SCC Court File No. 39781

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

MATTHEW WINSTON BROWN

Appellant
(Respondent)

-and-

HER MAJESTY THE QUEEN

Respondent
(Appellant)

-and-

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Interveners

FACTUM OF THE APPELLANT
(MATTHEW WINSTON BROWN, APPELLANT)

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

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PART I – CONCISE OVERVIEW AND STATEMENT OF THE FACTS

1. The Appellant, a 27-year-old hockey player with no criminal record, attended a party on the evening of January 12, 2018. Like many young persons at parties, the Appellant consumed some alcohol and ate some magic mushrooms that were sitting on the kitchen counter. He had used magic mushrooms on one prior occasion and had a positive experience. The Appellant played games and listened to music with his friends until about 1:30am, when the Appellant testified that he began to lose his grip on reality and feel wonky.[1] The next thing he remembered was waking up in a hospital, and then waking up again in a jail cell.[2]

2. Unbeknownst to the Appellant, around 3:45am he had taken off all his clothes and ran naked into the street on a frigid winter night.[3] He eluded his friends for 10-15 minutes as they attempted to chase him down.[4] The Appellant broke into a stranger's home and assaulted her repeatedly with a broken broom handle, which resulted in a permanent disability to her right hand.[5] He was screaming "like an animal" throughout the course of the attack.[6] The Appellant then ran into the street, where a witness saw him trying to break into various vehicles on the street. The witness confirmed that the Appellant was completely naked and not wearing any shoes.[7] The Appellant then ran to another stranger's house, breaking into the glass window of the home at approximately

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[1] Reasons for Judgment at Trial, *Appellant's Record*, Vol. I, Tab 4, paras. 36-40.
[2] *Ibid*, para. 40.
[3] *Ibid*, at paras. 2, 45
[4] *Ibid* at para. 45.
[5] Agreed Statement of Facts, *Transcript of Proceedings*, November 12, 2019, *Appellant's Record*, Vol. IV, p. 112 (p. 118).
[6] Evidence of Janet Hamnett, *Transcript of Proceedings*, November 12, 2019, *Appellant's Record*, Vol. IV, p. 140 (p. 146).
[7] Reasons for Judgment at Trial, *Appellant's Record*, Vol. I, Tab 4, paras. 48-49.

5:00am.[8] He was apprehended and arrested by police inside that home and brought to the hospital.[9] He was ultimately charged with two offences under s. 348(1)(b) of the *Criminal Code*: break and enter and commit aggravated assault, and break and enter and commit mischief.

3. Dr. Thomas Dalby assessed the Appellant and concluded that the Appellant was in a state of "short-term but acute delirium" at the time of the offences.[10] In his view, psylocibin was the "clear causative factor" for this behaviour.[11] Dr. Mark Yarema testified that consumption of magic mushrooms at toxic levels can result in delirium, including an altered level of consciousness, lack of orientation, or inability to focus or employ judgment. It can also result in psychosis.[12] In Dr. Yarema's opinion, if the Appellant was suffering from delusions resulting from psilocybin intoxication, he would not have had control over his actions.[13] The trial judge accepted this evidence and found that the Appellant "was suffering from extreme intoxication akin to automatism" when the offences occurred.[14]

4. The Appellant was acquitted of the charge of break and enter and commit mischief, as the Crown had failed to prove that his actions were voluntary or that he had the requisite *mens rea* to commit the offence. He was further acquitted of the charge of break and enter and commit aggravated assault, as the *voir dire* judge had declared that s. 33.1 of the *Criminal Code* was of no force or effect. The Crown appealed the constitutional ruling to the Alberta Court of Appeal, which

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[8] Evidence of Pratap Varshney, *Transcript of Proceedings*, November 12, 2019, *Appellant's Record*, Vol. IV, p. 156 (p. 162).
[9] Evidence of Cst. Juha, *Transcript of Proceedings*, November 13, 2019, *Appellant's Record*, Vol. IV, pp. 201, 205 (pp. 207, 211).
[10] Reasons for Judgment at Trial, *Appellant's Record*, Vol. I, Tab 4, para. 70.
[11] *Ibid* at para. 73.
[12] *Ibid* at para. 57.
[13] *Ibid* at para. 61.
[14] *Ibid* at para. 87.

issued three separate opinions but unanimously concluded that s. 33.1 of the *Criminal Code* does not infringe the *Charter* or that any infringement is justified under s. 1. The acquittal for break and enter and commit aggravated assault was quashed and a conviction was entered for aggravated assault.[15] The acquittal on the other count was upheld, as the offence of break and enter and commit mischief is not captured by s. 33.1 of the *Criminal Code*.

PART II – QUESTIONS IN ISSUE

5. There are three questions in issue in this appeal:

   a. What is the proper interpretation of s. 33.1 of the *Criminal Code*?

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

   c. If s. 33.1 of the *Criminal Code* infringes s. 7 or s. 11(d) of the *Charter*, is that infringement justified under s. 1?

PART III – STATEMENT OF ARGUMENT

6. The Appellant's argument will proceed in four parts. First, the Appellant submits that the majority of the Court below erred in directly overturning this Court's decision in *Daviault* without explaining why it was not binding or no longer good law. Second, the Appellant submits that the majority of the Court below erred in its application of the principles of statutory interpretation to s. 33.1 of the *Criminal Code*, which resulted in the majority utilizing an erroneous interpretation

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[15] As the Alberta Court of Appeal erroneously identified the charge as "break and enter *with intent to commit* an indictable offence", it erred in declining to enter a conviction under s. 348(1)(b) of the *Criminal Code*. The Appellant conceded that the offence of break and enter and commit aggravated assault is a general intent offence, and the proper conviction is recorded on the Formal Order entered by the Alberta Court of Appeal: see *Appeal Record*, Vol. I, Tab 6.

of the provision to reach a flawed conclusion as to its constitutionality. Third, once s. 33.1 is properly interpreted, the Appellant submits that it infringes both s. 7 and s. 11(d) of the *Charter* by substituting the decision to become intoxicated for the decision to commit a criminal offence, contrary to the principles of fundamental justice. Fourth, this infringement cannot be justified under s. 1.

A. *Daviault* is Still Good Law

7. The majority of the Court below appeared to treat this Court's decision in *Daviault* as not binding or no longer good law, either because *Daviault* concerned a common law rule rather than a statutory provision,[16] or because Parliament's legislative response somehow invalidates the binding nature of that decision.[17] Both of these assumptions are in error. As Justice LeBel observed in *R. v. Bouchard-Lebrun*, "the principles set out in *Daviault* still represent the state of the law in Canada".[18] While this Court's decision in *R. v. Daviault* considered the constitutionality of the common law limitation on the defence of intoxication, Justice Cory's reasoning was based on the principles of fundamental justice. The principles of fundamental justice are just that – fundamental. They are not changed or lessened simply because Parliament has enacted a statutory provision to replace a common law rule. As this Court observed in *R. v. Vaillancourt*, "while Parliament retains the power to define the elements of a crime, the courts now have the jurisdiction and, more important, the duty, when called upon to do so, to review that definition to ensure that it is in accordance with the principles of fundamental justice".[19]

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[16] Reasons for Judgment of the Court of Appeal, *Appellant's Record*, Vol. I, Tab 5, paras. 157-158 (per Justice Hughes).
[17] *Ibid* at paras. 14, 16 (per Justice Slatter).
[18] *R. v. Bouchard-Lebrun*, 2011 SCC 58 at para. 35.
[19] *R. v. Vaillancourt*, [1987] 2 S.C.R. 636 at 652.

