

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 -

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

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TABLE OF CONTENTS

PART I: OVERVIEW AND FACTS	1
PART II: ISSUES	3
PART III: STATEMENT OF ARGUMENT	3
A. Substance Use is Not Inherently Risky	3
B. ‘Reasonable People Use Substances’	4
C. The Reasons for Drug Use Are Varied and Complex	6
i. The Association Between Drug Use and Violence Must not be Oversimplified	6
ii. People who use Drugs and People at Risk of Violence are not Mutually Exclusive Groups	7
D. Parliament Has Other Means Available to Address Intoxicated Violence	8
PARTS IV AND V: COSTS AND ORDER SOUGHT	8
PART VI: TABLE OF AUTHORITIES	10

PART I — OVERVIEW AND FACTS

1. The intervener, the Empowerment Council, Systemic Advocates in Addictions and Mental Health [“the EC”] is an Ontario organization advocating on behalf of persons with addictions and mental health issues, including those in the forensic mental health system who have been found not criminally responsible. The EC intervenes in this appeal to provide the needs and perspectives of the EC’s clients to the Court as it considers the scope and constitutionality of s. 33.1 of the *Criminal Code*.

2. The Alberta Court of Appeal’s conclusion that s. 33.1 is constitutionally compliant is contingent on the premise that illicit drug use always carries an objective foreseeability of a risk of harm.¹ The majority found that consuming illegal substances always carries a foreseeable risk of losing conscious control and harming other persons, stating that “Those who take [illegal drugs] in reckless disregard of the possible risks must bear the consequences.”²

3. The Empowerment Council asks this Court to reject these findings. They are unsupported by any evidence, and inflammatory. The reality is that many users of illicit substances consume them responsibly and in moderation. They do so without creating any foreseeable risk of harm to other persons, just like many users of alcohol and marijuana. To hold otherwise, particularly without any evidentiary foundation, entrenches discriminatory stereotypes and prejudice. These conclusions risk exacerbating existing marginalization of substance users, particularly those who may use illicit substances as a result of trauma and abuse.³ These views should not be endorsed by this Court.

¹ Although Slatter J.A. refers a number of times to objective foreseeability of a risk of harm, he refers at other times to an “objectively foreseeable risk of intoxication,” of “severe intoxication,” or of “rendering oneself an automaton.” It is therefore not entirely clear from the decision what, in the majority’s view, s. 33.1 must be reasonably foreseeable in order for s. 33.1 to apply. (Decision of the Alberta Court of Appeal at paras. 21-22, 25, 30-31, 33, 37)

² Decision of the Alberta Court of Appeal at paras. 22, 25, 30, 34, 37, 52

³ Nadine Wathen, Department of Justice Canada, Research and Statistics Division, “Health Impacts of Violent Victimization on Women and their Children” (2012), online: < https://www.justice.gc.ca/eng/rp-pr/cj-jp/fv-vf/tr12_12/tr12_12.pdf>; Government of Canada, Canadian Pain Task Force Report, “Chronic Pain in Canada: Laying a Foundation for Action” (last updated 08 August 2019()), online: < <https://www.canada.ca/en/health->

4. The reality of substance use is far more nuanced than the Court of Appeal’s decision allows. Canadians use illicit and legal substances every day, in a variety of ways, and for a host of reasons.⁴ These substances have varying effects on their users. The legal framework in this area should not be based on myths or outdated moralizing. It must reflect the diversity and reality of substance consumption in the lives of ordinary Canadians – something about which the Alberta Court of Appeal had no evidence.

5. The choice to consume illicit drugs, or to use prescription medication other than as prescribed, is not inherently blameworthy. It does not invariably reflect consciousness of or indifference to the lightning-strike possibility of extreme intoxication causing loss of conscious control.

