant evidentiary and legal burden on the accused. It thereby ensures the circumstances in which the defence can be raised are highly restricted, and the cases where it can succeed, exceedingly rare.

3. The CLA takes no position on the facts of *Brown*.

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[1] *R. v. Brown*, 2021 ABCA 273.
[2] *R. v. Daviault,* [1994] 3 S.C.R. 63.

PART II – ISSUES

4. In this appeal, a majority of the ABCA held that section 33.1 did not infringe ss. 7 and 11(d) of the *Charter*, and in the alternative, was justified under section 1. The entire Court concurred in holding that section 33.1 was constitutional. The CLA intends to make submissions with respect to two issues that arise from the ABCA's analysis under section 1. These issues are:

a) Does section 33.1 of the *Criminal Code* have a pressing and substantial purpose?

b) Assuming section 33.1 has a valid protective purpose, does it minimally impair an accused's ss. 7 and 11(d) *Charter* rights?

5. The CLA's position with respect to these issues is that section 33.1 does not have a valid purpose, it has an unconstitutional purpose; and, even if this is not accepted, section 33.1 cannot be saved because it does not impair an accused's rights as little as reasonably possible in furthering a protective legislative objective.

PART III – ARGUMENT

A. Section 33.1 Cannot be Saved Under Section 1 as it has an Invalid Purpose

6. The section 1 justification analysis requires the identification of an infringing law's purpose, and an assessment of whether that purpose is sufficiently pressing and substantial to warrant overriding the implicated *Charter* rights.[3] Two purposes have typically been attributed to section 33.1: an "accountability" purpose, and a "protective" one.[4]

7. The accountability purpose was described by Khullar J.A. in the Court below as "to hold individuals accountable for the violent acts they commit while intoxicated to the point of automatism;" the protective purpose was described as "to protect potential victims of violence, especially women and children" recognizing the rights and vulnerabilities of victims generally, and this subset specifically.[5]

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[3] *R. v. Oakes*, 1986 CanLII 46 (SCC), *Frank v. Canada (Att. Gen.),* 2019 SCC 1 at para. 46.
[4] *R. v. Sullivan,* 2020 ONCA 333 at para. 107, citing *R. v. McCaw,* 2018 ONSC 3464 at paras. 32-33; *Brown, supra* at paras. 61, 182-185.
[5] *Brown, supra* at paras. 183-185 (Khullar J.A.); see para. 61 (Slatter J.A.).

8. This Court has repeatedly affirmed that correctly identifying an infringing provision's objective is critical to the analysis - much turns on it. As stated by this Court in *Frank*:

> The integrity of the justification analysis requires that the legislative objective be properly stated. The relevant objective is that of the infringing measure, not, more broadly, that of the provision. The critical importance of articulating the measure's purpose at an appropriate level of generality has also been repeatedly affirmed by this Court. If a legislative purpose is stated too broadly, the result may be to exaggerate the importance of the objective and compromise the analysis. Conversely, if the measure's purpose is construed too narrowly, its articulation may merely reiterate the means chosen to achieve it [citations omitted].[6]

9. The impact of how the legislative objective is framed has been borne out in the jurisprudence considering the constitutionality of section 33.1. Those courts that have upheld s. 33.1 under section 1 have held that the provision's purpose is as stated in the Preamble, to protect the vulnerable from intoxicated violence.[7] Those courts that have found s. 33.1 unconstitutional have held that the provision's purpose was ulterior to that in the Preamble - to hold extremely intoxicated offenders accountable by convicting even those found on balance to be in a state of automatism.[8]

10. This framing of the inquiry is unhelpful - both accountability and public protection find voice in the enacting legislation's Preamble as well as the Parliamentary discussions surrounding enactment.[9] This does not leave a court any closer to identifying the legislation's objective for the purpose of conducting a section 1 analysis. Moreover, while Preambles and Parliamentary debate

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[6] *Frank, supra* at para. 46. See: *R. v. K.R.J.*, 2016 SCC 31 at paras. 61-63; *Toronto Star Newspapers Ltd. v. Canada*, 2010 SCC 21 at para. 20; *RJR-MacDonald*, at para. 144); *R. v. Moriarity*, 2015 SCC 55 at para. 28; *RJR-MacDonald Inc. v. Canada (Attorney General)*, 1995 CanLII 64 (SCC) at para. 144.

