SCC Court File No. 39781

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

MATTHEW WINSTON BROWN

Appellant

- AND -

HER MAJESTY THE QUEEN

Respondent

- AND -

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

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PART I: STATEMENT OF THE CASE

1. This case concerns the constitutionality of s. 33.1 of the *Criminal Code* which eliminated the defence of extreme intoxication in response to this Honourable Court's decision in *R. v. Daviault*. Following the enactment of s. 33.1, an accused may be convicted of a personal injury offence when, due to extreme intoxication, their actions were involuntary and they were unable to form the prescribed intent to commit the crime. On this appeal, the Canadian Civil Liberties Association (CCLA) is concerned with the proper doctrinal and analytical approach to s. 7 and whether collective interests[1] ought to limit an accused's *Charter* rights at the rights determination stage (before a consideration of s. 1). Justice Slatter found that s. 33.1 of the *Criminal Code* did not breach the Appellant's s. 7 rights, in part, because the Appellant had harmed Ms. Hamnett (the victim) and she should not be the only one to suffer. In Slatter J.A.'s view, the need to protect victims and hold perpetrators accountable justified decreased constitutional protections for the Appellant.[2] In effect Slatter J.A. 'internally balanced' the accused's s. 7 rights against the collective interest in security and accountability at the rights determination phase. Notably, such an approach was explicitly rejected by both the majority and dissenting judges of the Ontario Court of Appeal in *Sullivan*[3] as well as by Khullar J.A. in her minority reasons in *Brown*.[4]

PART II: POSITION ON QUESTIONS IN ISSUE

2. The CCLA respectfully submits that the principles of fundamental justice that determine the minimum constitutional requirements that must be satisfied before affixing criminal liability should *not* be circumscribed by collective interests. Allowing collective interests to reduce the level of constitutional protection afforded to accused persons would fundamentally and irreparably

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[1] The CCLA uses the term 'collective interests' deliberately. These are interests, not *Charter* protected rights, that may be held by certain segments of the community, not identified parties to the litigation. The dichotomy between collective and individual best communicates the different nature of the interests involved (i.e. the interests of the community versus the *Charter* rights of the individual accused).

[2] *R. v. Brown*, 2021 ABCA 273, at paras. 42-43 per Slatter J.A.

[3] *R. v. Sullivan*, 2020 ONCA 333, 387 C.C.C. (3d) 304, at paras. 56-57, per Paciocco J.A., and paras. 203-204, per Lauwers J.A., appeal to the Supreme Court of Canada heard October 12, 2021 (SCC File No.: 39720).

[4] *Brown*, *supra* note 2, at paras. 169-174 per Khullar J.A.

undermine the integrity of the criminal justice system. Collective interests, such as the desire to hold individuals to account for the alleged harm they have caused or protecting vulnerable persons by deterring criminal conduct, should *not* be considered in the rights determination stage. Undoubtedly, Parliament may enact laws limiting individual rights in service of such goals, but those laws must be justified either by resort to s. 1 of the *Charter* or by use of the notwithstanding clause (s. 33(1) of the *Charter*).

3. To the extent that any internal balancing under s. 7 is appropriate, it should be limited to the exceptional circumstances where each of the following is present:

a. The accused's s. 7 interest concerns procedural rights to ensure a fair trial or the right to full answer and defence (not whether a substantive *Criminal Code* provision eliminates the minimum constitutional requirements required for a conviction);

b. The state action or judicial order made to protect the accused's s. 7 right to a fair trial or full answer and defence would result in the breach of another person's *Charter* protected right; and

c. The competing *Charter* protected right is held by a person who has standing to assert the *Charter* right in the proceeding in which the s. 7 conflict arises (not potential victims of crime or society writ large).

PART III: ARGUMENT

A. Focus of the s. 7 *Charter* analysis is the individual rights of the accused

4. The question of whether an individual's s. 7 *Charter* rights are breached by the elimination of the defence of extreme intoxication under s. 33.1 of the *Criminal Code* must remain focused on the rights of the individual accused. Namely, does this provision alter the constitutionally mandated intent requirements such that it criminalises conduct in the absence of intent or voluntary action?