6. The subjective blameworthiness of any individual for violent acts committed in a state of extreme intoxication should depend on a case-by-case assessment of the information, experiences and mental state of the individual. Considering this will mean having regard to the known effects of a substance, and the quantity and circumstances in which it was consumed. The foreseeability of violence should not be presumed and cannot be deduced from stereotypes — either about people who consume illicit substances, or people who display or experience symptoms typically associated with mental illness, like hallucinations or psychosis. Drug use does not entail indifference to violence any more than psychosis entails inherent dangerousness.

7. The Court of Appeal clearly did not view Mr. Brown’s outright acquittal — the inevitable result if it struck down s. 33.1 — to be a just result. Where the accused’s consumption of substances is found to be morally blameworthy to any degree, acquittal may be perceived by some as a failure to achieve justice. But fashioning a basis for liability to satisfy a public desire that somebody be punished is not the Court’s role. If striking down the provision leaves a gap in the law, it is open to Parliament to respond, providing it does so in a way that respects the constitutional limits of the criminal law. This might include creating an offence of reckless intoxication or of committing a prohibited act while drunk, as suggested by this Court in

[canada/corporate/about-health-canada/public-engagement/external-advisory-bodies/canadian-pain-task-force/report-2019.html](https://www150.statcan.gc.ca/n1/daily-quotidien/181030/dq181030b-eng.htm)> at “Indigenous Peoples.”

⁴ Statistics Canada, “Canadian Tobacco, Alcohol and Drugs Survey, 2017” (last modified 30 October 2018), online: <https://www150.statcan.gc.ca/n1/daily-quotidien/181030/dq181030b-eng.htm>; Adlaf, E.M., Begin, P., & Sawka, E. (Eds.). (2005). Canadian Addiction Survey (CAS): A national survey of Canadians’ use of alcohol and other drugs: Prevalence of use and related harms: Detailed report. Ottawa: Canadian Centre on Substance Abuse.

Daviault.⁵ That it has chosen not to do so cannot justify the imposition of criminal liability for morally involuntary conduct.

PART II — ISSUES

8. The EC’s interest in this appeal pertains to the first two issues identified by the Appellant, Mr. Brown. On those issues, the EC’s position is that:

- A. The interpretation of s. 33.1, the determination of the constitutionality of that provision and the justification of any infringement under s. 1 must not be based on discriminatory or impoverished perspectives of people who use substances, whether illicit, lawful, or prescribed; and
- B. Punishment is not the measure of justice. A morally innocent person’s acquittal is not a failure to achieve justice. Instead, it is no more than the presumption of innocence requires. The criminal justice system fails when a person is convicted for something they did not will and could not have foreseen. Our law must remain committed to this principle, even when it is tested by public outcry.

PART III — STATEMENT OF ARGUMENT

A. Substance Use is Not Inherently Risky

9. It is discriminatory and stigmatizing to treat people who use drugs as if they are inherently dangerous, violent or volatile, or to suggest that all drug use is inherently immoral. These misconceptions have no place in our legal system. The law must not perpetuate or entrench prejudice. Endorsing the statement of the Court of Appeal that all people who use illicit substances act “in reckless disregard of the possible risk” of harm to others, and that this risk is invariably present whenever someone consumes illegal substances, would have just this effect.⁶

10. The premise that all substance users are risk-taking and morally blameworthy drives the majority’s decision. Slatter J.A. went so far as to characterize the statement of the trial judge in *R. v. Sullivan et al.*, that Mr. Chan was a “good kid who got super high and did horrific things” as “internally contradictory.”⁷ The logic of the Court is inescapable: no good person uses drugs, and no person who uses drugs is a good person.

⁵ *R. v. Sullivan*, 2020 ONCA 333 at paras. 132-136

⁶ Decision of the Alberta Court of Appeal at para. 52

⁷ Decision of the Alberta Court of Appeal at para. 40

11. Although Slatter J.A. singles out illicit drug use for particular condemnation, nothing about the majority's interpretation of s. 33.1 limits its reach to unlawful substances.⁸ The text of the provision itself certainly draws no such distinction. The majority leaves open the question of whether and when the objective foreseeability of severe intoxication and violence may also attach to the use of legal and controlled substances such as alcohol, cannabis or prescription medication. Slatter J.A. says nothing about how s. 33.1 applies to unexpected effects of lawful substances. However, in her concurring opinion, Hughes J.A. seems to contemplate that unintended intoxication stemming from the consumption of prescription medications could attract liability, when she suggests that the accused may raise a reasonable doubt about whether the intoxication was self-induced based on "whether, for example, the prescribed medication that caused the self-induced intoxication had any warning of its possible effects."⁹