[7] **Ontario**: *R. v. Decaire*, [1998] O.J. No. 6339 (Gen. Div.), appealed on other grounds, [1999] O.J. No. 4794 (C.A.); *R. v. Chan*, 2018 ONSC 3849; **British Columbia**: *R. v. Vickberg* (1998), 16 C.R. (5th) 164 (B.C.S.C.); **Quebec**: *R. v. Dow*, 2010 QCCS 4276, rev'd on other grounds, 2014 QCCA 1416; **Nunavut**: *R. v. S.N.*, 2012 NUCJ 2; **Saskatchewan**: *R. v. Robb*, 2019 SKQB 295.

[8] **Ontario**: *R. v. Dunn* (1999), 28 C.R. (5th) 295 (Ont. Ct. (Gen. Div.)); *R. v. Jensen*, [2000] O.J. No. 4870 (Sup. Ct.), appealed on other grounds (2005), 74 O.R. (3d) 561 (C.A.); *R. v. Cedeno*, 2005 ONCJ 91; *R. v. Fleming*, 2010 ONSC 8022; *R. v. McCaw*, 2018 ONSC 3464; **Alberta**: *R. v. B.*, 2019 ABQB 770, resulting in an acquittal in *R. v. Brown*, 2020 ABQB 166, Crown appeal allowed *R. v. Brown,* 2021 ABCA 273; **Northwest Territories**: *R. v. Brenton*, [1999] N.W.T.J. No. 113 (Sup. Ct.), rev'd on other grounds, 2001 NWTCA 1.

[9] *Brown, supra* at para. 12.

can assist in determining legislative intent, the utility of both has its limits.[10] And treating either as determinative abdicates the Court's role in correctly identifying the legislative objective for the purpose of the section 1 analysis.

11. The better and correct path is to apply the framework developed by this Court, which examines "the scope of what a legislature sought to regulate,"[11] while remaining focussed on "the objective of the infringing measure, since it is the infringing measure and nothing else which is sought to be justified."[12] As a matter of necessity, this examines the effects of the infringing measure, which is unsurprising, because what a provision does tells you a lot about what it's for.

12. The CLA submits that a review of section 33.1, and how it infringes ss. 7 and 11(d) of the *Charter*, lays bare that section 33.1's narrow purpose is accountability. While Parliament's choice to legislate arose out of a concern to protect, "protection" is not "the objective of the infringing measure." Section 33.1 operates to duplicate the common law with respect to crimes of violence. In this context, it departs from *Daviault* in only one respect - it requires the conviction of even those proven on balance to have committed the prohibited act involuntarily, and without mental fault. Parliament's objective was to hold these individuals accountable. The means by which it

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[10] *Frank, supra* at paras. 130-137 (Côté and Brown JJ., in dissent on other grounds); *R. v. Heywood*, 1994 CanLII 34 (SCC); *Vriend v. Alberta,* 1998 CanLII 816 (SCC) at paras. 112-113 [Preamble accurately set out the objective of the legislation as a whole; but, a different objective applied to the omission which excluded sexual orientation from the Act]. See also: *CCLA v. Attorney General of Ontario*, 2020 ONSC 4838 at para. 66 ["Sticking strictly to the legislative language is only reliable where the context supports the language used. Without putting too fine a point on it, scholars of statutory interpretation have observed that statutes are enacted by legislators/politicians, and that "politicians sometimes misrepresent their actual policy preferences": McNollgast (Matthew McCubbins, Roger Noll, Barry Weingast), "The Use of Positive Political Theory in Statutory Interpretation", 57 Law & Contemp. Probs. 3, 8 (1994)"] [Book of Authorities, Tab 1].

[11] *Frank, supra* at paras. 130 (Côté and Brown JJ., in dissent on other grounds); *Interpretation Act,* R.S.C. 1985 c. 1-21, s. 13.

[12] *RJR-MacDonald, supra* at para. 144.

achieved this was to remove the common law defence of automatism caused by self-induced intoxication.