5. The Ontario Court of Appeal in *R. v. Sullivan* explicitly rejected the notion that s. 7 should include internal balancing.[5] In the present case, Slatter J.A., without addressing *Sullivan*, implicitly

[5] *Sullivan*, *supra* note 3, at paras. 56-57, per Paciocco J.A., and paras. 203-204, per Lauwers J.A.

endorsed the opposite approach, balancing the interests of victims within the s. 7 framework.[6] Justice Slatter used the community's need to hold the accused criminally accountable and to protect victims to justify decreased constitutional protections for the accused. Put simply, the collective interest in ensuring that the victim was not the only one to "suffer" deprived (as a "principle" of fundamental justice) the Appellant of his liberty.

6. It is a principle of fundamental justice that only voluntary conduct perpetrated with the necessary mental element should attract the penalty and stigma of criminal liability.[7] It is a central organizing principle of our criminal law not to punish a person where their actions are involuntary, or where they did not have the requisite *mens rea*.

7. Moral outrage at the circumstances of an offence or its impact on a particular victim cannot be permitted to diminish constitutional protections afforded to an individual accused. This would sanction wrongful convictions in cases where the public has deemed the allegations particularly heinous; contrary to this Court's jurisprudence that the mental element for an offence must be proportionate to the stigma attached to the offence.[8] Justice Slatter's reliance on collective concerns at the rights determination stage of the constitutional analysis should be rejected. Section 7 moderates the relationship between the individual claimant and the legislatures' statutes or the common law.[9] As this Honourable Court held in *Swain*, "it is not appropriate to thwart the exercise of the accused's s. 7 rights by trying to bring in societal interests into the principles of fundamental justice to limit an accused's rights."[10] To do otherwise would impose a deprivation of liberty (punishment following a finding of guilt) on an accused via a process that is fundamentally unfair.[11]

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[6] *Brown*, *supra* note 2, at paras. 42-43 per Slatter J.A.
[7] *R. c. Daviault*, [1994] 3 S.C.R. 63, at pp. 74-77, 89-91, 92-93, and 102-103; *R. v. Ruzic*, 2001 SCC 24, [2001] 1 S.C.R. 687, at paras. 34-37, and 45-47; *R. c. Bouchard-Lebrun*, 2011 SCC 58, [2011] 3 S.C.R. 575, at para. 45-51.
[8] *R. v. Martineau*, [1990] 2 S.C.R. 633, at p. 645-646.
[9] *Bedford v. Canada (Attorney General),* 2013 SCC 72, [2013] 3 S.C.R. 1101, at paras. 124-129; *Carter v. Canada (Attorney General)*, 2015 SCC 5, [2015] 1 S.C.R. 331, at paras. 79, 81, 82 and 85; *Reference re s. 94(2) of Motor Vehicle Act (British Columbia)*, [1985] 2 S.C.R. 486, at pp. 517 and 520.
[10] *R. v. Swain*, [1991] 1 S.C.R. 933, at p. 937.
[11] *Carter, supra* note 9, at para. 81.

8. Section 1 is the presumptive constitutional vehicle for analyzing whether a collective interest can justify a particular limit on a *Charter* right.[12] Alternatively, the concern of the collective could be properly considered as part of the enactment of the notwithstanding clause. This analytical structure is important to ensure that the burden of proof in establishing a justifiable limit on the accused's s. 7 rights remains with the state and to ensure clear reasoning.[13] In considering collective interests, the question is not whether an accused person's constitutional protections should be *decreased* given the collective interest, but rather, whether any breach of the accused's constitutional protections can be *justified* with reference to the competing interests under s. 1.

9. In this case, the fact that in legislating s. 33.1 Parliament was concerned with gendered-based violence and sexual violence does not justify a more deferential or restrained approach to protect Parliament's choice when reviewing s. 33.1 at the rights determination stage. As this Honourable Court remarked in *Ruzic*, "statutory defences do not warrant more deference simply because they are the product of difficult moral judgements."[14] Instead, Parliament's policy choice is given currency at the s. 1 stage or to inform the invocation of the notwithstanding clause.

B. 'Internal Balancing' limited to specific exceptions

10. This Honourable Court has utilized internal balancing in criminal cases where competing *Charter* rights of other participants are potentially implicated by an accused's s. 7 claim.[15] Justice Khullar gestured to the competing approaches,[16] but did not resolve how to distinguish between cases where it may be appropriate to internally balance competing *Charter* rights, and cases where it is not.