12. On the Court of Appeal's interpretation, s. 33.1 therefore contemplates the conviction of substance users, and those who misuse prescribed medications, for outcomes not foreseen or reasonably foreseeable. It may even permit the conviction of those who take their medication exactly as prescribed but fail to read the accompanying pamphlet.

B. Reasonable People Use Substances

13. In weighing the salutary effects of s. 33.1, Slatter J.A. held that the provision "denounces and deters the use of illegal substances, and confirms society's intolerance of such behaviour."¹⁰ Slatter J.A. cites no evidence of Canadian "intolerance" of illicit substance use. The EC submits that the Court of Appeal could not properly take judicial notice that Canadians hold this view. Millions of Canadians used cannabis before it was decriminalized and legalized. There is no consensus that the consumption of illicit substances is inherently immoral, unreasonable or blameworthy. Neither is the use of legal substances in ways that are not recommended or consistent with the prescribing instructions. Drug use itself does not constitute a marked departure from what reasonable people do.

14. Assuming this thin view of how Canadians see drug use would ignore the competing signs that the public actually has a nuanced and evolving attitude on this issue. There is certainly

⁸ Decision of the Alberta Court of Appeal at paras. 37, 52, 80

⁹ Decision of the Alberta Court of Appeal at para. 161, per Hughes J.A., concurring

¹⁰ Decision of the Alberta Court of Appeal at para. 80

a foundation to suggest that Canadians think about drug use with a mature complexity, and do not necessarily form their views about the morality of substance use based simply on the legal status of the substance. This foundation, which makes the attitude of Canadians to illicit drug use a poor target for judicial notice, is evident in the mainstream public conversation about drug use and addiction in Canada. The guidelines for the main prosecutorial body for drug offences now advise prosecutors that charges for the personal possession of drugs should not be advanced in most cases, unless other aggravating circumstances are present.¹¹ At least one federal correctional facility permits sentenced inmates to consume illicit substances within a controlled safe consumption site, despite that those substances are both illegal and contraband within the institution.¹² The Canadian Association of Chiefs of Police has endorsed decriminalization of personal possession of drugs.¹³ Canadian cities are exploring a variety of approaches to substance use, including applications for city-wide exemptions under s 56(1) of the *Criminal Code*.¹⁴ All of this undermines the Court of Appeal’s presumption that Canadians share a common and stark view of drug use as immoral or inherently risky.¹⁵

15. The suggestion that Canadians have a wide variety of views about substance use is also apparent from the personal choices of Canadians. At least half of Canadians have tried an illegal

¹¹ Public Prosecution Service of Canada, “5.13 Prosecution of Possession of Controlled Substances Contrary to s. 4(1) of the *Controlled Drugs and Substances Act*” (last modified 17 August 2020), online: <<https://www.ppsc-sppc.gc.ca/eng/pub/fpsd-sfpg/fps-sfp/tpd/p5/ch13.html>>.

¹² Correctional Service of Canada, “Overdose Prevention Service” (last modified 28 August 2018), online: <<https://www.csc-scc.gc.ca/health/002006-2003-en.shtml>>.

¹³ Canadian Association of Chiefs of Police, “Canada’s police leaders recommend adopting a public health led diversionary approach to illicit substance use” (9 July 2020), online: <<https://www.cacp.ca/news/canadas-police-leaders-recommend-adopting-a-public-health-led-diversionary-approach-to-illicit-subst.html>>.