8. This Court's ruling in *Daviault* affirmed several basic principles of fundamental justice. First and foremost, the principles of fundamental justice require proof of a minimum mental state as an essential element of a criminal offence, which requires, at the very least, "proof that the accused who committed the prohibited act did so intentionally or recklessly, with knowledge of the facts constituting the offence, or with wilful blindness toward them. Mere negligence is excluded from the concept of the mental element required for conviction".[20] Second, "it is a principle of fundamental justice that only voluntary conduct – behaviour that is the product of a free will and controlled body, unhindered by external constraints – should attract the penalty and stigma of criminal liability".[21] Third, "a person should not be punished unless that person knows that he was committing the prohibited act or would have known that he was committing the prohibited act if … he had given to his conduct, and to the circumstances, that degree of attention which the law requires, and which he is capable of giving".[22]

9. In applying these principles, Justice Cory held that it is a violation of the principles of fundamental justice where "self-induced intoxication is substituted for the mental element of the crime", such that "the intentional act of the accused to voluntarily become intoxicated is substituted for the intention to commit the sexual assault or for the recklessness of the accused with regard to the assault".[23] In his view, "the substituted *mens rea* of an intention to become drunk cannot establish the *mens rea* to commit the assault" because "[t]he consumption of alcohol cannot lead

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[20] *R. v. Sault Ste. Marie*, [1978] 2 S.C.R. 1299 at 1309-1310, cited in *Vaillancourt*, *supra* at 652-653 as a principle of fundamental justice.
[21] *R. v. Ruzic*, 2001 SCC 24 at para. 47.
[22] *R. v. Hess and Nguyen*, [1990] 2 S.C.R. 906 at 918.
[23] *R. v. Daviault*, [1994] 3 S.C.R. 63 at 87.

inexorably to the conclusion that the accused possessed the requisite mental element to commit a sexual assault, or any other crime".[24]

10. Second, Justice Cory held there must be a "necessary link … between the minimum mental element and the prohibited act; that is to say that the mental element is one of intention with respect to the *actus reus* of the crime charged".[25] Because the decision to consume an intoxicant is not a decision to commit the *actus reus* of a criminal offence while in a state of automatism, there is no link between the mental element of consuming an intoxicant and the *actus reus* of the criminal offence.[26]

11. Despite these clear and unambiguous statements of principle, the majority of the Court below made no effort to explain why the reasoning in *Daviault* is no longer binding. Justice Slatter seemed to suggest that *Daviault* was not binding because this case concerned a statutory rather than common law rule.[27] With respect, this is a distinction without a difference. The principles of fundamental justice articulated in *Daviault* are equally applicable to statutory provisions such as s. 33.1. Justice Slatter provided no reason as to why he believed *Daviault* was wrongly decided or no longer binding in its articulation of the principles of fundamental justice,[28] and erred in ignoring

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[24] *Ibid* at 90.
[25] *Ibid* at 92.
[26] *Ibid*.
[27] See Reasons for Judgment of the Court of Appeal. *Appellant's Record*, Vol. I, Tab 5, paras. 9-15.
[28] For example, at para. 17, after reciting the common law history of the *Leary* rule, Justice Slatter noted that "in this appeal, it is argued that this long-standing rule of our criminal law was not only misguided, but contrary to the principles of fundamental justice". He went on to cite Justice La Forest's opinion in *R. v. Bernard*, [1988] 2 S.C.R. 833 for the proposition that "established common law rules should not … lightly be assumed to violate the *Charter*". However, neither party had made this argument before the Alberta Court of Appeal, as this Court had ruled in its

this Court's articulation of how the principles of fundamental justice prohibit limitations on the defence of intoxication.

12. For Justice Hughes, *Daviault* was distinguishable because "at the time of *Daviault* the sole *mens rea* for sexual assault was subjective *mens rea*" and because Justice Cory had held in *Daviault* that "the mental element cannot be taken away by judicially developed policy".[29] Both of these conclusions are in error. The *mens rea* for sexual assault was never subjective, whether at the time of *Daviault* or now. This Court conclusively ruled in its 1987 decision in *R. v. Chase* that "the offence [of sexual assault] is one requiring a general intent only".[30] This was obviously recognized by this Court in *Daviault* itself, since the constitutional issue in that case would not have arisen if the Court believed that the *mens rea* for sexual assault was subjective.[31] Further, Justice Cory was not implying that Parliament can enact a provision that removes the mental element of voluntariness when he referred to a "judicially developed policy". His comments were focused on the actual issue in *Daviault* – the constitutionality of the *Leary* rule – but, as this Court held in *R. v. Ruzic*, the principles of fundamental justice *require* a mental element of voluntariness.[32] Any attempt by Parliament or the judiciary to remove the mental element of a crime must be justified under s. 1, as it is in clear breach of the principles of fundamental justice.

1994 decision in *Daviault* that this long-standing rule of our criminal law was contrary to the principles of fundamental justice.

[29] Reasons for Judgment of the Court of Appeal, *Appellant's Record*, Vol. I, Tab 5, at para. 157.
[30] *R. v. Chase*, [1987] 2 S.C.R. 293 at 302.
[31] And Justice Cory noted at multiple points in his opinion that the *mens rea* for sexual assault is one of general intent: see *Daviault*, *supra* at 78, 82, 89, and 92.
[32] *Ruzic*, *supra* at para. 47.

13. Respectfully, the justifications relied upon by the majority below for ignoring or failing to follow this Court's decision in *Daviault* are weak at best and show little adherence to the doctrine of *stare decisis*. As this Court once observed, "it is fundamental to the due administration of justice that the authority of decisions be scrupulously respected by all courts upon which they are binding".[33] For a lower court to "disregard law laid down by higher courts because the lower court thinks that the reasoning or criteria lack force at different places or different times, is largely to ignore the doctrine of precedent".[34] To permit a lower court "to make separate rulings on *Charter* issues without regard to rulings of higher courts would result in palm-tree justice and would displace the rule of law".[35] This is, with respect, precisely what the majority of the Court below did in this case. It therefore follows that the majority of the Court below erred in failing to explain why the reasoning in *Daviault* is no longer binding before declining to follow this Court's decision.

B. The Proper Interpretation of Section 33.1 of the *Criminal Code*

14. Both Justice Hughes and Justice Slatter offered differing interpretations of s. 33.1 of the *Criminal Code* that, if accepted, may help it pass constitutional muster. Beginning with Justice Slatter, he interpreted s. 33.1 as applying only to the voluntary consumption of dangerous intoxicants for the purpose of becoming intoxicated where the risk of harm resulting from the consumption of those intoxicants is objectively foreseeable.[36] Further, he interpreted s. 33.1 as altering the essential elements of all general intent crimes of violence, such that intoxication is now an essential element of all general intent personal injury offences. Finally, he reasoned that s.

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[33] *Woods Manufacturing Co. Ltd. v. The King*, [1951] S.C.R. 504 at 515.
[34] *R. v. Mitchell* (1994), 162 A.R. 109 (Alta. C.A.) at para. 10, cited in *R. v. Caswell*, 2015 ABCA 97 at para. 32 (per Brown J.A., as he then was).
[35] *R. v. Rybansky et. al.* (1982), 66 C.C.C. (2d) 459 (Ont. H.C.J.).
[36] Reasons for Judgment of the Court of Appeal, *Appellant's Record*, Vol. I, Tab 5, paras. 25-26, 30.

33.1 does not infringe s. 7 of the *Charter* because "the criminalized *mens rea* is voluntary intoxication, which departs markedly from the standard of reasonable care generally recognized in Canadian society".[37] Justice Hughes interpreted s. 33.1 slightly differently. In her view, it does not remove a defence but, rather, prescribes a new mode of liability for criminal offences.[38] The Appellant respectfully submits that each of these interpretations is in error.

i. *Section 33.1 is Not Limited to Dangerous Intoxicants*

15. First, there is no wording in s. 33.1 that limits its application only to "dangerous" intoxicants, nor where there is some objectively foreseeable risk of violence resulting from the consumption of that intoxicant, nor even where the person consumes the intoxicant for the purpose of becoming intoxicated. It is also not limited only to those substances that Parliament has chosen to criminalize.[39] Section 33.1 only refers to "self-induced intoxication". It therefore captures within its scope all substances which may result in intoxication. It captures intoxication by non-criminalized (but regulated) substances such as alcohol and marijuana, criminalized substances such as psilocybin,[40] criminalized and/or regulated substances such as prescription medication,[41]

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[37] *Ibid* at para. 20. See also paras. 14, 31, and 46 for the interpretation that s. 33.1 deems the act of voluntary intoxication to be a marked departure from the standard of care.

[38] *Ibid* at paras. 136-146.

[39] Contrary to the assertion of Justice Slatter – see Reasons for Judgment of the Court of Appeal, *Appellant's Record*, Vol. I, Tab 5, para. 52.

[40] As in this case, as well as the appeal in *R. v. Chan*, 2020 ONCA 333.

