SCC File No.: 39781

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

BETWEEN:

MATTHEW WINSTON BROWN

APPELLANT
(Respondent)

- and -

HER MAJESTY THE QUEEN

RESPONDENT
(Appellant)

- and -

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

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PART I: OVERVIEW OF POSITION

1. Enacting s. 33.1 of the *Criminal Code*[1] in 1995, Parliament decided that those who willingly or carelessly pursue dangerous forms of intoxication should be held responsible for any violent acts they commit while in that state.
2. Many cases challenging the constitutionality of s. 33.1 have been heard and decided over the past twenty years, but the provision's constitutional status remains contested. This appeal focuses on the judiciary's most recent adjudication of the issue, wherein the Alberta Court of Appeal held s. 33.1 does not limit s. 7 nor s. 11(d). It further held that if s. 33.1 did limit either ss. 7 or 11(d), any such limitation would be justifiable under s. 1. A minority found a limit on ss. 7 and 11(d), but one that is justifiable under s. 1.
3. The Attorney General of Saskatchewan ("Saskatchewan") intervenes to make submissions on this issue. If s. 33.1 infringes s. 7 or 11(d), any such infringement is justifiable under s. 1. Properly interpreted, s. 33.1 is a minimally impairing measure that advances important societal objectives. Its benefits outweigh its costs.

PART II: POSITION WITH RESPECT TO QUESTIONS IN ISSUE

4. Two Constitutional Questions are set for this Court's consideration:
   (1) Does s. 33.1 of the *Criminal Code* infringe ss. 7 or 11(d) of the *Charter*?
   (2) 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?
5. Saskatchewan submits the answer to the first question is "no", and the answer to the second question is "yes". This factum focuses on the justification issue and does not discuss the question of infringement in detail.

PART III: STATEMENT OF ARGUMENT

6. Any infringement of ss. 7 or 11(d) caused by s. 33.1 is justifiable under s. 1. Saskatchewan's argument in favour of this position proceeds in two parts. Part A identifies the proper interpretation of s. 33.1, because no infringement or justification analysis can proceed without first precisely identifying the effect of the impugned provision. Part B then applies this interpretation to demonstrate that any infringement found by this Court is justifiable under s. 1.

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[1] RSC 1985, c C-46.

A. The proper interpretation of s. 33.1

7. Interpretation is a central issue in this appeal. The issue is determining which elements must be proven for s. 33.1 to apply. Does s. 33.1 apply wherever an accused voluntarily consumes a substance they knew or ought to have known could result in intoxication to any degree, and automatism and violence occurs? Or, is there an additional requirement? Must the automatism or violence also be objectively foreseeable? Or must the consumption constitute a marked departure?

8. In *R v Sullivan*,[2] the Ontario Court of Appeal adopted the broadest possible interpretation of s. 33.1,[3] a conclusion that led to their ultimate finding that s. 33.1 is unconstitutional. In contrast, each of the three judges in the Court below adopted some form of narrower interpretation at some point in their respective reasons.[4] The precise characterization of s. 33.1's requirements varies throughout the decision, but the court below repeatedly suggested the provision applies only where automatism or extreme intoxication is self-induced in the sense that it is objectively foreseeable:

- "It is not contrary to the principles of fundamental justice to hold persons accountable for what they do when they voluntarily become extremely intoxicated and cause injury to others."[5]
- "Self-induced extreme intoxication is behaviour that is outside the purpose of s. 7 and unworthy of constitutional protection."[6]
- "Section 33.1 makes them accountable for unintended consequences based on their intentional and voluntary consumption of drugs and/or alcohol to an extreme level."[7]
- "I agree with the majority in Sullivan that in today's society, voluntary mild intoxication has become widely socially acceptable: at para 90. Not only is alcohol consumption legal and an integral part of many social situations, now cannabis is legal as well. There are of course other recreational drugs that are commonly consumed which are not legal. Socially acceptable consumption of alcohol and other intoxicants is not morally blameworthy in itself and, as the majority in Sullivan points out, is not a marked departure from the norm. However, that is not the conduct that s 33.1 is targeting. Rather, it is targeting the irresponsible use and mixing of intoxicants which could lead to automatism and result in violent behavior."[8]

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[2] 2020 ONCA 333; 387 CCC (3d) 304 [*Sullivan*].
[3] *Ibid*. at para 88 (per Paciocco and Watt JJA); at para 274 (per Lauwers JA).
[4] *CA Reasons* at paras 20, 31, 37, 39, 44, 49, 50 & 77 (per Slatter JA); 139 (per Hughes JA); 197 & 205 (per Khullar JA).
[5] *CA Reasons* at para 49 (per Slatter JA) (emphasis added).
[6] *CA Reasons* at para 50 (per Slatter JA) (emphasis added).
[7] *CA Reasons* at para 139 (per Hughes JA) (emphasis added).
[8] *CA Reasons* at para 205 (per Khullar JA) (emphasis added).