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[12] *Ibid*, at paras. 79 and 82.
[13] *Brown*, *supra* note 2, at para. 174 per Khullar J.A.
[14] *Ruzic*, supra note 7, at para. 25.
[15] See for example *R. v. Mills*, [1999] 3 S.C.R. 668. The CCLA respectfully submits that in many of the prior cases, the constitutional analysis would have been doctrinally clearer if the competing rights had been reconciled under s. 1 of the *Charter* rather than within the rights determination phase.
[16] *Brown*, *supra* note 2, at para. 170 per Khullar J.A.

11. The CCLA respectfully submits that cases where an internal balancing approach was adopted at the rights determination stage are defined by the presence of *all three* of the following factors:

a. The individual accused's s. 7 interest concerns procedural rights that ensure a fair trial or the right to full answer and defence;

b. The state action or judicial order made to protect the accused's s. 7 right to a fair trial or full answer and defence would result in the breach of another person's *Charter* protected right; and

c. The competing *Charter* protected right is held by a person who has standing to assert the *Charter* right in the proceeding in which the s. 7 conflict arises.

12. Respectfully, there is no role for internal balancing that reduces the scope of constitutional rights protections in situations defined by any one of the following factors:

a. the s. 7 right of the individual concerns the minimum constitutional requirements that must be satisfied before a conviction is entered. Either the minimum requirements are met or they are not. It is a question of universal application unrelated to a case-by-case assessment of the fairness of the trial;

b. the state action or judicial order made to protect the accused's s. 7 right will not impact or breach another person's *Charter* protected right. In other words, there is no competing *Charter* right; or

c. the competing interest is held by an individual or entity without standing to assert that interest, such as the public or community at large.

i. The s. 7 interest concerns procedural rights

13. The first feature of cases employing an internal balancing approach is the nature of the s. 7 claim: namely, where the s. 7 right of the individual accused involved the right to full answer and

defence[17] or the right to a fair trial[18]. In these cases, the Court was asked to identify and regulate case specific procedural circumstances to ensure a fair trial. For instance, whether a trial is fair in light of the disclosure received by the accused,[19] the limits on the use of certain information at trial,[20] the particular media coverage of a given trial,[21] or the ability to observe the face of a witness in a proceeding.[22]

14. Notably, while the s. 7 rights of the accused are "balanced" with competing interests in these cases, the competing right never operates to deprive the accused of their constitutional protections. In other words, the competing interest will yield to ensure a fair trial[23] or where necessary to protect full answer and defence[24] even if that means treading on the competing interest.[25] *Mills* itself, affirms the primacy of the requirement of a fair trial.[26]

15. By contrast, where the s. 7 claim alleges that a conviction does not satisfy minimum constitutional fault requirements, an internal balancing approach is not appropriate. There is no case-by-case assessment that looks to the particular circumstances. Rather, the question is of universal application: either the statute permits a conviction only where the necessary *actus reus* and *mens rea* is established beyond a reasonable doubt, or it does not.

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[17] *Mills*, *supra* note 15, at paras. 17, 62, 73, and 76; *R. v. Darrach*, 2000 SCC 46, [2000] 2 S.C.R. 443, at paras. 3 and 21; *R. v. Quesnelle*, 2014 SCC 46, [2014] 2 S.C.R. 390, at para. 64; *R. v. Goldfinch*, 2019 SCC 38, 380 C.C.C. (3d) 1, at para. 39.

[18] *Darrach*, *supra* note 17, at para. 21; *R. v. N.S.*, 2012 SCC 72, [2012] 3 S.C.R. 726, at paras. 1-2; *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, at pp. 875-878.

[19] *Mills*, *supra* note 15, at paras. 18, 21, 61, 63, 73, 87 and 94; see also: *Quesnelle*, *supra* note 16.

[20] *Darrach*, *supra* note 17, at paras. 24, 31; *Goldfinch*, *supra* note 17, at para. 39; *R. v. R.V.*, 2019 SCC 41, 378 C.C.C. (3d) 193; see also *R. v. White*, [1999] 2 S.C.R. 417, at paras. 45-48.

[21] *Dagenais*, *supra* note 18, at pp. 876 and 878.

[22] *N.S.*, *supra* note 18.

[23] *N.S.*, *supra* note 18, at para. 3, 38, 44, and 46; *Dagenais*, *supra* note 18, at p. 878.