[41] As in *R. v. Sullivan*, 2020 ONCA 333, where the accused attempted to overdose on prescription medication in a suicide attempt. It is a criminal offence to possess some, but not all, prescription medication without lawful authorization. For example, possession of oxycodone without authorization is a criminal offence (as oxycodone is listed in Schedule I to the *Controlled Drugs*

and, in theory, non-criminalized and non-regulated substances such as cough medicine.[42] There is no requirement in the wording of s. 33.1 that the substance that is ingested be objectively dangerous, nor that it be consumed for the purpose of becoming intoxicated.

ii. *Section 33.1 Does Not Require Objective Foreseeability*

16. Second, there is no requirement in s. 33.1 that the risk created by the consumption of the intoxicant be objectively foreseeable. Justice Slatter cited no source for this proposition, despite repeating this purported requirement of objective foreseeability at least seven times throughout his opinion.[43] It is not even clear what he understood must be objectively foreseeable for the consumption of an intoxicant to fall within the ambit of s. 33.1. Is it a risk of bodily harm to others resulting from the consumption of an intoxicant?[44] A risk of acting dangerously while intoxicated?[45] A risk of automatism?[46] Or just a risk of intoxication?[47] Justice Slatter was never clear. However, what *is* clear from the text of s. 33.1 is that it does not oblige the Crown to prove in any case that the conduct captured by the provision – a general intent crime of violence

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and Substances Act), but possession of Wellbutrin (or bupropion), the substance that Mr. Sullivan attempted to overdose on, is not a criminal offence.

[42] While there is no reported case on the issue in Canada, there is at least one American case where automatism resulted from the consumption of dextromethorphan, a common over-the-counter cough suppressant, and was captured by the applicable version of s. 33.1: see *People v. Low*, 732 P.2d 622 at 632 (1987) (Co. S.C.), *Appellant's Book of Authorities*, Tab 1.

[43] Reasons for Judgment of the Court of Appeal, *Appellant's Record*, Vol. I, Tab 5, paras. 26, 33, 36, 37, 39, 42, 68.

[44] *Ibid* at paras. 26, 33.

[45] *Ibid* at para. 39.

[46] *Ibid* at paras. 42, 45, 68.

[47] *Ibid* at para. 52.

committed while in a state of automatism – was an objectively foreseeable risk of consuming the substance.

17. Indeed, were objective foreseeability of the conduct captured by the provision an implicit requirement of s. 33.1, the provision would rarely, if ever, apply. Objective foreseeability requires that the reasonable person "would have foreseen the risk and taken steps to avoid it if possible".[48] The reasonable person is not imbued with advanced medical knowledge, such as incredibly rare side effects of various intoxicants.[49] If expert evidence is required to prove that consumption of a particular intoxicant resulted in a state of automatism,[50] how can that fact be within the knowledge of the reasonable person such that it is objectively foreseeable? The two propositions cannot coexist – if expert evidence is required, it is not something that the reasonable person would necessarily foresee. The fact that expert evidence is necessary to prove the causal link between the consumption of an intoxicant and a state of automatism resulting from that consumption means that the risk of automatism can rarely, if ever, be objectively foreseeable at the time the intoxicant was consumed.

iii. *Intoxication is Not an Essential Element of General Intent Crimes of Violence*

18. Third, contrary to the opinion of Justice Slatter, intoxication is not "an element of general intent personal injury crimes",[51] and there is no such thing as "general intent offences of gross

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[48] *R. v. Javanmardi*, 2019 SCC 54 at para. 22, citing *R. v. Roy*, 2012 SCC 26 at para. 36.

[49] See, by analogy, *R. v. Clark*, 2020 ABCA 356 at para. 26 ("Expert evidence is antithetical to the standard of the reasonable person … The conduct of the accused is to be measured against something that is commonly understood by members of society—a "societal minimum which has been established for conduct" or a "uniform minimum level of care").

[50] *Daviault*, *supra* at 101, 103.

[51] Reasons for Judgment of the Court of Appeal, *Appellant's Record*, Vol. I, Tab 5, at para. 27.

self-intoxication".[52] Intoxication is not an essential element of any general intent offence of violence. An essential element of an offence is one that must be proven beyond a reasonable doubt to secure a conviction for that offence, as failure to prove an essential element of an offence results in an acquittal.[53] It is nonsensical to interpret s. 33.1 as deeming intoxication to be an essential element of a personal injury offence, as this would mean that an essential element of an offence only exists where the accused relies on that element as a defence to the charge. The defence, which must be proven on a balance of probabilities,[54] would then become something that the Crown must prove beyond a reasonable doubt in order to secure a conviction. This is absurd.

19. The majority in the Court below went to great effort to interpret s. 33.1 in a manner that would enable it to rely on this Court's decision in *R. v. Penno*.[55] However, despite these efforts, *Penno* is simply not applicable in these circumstances. *Penno* concerned the application of the defence of intoxication to the offence of impaired driving. The *actus reus* of the offence of impaired driving is the act of assuming care or control of a vehicle while one's ability to drive is impaired through voluntary intoxication.[56] The *mens rea* is the intent to assume care or control.[57] Intoxication is the gravamen of the offence. Thus because voluntary intoxication is an essential element of the *actus reus* of impaired driving, the majority of this Court held that voluntary intoxication cannot also serve as a defence.

20. Unlike the offence of impaired driving at issue in *Penno*, voluntary intoxication is not an essential element of any general intent crime of violence. It is not something that the Crown must

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[52] *Ibid* at para. 46.
[53] *R. v. Charemski*, [1998] 1 S.C.R. 679 at para. 3.
[54] *Daviault*, *supra*, at 101.
[55] *R. v. Penno*, [1990] 2 S.C.R. 865.
[56] *Ibid* at 876.
[57] *Ibid*.

prove beyond a reasonable doubt in order to secure a conviction, and it is not something that results in acquittal if the Crown fails to prove that element beyond a reasonable doubt. In the offence of impaired driving, failure to prove intoxication results in an acquittal because the act of driving is not a criminal offence. In a general intent offence of violence, by contrast, mere failure to prove intoxication still results in conviction, as a general intent offence of violence is a criminal offence with or without intoxication. Because intoxication is not an essential element of a general intent offence of violence nor the gravamen of the offence, the reasoning in *Penno* simply does not apply.

21. This is not to say that it would not be open to Parliament to create an offence similar to impaired driving that incorporates voluntary intoxication as an essential element of the offence. But s. 33.1 does not do that, and no amount of creative judicial interpretation can alter the clear wording of that provision. As this Court stated in *R. v. Levkovic*, the principles of fundamental justice require "that the essential elements of the crime must be ascertainable in advance".[58] For impaired driving, the essential elements are always known in advance: regardless of one's level of intoxication, driving while impaired is a crime, but driving while not impaired is perfectly legal behaviour.[59] The impaired driving provisions provide fair notice to a citizen that any decision to drive after consuming an intoxicant can attract criminal consequences. Section 33.1 does not provide such fair notice. It does not inform citizens, in advance, that intoxication is an essential element of all general intent crimes of violence – at most, it informs them that their intoxication may become an essential element of the offence if the Crown cannot prove their guilt in the normal course. This does not provide a constitutionally sufficient level of fair notice, and, as a result, any analogy to *Penno* is flawed.

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[58] *R. v. Levkovic*, 2013 SCC 25 at para. 34.
[59] Assuming, of course, that the manner of driving does not independently attract criminal liability.

iv. *The Marked Departure from the Standard of Care is Not the Act of Consuming Intoxicants*

22. Fourth, contrary to the interpretation adopted by Justice Slatter, the marked departure from the standard of care imposed by s. 33.1 is *not* the act of voluntarily becoming intoxicated to the point of automatism.[60] Section 33.1 does not state that it is a marked departure from the standard of care to become voluntarily intoxicated, even to the point of becoming an automaton. Rather, Parliament has deemed it to be a marked departure from the standard of care only where the accused commits a general intent crime of violence while in a state of automatism resulting from self-induced intoxication. The marked departure from the standard of care lies in the commission of a criminal offence where the accused lacks voluntary control or awareness of his or her behaviour, not in the act of becoming intoxicated.

23. It would be illogical to interpret s. 33.1 any other way. The act of voluntarily consuming intoxicants occurs every single day across this country in bars, restaurants, private residences, hospitals, doctors' offices, and everywhere in between. How can it be a marked departure from the standard of care to engage in conduct that most Canadians regularly engage in? The standard of care is defined by the reasonable person who "acts in accord with general and approved practice".[61] If the general and approved practice in Canada is to voluntarily consume intoxicants, it cannot be a marked and substantial departure from the standard of care to engage in that practice. To conclude otherwise would render incoherent the very concept of negligence.

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[60] See Reasons for Judgment of the Court of Appeal, *Appellant's Record*, Vol. 1, Tab 5, at paras. 14, 20, 31, and 46.

[61] *Arland v. Taylor*, [1955] O.R. 131 (Ont. C.A.).