9. The Appellant argues the court below erred in interpreting s. 33.1 as it did. They favour the broader interpretation, suggesting that "there is no requirement in s. 33.1 that the risk created by the consumption of the intoxicant be objectively foreseeable"[9] and "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."[10] In contrast, the Respondent suggests "the predicate element of voluntarily intoxication [within s. 33.1] must be a marked departure from standards of care."[11]
10. Saskatchewan submits that the interpretation of s. 33.1 of the court below is correct insofar as it suggests the provision applies only where automatism or extreme intoxication – rather than intoxication *simpliciter* -- was self-induced in the sense that it was objectively foreseeable. Such an interpretation should be confirmed by this Court.
11. The text of s. 33.1 can plausibly support both the broader interpretation found by the Ontario Court of Appeal and the narrower interpretation found by the court below. The ambiguity should be resolved in favour of the narrower interpretation because: (i) the presumption against surplusage supports it, (ii) the strict construction rule supports it, (iii) the provision's legislative history supports it, (iv) it is not precluded by the jurisprudence to date, and (v) the presumption of constitutional compliance also may support it.

i. Section 33.1 is ambiguous

12. Section 33.1 is genuinely ambiguous and can plausibly support both interpretations presented to this Court. This ambiguity arises from s. 33.1(2):

> (2) For the purposes of this section, a person departs markedly from the standard of reasonable care generally recognized in Canadian society and is thereby criminally at fault where the person, while in a state of self-induced intoxication that renders the person unaware of, or incapable of consciously controlling, their behaviour, voluntarily or involuntarily interferes or threatens to interfere with the bodily integrity of another person.

13. The issue is determining precisely what the adjective "self-induced" modifies. Under one interpretation (the "Broader Interpretation"), the adjective "self-induced" only modifies "intoxication". The standard of care created by s. 33.1(2) would be breached wherever intoxication-*simpliciter* is self-induced, and extreme intoxication and violence follows. Because

[9] Appellant's Factum at para 16.
[10] Appellant's Factum at para 22.
[11] Respondent's Factum at para 48.

it is only intoxication-*simpliciter* that has to be self-induced, the mental element paired with self-inducement (voluntarily doing something that is objectively foreseeable to have that result[12]) is easy to satisfy: only intoxication-*simpliciter* must be objectively foreseeable. Interpreted this way, s. 33.1 attaches criminal responsibility to all intoxication when it is willingly or carelessly pursued, and results in automatism and harmful violence.

14. Under the other interpretation (the "Narrower Interpretation"), the adjective "self-induced" modifies the entire phrase "intoxication that renders the person unaware of, or incapable of consciously controlling, their behavior." The standard of care created by s. 33.1(2) would only be breached if *extreme* intoxication is self-induced, and violence follows. Because *extreme* intoxication has to be self-induced, the mental element paired with self-inducement (voluntarily doing something that is objectively foreseeable to have that result) is more difficult to satisfy: extreme intoxication or automatism, and not just intoxication-*simpliciter*, must be objectively foreseeable. Interpreted this way, s. 33.1 attaches criminal responsibility to *uncontrolled* intoxication when it is willingly or carelessly pursued, and results in automatism and harmful violence.

ii. The presumption against surplusage

15. In *R v Proulx*,[13] this Court said "it is a well accepted principle of statutory interpretation that no legislative provision should be interpreted so as to render it mere surplusage."[14] It is presumed that Parliament "avoids superfluous or meaningless words, that it does not pointlessly repeat itself or speak in vain."[15] Although the text of s. 33.1 plausibly supports both the Narrower and Broader Interpretations, the Broader Interpretation would render s. 33.1(2) mere surplusage and it should therefore be rejected.

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[12] Saskatchewan submits that a subjective-objective hybrid *mens rea* should attach to the phrase "self-induce", as determined by the Nova Scotia Court of Appeal in *R v Chaulk* (2007 NSCA 84 at para 47, 223 CCC (3d) 174 [*Chaulk*]).

[13] 2000 SCC 5, [2000] 1 SCR 61.

[14] *Ibid.* at para 28.

[15] Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed (Markham: LexisNexis 2014) at 211. This presumption "applies to both individual words and phrases and to larger units of legislation such as paragraphs and sections and to parts of the legislative scheme" (at 212-13).

16. Subsection 33.1(1) reads:

> 33.1 (1) It is not a defence to an offence referred to in subsection (3) that the accused, by reason of self-induced intoxication, lacked the general intent or the voluntariness required to commit the offence, where the accused departed markedly from the standard of care as described in subsection (2).

17. It outlines four conditions that are required for s. 33.1 to apply: (i) The accused commits a violent offence outlined in s. 33.1(3), (ii) the accused had self-induced intoxication, (iii) the accused lacked the voluntariness required to commit the offence "by reason of" self-induced intoxication, and (iv) the accused departed markedly from the standard of care outlined in s. 33.1(2).

18. Under the Broader Interpretation, s. 33.1(2) serves no meaningful purpose. If the standard of care outlined in s. 33.1(2) is breached wherever an accused self-induces intoxication and automatism and violence follows, the subsection does nothing but duplicate the conditions already incorporated into ss. 33.1(1) and (3). Under this interpretation, s. 33.1(2) becomes irrelevant. The interpretation therefore offends the presumption against statutory surplusage.

19. In contrast, s. 33.1(2) does serve a meaningful purpose under the Narrower Interpretation. In such a situation, s. 33.1(2) adds an additional condition to those outlined in s. 33.1(1). An additional element other than self-induced intoxication, automatism, and violence is required to engage s. 33.1 (all conditions that are already present in ss. 33.1(1) and (3)); the extreme intoxication must itself be self-induced (a condition that is not present in ss. 33.1(1) and (3)). The presumption against surplusage therefore favours the Narrower Interpretation.

iii. Strict construction

20. In *Marcotte v Canada (Deputy AG)*,[16] this Court said "No authority is needed for the proposition that if real ambiguities are found, or doubts of substance arise, in the construction and application of a statute affecting the liberty of a subject, then that statute should be applied in such a manner as to favour the person against whom it is sought to be enforced."[17] When interpreting penal provisions, ambiguity should be resolved in a manner most generally favourable to accused persons.[18]

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[16] [1976] 1 SCR 108.
[17] *Ibid.* at 115.
[18] *R v SAC*, 2008 SCC 47 at paras 30-32, [2008] 2 SCR 675; *R v McIntosh*, [1995] 1 SCR 686 at para 29; *R v Pare*, [1987] 2 SCR 618 at 629-630.