¹⁴City of Vancouver, “Decriminalizing simple possession of illicit drugs in Vancouver” (accessed June 20, 2021), online: <https://vancouver.ca/people-programs/decriminalizing-simple-possession-of-illicit-drugs-in-vancouver.aspx?utm_campaign=decriminalization&utm_medium=Vanity&utm_source=decriminalization_Vanity>; Drug and Alcohol Testing Association of Canada, “More Canadian cities push for decriminalization of illicit drugs” (14 January 2021), online: <<https://datac.ca/more-canadian-cities-push-for-decriminalization-of-illicit-drugs/?locale=en>>

¹⁵ Decision of the Alberta Court of Appeal at paras. 35, 37, 40, 82

drug, and nearly half have tried an illegal drug that is not marijuana.¹⁶ A significant number have done so in the recent past.¹⁷ The number of Canadians who have consumed illicit substances, or intentionally misused prescription medication, reveals the difficulty with oversimplifying their collective position.

C. The Reasons for Drug Use Are Varied and Complex

16. The mere fact that a person consumed an illegal substance, or misused a legal one, does not establish that they were seeking a state of extreme intoxication, or were indifferent to that possibility. The reasons people experiment with or regularly consume illicit and intoxicating substances are varied and complex. Much of the reasoning on this issue draws a false dichotomy between people who consume intoxicating substances and people who are victims of violent crime. In reality, large numbers of people find themselves in the former category because of their membership in the latter.

(i) *The Association Between Drug Use and Violence Must not be Oversimplified*

17. It is implicit in the Court of Appeal's finding that choosing to consume illegal drugs can replace the *mens rea* for violent offences, and that people who consume drugs are violent and inherently dangerous.¹⁸ These generalizations should not be cemented in the law of self-induced extreme intoxication.

18. Those who have spent time working in the Canadian criminal legal system will recognize that many criminal offences and offending patterns are connected to addiction.¹⁹ This does not mean we can assume the inverse is also true. The overwhelming majority of Canadians consuming intoxicating substances do so without ever coming in contact with the justice system.

¹⁶ Statistics Canada, "Canadian Tobacco, Alcohol and Drugs Survey, 2017" (last modified 30 October 2018), online: <https://www150.statcan.gc.ca/n1/daily-quotidien/181030/dq181030b-eng.htm>.

¹⁷ *Ibid*; Adlaf, E.M., Begin, P., & Sawka, E. (Eds.). (2005). Canadian Addiction Survey (CAS): A national survey of Canadians' use of alcohol and other drugs: Prevalence of use and related harms: Detailed report. Ottawa: Canadian Centre on Substance Abuse.

¹⁸ Decision of the Alberta Court of Appeal at paras. 25-27

¹⁹ *R v Boudreault*, 2018 SCC 58 at para 54-55; *R v Zora*, 2020 SCC 14 at para 79; *R v Ipeelee*, 2012 SCC 13 at paras 61-63.

(ii) ***People who use Drugs and People at Risk of Violence are not Mutually Exclusive Groups***

19. This Court should resist the oversimplification that s. 33.1 is necessary to protect vulnerable people from people who use drugs. The reality is large numbers of people fall into both groups. Much of our law in the last 30 years reflects the understanding that surviving sexual and/or physical violence, and using intoxicants to deal with ongoing pain and trauma, often go together. The connection between trauma and drug use is established in a variety of contexts, including for those who have come through the child welfare system, those who are inter-generational residential school survivors, and others whose adverse childhood experiences predict higher than average rates of substance use.²⁰ This Court has acknowledged this in its decisions on the law of bail and on the principles articulated in *Gladue*.²¹

20. The connection between victimization and drug use is not limited to emotional pain. Many victims of violence are left with physical injuries and chronic pain, which may introduce the daily use of prescription painkillers into their lives.²² Research emerging out of the opioid poisoning crisis shows how easily this kind of prescription use turns into illicit substance use. Alberta’s provincial statistics on the crisis demonstrate that at least a third of people who died after consuming fentanyl or a similar opioid had a valid prescription for an opioid painkiller issued within the previous year.²³ These issues cannot be reduced to one-dimensional storytelling, with good and bad actors in every circumstance. The law must be responsive to and reflect the reality of Canadians dealing with difficult situations.