24. Instead, the marked and substantial departure from the standard of care is the commission of a criminal offence while in a state of intoxicated automatism. However, this adds little to the analysis, as the commission of a criminal offence is always, in a sense, a marked departure from the standard of care – the reasonable person does not commit criminal acts. To simply deem the commission of a criminal offence to be a marked departure from the standard of care and therefore a criminal offence is to skip over the analysis of what makes the offence criminal in nature.

v. *Section 33.1 Removes a Defence*

25. Fifth and finally, the interpretation adopted by Justice Hughes – that s. 33.1 does not remove a defence but instead creates a new mode of liability -- fails to accord for the plain wording of s. 33.1. The provision, appropriately titled "when defence not available", begins with the words: "it is not a defence…". It then defines the circumstances in which intoxication is not a defence to a criminal charge. Interpreting this provision as doing anything other than removing a defence is, with respect, inconsistent with the plain meaning of the words chosen by Parliament.

26. However, even if s. 33.1 could somehow be characterized as a new mode of liability rather than the removal of a defence, this still is no answer to the constitutional issue. Parliament can create as many modes of liability as it wishes, but those modes of liability must still conform to the principles of fundamental justice. The principles of fundamental justice require a meaningful mental element with respect to the *actus reus* of a criminal offence regardless of the party's relationship to the *actus reus* of that offence. For intentional offences, the principal offender must, at the very least, intentionally commit the *actus reus* of the offence.[62] The aider must render assistance for the purpose of aiding the principal offender to commit the *actus reus*, which requires

[62] *R. v. Duong* (1998), 39 O.R. (3d) 161 (C.A.).

knowledge of the principal's intention to commit the offence.[63] The abetter must do something to encourage, instigate, promote, or procure the substantive offence to be committed, and must intend that her acts or omissions will encourage the principal to commit the substantive offence.[64] An accessory after the fact must have actual knowledge of a criminal offence that was committed and intend to assist the principal escape the consequences of that offence.[65] Attempts require proof of an intention to commit the substantive offence, as well as steps taken for the purpose of carrying out that intent.[66]

27. The principles of fundamental justice require proof of a meaningful mental element with respect to the substantive offence charged for all these modes of liability. Mere commission of a morally blameworthy act that contributes to the *actus reus* of a later criminal offence is not sufficient without that mental element. Thus the person who gives a gun to his friend with no knowledge that his friend intends to use the gun to rob a bank is not guilty of aiding the robbery, even if he committed a morally blameworthy act by trafficking a firearm. The principles of fundamental justice do not permit substitution of one morally blameworthy act for the *actus reus* of another offence. Therefore whether one characterizes s. 33.1 as a mode of liability or a removal of a defence, the effect is the same: it fails to comply with the principles of fundamental justice because it mandates a conviction for a substantive criminal offence without proof that the accused intentionally and voluntarily committed that offence.

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[63] *R. v. Briscoe*, 2010 SCC 13 at para. 17.
[64] *R. v. Helsdon*, 2007 ONCA 54 at para. 43.
[65] *R. v. Camponi* (1993), 82 C.C.C. (3d) 506 (B.C.C.A.).
[66] *Criminal Code*, s. 24(1).

vi. *Section 33.1 is Not a Constitutionally Compliant Form of Objective Fault*

28. Finally, both Justice Slatter and Justice Hughes interpreted s. 33.1 as creating a constitutionally compliant form of objective fault. This interpretation is also misplaced. As this Court held in *Creighton*, the mental element in a crime of objective fault lies in the failure to direct one's mind to a risk which the reasonable person would have foreseen.[67] As set out above, s. 33.1 requires no proof that the reasonable person would have foreseen the risk of automatism and the further risk of committing a violent offence while in that state of automatism. Instead, s. 33.1 conclusively deems the commission of a general intent crime of violence while in a state of automatism to be a "marked departure from the standard of reasonable care generally recognized in Canadian society".[68] Proof of voluntary consumption of an intoxicant is deemed to be conclusive proof of the accused's fault for any offence committed while in a state of intoxicated automatism.

29. Couching this absolute liability for a criminal offence in the language of objective fault does not insulate it from *Charter* review.[69] Section 33.1 does not permit an accused to establish that he or she exercised due diligence to avoid a state of automatism once the Crown proves that he or she voluntarily consumed an intoxicant. Consider, for example, an accused person who attempts to overdose on prescription medication but, in a moment of regret, calls 911 in order to have his stomach pumped. If that medication then causes a state of automatism and the accused involuntarily assaults a nurse at the hospital, the accused would be criminally responsible for the

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[67] *R. v. Creighton*, [1993] 3 S.C.R. 3 at 59.
[68] *Criminal Code*, s. 33.1(2).
[69] As this Court ruled in *R. v. Wholesale Travel Group Inc.*, [1991] 3 S.C.R. 154 at 183, the *Charter* requires that the defence of due diligence be available for all objective *mens rea* or negligence-based offences.

assault by virtue of s. 33.1 even though the accused took steps to avoid the effect of the intoxicant he voluntarily consumed. There is no room for the accused to demonstrate that he took due diligence to avoid the commission of a criminal offence once voluntary consumption of an intoxicant is proved. Therefore even if s. 33.1 creates some form of objective fault, it is not a form that complies with the basic principles of fundamental justice.

vii. *The Proper Interpretation*

30. The Appellant respectfully submits that the proper interpretation of s. 33.1 is an interpretation that gives effect to the plain meaning of the words used in the provision. As the Nova Scotia Court of Appeal held in *R. v. Chaulk*, s. 33.1 applies where "(i) the accused voluntarily consumed a substance which; (ii) s/he knew or ought to have known was an intoxicant and; (iii) the risk of becoming intoxicated was or should have been within his/her contemplation".[70] This interpretation was endorsed by this Court in *R. v. Bouchard-Lebrun*.[71] It is, therefore, the interpretation that ought to anchor the constitutional analysis.

31. Section 33.1 is not an offence-creating provision, as it only operates where a person is charged with a substantive offence – in this case, the offence of break and enter and commit aggravated assault. If the accused is convicted, the conviction that is entered is for the substantive offence. In order to secure that conviction, the Crown must prove all of the elements of the substantive offence. Section 33.1 only steps in to aid the Crown in that endeavour where the Crown cannot prove voluntariness or *mens rea* due to the accused's state of intoxicated automatism. Whether one characterizes s. 33.1 as a removal of a defence or a mode of liability, the result is the

[70] *R. v. Chaulk*, 2007 NSCA 84 at para. 47.

[71] *Bouchard-Lebrun*, *supra* at para. 89.

same: it requires a conviction for a substantive criminal offence where the principles of fundamental justice would mandate an acquittal.

C. Section 33.1 Infringes s. 7 and s. 11(d) - The Substitution Breach

32. The Appellant respectfully submits that the majority of the Court of Appeal erred by finding that s. 33.1 does not improperly substitute the intention to consume an intoxicant for the intention to commit a criminal offence. As this Court stated in *R. v. Whyte*, "only if the existence of the substituted fact leads inexorably to the conclusion that the essential element exists, with no other reasonable possibilities, will the statutory presumption be constitutionally valid."[72] The choice of the word "inexorably" was not a mere linguistic flourish on the part of Chief Justice Dickson. Instead, it conveys the inevitability that grounds this principle of fundamental justice: it is only where it would be reasonably impossible for proof of the substituted fact to be anything other than proof of the required element of the offence that the substitution does not infringe the principles of fundamental justice.

33. In *R. v. Whyte*, Chief Justice Dickson held that the presumption of care and control did not have such an inexorable character, as "a person can be seated in the driver's seat without an intention to assume care or control of the vehicle".[73] Similarly, in *R. v. Downey*, Justice Corey held that "the fact that someone lives with a prostitute does not inexorably lead to the conclusion that the person is living off the avails", such that the presumption infringed s. 11(d) of the *Charter*.[74] Justice Moldaver summarized this principle in *R. v. Morrison* as follows:

> [53] To be clear, the nexus requirement for demonstrating that a statutory presumption does not offend the presumption of innocence is strict. It is not one of

[72] *R. v. Whyte*, [1988] 2 S.C.R. 3 at 19.
[73] *Ibid* at 19.
[74] *R. v. Downey*, [1992] 2 S.C.R. 10 at 30.

> mere "likelihood" or "probability", nor is it one satisfied by a "common sense" or "rational" inference. Rather, this Court's jurisprudence demonstrates that the connection between proof of the substituted fact and the existence of the essential element it replaces must be nothing less than "inexorable". An "inexorable" link is one that necessarily holds true in all cases.[75]

34. Both Justice Slatter and Justice Hughes' opinions rest on an assumption that the consumption of intoxicants is an adequate substitute for the voluntariness and *mens rea* of a criminal offence. However, proof of voluntary intoxication is not "capable, *in itself*, of satisfying the trier of fact beyond a reasonable doubt" of the intent to commit a general intent offence of violence.[76] It does not necessarily "hold true in all cases" that a person who intends to consume an intoxicant, or even intends to become intoxicated, thereby intends to commit an act of violence.