21. Compared to the Broader Interpretation, the Narrower Interpretation restricts the scope of s. 33.1 and is therefore more favourable to accused persons. This is true despite the fact that the accused person in this *particular* appeal bolsters their constitutional challenge by arguing for the Broader Interpretation. The strict construction rule therefore provides another reason this Court should reject the Broader Interpretation when resolving the ambiguity present in s. 33.1.

iv. Legislative history

22. A provision's legislative history provides contextual information that is helpful when interpreting legislation.[19]

23. The legislative history of s. 33.1 reveals a Parliament concerned with the moral and legal culpability of those who willingly intoxicate themselves into *an automatistic state* and not with all who intoxicate themselves.[20] It demonstrates a desire to denounce and deter *uncontrolled* intoxication, and not to denounce or deter intoxication-*simpliciter*.[21] This supports the Narrower Interpretation which orients the provision's effect toward this particular type of antisocial behavior.[22]

v. The Narrow Interpretation is not precluded by the jurisprudence to date

24. The Appellant notes that Justice Slatter cited no authority for his proposition that s. 33.1 requires the risk created by the consumption of intoxicants to be objectively foreseeable.[23] While this is true, he is not the first to interpret the provision as to exclude accidental or unforeseeable automatism.

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[19] *Canadian National Railway v Canada (Attorney General)*, 2014 SCC 40 at para 47, [2014] 2 SCR 135.

[20] See for e.g. *House of Commons Debates*, 35th Parl, 1st Sess (27 March 1995) at 11038-11039 (Hon Allan Rock) [*March 27 Debates*]; Minutes of Proceedings and Evidence of the Standing Committee on Justice and Legal Affairs, *Respecting Bill C-72, An Act to amend the Criminal Code (self-induced intoxication)*, (6 April 1995) at 98:5 (Hon Alan Rock); *March 27 Debates, Ibid.* at 11048 (Hon Myron Thompson); Minutes of Proceedings and Evidence of the Standing Committee on Justice and Legal Affairs, *Respecting Bill C-72, An Act to amend the Criminal Code (self-induced intoxication*, (5 April 1995) at 97:5 (Professor Patrick Healy).

[21] *Ibid.*

[22] *Ibid.*

[23] Appellant's Factum at para 16.

25. Other courts have described s. 33.1 in language that suggests they also interpreted the provision as to require voluntary or self-induced *extreme* intoxication, and to exclude accidental or unforeseeable automatism:

- "In summary, s. 33.1 in effect provides that the act of becoming voluntarily intoxicated to the extent of being incapable of controlling one's behaviour, constitutes criminal culpability sufficient to found criminal liability for offences committed against the bodily integrity of others"[24]
- "In my view, reasonable people do not agree that a person who drinks himself or herself to a stupor is morally innocent, at all… people who drink themselves to a stupor possess a continuing blameworthy state of mind for subsequent violence and should not be considered morally innocent."[25]
- "There is a moral blameworthiness attached to getting oneself so intoxicated as to lose control of one's faculties. Individuals caught within the net of this provision are not entirely morally blameless."[26]
- "Parliament is entitled to express the view that extreme self-intoxication is morally blameworthy behaviour. It is entitled to express the view that those who voluntarily become extremely intoxicated and hurt others while in that condition are to be held accountable."[27]
- "In this context, it is justifiable to reasonably limit the rights of those who voluntarily consume extreme amounts of intoxicants and then commit violence."[28]
- "Those who choose to consume intoxicating substances in amounts that contribute to them committing violence against others should be held accountable."[29]

26. Saskatchewan acknowledges that these cases could be seen to conflict three cases often cited when interpreting s. 33.1: *R v Vickberg*;[30] *R v Chaulk*;[31] and *Bouchard-Lebrun*.[32]

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[24] *R v T(BJ)*, 2000 SKQB 572 at para 35, 200 Sask R 42 (emphasis added).

[25] *R v SN*, 2012 NUCJ 2 at paras 109-111, [2012] NuJ No 3 (emphasis added) [*SN*]. See also para 113: "I acknowledge that the notion of moral blameworthiness can be problematic. For example, one can sympathize with the high school senior who, never having had a drink, achieves an unexpected and extreme state of intoxication at the grad dance after consuming a moderate amount of alcohol. Perhaps a flexible approach to the question of what constitutes 'self-induced' intoxication might be appropriate in such a case."

[26] *R v Chan*, 2018 ONSC 3849 at para 132, 365 CCC (3d) 376 (emphasis added), overturned by *Sullivan*, *supra* note 2.

[27] *Ibid.* at para 152 (emphasis added).

[28] *R v Robb*, 2019 SKQB 295 at para 34, 163 WCB (2d) 26 [*Robb*].

[29] *Ibid.* at para 56.

[30] (1998), 16 CR (5th) 164 (CanLII) (BCSC) [*Vickberg*].

[31] *Supra* note 12.

[32] 2011 SCC 58, [2011] 3 SCR 575 [*Bouchard-Lebrun*];

27. These three cases are not determinative, and neither Justice Slatter's nor the Narrower Interpretation should be rejected based on a purported conflict with these three cases. First, a careful examination of these cases reveals that nowhere do they examine or authoritatively settle the main interpretive question in issue here: Whether the standard of care created by s. 33.1(2) requires extreme intoxication to be self-induced, or whether it just requires intoxication-*simpliciter* to be self-induced. Second, and in the alternative, if *Bouchard-Lebrun* did conclusively decide this question, it is time to revisit this precedent.