13. There are several other features of section 33.1 which cast doubt on its "protection" purpose. First, accepting that the Preamble is a helpful guide to legislative intent, the language of the Preamble focuses on criminal fault and accountability much more than on protection.[13] Second, as articulated by the majority in *Sullivan*, there is no empirical or rational basis to conclude "the *Daviault* defence" will achieve enhanced deterrence; and, if s. 33.1 doesn't further deter, it cannot further protect.[14] Third, if Parliament was legislating to protect against intoxicated violence, it could have directly done so by criminalizing extreme or dangerous intoxication.[15] It chose instead to remove a constitutionally required defence for the stated purpose of increasing accountability.

14. For the foregoing reasons, the CLA submits that articulating the objective of section 33.1 as including a protective purpose - either alone, or in conjunction with an accountability objective - states the legislative purpose too broadly. Focussing on the objective of the infringing measure reveals Parliament's purpose was to achieve accountability; and, the means Parliament chose to achieve accountability was enacting legislation requiring the conviction of automatons.

15. If accepted, this implicates the very constitutionality of the legislative objective. As identified by the ONCA in *Sullivan,* in enacting s. 33.1, Parliament deliberately removed a defence that *Daviault* held was required for constitutional compliance. Legislation designed to require convictions when the *Charter* forbids it is legislation with an unconstitutional aim; and, that aim can never be of sufficient importance to warrant overriding *Charter* protections.[16] In *Brown*, Justice Khullar held that this reasoning begs the question of "whether holding an accused

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[13] See *McCaw, supra* at para. 128 "As stated by the Hon. Allan Rock on March 27, 1995, the nature of the change in the law brought about by *Daviault* and "its effect in subsequent cases and the concern it caused about the principle of accountability in criminal law lie behind the government's decision to introduce Bill C-72;" House of Commons Debates, 35th Parl, 1st Sess, No 224 Vol 9, (March 27, 1995)".

[14] *Sullivan, supra* at paras. 119-122.

[15] *Sullivan, supra* at paras. 132-136.

[16] *R. v. Big M. Drug Mart Ltd.*, 1985 CanLII 69 (SCC); *Sullivan, supra* at para. 114.

accountable in the circumstances set out in s. 33.1 can be justified under s. 1."[17] However, as observed by the Appellant, this fails to recognize that legislation can simultaneously have both *Charter*-infringing effects, and *Charter*-infringing aims.[18] That holding automatons accountable is an unconstitutional effect does not foreclose on it also being an unconstitutional aim. The CLA submits that Justice Paciocco's reasoning on this point should be preferred, and fully explains why this legislative purpose is neither pressing nor substantial.[19]

B. Section 33.1 Cannot be Saved Under Section 1 as it Does Not Minimally Impair

16. The CLA submits in the alternative that, if section 33.1 has a pressing and substantial "protection" purpose, the provision still fails at the minimal impairment stage of the section 1 analysis. This stage "requires the government to show that the measure at issue impairs the right as little as reasonably possible in furthering the legislative objective."[20] This does not require Parliament to adopt the least restrictive means possible. The issue is "whether Parliament could reasonably have chosen an alternative means which would have achieved the identified objective as effectively."[21] Parliament is owed deference, in the form of some latitude, by courts in making this assessment.[22]

a) Codifying Daviault

17. The CLA's position is that section 33.1 does not minimally impair because Parliament could have reasonably chosen an equally effective alternative - specifically, it could have codified *Daviault*. As recognized in *Sullivan,* doing so would have achieved the deterrent effect underlying

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[17] *Brown, supra* at para. 183.
[18] Appellant's Factum at para. 44, p. 25.
[19] Khullar J.A.'s analysis makes a further mistake. The majority in *Daviault* did not just find that the law violates section 7 and 11(d) where it requires the conviction of automatons. It also held that such a law could not be saved under section 1 (see *Daviault, supra* at 102-103). The ONCA's analysis does not beg the question, it applies the law as set out by this Court.
[20] *Frank, supra* at para. 66. See *RJR-MacDonald*, *supra* at para. 160; *Oakes*, *supra* at p. 139.
[21] *R. v. Chaulk,* 1990 CanLII 34 (SCC).
[22] *Frank, supra* at para. 66.