35. Indeed, neither Justice Slatter nor Justice Hughes professed to identify such a connection. Instead, they founded the link in the concept of moral blameworthiness – in their view, the decision to consume an intoxicant is *so* morally blameworthy that it can subsume and replace the moral blameworthiness associated with commission of a criminal offence. However, this obfuscates the analysis. Mere commission of one morally blameworthy act cannot inexorably lead to the conclusion that the accused voluntarily or intentionally committed an entirely different criminal offence. Even if a state of automatism and potential violent behaviour could be an objectively foreseeable result of morally blameworthy conduct, that is not an acceptable or constitutional reason for imposing criminal liability. We do not attribute criminal liability to the schizophrenic who voluntarily chooses not to take his or her medication and commits an offence while in a state

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[75] *R. v. Morrison*, 2019 SCC 15 at para. 53.
[76] *Ibid* at para. 56.

of psychosis,[77] or to the person who receives a blow to the head in the course of a fight, enters a state of automatism, and later commits a criminal offence.[78] In both of the latter examples, the accused's actions do not result in criminal liability because the accused did not act voluntarily or intentionally, even though the accused arguably acted in a morally blameworthy manner by failing to take steps to avoid the state of automatism.

36. Further, the majority in the Court below provided no support for the proposition that the act of consuming an intoxicant is inherently morally blameworthy behaviour. The fact that some intoxicants are criminalized and others are regulated does not, in itself, confer moral blameworthiness on the act of consuming those intoxicants. Many regulated intoxicants can be lawfully consumed – for example, anyone over a particular age is free to buy cannabis or alcohol from a licensed retailer, and to consume those products in their private residence or a licensed establishment. Further, many intoxicants are consumed for socially beneficial purposes, such as prescription medication. Psychosis may be a side effect of many medications, including things such as anticonvulsants, antihistamines, chemotherapy drugs, cardiovascular medication, antimicrobial medication, gastrointestinal medication, and non-steroidal anti-inflammatory medication.[79] It should go without saying that there is no moral blameworthiness in consuming any of these drugs for medical purposes, yet the act of voluntarily consuming them would trigger s. 33.1. The majority of the Court below made no effort to explain why the consumption of all of

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[77] See, e.g., *R. v. Weldon* (1995), 86 O.A.C. 362 (Ont. C.A.), quashing a conviction for first degree murder in circumstances where the accused voluntarily chose not to take his medication to control his paranoid schizophrenia.

[78] *Bleta v. The Queen*, [1964] S.C.R. 561.

[79] American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (5th ed.), *Appellant's Book of Authorities*, Tab 2.

these substances was morally blameworthy behaviour, nor why it was so morally blameworthy as to be capable of supplanting and replacing the essential elements of a criminal offence.

D. Section 33.1 Infringes s. 7 - The Contemporaneity Breach

37. Section 33.1 also infringes s. 7 of the *Charter* because it mandates a conviction without any contemporaneity between the *actus reus* and *mens rea* of a criminal offence. While Justice Sopinka had held in *R. v. DeSousa* that the principles of fundamental justice do not require proof of intention with respect to every element of the *actus reus* of a criminal offence,[80] he also held that "there must be an element of personal fault in regard to a culpable aspect of the *actus reus*".[81] The majority's error in the Court below was to adopt the first element of Justice Sopinka's reasoning in *DeSousa* while ignoring the latter. The issue with s. 33.1 is not that it severs full contemporaneity between the *actus reus* and *mens rea* of a general intent crime of violence, but that it compels conviction where there is no contemporaneity at all.

38. The principle of contemporaneity requires that there be, at some point, concurrence between the *mens rea* and *actus reus* of a prohibited act. As Justice Cory explained in *R. v. Cooper*, the "classic rule [is] that at some point, the *actus reus* and the *mens rea* or intent must coincide".[82] Justice Cory affirmed this principle as a principle of fundamental justice one year later in *Daviault*.[83] It therefore follows that Justice Slatter was in error when he pronounced that "symmetry is not required between the *mens rea* and *actus reus* of an offence".[84] The two must, at some point, coincide.

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[80] *R. v. DeSousa*, [1992] 2 S.C.R. 944 at 965.
[81] *Ibid*.
[82] *R. v. Cooper*, [1993] 1 S.C.R. 146 at 157.
[83] *Daviault*, *supra* at 75, 92.
[84] Reasons for Judgment of the Court of Appeal, *Appellant's Record*, Vol. I, Tab 5, para. 55.

39. Section 33.1 requires conviction for a criminal offence absent proof that the *actus reus* of the criminal offence ever coincided with the substituted *mens rea* of voluntary intoxication. There is no legal, logical, or inexorable link between the element of objective fault – voluntary intoxication – and the *actus reus* of a later criminal offence, as the accused in a state of automatism has, by definition, no knowledge of the nature of acts committed while in that state. The *actus reus* of the offence charged would be committed alone without the minimal mental element required to attract criminal culpability for that act. This is contrary to the basic principles of our criminal justice system, as Justice Wilson explained in *R. v. Hess and Nguyen*,

> [T]the history of the doctrine of *mens rea* shows a gradual move away from a purely retributive conception of punishment, where the law sought to pay back the moral evil done without regard for the reasons why the actor committed the prohibited act, to a conception of punishment that is not only sensitive to the injustice involved in punishing those who are mentally innocent, but also takes account of the fact that punishment will not act as an effective deterrent if persons are punished who did not know or could not have known that they were committing an offence. The doctrine of *mens rea* reflects the conviction that a person should not be punished unless that person knew that he was committing the prohibited act or would have known that he was committing the prohibited act if, as Stroud put it, "he had given to his conduct, and to the circumstances, that degree of attention which the law requires, and which he is capable of giving".[85]

40. Section 33.1 mandates a conviction where the accused did not intentionally or voluntarily commit a criminal act, on the basis that the accused earlier voluntarily engaged in other potentially morally blameworthy behaviour. In other words, there is no point at which the guilty act coincided with the guilty mind. It is no answer to this problem to say that *mens rea* need not extend to the consequences of criminal conduct,[86] as here, the consequences *are* the criminal conduct. There is no criminality in simply consuming an intoxicant. The criminality lies in the commission of a

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[85] *Hess and Nguyen*, *supra* at 917-918.
[86] Reasons for Judgment of the Court of Appeal, *Appellant's Record*, Vol. I, Tab 5, paras. 35, 139.

subsequent criminal act, regardless of whether that act was committed while the accused was intoxicated. Because s. 33.1 mandates a conviction for that criminal act in the absence of any culpable mental state in relation to that act, s. 33.1 infringes s. 7 of the *Charter*.

E. The Infringement is Not Justified Under Section 1

41. The Appellant further submits that the Court of Appeal unanimously erred in finding that the infringement was justified under s. 1. As Justice Hughes concurred with Justice Slatter and Justice Khullar's reasoning on this point,[87] the Appellant's argument will focus on the reasons of Justice Slatter and Justice Khullar.

a. Pressing and Substantial Objective

42. The Court below held that s. 33.1 has two objectives: accountability and protection. As Justice Khullar summarized, the accountability objective "is to hold individuals accountable for the violent acts they commit while intoxicated to the point of automatism". The protective purpose "is to protect potential victims of violence, especially women and children".[88] For the Court below, both purposes were pressing and substantial.

43. The Appellant accepts both characterizations of the purposes and concedes that the protective purpose is a pressing and substantial objective.[89] However, the Appellant submits that

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[87] Reasons for Judgment of the Court of Appeal, *Appellant's Record*, Vol. I, Tab 5, para. 164.

[88] *Ibid* at para. 182-183. It appears that Justice Slatter agreed with these objectives, though he did not couch them in a similarly clear analysis.