28. In *Vickberg*, the court concluded "two things must be established" for s. 33.1 to apply: "First, the intoxication must be self-induced, and second, there must be a marked departure from the recognized standard of care in the actions of the accused."[33] On the first point, it concluded that "for intoxication to be self-induced, the accused must intend to become intoxicated, either by voluntarily ingesting a substance knowing or having reasonable grounds to know it might be dangerous, or by recklessly ingesting such a substance."[34] Applying this definition, it concluded s. 33.1 had no application. It then proceeded to discuss the second point, the definition of "marked departure," and adopted the Broader Interpretation, but the analysis was sparse and the discussion was *obiter dicta*.

29. In *Chaulk*, the court was tasked with determining whether the trial judge erred in the test used to determine whether "intoxication was 'self-induced' as used in s. 33.1(1) of the *Criminal Code*."[35] It relied on *Vickberg's*[36] interpretation of s. 33.1 and cases that define the "defence of involuntary intoxication" in the context of impaired driving offences[37] to conclude "the test for self-induced intoxication" incorporates a hybrid subjective-objective *mens rea*. Intoxication is "self-induced" within the meaning of s. 33.1(1) where the accused "voluntarily consumed a substance which s/he knew or ought to have known was an intoxicant and the risk of becoming intoxicated was or should have been within his/her contemplation."[38] Although some subsequent cases have applied this formulation as an overarching test for s. 33.1, the court's analysis and conclusions were restricted to s. 33.1(1) and the phrase "self-induced intoxication", as it appears in that subsection.

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[33] *Vickberg*, *supra* note 30 at para 67.
[34] *Ibid.* at para 68.
[35] *Chaulk*, *supra* note 12 at para 6 (emphasis added).
[36] *Ibid.* at paras 35-37.
[37] *Ibid.* at paras 42-46.
[38] *Ibid.* at para 47.

It did not interpret s. 33.1(2) or s. 33.1 more generally, as it did not need to do so because the appeal was allowed on other grounds.

30. *Bouchard-Lebrun*, a seminal decision on the application of s. 16 of the *Criminal Code*, is the next case that must be considered. In the final three paragraphs of that 40-page decision, this Court discussed whether s. 33.1 applied to the facts before it. In concluding that the provision applied, this Court cited *Vickberg* and *Chaulk* to state that s. 33.1 applies where "(1) the accused was intoxicated at the material time; (2) the intoxication was self-induced; and (3) the accused departed from the standard of reasonable care generally recognized in Canadian society by interfering or threatening to interfere with the bodily integrity of another person."[39] Such a passage must be considered in the context it was written. And, considering the limited nature of the question the Court was adjudicating and the aforementioned limits of the cases it cited for this proposition, it should not be assumed that this Court intended this passage to dispose of all question related to the proper interpretation of s. 33.1.

31. In concluding that s. 33.1 applied, this Court in *Bouchard-Lebrun* also rejected the Appellant's argument that intoxicant-induced psychosis is automatically excluded from the ambit of s. 33.1 because it is not a "normal effect" of intoxication.[40] It is important to note, however, that this Court also rejected the distinction between "normal effects" and "abnormal effects" of intoxicants, and found that toxic psychosis is a "fairly frequent phenomenon" resulting from some intoxicants.[41] In light of these factual conclusions, the legal conclusion that intoxicant-induced psychosis is not automatically excluded from the ambit of s. 33.1 cannot be characterized as a rejection of the Narrower Interpretation and its requirement that extreme intoxication be objectively foreseeable for standard of care outlines in s. 33.1(2) to be breached.

32. A careful examination of *Vickberg*, *Chaulk*, and *Bouchard-Lebrun* therefore reveals that the important interpretation question raised in this appeal remains open.

33. In the alternative, if this Court decides that in *Bouchard-Lebrun* it did decisively interpret s. 33.1 and in doing so incorporated the Broader Interpretation into the provision's governing test,

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[39] *Bouchard-Lebrun*, *supra* note 32 at para 89.
[40] *Ibid.* at para 91.
[41] *Ibid.* at para 79.

Saskatchewan submits it is time to revisit that precedent.[42] Such an interpretation arose out of a case where the provision's interpretation was not a central issue, and where the provision's constitutionality was not in issue at all. As such, the Court's interpretive analysis was brief and was not informed by the presumption against surplusage, the strict construction rule, the provision's legislative history, and perhaps most importantly the presumption of constitutional compliance, which will be discussed next.

vi. The presumption of constitutional compliance

34. Where genuine ambiguity exists, courts ought to adopt the interpretation which best accords with the *Charter* and the values to which it gives expression.[43] As this Court noted in *R v Mabior*,[44] "Charter values are always relevant to the interpretation of a disputed provision of the *Criminal Code*."[45]

35. Saskatchewan's position is that if s. 33.1 infringes either s. 7 or s. 11(d), any such infringement is justifiable under s. 1 of the *Charter* regardless of whether the Broader or Narrower Interpretation is applied.

36. There is, however, enough distance between the Broader and Narrower Interpretation of s. 33.1 that this Court could conclude s. 33.1 is not justifiable under the Broader Interpretation and is justifiable under the Narrower Interpretation. In such a situation, the presumption of constitutionality becomes an additional and powerful reason to favour the Narrower Interpretation over the Broader Interpretation.

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[42] In both *Craig v R* (2012 SCC 43, [2012] 2 SCR 489) and *R v Chaulk* ([1990] 3 SCR 1303) this Court revisited previous interpretations. In *R v Bernard* ([1988] 2 SCR 833) Justice Dickson set out a non-exhaustive list of instances in which this Court is willing to overturn its own precedent. Although he was in dissent, these factors were later adopted by the full Court (*R v Chaulk*, *Ibid.* and *R v B(KG)*, [1993] 1 SCR 740). Two of these factors militate toward reconsideration in this instance: First that a movement from the Broader Interpretation to the Narrower Interpretation would better protect *Charter* values, and second that a movement from the Broader Interpretation to the Narrower Interpretation would establish a rule that is favourable to accused persons.