²⁰ Brittany Barker, Thomas Kerr et al, “High prevalence of exposure to the child welfare system among street-involved youth in a Canadian setting: implications for policy and practice” (2014) 14 BMC Public Health, online: <<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3936938/>>.

²¹ *Supra* at footnote 8.

²² Nadine Wathen, Department of Justice Canada, Research and Statistics Division, “Health Impacts of Violent Victimization on Women and their Children” (2012), online: <https://www.justice.gc.ca/eng/rp-pr/cj-jp/fv-vf/rr12_12/rr12_12.pdf>; Government of Canada, Canadian Pain Task Force Report, “Chronic Pain in Canada: Laying a Foundation for Action” (last updated 08 August 2019()), online: <<https://www.canada.ca/en/health-canada/corporate/about-health-canada/public-engagement/external-advisory-bodies/canadian-pain-task-force/report-2019.html>> at “Indigenous Peoples.”

²³ Government of Alberta, “Opioid-related deaths in Alberta in 2017: Review of medical examiner data” (last updated July 2019), online: <<https://open.alberta.ca/dataset/f9912915-bd4f-4b57-93bf-2a963cb99038/resource/a2857fb6-6663-491c-b9df-686e348bb456/download/070519-me-chart-review-final.pdf>> at p 23; see also, for example, *R. v. Christie*, 2017 BCPC 264 at para. 5; *R. v. Giannilos*, 2016 ONSC 556 at para. 10

D. Parliament Has Other Means Available to Address Intoxicated Violence

21. A conviction must not be the only way we acknowledge a tragedy’s significance or severity. The public is entitled to a fair and just process, but they are not entitled to the conviction of the morally innocent because something awful has occurred. An acquittal does not deprive the public of justice where it accords with our fundamental values and fairness rules. The presumption of innocence is the “golden thread” of the criminal justice system. The conviction of a morally innocent individual is a wrongful conviction, and a failure to achieve justice.

22. It is the spectre of the wrongful acquittal that lurks in Slatter J.A.’s decision. After quoting the trial judge’s findings regarding the impact of Mr. Brown’s conduct on the victim, Slatter J.A. asks: “Who is to be held responsible for this?” The victim, he says, “should not be the only one who suffers the consequences of [Brown’s] voluntary choices.”²⁴ But the fundamental values of our justice system mean that sometimes no one is held legally responsible for tragedy or loss, because no one may be held responsible unless we are able to say with precision: for what, and why.

23. The dichotomy in the decision is also false. Finding that s. 33.1 is unconstitutional does not mean that the predictable, negative effects of voluntary choices are completely beyond the law’s reach. Iterations of negligent intoxication, or negligent intoxication causing harm, have been in place in other jurisdictions around the world for many years. The question of how we might hold an individual responsible for these kinds of outcomes has a specific answer. The answer has been repeatedly suggested to Parliament, including by the Law Reform Commission of Canada, and by Cory J. in *Daviault*.²⁵ The fact that Parliament has chosen not to pursue this option, despite what the Ontario Court of Appeal in *Sullivan* described as “the impressive endorsements it has received,”²⁶ cannot justify the imposition of criminal liability for morally involuntary conduct.

PARTS IV and V – COSTS AND ORDER SOUGHT

24. The EC does not seek costs and asks that no costs be awarded against it. The EC takes no position on the disposition of this appeal as it pertains to the facts of the case before the Court.

²⁴ Decision of the Alberta Court of Appeal at para. 42

²⁵ *R. v. Sullivan*
at paras. 132-136

²⁶ *Sullivan, supra* at para. 132

**ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 25th DAY OF OCTOBER,
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PART VI – TABLE OF AUTHORITIES

Cases	Para. Ref.
<i>R v Boudreault</i> , 2018 SCC 58	18
<i>R. v. Christie</i> , 2017 BCPC 264	20
<i>R. v. Giannilos</i> , 2016 ONSC 556	20
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