the protective objective as effectively as section 33.1, without the drastic infringement of bedrock *Charter* principles.[23]

18. Contrary to Justice Slatter's comments in the decision below, codifying *Daviault* was neither doing nothing nor "giving up". As reviewed by the Court of Appeal for Ontario in *Sullivan*, the automatism defence articulated by this Court in *Daviault* was a carefully tailored compromise that advanced both public protection and accountability:

> [137] … By design, the non-mental disorder automatism defence is difficult to access. As with other defences, if there is no air of reality to the defence based on the evidence, it should not be considered. It is also a reverse onus defence, and it requires expert evidence. If the defence is not established on the balance of probabilities, it fails. Indeed, it may well have failed for Mr. Daviault had the complainant not died before his retrial. According to evidence that Parliament has accepted, alcohol intoxication is not capable, on its own, of inducing a state of automatism. Had similar evidence been presented and accepted at Mr. Daviault's retrial, he would have been convicted.
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> [138] Moreover, even in those few cases where the accused might succeed in demonstrating automatism as the result of the voluntary consumption of intoxicants, the accused may not be acquitted. If the accused is unable to establish that the cause of the automatism was not a disease of the mind, which it will be if the automatism is internally caused or there is a continuing danger of further episodes of automatism, the accused will not be acquitted, but found not criminally responsible on account of mental disorder. The accused would then be subject to a disposition hearing driven by public safety considerations [citations omitted].[24]

The only thing codifying *Daviault* fails to achieve is *total accountability*, since it does not require the conviction of automatons. However, the CLA submits that this failure to achieve an unconstitutional objective can be no barrier to concluding section 33.1 does not minimally impair.

b) Other Alternatives

19. Finding a suitable, constitutional alternative to the codification of the *Daviault* has proven challenging. This was not only the subject of considerable Parliamentary study and debate,[25] it has also been the focus of a substantial, and sustained body of academic literature.[26]

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[23] *Sullivan, supra* at para. 140.
[24] *Sullivan, supra* at paras. 137-138.
[25] Respondent's Factum at paras. 20-21.
[26] For example: Gerry Ferguson, "The Intoxication Defence: Constitutionally Impaired and in Need of Rehabilitation" (2012) 57 SCLR (2d) 111; Patrick Healy, "Intoxication in the Codification

20. One potential alternative was restricting the availability of the *Daviault* defence, by taking it away from the accused in circumstances in which extreme intoxication was subjectively or objectively foreseen. However, while this solution is more carefully tailored, it would still allow convictions in the face of a doubt as to the voluntariness and mental culpability of the accused. This means that it suffers from the same constitutional infirmities as the current version of section 33.1.

21. The more often cited alternative - creating a stand-alone offence of criminal intoxication - also presents potential constitutional difficulties. Were Parliament to prohibit acts of intoxicated violence, this would make impairment part of the *actus reus*. Following this Court's decision in *Penno*,[27] disallowing an intoxication defence where impairment forms part of the *actus reus* is not contrary to fundamental principles of justice or to the presumption of innocence. However, when this case is scrutinized further, it becomes evident that *Penno* does not lay the foundation for the idea that Parliament can constitutionally bar an automatism defence in any context simply by creating offences that include intoxication as an essential element. The CLA submits there are several reasons this is so:

a) Whether self-induced extreme intoxication akin to automatism would provide a defence to impaired operation / care and control was not an issue squarely before the Court in *Penno*;

b) The ss. 7 and 11(d) issues were raised for the first time at the Supreme Court who did not have "the benefit of hearing full argument on the point, nor … the benefit of the views of the judge and justices in the courts below";[28]

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of Canadian Criminal Law" (1994) 73 Can Bar Rev 515; Plaxton, Michael and Mathen, Carissima, "What's Right with Section 33.1" (February 10, 2021). (2021) Canadian Criminal Law Review (Forthcoming), Ottawa Faculty of Law Working Paper No. 2021-06. [Appellant's Book of Authorities, Tab 6]

[27] *R. v. Penno,* [1990] 2 S.C.R. 865.