[43] *R v Zundel*, [1992] 2 SCR 731 at 770-771; *Application Under s. 83.28 of the Criminal Code, Re*, 2004 SCC 42 at para 35, [2004] 2 SCR 248; *R v Sharpe*, 2001 SCC 2 at para 33, [2001] 1 SCR 45.

[44] 2012 SCC 47, [2012] 2 SCR 584.

[45] *Ibid.* at para 44. See also paras 45-46.

B. Section 33.1 is justifiable under s. 1 of the *Charter*

37. The proper interpretation of s. 33.1 established, the next question is whether the provision infringes ss. 7 and 11(d) of the *Charter* and, if it does, whether such an infringement is justifiable under s. 1.

38. Justices Slatter and Hughes concluded that s. 33.1 infringes neither s. 7 nor s. 11(d). Largely adopting the Respondent's submissions on this issue, Saskatchewan's position is Justices Slatter and Hughes were correct in holding as they did. Properly interpreted, s. 33.1 creates an alternative path to criminal culpability. It allows for conviction where an accused self-induces automatism through intoxication and while in that automatistic state performs the *actus reus* of a violent general intent offence. Section 33.1 does not allow for conviction absent the minim required levels of *mens rea* or voluntariness. It does not improperly substitute the intention to consume any intoxicant for the intention to commit a criminal offence. And the principles of fundamental justice do not require contemporaneity or absolute symmetry between the *mens rea* and prohibited consequences of the offence.

39. But if this Court rejects this position and finds any infringement, Saskatchewan submits that any such infringement is justifiable under s. 1.[46] The constitution allows for those who willingly or carelessly pursue dangerous forms of intoxication to be held responsible for the violent acts they commit while in that state.

i. The governing framework

40. The framework for determining whether a limit on rights that is prescribed by law is justifiable under s. 1 is well established. An appropriate level of deference must permeate the application of the *Oakes*[47] framework in this instance. Deference is owed where an impugned provision seeks to balance competing rights, even when the impugned provision is criminal in nature.[48] In enacting s. 33.1, Parliament sought to protect of the security and equality rights of actual and potential

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[46] On this point, Saskatchewan submits that the potentially infringing aspects of s. 33.1 are justifiable under s. 1 regardless of whether the Narrower or Broader Interpretation is applied to the provision. The provision is constitutional under the Broader Interpretation, and is constitutional under the Narrower Interpretation *a fortiori*.

[47] [1986] 1 SCR 103.

[48] *RJR-MacDonald Inc v Canada*, [1995] 3 SCR 199 at para 135 [*RJR-MacDonald*].

victims, and to balance those rights with the rights of accused persons. Furthermore, the question of how a person's willingly-induced intoxicated state should factor into an assessment of their criminal culpability is not an issue for which there is an "obviously correct or obviously wrong solution."[49] Courts and legislators around the world have struggled with this issue for centuries.[50]

ii. Pressing and substantial objective: Identifying the objectives

41. Saskatchewan submits the objective of s. 33.1 is as stated in the preamble, as found by Justice Khullar,[51] and as is accepted by the Appellant.[52] The provision pursues two interrelated objectives: (i) promoting accountability for acts of violence committed by those who self-induce automatism through self-intoxication, and (ii) protecting the security of the person and equality rights of others, particularly women and children, from violent crimes at the hands of intoxicated offenders (the "Protective Objective").

42. The accountability objective, however, should be subdivided further. Accountability is not synonymous with punishment, and the accountability objective's focus is broader than convicting and punishing those who commit violent acts after self-inducing extreme intoxication (the "Penal Objective").[53] It is also about communication and education (the "Communicative Objective").[54] Several parliamentarians debating s. 33.1 expressed concern about how the availability of an extreme intoxication defence could signal that intoxicated violence was generally more excusable than non-intoxicated violence.[55] They also emphasized that an important objective of s. 33.1 was to communicate that no violence against women is tolerated, thus encouraging women to report

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[49] *Newfoundland (Treasure Board) v NAPE*, 2004 SCC 66 at para 83, [2004] 3 SCR 381.
[50] See generally *R v Daviault*, [1994] 3 SCR 63 at 109-114 [*Daviault*].
[51] *CA Reasons* at paras 182-183 (per Khullar JA).
[52] Appellant's Factum at para 43.
[53] Though this is one component of the accountability objective. See e.g. *March 27 Debates, supra* note 20 at 11037 (Hon Alan Rock).
[54] Punishment is itself communicative, as demonstrated by the sentencing objective denunciation. But the Communicative Objective is broader than this: Criminalization of an egregious subspecies of intoxicated violence itself communicates moral censure regarding all intoxicated violence, regardless of whether denunciation through punishment follows.
[55] *March 27 Debates, supra* note 20 at 11039 (Hon Allan Rock); 11043-11044 (Hon Christiane Gagnon); 11048 (Hon Myron Thomson).

the violent crimes against them that are chronically underreported.[56] Justice Slatter also emphasized that s. 33.1 serves "the general purpose of the criminal law of protecting core societal values."[57]

43. It can therefore be said that s. 33.1 has three objectives: A Penal Objective and a Communicative Objective (which together comprise the accountability objective mentioned in the Preamble), and a Protective Objective.