[89] To be clear, the Appellant had made a similar concession in the Court below. Contrary to the assertion of Justice Slatter (at para. 65), the Appellant *did not* argue that Parliament was not entitled to act to protect women and children from violence. The Appellant's only point was that couching this protective purpose in the language of the *Charter* rights of the victims muddied the analysis

the Court below erred in finding that the accountability objective is pressing and substantial. Justice Slatter declined to follow the Ontario Court of Appeal on this point, characterizing Justice Paciocco's reasoning in *Sullivan* as "circular" because, in Justice Slatter's view, the effects of the legislation cannot be used as a reason for finding that the purpose of the legislation is not pressing and substantial.[90]

44. However, this mischaracterizes the reasoning in *Sullivan*,[91] and misunderstands the difference between the purpose and effect of a legislative provision. A provision can have both a *Charter*-infringing objective and *Charter*-infringing effects – the two are not mutually exclusive. Take, for example, the provision at issue in *R. v. Big M Drug Mart*. The effect of the provision was to infringe the s. 2(a) rights of non-Christians in Alberta, as they were "prohibited for religious reasons from carrying out activities which are otherwise lawful, moral and normal".[92] The purpose of this prohibition was to compel observance of the Christian Sabbath.[93] The provision therefore infringed the *Charter* in both purpose and effect. This was not a circular analysis but, rather, a recognition of the true purpose of the provision at issue. The same analysis applies here. The *Charter*-infringing effect of the law is to require an accused to be convicted where the principles of fundamental justice would mandate an acquittal. The accountability purpose of the law is to

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and could potentially be taken as a recognition of positive *Charter* rights. The Appellant had relied on this Court's decision in *R. v. K.R.J.*, 2016 SCC 31 at para. 65 as an example of how the protective purpose ought to be framed.

[90] Reasons for Judgment of the Court of Appeal, *Appellant's Record*, Vol. I, Tab 5, paras. 62-64.

[91] As there are already multiple parties addressing the correctness of *Sullivan* in the appeal of that decision, the Appellant will not attempt to duplicate those submissions. However, to be clear, the Appellant fully adopts the reasoning of the majority in *Sullivan* on this point.

[92] *R. v. Big M Drug Mart*, [1985] 1 S.C.R. 295 at 337.

[93] *Ibid* at 351-352.

ensure that persons are accountable for their actions while in a state of automatism. The two are distinct.

45. The pressing and substantial objective analysis requires the party justifying the law to identify an objective that is "so pressing and substantial as to be capable of overriding the *Charter*'s guarantees".[94] The identified objective must "clearly reveal the harm that the government hopes to remedy".[95] As Justice Bastarache summarized in *R. v. Daley*, there are three "legally relevant degrees of intoxication" in our criminal law. The first, mild intoxication, "has never been accepted as a factor or excuse in determining whether the accused possessed the requisite *mens rea*".[96] The second, advanced intoxication, may raise a reasonable doubt as to the *mens rea* of a specific intent offence where the accused is unable to foresee the consequences of his or her acts.[97] The third, extreme intoxication akin to automatism, "negates voluntariness and thus is a complete defence to criminal responsibility".[98] Justice Bastarache recognized in *Daley* that s. 33.1 is aimed only at this third form of intoxication.[99]

46. The harm that Parliament sought to remedy in enacting s. 33.1 is therefore only the harm resulting from the commission of a criminal offence while in a state of automatism, as s. 33.1 does not amend the other common law rules governing intoxication. Its purpose, therefore, is to hold offenders accountable for their conduct while in a state of automatism. If automatism is defined as conduct over which the accused had no conscious control, then, phrased another way, the purpose of s. 33.1 is to hold offenders accountable for conduct over which they had no conscious control.

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[94] *R. v. Zundel*, [1992] 2 S.C.R 731 at 762.
[95] *Sauvé v. Canada (Chief Electoral Officer)*, 2002 SCC 68 at para. 23.
[96] *R. v. Daley*, 2007 SCC 53 at para. 41.
[97] *Ibid*.
[98] *Ibid* at para. 43.
[99] *Ibid*.

This is not an objective that is sufficiently pressing and substantial to warrant overriding the *Charter*'s guarantees. If the purpose of the legislation is to hold persons accountable for criminal acts despite that state of automatism, the purpose of the legislation is to infringe *Charter* rights. A provision that has a *Charter* infringement as its purpose cannot, as a matter of logic, anchor the s. 1 analysis.

47. The Appellant therefore submits that, in conducting the s. 1 analysis, it is the protective purpose that ought to anchor the analysis. The accountability purpose is, if anything, merely the protective purpose stated at a broader level of abstraction – we hold people accountable for their violent behaviour not as an end in itself, but rather for the purpose of protecting everyone from harm.[100] The protective purpose of s. 33.1 – protecting people from intoxication-fuelled violence – is stated at the appropriate level of abstraction and ought to be characterized as the objective of the provision. However, for the sake of completeness, the Appellant will provide submissions on both purposes.

b. Rational Connection

48. The Appellant submits that there is no rational connection between the means chosen and the protective purpose, as the protective purpose rests on the deterrent value of s. 33.1. The alleged rational connection, taken at its highest, is best articulated in the reasons of Justice Khullar: s. 33.1 "can reasonably be expected to deter rational actors – at the point at which they make consumption decisions – from excessive consumption of intoxicants" and it "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 formal sanctions of the legal system".[101] In

[100] *Zundel*, *supra* at 762.
[101] Reasons for Judgment of the Court of Appeal, *Appellant's Record*, Vol. I, Tab 5, para. 189.

essence, the rational connection between the means chosen and the protective purpose lie in the deterrent value of s. 33.1.

49. The rational connection between the measures employed in s. 33.1 – removing the defence of automatism for certain violent offences where the automatism is caused by voluntary intoxication – and the protective purpose of the measure is not borne out on reason or logic. The *post facto* attribution of criminal responsibility to an accused person does little to protect women and children from violence unless that attribution of criminal responsibility has the potential to deter others in the future from committing similar acts of violence against women and children.[102] As s. 33.1 does not alter the common law rule that intoxication short of automatism is not a defence to a criminal offence, its only deterrent value rests on the assumption that an individual who consumes an intoxicant could foresee the possibility that the intoxication could lead to a state of automatism and that the individual could commit certain acts of violence while in that state of automatism, and that the individual would therefore refrain from consuming the intoxicant.

50. Given the extreme rarity of intoxication-caused automatism, it is difficult to see, on reason or on logic, how s. 33.1 could have any deterrent effect. Deterrence theory rests on the fundamental criminal law premise that individuals are autonomous, rational actors capable of distinguishing between right and wrong.[103] Where that premise cannot be established, such as in the case of automatism, there is no rational or logical basis for the inference that a provision criminalizing

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[102] While the Appellant agrees with Justice Slatter's proposition that all criminal sanctions are imposed *post facto*, this is not an answer to the problem of deterring behaviour that is, by definition, irrational. A *post facto* sanction must be logically capable of deterring the behaviour it targets in order to be rationally connected to a deterrent purpose.

[103] *R. v. Chaulk*, [1990] 3 S.C.R. 1303 at 1396-97, per McLachlin J.

conduct committed while in that state of automatism is capable of deterring future criminal conduct.[104] Unless a person can objectively foresee at the time of consuming an intoxicant that they could enter into a state of automatism and commit a violent offence, the criminalization of offences committed while in a state of automatism does nothing to deter a rational individual from consuming an intoxicant.

51. For the majority in the Court below, this was of no moment, as they identified the value of s. 33.1 in deterring the act of consuming intoxicants and not the act of committing criminal offences while in a state of automatism. However, s. 33.1 is no more effective than the common law in deterring the act of consuming intoxicants such as alcohol since intoxication short of automatism is not a defence to any general intent crime at common law. A person already knows at the time they consume an intoxicant that the mere fact of intoxication is not a defence to any criminal acts that they commit while intoxicated. Is it logical or rational to say that a person, imbued with that knowledge, would nevertheless consume an intoxicant in the hope that they enter a state where they lack rational control over their body, so that they can then commit a criminal offence that they have no awareness they are committing? Such a proposition is illogical at best. A person cannot, by definition, anticipate how they will behave while in a state of automatism. This would be akin to expecting a person with a history of sleepwalking to anticipate the behaviour they will engage in while asleep. Criminalizing automatic behaviour can have no deterrent effect on that person while they are still in control of their faculties, because deterrence depends on a state of rationality and foresight. The Appellant therefore submits that, as s. 33.1 has no deterrent

[104] *Hess and Nguyen*, *supra* at 918.

value beyond that which is already created by the common law, the means chosen are not rationally connected to the protective purpose.

52. Justice Khullar identified some additional social norms of deterrence that are advanced by s. 33.1, though she provided no support for this analysis. In her view, the disapproval of "excessive intoxication" that is imposed by s. 33.1 creates some sort of informal social penalties in addition to the formal penalties that s. 33.1 mandates, which can further deter excessive consumption of intoxicants. While it is true that the government can rely on "inferential reasoning that is premised on common sense, and not only on concrete evidence, in order to discharge its burden under s. 1",[105] this link must rest on something more than pure speculation.