[28] *Penno, supra* at 878.

c) The majority did not explicitly rule that intoxication akin to automatism could not afford a defence to impaired operation / care and control, and if they had, their analysis arguably was overtaken by *Daviault,* decided four years later;[29]

d) Forest J. found that the removal of the defence of intoxication is not contrary to principles of fundamental justice but arrives at this result via a flawed section 7 assessment (in which he considers that the "public interest" is encompassed within consideration of principles of fundamental justice, thereby conflating s. 7 and s. 1 in a manner rejected by this Court in *Bedford* and *Carter*); [30] and,

e) Perhaps most interestingly, Wilson and L'Heureux-Dube JJ. wrote that precluding an accused from advancing a defence of automatism via self-induced extreme intoxication might violate the *Charter*;[31] however, they noted that such an infringement would be justified under s. 1 *in this context*.

22. This latter point is notable because of the reservations Wilson J. expresses about the creation of an offence of "dangerous intoxication":

> Some commentators have suggested that the creation of an offence of "dangerous intoxication" would resolve the constitutional problem of intoxicated offenders because the elements of that offence would be more in keeping with accepted fundamental principles of criminal liability. I am not sure that such a generalized offence would achieve the desired result. I think the courts would still have to determine whether the denial of an accused's opportunity to question the presence of an essential element of the offence in different contexts was constitutional. Parliament has, in my view, attempted to resolve the problem in s. 234 by creating the offence of care or control of a motor vehicle while impaired. It has, in other words, criminalized the act of

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[29] *Penno, supra* at 903-904.

[30] *Penno, supra* at 893-894; *Canada (Attorney General) v. Bedford*, 2013 SCC 72 at para. 125; *Carter v. Canada (Attorney General)*, 2015 SCC 5 at para. 79.

[31] *Penno, supra* at 889 ["It seems to me, moreover, that if my colleague is speaking of impairment to an extent that could deprive the accused's act of its volitional character, he must be speaking of a state of extreme impairment verging on automatism and, at most, the section would violate the *Charter* only to the extent it deprived an accused in that condition of the defence of lack of volition. This would be consistent with the view I expressed in *Bernard* that intoxication to that extreme degree could also negate the required minimal mental element."]

> becoming impaired in a particular circumstance, i.e. in the context of having care or control of a motor vehicle. I think it was open to Parliament to, in effect, create an offence akin to "dangerous intoxication" but contextualized to the care or control situation. This may, indeed, be the preferred route to follow. Impairment in different contexts poses different social evils. In my view it is not only open to, but perhaps incumbent upon, Parliament to take account of those differences and to fashion offences in response to specific social needs [emphasis in original].[32]

23. In light of the foregoing, *Penno* says very little about whether a grab-all offence prohibiting intoxicated violence could constitutionally foreclose on an automatism defence. Certainly, such an offence would have to undergo the authoritative *Charter* analysis delivered by this Court in *Daviault*; and, to Wilson J.'s point, the constitutional compliance of the provision would depend on the context in which it was invoked, and the social evil it was attempting to address.

24. The CLA submits that no alternative is necessary or advisable. As stated at the outset, the law as articulated in *Daviault* was a compromise. It places onerous burdens on the accused, is rarely raised, and even more rarely succeeds. As noted by the Appellant, fears that the *Daviault* defence would become an exploited loophole in our legal system have been proven misplaced.[33] Any enactment Parliament chooses to pass risks disrupting the incredibly delicate balance which this Court so boldly struck. The CLA is well-aware that this Court cannot and should not interfere with Parliament's legitimate legislative function. This Court can, however, articulate why leaving or codifying *Daviault* would be a perfectly sensible approach. The CLA asks this Court to do so.

PART IV – COSTS

25. The CLA requests no costs and requests that no costs be ordered against it.

PART V – ORDERS SOUGHT

26. The CLA does not seek any additional orders.

All of which is respectfully submitted this 26th day of October, 2021.

Lindsay Daviau & Eric Neubauer
Counsel for the Intervener,
Criminal Lawyers' Association (Ontario)

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[32] *Penno, supra* at 892-893.
[33] Appellant's Factum at para. 71, pp. 39-40 (see: fn 129).

PART VI - TABLE OF AUTHORITIES

Cases **Para. Ref.**

Secondary Sources

Statutory Provisions