44. Although courts must be careful not to define legislative objectives too broadly,[58] it is also important not to define the legislative objective too narrowly, as Saskatchewan submits the Appellant does in stating s. 33.1 is only aimed at "the harm resulting from the commission of a criminal offence while in a state of automatism."[59] The Penal Objective's focus is restricted to those who voluntarily induce extreme intoxication, but the foci of the Communicative and Protective Objectives are broader: They are aimed at intoxicated violence more generally.

45. This broader focus is evident in the fact the beneficial effects of s. 33.1 are broader than the sum of the situations to which it applies. By attaching criminal culpability to violence committed after self-inducing extreme intoxication, the provision closed a loophole and established a blanket prohibition on intoxicated violence.[60]

46. With respect to the Communicative Objective, this communicates that *no* intoxicated violence is acceptable or excusable in Canadian society, and that the state cares equally about victims of intoxicated violence and victims of non-intoxicated violence.

47. The Protective Objective is advanced through similar means. By criminalizing an egregious subspecies of intoxicated violence, the provision deters intoxicated violence and dangerous intoxication more generally, just as the *Criminal Code*'s dangerous driving causing death provisions deter all hazardous driving despite only applying to driving that rises to the level of a marked departure and that results in death. A scheme that criminalizes intoxicated violence except where the intoxication is extreme simply does not deter intoxicated violence or dangerous

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[56] *Ibid.* at 11044 (Hon Christiane Gagnon); 11039 (Hon Alan Rock).
[57] *CA Reasons* at para 61 (per Slatter JA).
[58] *RJR-MacDonald*, *supra* note 48 at para 144.
[59] Appellant's Factum at para 46.
[60] Following the enactment of s. 33.1, only one uncommon form of intoxicated violence was not criminalized: Violence that follows extreme intoxication when such extreme intoxication is not self-induced.

intoxication to the same extent as the scheme created by s. 33.1, which criminalizes intoxicated violence and leaves no exception for those who commit acts of violence after self-inducing extreme intoxication.

iii. Pressing and substantial objective: Determining whether objectives are pressing and substantial

48. The pressing and substantial nature of Penal Objective, the Communicative Objective, and the Protective Objective ought to be assessed independently. Such an assessment demonstrates that each of these three objectives are pressing and substantial.

49. In *R v Penno*,[61] a case about intoxicated driving, Lamer CJC in his concurring decision categorically stated that "a measure ensuring that the most drunk, and by implication the ones representing the greatest threat to public safety, be convicted is of sufficient importance to justify restricting the rights contained in ss. 7 and 11(d)." As Professor Coughlin noted in his commentary[62] cited by Justice Khullar,[63] the Penal Objective is pressing and substantial, and the court below was correct in holding that it was.[64]

50. The Communicative Objective is also pressing and substantial. This Court has noted that "[o]ur criminal law is a system of values" and that criminalization is a tool used to enshrine a "basic set of communal values shared by all Canadians."[65] When Parliament criminalizes particular conduct, it signals that such conduct encroaches on our society's basic code of values and that the state is concerned about those harmed by such conduct. It is obviously pressing and substantial to communicate that intoxicated violence is never acceptable in our society, and that the state is concerned about all of those who are harmed by intoxicated violence (particularly women and children who are disproportionately harmed by such violence). The pressing and substantial nature of the Communicative Objective is perhaps most clearly illustrated by the societal response to the *Daviault* decision, which Justice Slatter noted "rightly caused public outcry."[66] The notion that someone who self-induced extreme intoxication could use that morally culpable and objectively

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[61] [1990] 2 SCR 865 at 883.
[62] Steve Coughlan, "Sullivan: Can a Section 7 Violation Ever be Saved Under Section 1?" (2020) 63 CR (7th) 157.
[63] *CA Reasons* at para 172 (per Khullar JA).
[64] *CA Reasons* at paras 62-65 (per Slatter JA); paras 183-184 (per Khullar JA). See also *Sullivan, supra* note 2 at para 252 (per Lauwers JA).
[65] *R v M(CA)*, 1996 SCC 230 at para 81, [1996] 1 SCR 500.
[66] *CA Reasons* at para 84 (per Slatter JA).

risky behaviour as an excuse to entirely negate criminal culpability was widely condemned as "being inconsistent with important social and legal values."[67]

51. In *R v Robinson,*[68] Lamer CJC said "[t]here is no question that the protection of the public from intoxicated offenders is of sufficient importance to warrant overriding a constitutionally protected right or freedom."[69] The Protective Objective is therefore also pressing and substantial, as the Appellant concedes.[70]

iv. Rational connection

52. To establish a rational connection, the Crown only must prove that it is *rational* for Parliament to believe the measures enacted by the impugned law will help achieve the impugned law's objective. As this Court stated in *RJR-MacDonald Inc v Canada,*[71] such a causal connection can be based on "reason", "logic", or "common-sense", and can even be found in the face of inconclusive empirical evidence.[72] The rational connection test "is not particularly onerous."[73]
53. It is rational to believe that criminalizing the violent consequences of self-induced extreme intoxication advances all three of the provision's objectives.
54. There can be no real dispute that it is rational to believe s. 33.1 advances the Penal and Communicative Objectives. Criminalizing violent acts committed by those who self-induce extreme intoxication both allows for such people to be convicted for such acts and communicates that intoxicated violence is unacceptable in Canada.
55. With respect to the Protective Objective, it is rational to believe the provision protects, as was held by all three judges in the court below.[74] First, it is rational to believe the provision deters people from self-inducing *extreme* intoxication or intoxicating themselves to the point that they risk losing their ability to control themselves because they know they will be responsible for whatever acts of violence they commit while automatistic. The Appellant's contrary assertion is attributable

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[67] *CA Reasons* at para 11 (per Slatter JA).
[68] *R v Robinson*, [1996] 1 SCR 683.
[69] *Ibid.* at para 43.
[70] Appellant's Factum at para 43.
[71] *Supra* note 48.
[72] *Ibid.* at paras 86, 156-158.
[73] *Little Sisters Book & Art Emporium v Canada (Minister of Justice)*, 2000 SCC 69 at para 228, [2000] 2 SCR 1120.
[74] *CA Reasons* at paras 67-68 (per Slatter JA); 164 (per Hughes JA); 189 (per Khullar JA).

to their adoption of the Broader Interpretation.[75] Considering the evidence before Parliament when it enacted s. 33.1 that showed a strong correlation between intoxication and violence,[76] it is rational to believe deterring *extreme* intoxication reduces violence.