[24] *Mills*, *supra* note 15, at paras. 89 and 94; *Darrach*, *supra* note 17, at paras. 38 and 43; *Quesnelle*, *supra* note 17, at para. 63.

[25] This is not to say that the competing right will be justifiably infringed, but rather what defines the scope of the competing right is a full appreciation of the principles of fundamental justice as they operate in a particular context: *Mills*, *supra* note 15, at para. 63.

[26] *Mills*, *supra* note 15, at para. 94; *R. v. Shearing*, 2002 SCC 58, [2002] 3 S.C.R. 33, at para. 132. See also *R. v. Seaboyer*, [1991] 2 S.C.R. 577, at p. 617-618.

ii. The state action in protecting the accused's s. 7 right would result in the breach of another *Charter* protected right

16. The second defining feature of cases where this Court has employed an internal balancing approach is where the competing right is itself a *Charter* protected right that will be breached depending on the decision reached by the criminal court. For instance: the s. 8 right of a complainant *if* the court makes a disclosure order,[27] the s. 8 right of a complainant *if* the court permits a line of cross-examination,[28] the s. 2(a) right of a witness *if* the court orders her to remove her niqab,[29] and the s. 2(b) right of the media *if* the court orders a publication ban.[30] In short, the state action implicates another *Charter* protected right. Therefore, a compromise position was needed that considered, to varying degrees, the competing constitutional interests.[31]

17. The same cannot be said when considering the constitutionality of s. 33.1 (or other substantive *Criminal Code* provisions). Depriving an accused of a defence and putting them at risk of an unconstitutionally sound conviction does not protect women and other vulnerable groups. These are not competing interests. As noted by Paciocco J.A. in *Sullivan*, s. 33.1 is "not about the constitutionality of a legislated compromise between protected interests."[32] Assuming that there exists a broader collective interest in ensuring a conviction on any basis is necessary so that

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[27] *Mills, supra* note 15, at paras. 17 and 62; *Quesnelle*, *supra* note 17, at para. 2.
[28] *Darrach, supra* note 17, at paras. 3, 28, and 31; *Goldfinch, supra* note 17, at paras. 1 and 39; *R.V.*, *supra* note 20, at para. 6.
[29] *N.S., supra* note 18, at para. 1.
[30] *Dagenais, supra* note 18.
[31] The CCLA adopts the submissions made by respondent counsel in *R. v. J.J.* (SCC File No.: 39133), at para. 21 of the Respondent's Factum: "This Court has established two analytical approaches for assessing competing claims: first, the reconciliation approach, which internally limits the scope of each claimed right to avoid any possible conflicts, as in *Mills* and *Darrach*. Second, the *Dagenais*/*Mentuck* approach, which allows for *prima facie* conflicts between claimed rights but balances interests to resolve the conflict." For the purposes of the CCLA position on this appeal, the distinction between the reconciliation approach and the *Dagneais* approach is immaterial. The key aspect is that there are competing rights which, by some mechanism, are 'balanced'.
[32] *Sullivan*, *supra* note 3, at para. 58.

someone is held accountable, that collective interest is not a *Charter* protected right and cannot be relied upon to erode constitutional protections at the rights determination stage.

iii. The competing *Charter* protected right is held by another person who has standing to assert the *Charter* right

18. The final feature of the cases where this Court has employed internal balancing concerns the identity of the competing right holder. Internal balancing at the rights determination stage has been used where the competing *Charter* protected right is held by a party with standing to assert that right. For instance, where the *Charter* protected right is held by the media subject to a publication ban,[33] a complainant,[34] or a witness.[35]

19. By comparison, where the competing interest is held by society more broadly and hence no person has standing, it is not appropriate to internally balance that interest as against the individual accused's s. 7 right.

iv. Internal balancing in other non-criminal contexts

20. This Court has internally balanced the individual's interests with collective concerns under s. 7 outside the criminal law. Respectful, it is not appropriate to import the approach in those other contexts to the criminal law. The presumption of innocence and the burden of proof mandate that the criminal justice system be treated as a separate, *sui generis* process.