53. To the extent that the criminal law is capable of shaping social attitudes toward particular conduct, the common law restrictions on the defence of intoxication already achieve that purpose. Excessive intoxication short of automatism is never a defence to a general intent offence, and indeed is considered aggravating for many offences. How does criminalizing behaviour committed while in a state of automatism do anything more than what the common law already does to deter excessive intoxication or create social disapproval of that conduct? It is difficult to see the logical basis for this assumption.

54. While the Appellant concedes that if the accountability purpose is pressing and substantial, the means chosen would be rationally connected to that purpose, the Appellant submits that Justice Slatter's reasoning ought not be accepted in this regard. Justice Slatter held that "criminalizing the voluntary consumption of drugs which are known to have a hallucinogenic effect on the consumer is rationally connected to the objectives of the criminal law".[106] While this may be true, this is not

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[105] *Frank v. Canada (Attorney General)*, 2019 SCC 1 at para. 64.
[106] Reasons for Judgment of the Court of Appeal, *Appellant's Record*, Vol. I, Tab 5, para. 67.

what s. 33.1 does. Section 33.1 does not criminalize the voluntary consumption of drugs. It is still perfectly legal to consume drugs, alcohol, and any other type of intoxicant for any reason and in any quantity. All that s. 33.1 does is criminalize what would otherwise be criminal conduct – a general intent offence of violence committed while in a state of intoxicated automatism. Further, the rational connection analysis does not assess the connection between a choice of legislative means and the policy objectives of a broad area of law. Rather, it assesses whether there is a "causal connection between the infringement and the benefit sought [by the impugned provision] on the basis of reason or logic" in order to "show that the restriction on rights serves the intended purpose".[107] It is this connection between the purpose of the law and the means chosen to attain that purpose that the *Oakes* analysis seeks to measure.

c. Minimal Impairment

55. Even if the means chosen were rationally connected to the purpose of s. 33.1 – including both the protective purpose and the accountability purpose – the Appellant submits that the Court below found that the means chosen were minimally impairing of the *Charter* rights of accused persons. First, contrary to Justice Khullar's reasoning, the fact that Parliament carefully studied the issue, heard conflicting submissions as to the constitutionality of the provision, and ultimately rejected a less-impairing alternative does not lead to the conclusion that the means chosen are minimally-impairing.[108] While it is true that Parliament heard conflicting submissions from a number of witnesses in Committee, this is the case for virtually every single bill – that is one of the main purposes of Committee testimony. The mere fact that Parliament chose to reject the

[107] *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199 at para. 153.
[108] Reasons for Judgment of the Court of Appeal, *Appellant's Record*, Vol. I, Tab 5, paras. 192-196.

evidence of witnesses who identified constitutional flaws in proposed legislation in favour of the testimony of witnesses who saw no such flaws has never been a basis for finding that a provision is minimally impairing of *Charter* rights. A provision is not minimally impairing simply because Parliament chose to take a risk with its potential unconstitutionality.

56. Second, the notion that Parliament is entitled to deference when legislating a response to complex social problems does not, in the words of the trial judge in *Carter v. Canada (Attorney General)*, "allow a court to down tools and end the analysis".[109] As this Court stated in *Libman v. Quebec (Attorney General)*, this principle does not necessarily even apply in the criminal realm, as "the courts will judge the legislature's choices more harshly in areas where the government plays the role of the 'singular antagonist of the individual' -- primarily in criminal matters -- owing to their expertise in these areas".[110] The test at the minimal impairment stage is "whether there is an alternative, less drastic means of achieving the objective in a real and substantial manner".[111] Where such an alternative exists, Parliament is not entitled to deference simply because it chose a more-impairing means to achieve its objective.

57. Third, the fact that other jurisdictions may have enacted some form of s. 33.1 is no answer to the question of whether s. 33.1 is a demonstrably justified infringement of Canada's *Charter of Rights and Freedoms*.[112] As Chief Justice Wagner observed in *Frank v. Canada (Attorney General)*, "[t]he mere fact that a measure is in effect in other countries is of limited utility in determining whether, in the Canadian context, it is rationally connected to the specific legislative

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[109] *Carter v. Canada (Attorney General)*, 2012 BCSC 886 at para. 1228.
[110] *Libman v. Quebec (Attorney General)*, [1997] 3 S.C.R. 569 at para. 59.
[111] *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37 at para. 55.
[112] Reasons for Judgment of the Court of Appeal, *Appellant's Record*, Vol. I, Tab 5, para. 70, per Justice Slatter.

objective advanced" by the state.[113] Similar reasoning ought to apply to the minimal impairment analysis. Further, what may be a principle of fundamental justice in Canada may not necessarily be a principle of fundamental justice in other countries, as Canada's principles of fundamental justice are those that are "vital or fundamental to our societal notion of justice".[114] This Court already ruled in *Daviault* that the common law restrictions on the defence of intoxication contravened such vital Canadian principles. The fact that such restrictions remain in other countries has little to say on whether the *Charter* infringement wrought by s. 33.1 is minimally impairing.

58. The Appellant respectfully submits that there were several less-impairing alternatives available to Parliament that would have achieved Parliament's objective in a real and substantial manner. These alternatives were considered by Parliament but were rejected because they would not satisfy the government's objective to the exact same degree as s. 33.1. For example, a free-standing offence of intoxication was rejected because Parliament wanted "the same maximum penalties available" as for the underlying offence; because Parliament did not want to create a "drunkenness discount"; and because Parliament did not want to "offer an inducement to intoxicate oneself before committing a crime".[115] Parliament was also concerned about public perception that a person convicted under this provision is "not being held accountable for the substantial harm"

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[113] *Frank*, *supra* at para. 62.
[114] *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, 2004 SCC 4 at para. 10.
[115] House of Commons, Standing Committee on Justice and Legal Affairs, *Evidence* (6 April, 1995) at 98:5-98:6, per Allan Rock, *Appellant's Record*, Vol. II, Tab 8.

that he or she caused.[116] The same accountability reasons were relied upon to reject an offence of criminal negligence by intoxication causing bodily harm.[117]

59. None of these reasons are valid reasons to reject a less-impairing alternative, as this alternative would still achieve the same accountability purpose as s. 33.1 in a real and substantial manner. As the Appellant argued in the Court below, Parliament was perfectly entitled to legislate whatever penalties it wished for a free-standing offence of intoxication in order to signal its desired level of punishment for persons who take risks with the safety of others due to their extreme intoxication. Parliament could call this offence whatever it wished to achieve its desired level of stigmatization. The fact that it did not want to take a legislative option that was open to it and that could achieve Parliament's purpose in protecting individuals from intoxication-fuelled violence and holding individuals to account for that violence means that the *Charter*-impairing choice of means cannot be justified. It is not the most minimally-impairing choice of means.

60. As Plaxton and Mathen explain, a criminal offence of reckless or negligent intoxication would capture the conduct that Parliament seeks to deter – intoxication-fuelled violence – while placing criminal responsibility on individuals for creating "a situation in which they inflict wrongs and harms to others".[118] The causation of harm to others would be a necessary consequence of that reckless or negligent conduct, but the accused need not intentionally or voluntarily cause that harm.[119] Such an offence would reach the same result as s. 33.1 by holding individuals to account for their violent behaviour and deterring intoxication-fuelled violence. However, this offence

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[116] *Ibid* at 98:6.
[117] Canada, Parliament, *House of Commons Debates*, 35th Parl., 1st Sess., Vol. 133, No. 1777 (27 March, 1995) at 11038, per Allan Rock, *Appellant's Book of Authorities*, Tab 3.
[118] Michael Plaxton and Carissima Mathen, "What's Right with Section 33.1" (2020) 25 Can. Crim. L. Rev. 255 at 272, *Appellant's Book of Authorities*, Tab 6.
[119] *Ibid* at 271-272.

would have additional constitutional protections that s. 33.1 lacks: it would require proof of recklessness or negligence in the consumption of the intoxicant, as well as proof of a causal link between the fact of intoxication and the actual harm that results. This would require proof of, at the very least, objective foresight of the risk of bodily harm resulting from the consumption of the intoxicant. It would ensure that only persons who are reckless or negligent in consuming intoxicants are criminally liable, and that persons who experience unforeseeable or extremely rare reactions to ordinary levels of intoxicants are not criminally responsible for that which they could not foresee.