56. Second, it is rational to believe the provision deters people from acting violently while intoxicated. Section 33.1 puts the community on notice that under nearly no circumstances will self-induced intoxication be used as an excuse to negate criminal culpability for violent acts committed while intoxicated. This in turn dissuades people from either: (i) choosing violence on the off chance they may be able to later escape culpability by raising a reasonable doubt about their level of intoxication, or else (ii) choosing violence and then pursuing self-induced automatism in an act of devious opportunism.

57. It is therefore rational to believe s. 33.1 advances the Protective Objective by protecting the security of the person and equality rights of others, particular women and children, from violent crimes at the hands of intoxicated offenders.

v. Minimal impairment

58. The minimal impairment inquiry focuses on "whether the limit on the right is reasonably tailored to the pressing and substantial goal put forward to justify the limit […] whether there are less harmful means of achieving the legislative goal."[77] The focus is not on whether the adjudicating court can conceive of an alternative that might better tailor objective to infringement, it is whether a particular infringement falls "falls within a range of reasonable alternatives."[78] In making this assessment, "the courts accord the legislature a measure of deference, particularly on complex social issues where the legislature may be better positioned than the courts to choose among a range of reasonable alternatives."[79]

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[75] Appellant's Factum at para 50: Because s. 33.1 applies only where a person can objectively foresee at the time of consuming that they could enter into a state of automatism, the criminalization of violent acts while in a state of automatism caused by self-induced extreme intoxication *does* deter rational individuals from consuming certain intoxicants in certain quantities.

[76] As outlined in *Robb, supra* note 28 at para 32. See also *CA Reasons* at para 60 (per Slatter JA).
[77] *Hutterian Brethren of Wilson Colony v Alberta*, 2009 SCC 37 at para 53, [2009] 2 SCR 567.
[78] *Ibid.* at para 144 (per Abella J, dissenting on other matters).
[79] *Ibid.* at para 53. See also *RJR-MacDonald, supra* note 48 at para 160.

59. Saskatchewan submits the provision falls within a range of reasonable alternatives, and is therefore minimally impairing.

60. First, although the test is not whether other legislative options exist and which of those options "might be the most desirable,"[80] other options for achieving Parliament's objectives are less effective. The Appellant suggests that a standalone offence of negligent or reckless intoxication[81] would "still achieve the same accountability purpose as s. 33.1 in a real and substantial manner"[82] and is therefore a less-impairing alternative. This position overlooks that fact that symmetry between the offence convicted and harm caused can be an important aspect of the communicative purpose of criminalization, as Justice McLachlin (as she then was) recognized in *R v Creighton,*[83] when she stated "it might well shock the public's conscience to convict a person who has killed another only of aggravated assault" as opposed to convicting them of manslaughter.[84] The insufficiency of this, and other, alternatives becomes clear when the objectives of s. 33.1 and the manner in which it advances these objectives, which was discussed at paragraphs 44-47 and 53-57 of this factum, are properly understood.

61. Second, as found by Justice Khullar in the court below[85] and by the Saskatchewan Court of Queen's Bench in *Robb,*[86] s. 33.1 is narrowly tailored in the sense that it applies to a narrow set of circumstances. This considerably limits the number and type (in terms of moral blameworthiness) of offenders who may suffer an infringement of their rights. First, it applies only to general intent and not to specific intent offences which tend to be more serious and carry more stigma. Second, unlike similar rules in other commonwealth jurisdictions,[87] it applies only to violent general intent offences. Third, and perhaps most importantly, it applies only where extreme intoxication or automatism is self-induced. Only those whose behavior constitutes a marked departure in that they voluntarily choose or risk *extreme* intoxication are caught in the

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[80] *R v Edward Books and Art Ltd*, [1986] 2 SCR 713 at 783.
[81] Appellant's Factum at para 60.
[82] Appellant's Factum at para 59.
[83] [1993] 3 SCR 3.
[84] *Ibid.* at 48.
[85] *CA Reasons* at para 196 (per Khullar JA).
[86] *Robb, supra* note 28 at para 50.
[87] Luke McNamara et al, "Evidence of Intoxication in Australian Criminal Courts: A Complex Variable with Multiple Effects" (2017) 43:1 Monash U L Rev 148 at 169-170.

ambit of s. 33.1. The provision therefore cannot be used to impose imprisonment absent proof of an element of fault.[88]

62. It does not punish the morally innocent, it does not punish involuntary behaviour,[89] and it certainly does not require wrongful convictions.