21. This is plain when considering the consequences that flow from a constitutionally sound adjudication of guilt. After a finding of guilt and while in a correctional institution, the s. 7 paradigm alters. Considerations of a prospective parolee's liberty interest is affected by concerns for public safety. In *Cunningham v. Canada*, this Court found that a prospective parolee's s. 7 rights were not breached by the decision to deny him parole on his presumptive release date, given the risk that he would commit an offence causing death or serious harm before the expiry of his sentence. Justice McLachlin (as she then was) held that the principles of fundamental justice required a balancing between the individual's liberty interest and the protection of society.[36]

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[33] *Dagenais*, *supra* note 18, at p. 869.
[34] *Mills*, *supra* note 15; *Darrach*, *supra* note 17; *Goldfinch*, *supra* note 17; *R.V.*, *supra* note 20.
[35] *N.S.*, *supra* note 18; *Quesnelle*, *supra* note 17.
[36] *Cunningham v. Canada*, [1993] 2 S.C.R. 143, at pp. 151-153.

22. Such a pronouncement must be limited to the correctional context given the particular characteristics of that environment. Unlike a trier of fact determining whether the Crown has proven the accused's guilt beyond a reasonable doubt, the Parole Board is statutorily mandated to give paramount consideration to the protection of society.[37] The Parole Board accomplishes this through an individualized assessment of the risk posed. If a decision is made to release the individual, then the security interests of the community are engaged. Notably, the collective interests of the community do not extend further than the future risks posed by the individual. In other words, even in the correctional context, feelings of retribution or moral outrage alone would be insufficient to deprive someone of parole on their presumptive release date in the absence of established risk.[38]

23. The present case concerns the propriety of decreasing s. 7 protections owed to an individual accused in the criminal context. That context is crucial. It is not appropriate and would be unjust to import an approach to internal balancing conducted under s. 7 from other contexts at face value.

v. Conclusion on the exceptional nature of an 'internal balancing' approach

24. Any 'internal balancing' between competing interests at the rights determination stage of the s. 7 analysis must remain limited to situations where:

a. the s. 7 claim advanced concerns a case-specific assessment of trial fairness or full answer and defence;

b. the competing interest is itself a *Charter* protected right that would be breached if the criminal court protected the accused's s. 7 right; and

c. the competing *Charter* protected right is held by a party to the proceedings with standing to assert the right.

25. Balancing is inapplicable where the s. 7 claim implicates the minimum constitutional fault requirement, where there is no competing *Charter* protected right that will be breached (or even

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[37] *Corrections and Conditional Release Act*, S.C. 1992, c. 20, at s. 100.1.
[38] *Cunningham*, *supra* note 36, at p. 153.

implicated) if the accused's s. 7 rights are protected, or where the collective interest in ensuring accountability and protection is not held by a party with standing.

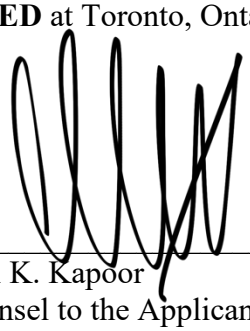
26. In short, this Court should keep the focus of the s. 7 inquiry on the rights of the individual. Collective interests can be considered within the s. 1 analysis or expressed by the use of the notwithstanding clause.

PART IV AND V: COSTS AND ORDER SOUGHT

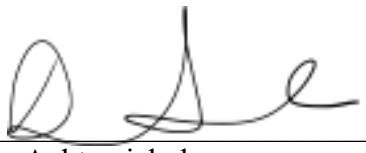
27. The CCLA takes no position on the disposition of this appeal. The CCLA does not seek costs and asks that no costs be awarded against it.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED at Toronto, Ontario this 25th day of October 2021.



Anil K. Kapoor
Counsel to the Applicant



Dana Achtemichuk
Counsel to the Applicant

PART VI: TABLE OF AUTHORITIES

Legislation	**Sections**
Constitution Act, 1982, Schedule B to the *Canada Act 1982*, 1982, c. 11 (U.K)	7
Loi Constitutionnelle de 1982, L'annexe B de la *Loi de 1982 sur le Canada*, 1982, Ch. 11, (R.-U.)	7
Corrections and Conditional Release Act, S.C. 1992, c. 20	100.1
Loi sur le système correctionnel et la mise en liberté sous condition (L.C. 1992, ch. 20)	100.1
Criminal Code, R.S.C., 1985, c. C-46	33.1
Code criminel, L.R.C. (1985), ch. C-46	33.1