61. Justice Slatter took a different tact in the Court below, arguing that any free-standing offence of intoxication or other offence that actually criminalized the morally blameworthy conduct that s. 33.1 seeks to capture would suffer the same constitutional issues as s. 33.1. As the only other option would be to do nothing at all, s. 33.1 must, by definition, be minimally impairing.[120] However, given Justice Slatter's erroneous interpretation of s. 33.1, this argument loses much of its force. Section 33.1 simply does not state what he wishes it to state.

d. Proportionality

62. The Appellant further submits that the Court below erred in finding that the salutary effects of s. 33.1 outweigh its deleterious effects. This aspect of the proportionality analysis assesses whether "the deleterious effects are out of proportion to the public good achieved by the infringing measure".[121] The Appellant submits that the Court below erred in minimizing the deleterious

[120] Reasons for Judgment of the Court of Appeal, *Appellant's Record*, Vol. I, Tab 5, paras. 72, 74-75.
[121] *Hutterian Brethren*, *supra* at para. 78.

effects of s. 33.1 and overstating its salutary benefits, leading to an imbalanced proportionality assessment and an erroneous conclusion.

63. With respect to the deleterious effects of the law, Justice Slatter refused to recognize any. His reasons do not mention a single negative effect of s. 33.1.[122] For Justice Khullar, the deleterious effects rested in the conviction of an individual for a criminal offence without proof of voluntariness or mens rea.[123] Both of these reasons understate the deleterious effect of the law.

64. By denying a small fraction of accused persons the ability to raise a reasonable doubt as to the voluntariness or *mens rea* elements of a general intent offence, s. 33.1 permits an individual to be convicted of a criminal offence and subject to the stigma, liberty restrictions, and collateral consequences of a criminal conviction for conduct which was not the product of the accused's free will or operating mind. The purpose of s. 33.1 is to impose punishment for an act alone without regard for whether the individual was aware of his or her conduct or had the capacity or ability to reason right from wrong. It runs counter to the fundamental organizing premises of our criminal justice system.

65. Persons like the Appellant who were in a state of automatism at the time they were alleged to have committed a criminal offence cannot raise a reasonable doubt as to the voluntariness of their actions or their ability to appreciate the nature and consequence of those actions. They face a criminal conviction for conduct that they were not aware of or could not control; or where they were incapable of appreciating the nature and consequences of that conduct. The law tells them they were responsible for this criminal conduct because they engaged in legal, commonplace

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[122] Reasons for Judgment of the Court of Appeal, *Appellant's Record*, Vol. I, Tab 5, paras. 80-82.
[123] *Ibid* at para. 201.

activity, with no subjective or objective foresight that a state of automatism and subsequent criminal offences could result.

66. Against this must be weighed the salutary effects. The salutary effects of the law, as identified by Justice Khullar, are the vindication of the dignity and self-worth of victims of crime and the likely deterrent effect of the law. For Justice Slatter, the salutary effects lay in the restoration of confidence in the notion that "our system of criminal law generates just results", that "it will encourage the reporting of violent crimes committed by intoxicated persons", and that it "denounces and deters the use of illegal substances".[124]

67. Care must be taken to refrain from assuming that justice exists in the fact of a conviction, or that victims will be vindicated or better protected if more people are convicted and punished. Canadian notions of justice are more nuanced than a primitive thirst for punishment. As this Court explained in *R. v. M.(C.A.)*, vengeance, or the "uncalibrated act of harm upon another, frequently motivated by emotion and anger, as a reprisal for harm inflicted upon oneself by that person" is not a valid principle of sentencing.[125] This is precisely the type of retribution that s. 33.1 imposes, as it inflicts a harm on the accused for actions that he or she did not foresee and could not control as a reprisal for the harm suffered by the victim while the accused was in a state of automatism. Vengeance, however satisfying it may be to the victim of a crime, is not a salutary aspect of a free and democratic society.

68. With respect to deterrence, as set out above, any deterrent effect of s. 33.1 is more illusory than real. What deters individuals from intoxication-fuelled violence is the knowledge that intoxication is not a defence to conduct that they are able to control. They know that they cannot

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[124] Reasons for Judgment of the Court of Appeal, *Appellant's Record*, Vol. I, Tab 5, para. 80.
[125] *R. v. M.(C.A.)*, [1996] 1 S.C.R. 500 at para. 80.

rely on their intoxication to commit violent acts, and are therefore, presumably, deterred from consuming intoxicants. However, s. 33.1 cannot deter someone from committing acts in a state of automatism, nor can it deter someone from entering that state of automatism. Automatism is not an objectively foreseeable nor necessarily avoidable result of consuming intoxicants. The primary deterrent effect is driven by the common law, which removes intoxication short of automatism as a defence to any general intent offence. Section 33.1 has no additional deterrent effect in that regard.

69. Finally, with respect to the suggestion that s. 33.1 somehow has the effect of encouraging the reporting of intoxication-fuelled violence, there is no evidence to support this suggestion. It is difficult to imagine that victims would otherwise refrain from reporting intoxication-fuelled violence on the assumption that, even though intoxication by alcohol is not a defence to a criminal charge, there is still a minute possibility that the accused could raise a reasonable doubt based on some other form of intoxication. Indeed, the defence has always remained available for specific intent crimes of violence. There is no evidence that, for example, victims of robbery have refrained from reporting robberies based on the possibility that the accused could be acquitted through the defence of intoxication. Absent such evidence, it is speculative to suggest that s. 33.1 has any salutary effect in this regard.

70. On balance, the Appellant submits that the deleterious effects on an individual accused far outweigh any salutary effects to Canadian society. It must be recalled that s. 33.1 does not capture intoxication by alcohol – which scientifically cannot result in a state of automatism[126] – and only

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[126] Michelle S. Lawrence, "Voluntary Intoxication and the *Charter*: Revisiting the Constitutionality of Section 33.1 of the *Criminal Code*" (2017) 40 Manitoba Law Journal 391 at 404-405, *Appellant's Book of Authorities*, Tab 5.

captures the incredibly rare circumstance where a state of automatism results from the consumption of an intoxicant. In that rare circumstance, an individual has no awareness or control over their actions yet are being held accountable for a criminal offence that they did not know they were committing. The ostensible salutary benefit of this law is to deter conduct that the common law already deters, and to satisfy a sense of vengeance in the community by punishing an individual with the stigma of a criminal conviction simply because their unconscious actions caused harm to another. This cannot outweigh the substantial deleterious effects of the law.

F. Remedy

71. The Appellant respectfully requests that s. 33.1 be declared of no force and effect pursuant to s. 52 of the *Constitution Act, 1982*. This is not an appropriate case for a suspension of the declaration of invalidity, nor the remedy of reading down. Section 33.1 cannot be read down in order to be constitutionally compliant, as the "offending portion of the statute" cannot "be defined in a limited manner".[127] The entirety of s. 33.1 infringes the *Charter*. Further, as this Court explained in *Ontario (Attorney General) v. G*, a suspended declaration should only be granted in "rare circumstances", as the onus lies on the government to demonstrate "that an immediately effective declaration would endanger a compelling public interest that outweighs the importance of immediate constitutional compliance and an immediately effective remedy for those whose *Charter* rights will be violated".[128] No such compelling public interest arises here. The number of cases in which an accused can successfully advance a defence of intoxication to a general intent offence of violence is vanishingly low – there is no prospect of intoxication claim "floodgates" if this Court were to strike down s. 33.1, just as no such flood of successful intoxication claims

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[127] *Ontario (Attorney General) v. G*, 2020 SCC 38 at para. 113.
[128] *Ibid* at paras. 132, 139.

resulted from this Court's decision in *Daviault*.[129] There is no compelling public reason why the declaration of invalidity ought to be suspended. It therefore must take immediate effect.

PART IV – COSTS

72. The Appellant does not request costs, and respectfully requests that no costs be awarded against him.

PART V – ORDER SOUGHT

73. The Appellant respectfully requests that s. 33.1 be declared of no force and effect pursuant to s. 52(1) of the *Constitution Act, 1982*, and that the acquittal entered by the trial judge on the charge of break and enter and commit aggravated assault be restored.

DATED at Ottawa, this 17th day of September, 2021

Sean Fagan and Michelle Biddulph
Counsel for the Appellant

[129] As Drassinower and Stuart chronicled, in the nine months following the decision in *Daviault*, the intoxication defence was invoked 11 times in "what must have been thousands of criminal cases involving intoxicated accused". Five of these cases resulted in acquittal, but at least two of those acquittals were reversed by appellate courts. See Martha Drassinower and Don Stuart, "Nine Months of Judicial Application of the *Daviault* Defence" (1995) 39 CR (4th) 280, *Appellant's Book of Authorities*, Tab 4.

PART VI – AUTHORITIES CITED

Cases	**Paragraph Referenced in Factum**
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