63. By limiting s. 33.1's application to morally blameworthy offenders and by limiting s. 33.1's application to a very narrow set of circumstances, Parliament succeeded in drafting a provision that falls within a range of reasonable alternatives. Other options simply would not have advanced the provision's objectives as effectively. Section 33.1 is therefore minimally impairing.

vi. Salutary and deleterious effects

64. Finally, s. 33.1 achieves proportionality between its deleterious and salutary effects.

65. The benefits of s. 33.1 are both compelling and broad. Although the provision's deleterious effects are limited to the sum of the situations to which it applies, which will be discussed shortly, its salutary effects are not. By attaching criminal culpability to violence committed after self-inducing extreme intoxication, the s. 33.1 closed a loophole and established a blanket

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[88] And for this reason it does not "deny that even a very minimal mental element is required for sexual assault" and other violent general intent offences, which was Justice Cory's specific concern with the Leary Rule in *Daviault*, and which he described as a breach "so drastic and so contrary the principles of fundamental justice that it cannot be justified under s. 1 of the *Charter*" (*supra* note 50 at 92). In the alternative, if s. 33.1 is deemed to breach the principles of fundamental justice in the manner described by Justice Cory in this passage, Saskatchewan submits that the passage is not dispositive of the s. 1 inquiry with which this Court is currently tasked. As explained by Justice Khullar in the decision below (*CA Reasons* at para 176), the passage arose out of a "cursory s 1 analysis" for which there "was no evidence before the Court to explain or justify the common law rule in Leary", let alone the "evidentiary record that exists in this case." Put simply, this Court cannot assume Justice Cory intended to take the exceptional, if not entirely unprecedented, step of creating an absolute right.

[89] It rather punishes the voluntary creation of conditions in which involuntary behaviour which puts others at risk may follow.

prohibition for intoxicated violence.[90] As was explained in detail at paragraphs 44-47 and 53-57 of this factum, the closure of this loophole both communicates and protects.

66. The communication is valuable from both a deontological and consequentialist perspective. By communicating that all intoxicated violence offends Canada's communal values and that the state cares equally about victims of intoxicated violence and victims of non-intoxicated violence, s. 33.1 brings the criminal law in step with society's deep-seated convictions. It reflects and safeguards "values which are integral to a free and democratic society," as discussed by this Court in *R v Butler*.[91] And this is a deontological good. But it is also reasonable to assume, as the Nunavut Court of Justice did in *R v SN*,[92] that such communication would also have collateral practical effects, such as encouraging the reporting of intoxicated and domestic violence because victims are made aware that such violence is always taken seriously by the state.

67. The protection it offers is also critically valuable. By deterring both extreme intoxicated and intoxicated violence more generally, s. 33.1 protects the equality and security rights of victims, particularly women and children who are disproportionately targeted by intoxicated violence.

68. In contrast, the provision's deleterious effects are narrow. Section 33.1 creates an alternative path to criminal culpability, allowing for conviction where an accused self-induces automatism through intoxication and while in that automatistic state performs the *actus reus* of a violent general intent offence. In doing so, it allows an individual who committed a particular offence involuntarily[93] to be convicted of that offence in the exact same manner as someone who committed the offence voluntarily, leaving the difference in the moral culpability between the two types of offender to be addressed only at sentencing. This does not result in conviction absent *mens rea* or voluntariness, or in the punishment of the morally innocent, as was previously discussed. But concerns about symmetry between the *mens rea* of self-induced extreme intoxication and *actus reus* of the offence convicted, and concerns about contemporaneity of the same, may arise. In Saskatchewan's submissions, no infringement of s. 7 or s. 11(d) occurs, but if any infringement is found it would have to be of this nature.

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[90] *Supra* note 60.
[91] *R v Butler*, [1992] 1 SCR 452 at 493.
[92] *SN, supra* note 25 at paras 100-104.
[93] Here, the phrase "committed the offence" is used loosely; it would be more accurate to say they committed the *actus reus* elements of the offence charged.

69. Such infringements, if found, may have a serious deleterious effect for a specific individual. But the severity and frequency of an impugned provision's impact both must be considered when the gravity of its overarching deleterious effects are assessed.[94] And, as other courts tasked with assessing the constitutionality of s. 33.1 have found,[95] s. 33.1's deleterious effects are greatly limited by the fact it applies in narrow set of circumstances and only to morally blameworthy offenders who voluntarily choose or risk extreme intoxication.
70. Section 33.1's deleterious effects are therefore proportionate with its salutary effects. Any infringement of ss. 7 and 11(d) found accordingly ought to be upheld under s. 1.

PART IV: COSTS

71. Saskatchewan makes no submissions about costs.

PART V: REQUEST FOR ORDER

72. Saskatchewan requests an order allocating ten (10) minutes of oral argument.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, this 26th October 2021, at Regina, Saskatchewan.

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Counsel for the Intervener,
Attorney General of Saskatchewan

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[94] See e.g. Coughlan, *supra* note 62.
[95] See e.g. *Robb*, *supra* note 28 at para 55; *R v Dow*, 2010 QCCS 4276 at para 150, 261 CCC (3d) 399, reversed on other grounds 2014 QCCA 1416, 115 WCB (2d) 457.

PART VII: TABLE OF AUTHORITIES

Legislation	Paragraph
Criminal Code, RSC 1985, c C-46, ss. 33.1, 33.1(1); 33.1(2) & 33.1(3). *Code criminel*, LRC 1985, c C-46, ss. 33.1, 33.1(1); 33.1(2)& 33.1(3).	1

Parliamentary Documents	Paragraph
House of Commons Debates, 35th Parl, 1st Sess (27 March 1995). [Appellant's Book of Authorities, Tab 3]	23**,** 42
Minutes of Proceedings and Evidence of the Standing Committee on Justice and Legal Affairs, *Respecting Bill C-72, An Act to amend the Criminal Code (self-induced intoxication*, (5 April 1995). [Appellant's Record, Vol. II, Tab 8].	23
Minutes of Proceedings and Evidence of the Standing Committee on Justice and Legal Affairs, *Respecting Bill C-72, An Act to amend the Criminal Code (self-induced intoxication)*, (6 April 1995). [Appellant's Record, Vol II, Tab 1].	23